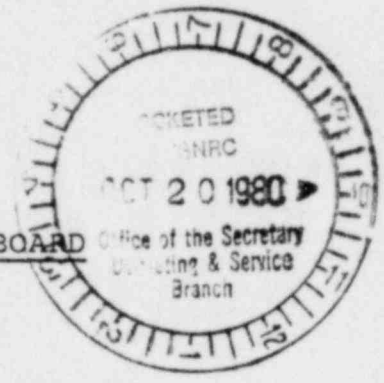
October 17, 1980



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
	)	
(Commanche Peak Steam Electric Station, Units 1 and 2)	)	(Application for Operating License)

APPLICANTS' ANSWER TO CASE'S
MOTION FOR PROTECTION

Pursuant to 10 CFR §2.730(c), Texas Utilities Generating Company, et al. ("Applicants") hereby submit Applicants' answer to a motion for protection filed October 2, 1980 by Citizens Association for Sound Energy ("CASE"). CASE moved the Atomic Safety and Licensing Board ("Board") in the captioned proceeding for a protective order pursuant to 10 CFR §2.740(c) which would (1) relieve CASE of its responsibility to supplement its answers to certain of Applicants' discovery requests until the Board rules on various motions for reconsideration of its June 16, 1980 Order admitting Contentions and CASE has had an opportunity to review Amendment 1 to the Environmental Report-Operating License Stage ("ER-OL"), (2) allow CASE 120 days before it would be required to respond further to Applicants' discovery, (3) limit Applicants' further discovery to thirty interrogatories for any forty-five day period and

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(4) enjoin Applicants from "misquoting or misstating" CASE'S statements. For the following reasons, Applicants urge the Board to deny CASE's motion in its entirety.

I. Discovery and Protective Orders in NRC Proceedings

CASE's motion for a protective order appears to be founded to a great extent on a misconception of many of the principles governing the conduct of discovery and the issuance of protective orders in Nuclear Regulatory Commission ("NRC") adjudicatory proceedings. Accordingly, before responding to the particulars of CASE's motion, Applicants set forth below a description of the principles applicable to discovery and protective orders in NRC proceedings.

A. Discovery

In NRC adjudicatory proceedings, as in other modern administrative and legal practice, discovery is to be "liberally granted to enable the parties to ascertain the facts in complex litigation, refine the issues, and prepare adequately" for the hearing. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978). In particular, as the Appeal Board in the Susquehanna proceeding stated, "the Applicants need discovery to prepare for trial." Pennsylvania Power and Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 11 NRC ___(September 23, 1980),

slip op. at 37. That Appeal Board also noted, as follows:

> The Applicants in particular carry an unrelieved burden of proof in Commission proceedings. Unless they can effectively inquire into the position of the intervenors, discharging that burden may be impossible. To permit a party to make skeletal contentions, keep the bases for them secret, then require its adversaries to meet any conceivable thrust at hearing would be patently unfair, and inconsistent with a sound record. [Susquehanna, supra, ALAB-613, slip op. at 37, quoting from Northern States Power Company, et al. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300-01 (1977) (footnote omitted).]

In any event, the discovery process must be open to all parties. In particular, a party may not seek to reap the benefits of discovery while at the same time attempting to avoid the burdens that may be associated with responsible participation in this proceeding. As was aptly stated by the Licensing Board in the Offshore Power proceeding,

> A party may not insist upon his right to ask questions of other parties, while at the same time disclaiming any obligation to respond to questions from those other parties. This is a basic rule of any adjudicatory proceeding, whether it be a judicial trial in court or an administrative hearing.
> [Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813, 815 (1975) (emphasis in original); cited in Susquehanna, supra, ALAB-613, slip op. at 37-38.]

In addition, parties to NRC licensing proceedings are under a continuing duty to supplement their responses to discovery requests. This duty applies, inter alia, to

information as to the identity of persons having knowledge of discoverable matters, the identity of witnesses and the substance of their testimony, and responses which were true when made but are found to be incorrect (where the failure to amend the response would constitute knowing concealment). See 10 CFR §2.740(e).

Finally, the fact that a party is conducting discovery cannot operate to delay any other party's discovery unless the Board orders otherwise upon motion and demonstration that, inter alia, justice so requires. 10 CFR §2.740(d).

B. Protective Orders

A party may, upon motion to the Board and for "good cause shown," obtain a protective order to protect that party from annoyance, embarrassment, oppression, or undue burden or expense. 10 CFR §2.740(c). The proponent of such an order has the burden of proof. 10 CFR §2.732. Also, a motion seeking such an order must state with particularity the grounds as well as the relief sought. 10 CFR §2.730(b). In particular, the grounds for a protective order must include specific objections to particular interrogatories. See 10 CFR §2.740(b); See also, Susquehanna, supra, ALAB-613, slip op. at 7, and Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 583 (1975).

Only a demonstration of undue burden or expense can satisfy the requirements of the NRC Rules of Practice as to whether claims of burden and expense constitute "good cause" for a protective order. 10 CFR §2.740(c). Responding to discovery requests necessarily involves some burden and expense, but in order to demonstrate "undue" burden or expense, more must be shown than that some expense or inconvenience may be incurred. In fact, a Licensing Board faced with a mere blanket claim of burdensomeness which is not substantiated with respect to particular discovery items should reject the claim in its entirety upon a finding of lack of merit of the claim as applied to at least one of the discovery requests. See Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-122, 6 AEC 322, 325, n. 14 (1973).

II. Applicants' Answer to CASE'S Motion

A. Answers to CASE's Purported Grounds for a Protective Order

CASE has set forth essentially three grounds for its motion for protection. However, CASE has failed to identify particular interrogatories to which its purported grounds for relief apply. Its blanket claims with respect to general groups of interrogatories cannot satisfy its burden of proof for its motion. See Susquehanna, supra, ALAB-613, slip op. at 7; See also Pilgrim, supra, 1 NRC at 583. Thus, these grounds do not constitute good cause,

either collectively or individually, for the relief CASE is seeking. Applicants respond below to each of those grounds before we deal with CASE's requests for relief.1/

1. Applicant's discovery is not premature.

CASE claims that "much of the information requested by Applicants is premature at this time [sic]". Assuming CASE means that many of Applicants' discovery requests are premature, CASE is simply wrong.

Applicants are entitled to begin discovery now. The Board indicated (in its June 16, 1980 Order admitting contentions) that discovery requests and responses thereto should be submitted with reasonable promptness. Also, since Applicants bear the ultimate burden of proof in this proceeding, they must be able to pursue discovery effectively to enable them to prepare their case for the hearing. Susquehanna, supra, slip op. at 37, quoting Tyrone, supra, 5 NRC at 1300-01. In any event, CASE has not identified

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1/ Applicants submit that CASE's objections and answers (filed September 3, 1980) to Applicants' August 1, 1980 discovery requests to CASE also do not provide good cause for any a protective order that the Board might issue on its own authority pursuant to 10 CFR§2.740(f)(2) in ruling on Applicants' Motion to Compel CASE, filed September 18, 1980. Applicants rest on that motion to show that CASE has not demonstrated in any of the grounds for objection in its September 3, 1980 response that good cause exists for a protective order.

interrogatories or requests to produce which are "premature." CASE does not, therefore, meet its burden of proof for issuance of a protective order. Susquehanna, supra., ALAB-613, slip op. at 7; Pilgrim, supra, 1 NRC at 583.

CASE also claims, in essence, that because recent amendments to the Final Safety Analysis Report ("FSAR") and the Environmental Report ("ER-OL") might affect its responses to Applicants' discovery requests, it should not be required to respond because its answers may change upon further review of the FSAR and ER-OL amendments. To the contrary, Applicants are entitled to pursue discovery now and must be able to do so effectively. If CASE is permitted not to answer discovery requests until CASE has reviewed new information as it becomes available, discovery may never proceed. New information applicable to CASE's contentions is likely to be disclosed continually throughout this proceeding. The proper procedure is for CASE to respond timely to discovery requests when received and supplement its responses, as required, when new information is acquired. Effective discovery could not be conducted otherwise.

2. Applicants' discovery requests to CASE would not be affected by the Board's reconsideration of Contentions.

CASE argues that responding to discovery requests concerning Contentions 5 and 23 may be unnecessary and time-consuming in that the Board has not yet ruled on motions for reconsideration of its June 16 Order. Notwithstanding that the Board has before it a motion by CASE for reconsideration of Contention 5 (CASE Motion for Reconsideration, July 14, 1980), Applicants' discovery on Contention 5 should not be denied until the Board acts on CASE's motion.

Applicants' discovery requests regarding Contention 5 submitted in Applicants' First Set of Interrogatories to CASE, filed August 1, 1980, would not require CASE to provide "unnecessary" responses even should the Board grant CASE's motion. CASE has requested in its motion for reconsideration that the Board revise Contention 5 by adding new concerns. However, since any Board action in response to CASE's motion regarding Contention 5 would be to enlarge rather than restrict the issues raised in Contention 5, and because Applicants' discovery requests regarding Contention 5 apply only to the issues raised in Contention 5 as now worded, CASE's responses to Applicants' discovery requests concerning the issues thus far raised in Contention 5 would not be unnecessary or a waste of time.

With respect to Contention 23, Applicants moved this Board 2/ to reword the Contention so as to limit the issue to Applicants' compliance with the "as low as is reasonably achievable" ("ALARA") standard as set forth in 10 CFR§50.34a and Part 50, Appendix I. CASE moved the Board 3/ to include expressly concerns of CASE regarding the health effects of low-level radiation in addition to Applicants' compliance with ALARA. However, Applicants' discovery requests on Contention 23 deal almost exclusively with issues relevant to the issue of compliance with ALARA. Therefore, as with Contention 5, responding to Applicants' discovery requests on Contention 23 would not be unnecessary or time-consuming regardless of whether the Board grants or denies Applicants' or CASE's motions. Nevertheless, Applicants would not object to CASE not responding to Interrogatories 42, 43, 47 and 48 (but respond to the first question of 47 and 48), 4/ (but respond to the first question of 47 and 48), until the Board rules on the motions.

2/ Applicants' Statement of Objections to Prehearing Conference Order and Motion for Modification, July 1, 1980.

3/ CASE's July 14, 1980 Motion for Reconsideration.

4/ Interrogatory 44 should be answered as if the response to Interrogatory 42 is in the negative.

3. Applicants have not misquoted or misstated CASE's statements.

CASE argues that Applicants have misquoted or misstated CASE's "intent or statements" in its answers to Applicants' interrogatories, filed September 3, 1980. CASE relies on this argument for one of its claims for relief under a protective order.5/ Contrary to CASE's assertions, Applicants have accurately represented CASE's answers to discovery requests.

CASE expressly objected to each of the interrogatories listed in Sections A and C of Applicants' September 18, 1980 Motion to Compel. CASE apparently does not disagree with Applicants' characterization of those statements.

CASE also objected to the principal portion of each of the interrogatories listed in Section B of Applicants'

5/ Applicants therefore respond to this claim even though it is raised in the context of CASE's Answer to Applicants' Motion to Compel, and replies to answers to motions are generally prohibited by 10 C.F.R. § 2.730(c).

Motion to Compel. CASE would evidently have its objections characterized as objections to "portions" of the interrogatories. However, in that CASE's reponse taken as a whole was not, in fact, responsive to the interrogatories, Applicants rightly viewed CASE's response as an objection to the interrogatories.

As for the interrogatories listed in Section D of Applicants' Motion to Compel, CASE would apparently also have its answers taken as objecting only to "portions" of the interrogatories. However, as Applicants stated in their Motion to Compel, CASE's answer to the interrogatories was not responsive to any portion of the interrogatories and can only be viewed as an objection to the interrogatories.

Finally, the interrogatories set forth in Section E of Appplicants' Motion to Compel were in substance objected to by CASE. CASE claims that it did not object to these interrogatories but instead answered the questions. Although CASE did not use the word "object" in its response, it clearly refused to respond except to the extent of stating that Intervenors are not required to provide the requested information. This is in effect an objection to the interrogatories and was properly viewed as such by the Applicants.

For the above reasons, CASE's claim that Applicants misquoted or misstated CASE's positions is without merit and should not serve as grounds for a protective order.

B. Answers to CASE's Claims For Relief

CASE makes five claims for relief. CASE requests that (1) it not be required to supplement its answers to Applicants' discovery requests with respect to Contentions 5 and 23 until the Board has ruled on the motions for reconsideration of the wording of those Contentions, (2) CASE not be required to supplement its responses to all discovery requests involving Contentions which are affected by Amendment 1 to the ER-OL for 90 days, (3) CASE not be required to respond to further discovery for 120 days to enable it to conduct its own discovery, (4) any future discovery by Applicants be limited to no more than thirty interrogatories for any forty-five day period, and (5) that Applicants be enjoined from "misquoting or misstating CASE's intent or statements."

CASE's first claim (to be temporarily relieved of the responsibility to supplement responses to interrogatories with respect to Contentions 5 and 23) is not supported by a demonstration of good cause for the relief requested, as required by 10 CFR §2.740(c). As noted above in Section II. A. 2, Applicants' discovery requests regarding Contentions 5 and 23 will not be affected by the Board's ruling on Applicants' or CASE's motions for reconsideration

of the Board's June 16, 1980 Order.6/ Accordingly, CASE has not demonstrated "good cause" for the relief requested and has failed to sustain its burden of proof with respect to its motion for a protective order. 10 CFR§§2.732 and 2.740(c). Applicants do not oppose CASE's request for relief with respect to the few interrogatories identified in Section II. A. 2., supra, but Applicants maintain that a protective order is not required for such relief since Applicants hereby consent to the relief.

CASE's second claim (that it not be required to supplement its responses to interrogatories regarding Contentions affected by Amendment 1 to the ER-OL for 90 days) is not supported by identification of particular interrogatories for which CASE seeks the protective order, see 10 CFR §2.740(f) and Susquehanna, supra, ALAB-613, slip op at 7, is not accompanied by a showing of "good cause" pursuant to 10 CFR §2.740(c), and would constitute an improper application of the NRC Rules of Practice governing discovery.

As discussed above in Section II. A. 1., the proper procedure for dealing with new information received

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6/ Also, Board action on CFUR's and ACORN's various filings concerning the Board's June 16 Order would not affect these discovery requests. See CFUR's Objections (July 23, 1980) and Motion to Reconsider (August 4, 1980) and ACORN's Motion for Reconsideration (July 1, 1980), Objection to the Application of NUREG-0694 (August 4, 1980), Reply and Motion for Modification (August 4, 1980) and Offer of Proof (August 29, 1980).

during discovery would be for CASE to timely respond to the interrogatories when served and supplement its responses, as required by 10 CFR§2.740(e), when new information is received. Also, CASE has totally failed to particularize its objections except to the extent of stating that it appears that Amendment 1 to the ER-OL contains information pertinent to Contentions 23 and 24. This is insufficient grounds for a protective order and does not constitute good cause for such an order. Accordingly, CASE has failed to sustain its burden of proof with respect to this claim. 10 CFR§2.732.

CASE's third claim would prevent Applicants from taking further discovery for 120 days while CASE conducts its own discovery from Applicants. As demonstrated in Section II. A above, CASE has not presented any grounds that would constitute "good cause" for granting this particular relief, as required by 10 CFR§2.740(c). In addition, CASE is improperly attempting to avoid its responsiblities in this proceeding (answering discovery requests) while at the same time exercising its rights (conducting discovery against other parties). See Susquehanna, supra, ALAB-613, slip op at 37-38, citing Offshore

Power Systems, supra, 2 NRC at 816-17. Neither has CASE demonstrated that the interests of justice would require that Applicants delay their discovery. 10 CFR§2.740(d). In any event, CASE has failed to sustain its burden of proof with respect to this claim. 10 CFR§§2.732 and 2.740(c).

CASE's fourth claim for relief would limit Applicants' future discovery against CASE to 30 interrogatories for any forty-five day period. Such a condition would unfairly and illegally restrict Applicants' right to conduct discovery against CASE. Applicants must be able to pursue discovery effectively in order to prepare their case for the hearing. Susquehanna, supra, ALAB-613, slip op. at 37, citing Tyrone, supra, 5 NRC at 1300-01. Effective discovery includes utilization of any of the methods of discovery set forth in 10 CFR§2.740(a), unimpaired by arbitrary and unsupported limitations. CASE has not demonstrated good cause for granting such extraordinary relief. 10 CFR§2.740(c).

Further, CASE's third and fourth claims for relief, discussed above, are premature. CASE may object to any of Applicants' further discovery requests when received on any of the grounds provided for in the NRC Rules of Practice. It would be unsound and inappropriate administrative practice for the Board

to prevent or unduly limit Applicants' discovery without having before it specific objections to particular requests.

Finally, CASE's fifth claim would have the Board enjoin Applicants "from misquoting or misstating CASE's intent or statements." As shown above in Section II. A. 3., CASE's allegations in this regard are without merit. CASE has not, therefore, sustained its burden of proof with respect to this claim for relief. 10 CFR §2.732.

III. Conclusion

For the foregoing reasons, Applicants submit that the Board should deny in its entirety CASE's motion for a protective order.

Respectively submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Answer to CASE's Motion for Protection", in the above captioned matter were served upon the following persons by deposit in the United States mail, first class postage prepaid this 17th day of October, 1980:

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