

October 3, 1980

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of	)	
	)	
TEXAS UTILITIES GENERATING	)	Docket Nos. 50-445
COMPANY, <u>et al.</u>	)	50-446
	)	
(Comanche Peak Steam Electric	)	(Application for
Station, Units 1 and 2)	)	Operating License)

APPLICANTS' ANSWER TO CFUR'S  
MOTION FOR PROTECTION

Pursuant to 10 C.F.R. §2.730(c), Texas Utilities Generating Company, et al., ("Applicants") hereby submit Applicants' answer to a motion for protection, filed September 18, 1980 by Citizens For Fair Utility Regulation ("CFUR"). CFUR moved the Atomic Safety and Licensing Board ("Board") in the captioned proceeding for a protective order pursuant to 10 C.F.R. §2.740(c) which would relieve CFUR of any responsibility to supplement its answers to Applicants' discovery requests, prevent Applicant from taking further discovery until "allowed to do so" by the Board, limit Applicants' future discovery requests to "not more than" thirty interrogatories for any forty-five day period, and award CFUR "such further relief to which it may be entitled." For the following reasons, Applicants urge the Board to deny CFUR's motion in its entirety.

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I. Discovery and Protective Orders  
In NRC Licensing Proceedings

Before responding to the specifics of CFUR's motion, Applicants provide below a discussion of the important principles applicable to discovery and the issuance of protective orders in Nuclear Regulatory Commission ("NRC" or "Commission") licensing proceedings.

A. Discovery

Discovery requests in NRC proceedings are 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). Indeed, it is imperative that Applicants be able to utilize the discovery process effectively. The Licensing Board in the Tyrone proceeding observed, as follows:

The Applicants in particular carry an unrelieved burden of proof in Commission proceedings. Unless they can effectively inquire into the positions 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.

[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).]

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). Also, upon motion by a party the Board may require another party to supplement any of its responses to discovery requests. See 10 C.F.R. §2.740(e). 1/

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1/ Applicants moved this Board on September 30, 1980, to order CFUR to supplement its responses to certain of Applicants' interrogatories and requests to produce where CFUR stated, inter alia, that no information is available "at this time."

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 C.F.R. §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 C.F.R. §2.740(c). The proponent of such an order has the burden of proof. 10 C.F.R. §2.732. Also, a motion seeking such an order must state with particularity the grounds as well as the relief sought. 10 C.F.R. §2.730(b). In particular, the grounds for a protective order must include specific objections to particular interrogatories. See 10 C.F.R. §2.740(f)(1) 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 C.F.R. §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 CFUR's Motion

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

CFUR raised in essence four grounds for relief in support of its motion. These grounds are unsubstantiated, do not demonstrate good cause for the relief CFUR requests, and fail to satisfy either individually or collectively CFUR's burden of proof in seeking a protective order. Accordingly, the motion for a protective order should be denied. Each of CFUR's "grounds" for relief are dealt with individually below.

1. The Contentions dealt with in Applicants'  
interrogatories have been "finalized."

CFUR contends the issues in this proceeding are not yet "finalized" (and that discovery should not be taken) since the Board has before it motions for reconsideration of its June 16, 1980 Order admitting Contentions. An examination of the facts reveals this argument to be without merit with respect to Applicants' First Set of Interrogatories to CFUR.

On June 16, 1980, the Licensing Board issued its Order which admitted 25 Contentions in this proceeding. The Applicants submitted their Statement of Objections to that Order on July 1, 1980, which moved that the Board modify its Order with respect to seven Contentions. Thereafter, CFUR filed an answer opposing Applicants' motion and its own motion for the Board to reconsider its June 16 Order. Neither Applicants' motion for modification or CFUR's motion for reconsideration challenged in any respect the admission of Contentions 2, 5, 7 or 8, which are the subject of Applicants' First Set of Interrogatories to CFUR, filed August 31, 1980. Consequently, the pending reconsideration or modification of the Board's June 16 Order has no bearing on Contentions 2, 5, 7 or 8 and as such cannot serve as a basis for delaying discovery on those Contentions.

2. Applicants' discovery requests are not burdensome.

CFUR argued that it is a substantial burden for it to respond to Applicants' interrogatories. CFUR claimed that because of its limited manpower and financial resources it has been unable to prepare any of its own discovery requests or otherwise prepare for the hearing since the time it received Applicants' interrogatories. However, CFUR does not identify any specific discovery requests which are burdensome.



In claiming undue burden and expense as bases for a protective order, CFUR must specify particular discovery requests which cause the undue burden or expense. Pilgrim, supra, 1 NRC at 583. CFUR has not so identified any specific discovery requests. In any event, CFUR is required to show that there is "undue" burden or expense (10 C.F.R. §2.740(c)), not merely that some burden or expense is incurred. Midland, supra, ALAB-122, 325, n. 14. Simply claiming, as CFUR does, that responding to the discovery requests is generally burdensome or expensive is insufficient.

CFUR objects to the number of discovery requests submitted to it by Applicants. Applicants' first set of interrogatories to CFUR consisted of 167 interrogatories and requests to produce, dealing with four Contentions. This is an average of 42 interrogatories for each Contention, hardly a burdensome request. Further, CFUR has had more than ample time 2/ to respond to the interrogatories on these four contentions, particularly given the fact that they deal with issues raised by CFUR in this proceeding and as to which we assume CFUR is knowledgeable.

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2/ Applicants did not object to CFUR's request for a two week extension of time in which to respond to Applicants' discovery request. See Applicants' Answer to CFUR's Motion for Extension of Time (September 9, 1980).

CFUR would not, therefore, be unduly burdened or incur undue expenses in responding to these discovery requests. CFUR obviously has not met its burden of proof to demonstrate "good cause" for a protective order. 10 C.F.R. §2.732.

3. CFUR's due process and freedom of speech claims are unsubstantiated.

CFUR merely set forth a general claim (unsupported by legal analysis) that its due process and freedom of speech rights are being violated. CFUR has not, therefore, adequately particularized the grounds for its claim (10 C.F.R. §2.730(b)) and can not satisfy its burden of proof with respect to the relief it seeks (10 C.F.R. §2.732).

4. Applicants' discovery is not premature.

CFUR claimed that before it can respond to questions regarding its participation in the upcoming hearings it must be given an opportunity to conduct its own discovery. Thus, CFUR claimed, Applicants' discovery requests are premature.

On the contrary, Applicants are entitled to begin discovery at this time. The NRC Rules of Practice require that discovery of any party not be delayed because another party is conducting discovery, unless, inter alia, justice so requires (see 10 C.F.R. §2.740(d)). Manifestly, CFUR has not demonstrated that justice, in fact, requires Applicants' discovery to be delayed.



Since, Applicants bear the ultimate burden of proof in this proceeding, they must be permitted to pursue discovery effectively to enable them to prepare their case for hearing. Tyrone, supra, 5 NRC at 1300-01. In any event, the Board has already indicated (in its June 16, 1980 Order) that discovery requests and responses thereto should be submitted with reasonable promptness. Thus, CFUR has not satisfied its burden of proof with respect to this basis for a protective order. 10 C.F.R. §2.732.

B. Answers to CFUR's Claims for Relief

CFUR makes four claims for relief. CFUR requests that it not be required to supplement any of its responses to Applicants' discovery requests, that Applicants' not be permitted to conduct further discovery until permitted to do so by the Board, that Applicants' future discovery be limited to 30 interrogatories for any forty-five day period, and "such further relief to which it may be entitled."

CFUR's first claim (to be relieved of any responsibility to supplement responses) is contrary to the NRC Rules of Practice. CFUR is required, pursuant to 10 C.F.R. §2.740(e)(1) and (2), to supplement its responses to certain interrogatories. In addition, CFUR may be required to supplement other responses pursuant to a Board Order issued under 10 C.F.R. §2.740(e)(3). Applicants' have moved this Board for such an Order and rest on that motion. In any event, Applicants

note that CFUR has provided no justification for concluding that it would be unable, or would be unjustly burdened if required, to supplement its responses as it obtains the necessary information. CFUR has, therefore, failed to sustain its burden of proof to demonstrate good cause for this relief. 10 C.F.R. §§2.732 and 2.740(c).

The second claim for relief would prevent Applicants' from conducting further discovery until permitted to do so by the Board. As demonstrated in Section II.A., supra, CFUR has not presented adequate grounds for limiting Applicants' discovery through issuance of a protective order. In addition, CFUR is improperly attempting to avoid its responsibilities in this proceeding (answering discovery requests) while at the same time exercising its rights (conducting discovery against other parties). Offshore Power Systems, supra, 2 NRC at 815. In any event, CFUR has failed to sustain its burden of proof with respect to this claim. 10 C.F.R. §§2.732 and 2.740(c).

CFUR's third claim for relief would limit Applicants' future discovery against CFUR to 30 interrogatories for any forty-five day period. Such conditions would unfairly and illegally restrict Applicants' right to conduct discovery against CFUR. Applicants' must be able to pursue discovery effectively in order to prepare their case for the hearing. Tyrone, supra, 5 NRC at 1300-1301. Effective discovery

includes utilization of any of the methods of discovery set forth in 10 C.F.R. §2.740(a), unimpaired by arbitrary limitations imposed at the instance of a party which simply seeks to avoid its duty as a party to respond to discovery requests. CFUR has not demonstrated good cause for granting such extraordinary relief. 10 C.F.R. §2.740(c).

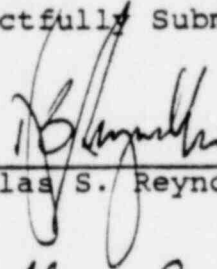
Further, CFUR's second and third claims for relief, discussed above, are premature. CFUR may object to Applicants' further discovery requests as received on any of the grounds provided for in the NRC Rules of Practice. It would be unsound and inappropriate administrative practice for the Board to prevent or unduly limit Applicants' discovery without having before it specific objections to particular requests.

Finally, CFUR's fourth claim for relief ("such further relief to which it may be entitled") lacks the particularity which is required for all motions. 10 C.F.R. §2.730(b). In any event, and especially in the absence of such particularity, the Board should fashion no relief for CFUR since CFUR has not sustained its burden of proof with respect to any aspect of the protective order which it seeks. 10 C.F.R. §2.732.

III. Conclusion

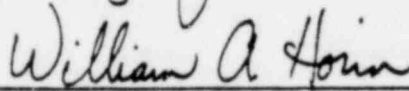
For the foregoing reasons, Applicants' submit that the Board should deny in its entirety CFUR's motion for a protective order.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Answer To CFUR's Motion For Protection", in the captioned matter were served upon the following persons by deposit in the United States mail, first class postage prepaid this 3rd day of October, 1980:

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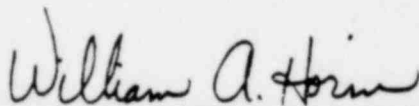
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