

February 23, 1981

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)

) (Application for
) Operating License
)

APPLICANTS' MOTION TO COMPEL AND
TO REQUIRE SUPPLEMENTATION OF RESPONSES
TO APPLICANTS' SECOND SET OF
INTERROGATORIES TO CASE



Pursuant to 10 C.F.R. §§2.740(e)(3) and 2.740(f), Texas Utilities Generating Co., et al ("Applicants"), hereby move the Atomic Safety and Licensing Board ("Board") in the captioned proceeding for an order compelling Citizens Association for Sound Energy ("CASE") to respond to Applicants' discovery requests set forth in "Applicants' Second Set of Interrogatories to CASE and Requests to Produce," filed January 12, 1981. Applicants also move the Board to issue an order requiring CASE to supplement its responses to certain of the discovery requests. CASE filed its answers to those discovery requests on February 6, 1981.

I. Background

On January 12, 1981, Applicants filed their "Second Set of Interrogatories to CASE and Requests to Produce."

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By that filing the Applicants sought discovery from CASE with respect to Contention 22, regarding emergency planning, and Contention 25, regarding financial qualifications. Pursuant to the Board's Memorandum and Order of December 31, 1980, CASE was consolidated with ACORN and designated the lead-party intervenor for all aspects of this proceeding (including discovery) with respect to Contention 22 (ACORN had also raised the issue in Contention 22(f)). As the sole sponsor of Contention 25, CASE was also designated lead-party intervenor for that contention in the Board's Memorandum and Order. On February 6, 1981, CASE filed its answers to Applicants' second set of interrogatories and requests to produce. CASE's responses to Applicants' second set of discovery requests generally state that CASE is in the process of reviewing information or that CASE intends to conduct discovery regarding the particular subject and, apparently for those reasons, CASE does not provide responses at this time. Although CASE indicates that it intends to "update" its answers at a later (unspecified) time, Applicants believe that CASE's initial responses to the subject discovery requests are inadequate under the NRC Rules of Practice. Accordingly, Applicants move this Board for an order compelling CASE to promptly respond to those requests and to supplement its answers as new information becomes available.

II. Applicants' Motion to Compel

Applicants believe that CASE's responses to the majority of the subject discovery requests evidence a failure to recognize its responsibility to provide all requested information available to CASE at the time its responses are due, even if additional information may become available at a later time and those responses will need to be supplemented. Accordingly, Applicants summarize below the requirements applicable to responding to discovery requests where only partial information is available.

Applicants also hereby incorporate the discussion of law and NRC practice regarding discovery which was set forth in its September 18, 1980, motion to compel CASE to respond to Applicants' first set of interrogatories. In addition, after that motion was served, the Appeal Board issued a decision in Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), 12 NRC 317 (1980), which discussed the conduct of discovery in NRC proceedings. That decision reinforces Applicants' summary of applicable discovery principles as stated in their September 18 motion.

A party to an NRC licensing proceeding is not excused from making timely responses to discovery requests because of a lack of complete knowledge or because the party has only partial knowledge of the answer. See Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 583 n. 10 (1975). That party must answer discovery requests to the best

of their ability, and if the party claims a lack of sufficient information to provide any response at the time answers are due, the party should answer by providing the information then available. Id. Further, it is not proper for a party to refuse to respond to valid discovery requests on the basis that the party is awaiting further discovery, without specifying what facts and what discovery requests are pending. Pilgrim, supra, 1 NRC at 585, see 10 C.F.R. §2.740(d).

Applicants submit that many of CASE's answers to Applicants' discovery requests do not comply with the above principles and are thus inadequate responses under NRC Rules of Practice governing discovery. Accordingly, Applicants move the Board for an order compelling CASE to promptly respond to the following interrogatories to the best of CASE's ability at this time.

A. Interrogatories 11-2 and 12-2, etc.

Interrogatory 11-2 asks whether CASE objects to any of the information regarding emergency planning set forth in the Applicants' Final Safety Analysis Report, and, if so, the bases for those objections. CASE responds "yes," but then states that it has not reviewed the most recent revisions, and that with respect to Applicants' Emergency Plan CASE intends to seek discovery regarding the plan, and thus is not "at this time in a position to fully respond" to the interrogatory. CASE adds that

it intends to update its response "later." Interrogatory 12-2 asks CASE to specify the "state authorities" it believes should be identified in the Applicants' Emergency Plan. CASE responds simply "those specified in NRC final regulations." CASE also refers to its response to Interrogatory 11-2 and again notes its intent to supplement its answer "later." Further, CASE responds to 61 of the 81 subsequent interrogatories on Contention 22 by simply referring to its response to Interrogatory 12-2 (and thus also Interrogatory 11-2).

As noted above, CASE must provide the information presently available in responding to discovery requests. Pilgrim, supra at 583, n.10. CASE's answers indicate only that it is unable to "fully respond" at this time. Such an answer directly conflicts with the requirement set forth in Pilgrim in that CASE is not permitted to await its ability to provide "full" responses before providing information then available. In addition, CASE may not refuse to respond because it intends to take discovery unless specific facts and pending discovery requests are identified in support of its responses. Id. at 585. CASE has thus failed to provide adequate responses to discovery where its only reason for not responding is that it intends to take discovery in the future.

Thus, it is axiomatic that CASE must supply the information it has available at the time responses are due. See Pilgrim, supra at 583, n.10. This CASE has failed to do.

Further, in that Applicants' Emergency Response Plan was issued on October 8, 1980 and transmitted to CASE on October 13, 1980, it is inconceivable that since that time CASE has not developed any information or position with respect to 63 interrogatories.

For the foregoing reasons, Applicants move that the Board issue an order compelling CASE to respond fully to the above interrogatories.

B. Interrogatories 2-2, 20-2, etc.

Interrogatories 2-2 and 20-2 seek CASE's bases for its position on Contention 22 and its responses to certain interrogatories. CASE responds by identifying 10 C.F.R. Part 50 Appendix E, and NUREG-0654^{1/} and its earlier pleadings regarding admission of its contentions. CASE also answers by indicating that additional bases are other "documents" and "regulations" (both unspecified) that are in the process of being developed. Finally, CASE responds to 16 additional interrogatories, all seeking the bases for CASE's responses, by referring to its answer to Interrogatory 20-2.

Applicants submit that CASE's answers are not adequately responsive. Applicants are entitled to seek the bases

^{1/} "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants," NUREG-0654, FEMA-REP-1, Rev. 1 (November 1980).

for CASE's claims, including the specific deficiencies or defects claimed to exist, in addition to the bases set forth on CASE's pleadings regarding admission of its contention. See Pilgrim, supra, 1 NRC at 582, 586. Also, CASE has not provided complete responses in that it fails to identify the "related documents" and "other regulations" which evidently are to serve as bases for CASE's position. CASE must provide responses to those interrogatories by specifying those documents and regulations. See Pilgrim, supra, 1 NRC at 583, n.10. Accordingly, Applicants move this Board for an order compelling CASE to promptly respond to the above interrogatories.

C. Interrogatories 95-2, 104-2, 106-2, 109-2, 111-2 and 116-2.

These interrogatories ask CASE (1) to identify the information on which it relies in support of its position that the owners of Comanche Peak are not financially qualified, (2) whether CASE contends the owners are unable to obtain any of the funds necessary to cover the operating costs for Comanche Peak, and (3) to set forth the bases for its position on Contention 25 and its answers to interrogatories. CASE responds by referring to its pleadings regarding admission of its contentions and by indicating that it relies on unspecified testimony in unidentified rate hearings

as bases for its position. CASE also indicates it expects to obtain more information in response to interrogatories.

Applicants contend that CASE's answers to these interrogatories are insufficient and not in compliance with the NRC Rules of Practice. In responding to interrogatories seeking the bases for its claims, CASE must provide all information which augments the bases used to support admission of its contentions. See Pilgrim, supra 1 NRC at 583 n.10, 586. In addition, CASE may not here claim it is awaiting its own discovery before providing responses that set forth the information now available. Id.; see also 10 C.F.R. §2.740(d). CASE's responses are inadequate with regard to both of those requirements. Further, CASE's answers must be responsive and complete to the extent information is now available. Id.; see also 10 C.F.R. §2.740(f). In this regard, CASE's answers are inadequate because it indicates that it is relying on testimony at rate hearings but fails to identify any of that testimony or produce the related documents.

Accordingly, Applicants move the Board to issue an order compelling CASE to respond to Interrogatories 95-2, 104-2, 106-2, 109-2, 111-2 and 118-2.

III. Applicants' Motion to Require Supplementation of Responses

Several of CASE's answers to interrogatories merely state that CASE will "update" its response later, that CASE has not "yet" analyzed the information required to provide a response or

that the answer is unknown "at this time." CASE does not object to any of the interrogatories.

While Applicants have also moved for an order compelling CASE to provide responses to many of the interrogatories which are subject to the instant motion to require supplementation, Applicants believe that the instant motion is necessary to assure complete responses to Applicants' interrogatories as CASE develops additional information regarding the subject matter dealt with in those interrogatories. Also, although CASE indicates it intends to supplement its responses with respect to most of the interrogatories which are subject to this motion, Applicants believe a more efficient proceeding will be assured if the Board affirms CASE's intentions to supplement its responses by requiring such supplementation as soon as CASE obtains further information. With respect to those answers which do not indicate an intent to supplement responses, an order requiring supplementation would promote the efficient conduct of these proceedings by eliminating the need for Applicants to resubmit discovery requests on those interrogatories and by clarifying the necessity for supplementation of both groups of answers as soon as CASE obtains or develops responsive information.

For the foregoing reasons, Applicants move that the Board issue an order pursuant to 10 C.F.R. §2.740(e)(3) requiring

CASE to supplement its responses as information is developed or obtained with respect to the following interrogatories.^{2/}

A. Interrogatories Regarding Contention 22.

Although Applicants have also moved for an order compelling immediate responses to the majority of these interrogatories, Applicants believe that an order requiring CASE to supplement its responses with respect to Interrogatories 2-2, and 11-2 through 93-2 would be appropriate in this instance. While the above motion to compel is intended to obtain information presently known by CASE, it is likely that CASE later will develop additional information supporting its position on Contention 22. In addition, CASE already has indicated that it fully intends to update its responses to these interrogatories. See CASE's Answers at p. 6. For the reasons discussed above, Applicants believe that the efficient conduct of this proceeding would be greatly promoted if the Board would affirm CASE's intentions to supplement its responses by issuing an order requiring such supplementation immediately upon receipt of additional information. Accordingly, Applicants move the Board for an order

^{2/} Applicants do not move for an order requiring supplementation of interrogatories which request the identity of witnesses, the subject matter of their testimony and the substance of that testimony since CASE is already clearly required to do so by the NRC Rules of Practice, 10 C.F.R. §2.740(e), and the Applicants assume CASE will abide by that requirement. (Interrogatories 8-2, 9-2, 10-2, 101-2, 102-2 and 103-2).

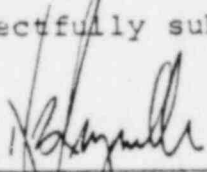
requiring that CASE supplement its responses to Interrogatories 2-2 and 11-2 through 93-2.

- B. Interrogatories 95-2, 100-2, 104-2, 106-2 through 116-2, 119-2, 120-2, 122-2 and 123-2.

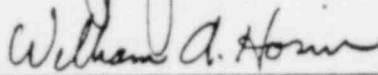
These interrogatories all seek information regarding CASE's position on Contention 25 (financial qualifications). CASE responds to each of these interrogatories by stating either that it does not presently have the requested information and that it will supplement its answer at a later time, that it hasn't reviewed the applicable information to provide a response "yet" or that the answer is unknown or the interrogatory is not applicable "at this time." Applicants believe that an order compelling CASE to supplement its responses as soon as it develops or obtains information on which it intends to rely for its position on Contention 25 would be appropriate. Applicants motion for an order compelling CASE to respond to certain of these interrogatories is directed at obtaining information as it is currently known or available to CASE regarding CASE's position on Contention 25 and supporting bases. Thus, an order requiring supplementation of CASE's answers as CASE develops or obtains information on which it intends to rely for its position on Contention 25 would serve to promote the efficient conduct of this proceeding and would provide concise guidance to CASE and the Applicants with respect to further discovery on Contention 25.

Accordingly, Applicants move the Board for an order requiring that CASE supplement its responses to Interrogatories 95-2, 100-2, 104-2, 106-2 through 116-2, 119-2, 120-2, 122-2 and 123-2 promptly upon developing or obtaining additional information applicable to those discovery requests.

Respectfully submitted,



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February 23, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
Valentine B. Deale, Chairman
Dr. Richard F. Cole
Dr. Forrest J. Remick

In the Matter of)
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TEXAS UTILITIES GENERATING)
COMPANY, et al.)
)

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

Docket Nos. 50-445
50-446

(Application for
Operating License)

March __, 1981

MEMORANDUM AND ORDER

(Granting Applicants' Motion to Compel Case to
Respond to Applicants' Second Set of Interrogatories
to CASE and to Require Supplementation of Responses)

1. On January 12, 1981, Applicants served "Applicants' Second Set of Interrogatories to CASE and Requests to Produce." CASE served its "Answers to Applicant's [sic] Second Set of Interrogatories and Requests to Produce" on February 6, 1981.^{1/} Applicants filed their "Motion to

^{1/} On January 26, 1981, the Board authorized a one-week extension of time to CASE, due to illness of CASE's representative, in which to serve its answers to Applicants' discovery requests. Applicants did not object to the extension.

Compel and to Require Supplementation of Responses to Applicants' Second Set of Interrogatories to CASE" on February 23, 1981. For the reasons set forth below, the Board grants Applicants' motions.

Motion to Compel

2. Applicants' motion to compel involves interrogatories which seek specification of the objections raised by CASE in Contention 22 to Applicants' emergency response plan and the bases for those objections. Applicants' also move for an order compelling responses to interrogatories which ask CASE to particularize its claim raised in Contention 25 regarding the Applicants' financial qualifications and to set forth the information on which CASE relies for its position on Contention 25. CASE's responses to these interrogatories indicate that CASE has available or has developed some information regarding those discovery requests. In each instance, however, CASE declines to provide answers because it intends to obtain further information at a later time and thus is not able to "fully respond" at this time. CASE indicates it intends to supplement its responses once it has obtained or developed more information pursuant to future discovery and/or analysis of available information or documents and regulations now "being developed." CASE does not object to any of the discovery requests.

3. Parties to NRC licensing proceedings have a duty to provide complete, explicit and responsive answers to valid discovery requests. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 583 (1975). Where a party does not have full or complete information at the time answers are due, the party should respond by providing the information available at that time, and indicate that the answer sets forth the information then available. Id. at 583, n.10. Further, a party is not excused from providing answers which reflect the information available on the grounds that it is awaiting further discovery without specifying the particular facts or discovery requests in that regard which are pending. Id. at 585.

4. In NRC licensing proceedings, Applicants must be able to inquire effectively into the positions of intervenors prior to the hearing because Applicants carry the ultimate burden of proof. Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300-01 (1978); see 10 C.F.R. §2.740(d). In this respect, the Commission has stressed, in an opinion which received explicit Supreme Court approval, that prior to a hearing an intervenor must provide information "sufficient to require reasonable minds to inquire further." Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC

317, 340 (1980); citing Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-74-5, 7 AEC 19, 30-32 and n.27 (1974), reversed sub nom. Aeschliman v. NRC, 547 F.2d 622, 628 (D.C. Cir. 1976) reversed and remanded sub nom. Vermont Yankee Nuclear Power Corp. v. NRC, 435 U.S. 519, 553-54 (1978).

5. Interrogatories 11-2 and 12-2 seek specification of CASE's claims raised in Contention 22 with respect to Applicants' emergency response plan. CASE responds to Interrogatory 11-2 by indicating that it is unable to respond "fully" at this time because it is still reviewing Applicants' Emergency Plan and because it intends to seek discovery regarding the plan. However, the Board notes that Applicants transmitted the Comanche Peak Emergency Plan to CASE on October 13, 1980, and that CASE thus has had more than ample opportunity to review the Plan. In addition, CASE answers Interrogatory 12-2, regarding the "state authorities" CASE claims (Contention 22a) should be identified in the emergency plan, by simply stating "those specified in NRC final regulations" and referring to its response to Interrogatory 11-2. CASE states that it intends to update its responses to both interrogatories "later." Applicants also served 61 interrogatories dealing with the six issues raised in Contention 22, parts a. through f., to which CASE responds either in whole or in part by referring to its answer to Interrogatory 12-2. Applicants contend, and the Board

agrees, that CASE must at this time supply the information it now has available and may not wait to conduct discovery against Applicants before providing any answers. Accordingly, CASE is ordered to respond to Interrogatories 11-2, 12-2 and those interrogatories to which it responds by referring to its answer to Interrogatory 12-2 by providing the information it presently has available or by indicating it has no information to provide at this time.

6. Interrogatories 2-2 and 20-2 request that CASE provide the bases for its position on Contention 22 and for its responses to interrogatories dealing with the contention, and identify documents on which it will rely in support of its position. In response, CASE merely identifies NRC regulations and its previous pleadings regarding admission of its contentions, along with "related," though unspecified, documents which are "being developed at the present time." CASE responds to sixteen other interrogatories seeking the bases for CASE's claims simply by referring to its response to Interrogatory 20-2. Applicants contend that CASE's answers to those interrogatories are incomplete and not responsive, and the Board agrees. Accordingly, CASE is directed to specify the factual basis for its position on Contention 22, and to identify the documents on which it will rely in support of those positions.

7. Interrogatories 95-2, 104-2, 106-2, 109-2, 111-2 and 116-2 seek (1) the information on which CASE relies for its claims in Contention 25 that Applicants are not financially qualified to operate Comanche Peak, (2) whether CASE believes the owners are unable to obtain any of the funds necessary to cover operating costs, and (3) the bases for CASE's position on Contention 25 and its answers to interrogatories. CASE's responses consist only of references to its pleadings supporting admission of Contention 25 and to unidentified testimony at unspecified rate hearings. The Board agrees with Applicants that CASE's answers are not responsive or complete. For the reasons discussed above, CASE is directed to provide the factual bases for CASE's position on Contention 25 as requested in these interrogatories, and to set forth complete responses, including identification of the testimony at rate hearings which it contends supports its position.

Motion to Require Supplementation

7. Applicants also seek an order pursuant to 10 C.F.R. §2.740(e)(3) directing CASE to supplement its responses to several interrogatories, as set forth below. Applicants argue that CASE's responses to these interrogatories are incomplete as they now stand. Further, CASE indicates it intends to supplement its answers to most of the interrogatories at a later time, when more information is obtained

or developed. Applicants suggest that the efficient conduct of this proceeding would be promoted if the Board affirms CASE's intention to supplement responses to the subject interrogatories. In addition, Applicants submit that for those answers which CASE does not explicitly indicate it intends to supplement, an order requiring supplementation would avoid delay entailed in resubmitting the interrogatories to CASE. The Board agrees that the proceeding would be conducted more efficiently, and since the Board finds that the Applicants' discovery requests are proper, directs, pursuant to 10 C.F.R. §§2.718 and 2.740(e)(3), that CASE supplement its responses to the interrogatories identified below immediately upon development or receipt of the requested information.

8. Interrogatories 2-2, and 11-2 through 93-2 each involve questions concerning CASE's positions or its bases for its positions with respect to Contention 22. CASE indicates that it intends to update its answers pending further analysis of Applicants' Emergency Plan. Further, although most of these interrogatories are also the subject of the above order compelling responses, that order is based on indications in CASE's answers that it presently has some information but does not provide that information because it is not prepared to respond "fully" at this time. Thus, while CASE should provide the information currently

available to it in response to the interrogatories subject to the above order, the Board directs that CASE supplement responses to Interrogatories 2-2, and 11-2 through 93-2 as soon as additional information is developed or obtained.

9. Interrogatories 95-2, 100-2, 104-2, 106-2 through 116-2, 119-2, 120-2, 122-2 and 123-2 ask CASE to provide information regarding its position on Contention 25. CASE answers by indicating that it does not presently have the requested information, that it "expects" to have further information, that it has not "yet" reviewed the information necessary to provide responses or that the interrogatory or answer is not applicable "at this time." Again, although several of these interrogatories are also the subject of the above order compelling responses, that order requires that CASE provide the information it indicates it now has available. Accordingly, the Board finds that in the interest of the efficient conduct of this proceeding it is appropriate to and so directs CASE to supplement its responses to Interrogatories 95-2, 100-2, 104-2, 106-2 through 116-2, 119-2, 120-2, 122-2 and 123-2 as soon as it develops or obtains additional information at a later time.

ORDER

For the foregoing reasons and in consideration of the record in this matter, it is on this ____ day of March, 1981

ORDERED

That Applicants' motion to compel and to require supplementation of responses with regard to Applicants' Second Set of Interrogatories to CASE and Requests to Produce is hereby granted, as follows:

That CASE provide complete responses to the extent information is presently available to it by [two weeks from issuance of Order], to Interrogatories 2-2, 11-2, 12-2, and 20-2 (and all interrogatories to which CASE responds by referring to its answers to Interrogatories 12-2 and 20-2), 95-2, 104-2, 106-2, 109-2, 111-2 and 116-2.

That CASE supplement its responses to the following interrogatories as soon as the information requested is developed or obtained: Interrogatories 2-2 and 11-2 through 93-2; and 95-2, 100-2, 104-2, 106-2 through 116-2, 119-2, 120-2, 122-2 and 123-2.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Valentine B. Deale, Chairman

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
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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)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Motion to Compel and to Require Supplementation of Responses to Applicants' Second Set of Interrogatories to CASE", in the above captioned matter were served upon the following persons by deposit in the United States mail, first class postage prepaid this 23rd day of February, 1981:

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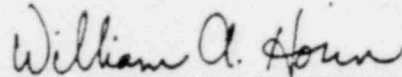
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