

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

10/23/82
DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD ~~NOV~~ OCT 26 P2:43

In the Matter of

APPLICATION OF TEXAS UTILITIES
GENERATING COMPANY, ET AL. FOR
AN OPERATING LICENSE FOR
COMANCHE PEAK STEAM ELECTRIC
STATION UNITS #1 AND #2
(CPSSES)

SECRETARY
OF ENERGY
& SERVICE
Docket Nos. 50-445
and 50-446

CASE'S MOTION FOR RECONSIDERATION
OF BOARD'S RULING REGARDING
ATTACHMENTS TO DEPOSITION/TESTIMONY
OF CASE WITNESS JACK DOYLE

Pursuant to 10 CFR 2.730 and as referenced in CASE's 10/9/82 Response to Board's 9/22/82 Memorandum and Order for Briefs re: Necessary Documents and Information¹, CASE (Citizens Association for sound Energy), Intervenor herein, hereby files this, its Motion for Reconsideration of Board's Ruling Regarding Attachments to Deposition/ Testimony of Case Witness Jack Doyle.

BACKGROUND

On August 19 and 20, 1982, CASE took the oral deposition of Jack Doyle, under subpoena. Applicants had the opportunity to, and in fact did, cross-examine Mr. Doyle extensively during that deposition. (The NRC Staff also had that opportunity but chose not to cross-examine Mr. Doyle.)

In CASE's 8/16/82 written Notice of Deposition, Mr. Doyle was advised that:

"The deposition will relate to all matters of which you have knowledge in connection with Contention 5 of CASE relating to quality assurance/quality control during construction activities at Comanche Peak Steam Electric Station and the construction activities employed during the plant's construction. Specifically, you should be prepared to answer questions regarding the failure

¹ Page 7, item 62.

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of the Applicants to include proper analysis factors in their STRUDL (Structural Design Language) computer calculations on pipe supports, including personal observation of at least one support failure; problems with the use of Richmond Inserts (used to hang pipe supports); problems with constraint of pipe thermal growth; supports which due to instability are actually non-supports; and any other matters relating to your knowledge of or work at the Comanche Peak nuclear plant, including wherever possible the dates, locations and circumstances of each item.

"You should also bring with you all documents on which you will rely and/or to which you will refer in your deposition or in future testimony before the Atomic Safety and Licensing Board." (Emphasis added.)

In accordance with these instructions, Mr. Doyle brought with him numerous pieces of information and documents (Doyle Deposition/Testimony, CASE Exhibit 669, page 80/line 23 on). To try to make his concerns clearer, Mr. Doyle broke his documents into groups, attaching a handwritten cover sheet to each group expressing his basic concerns regarding each group. It was made clear during the deposition that Mr. Doyle had made handwritten notes on some of the documents which he had brought, and in a rather detailed discussion, he explained how this had come about (Doyle Deposition/Testimony, CASE Exhibit 669, page 172/beginning with line 15, through 174/13):

"...this is one of the reasons I had all this stuff. Every time I'd get something funny, I'd usually make a copy and then put my pen scratching on it that I don't agree personally. And I would throw it in my drawer. So if somebody comes back and says, you know, what kind of stupidity is this, Jack?...So to play the game, you could see why I made a copy of it, and I put notes up in the front, and I say this happened...Q. (Mrs. Ellis): On (11)HH there are notes on the left-hand side towards the bottom. Are they your notes? A: Yeah. Q: So this was one of those occasions where you put what your thoughts were over on the left of the copy that you had. A: Yeah...on several occasions we've had people come back and tell us, you done it wrong. You did not do what we told you, or you did not do what you were supposed to. And things are so nebulous that nobody really knows -- particularly in the STRUDL Group -- nobody know to what extent you have to go, because something like this, if management found out that this was no good, the first thing the guy that done it is going to say is why I sent it to the STRUDL Group. But I'm going to say, you told me not to do that. Oh, no, I never told you not to do that. I wanted an analysis of this. So, therefore, you keep paper. Q: And to try to protect yourself later from it being said that you're the one who did this when you were doing what you were told to do at the time... A: Well, at least I can show that I personally had considered the problem. Now I have more of a leg to stand on, plus I think on several occasions we even went to Gary and told Gary that, you know, these people are submitting unstable structures..." (Emphases added.)

Applicants at no time during the deposition objected to the inclusion of the notes which Mr. Doyle indicated he had placed on the drawings. This was the first time an objection would have been in order. The drawings and other documents were included as attachments to the deposition.

As we had previously indicated, CASE prefiled Mr. Doyle's deposition as his prefiled testimony and offered it into evidence in the September hearings. CASE was willing to either have Mr. Doyle's deposition admitted as his prefiled testimony or have him testify from scratch since he was present and ready to testify. (Tr. 3587/16-3588/21.) At the suggestion of Applicants' counsel (tr. 3588/22-3589/5), Mr. Doyle's deposition testimony, including direct and cross-examination, and redirect and recross, was admitted as though it were the direct testimony to be given by Mr. Doyle at the hearing. (Tr. 3626/2-7.) The two-days' deposition testimony was admitted as CASE Exhibit 669 and 669A. The attachments to Mr. Doyle's deposition testimony (including the drawings which Mr. Doyle had brought to the deposition on which he had made handwritten notes) were admitted into evidence as exhibits for clarification only as CASE Exhibit 669B. (Tr. 3626/14-3628/21.)

The Board Chairman explained to CASE exactly what was meant by the acceptance of this deposition as Mr. Doyle's testimony in the proceedings. We were told that his testimony would be over (tr. 3590/11-12), that both Applicants and the NRC Staff were willing to have the cross-examination in that deposition stand as cross-examination in the hearings (tr. 3591/25-3592/4). CASE was willing to have Mr. Doyle's deposition and attachments be admitted on the basis indicated (see tr. 3587/16-3590/13, 3591/16-3592/14, 3626/2-3630/5). At no time was it ever indicated that Applicants or NRC Staff had any objections to the deposition testimony, including the attached drawings on which Mr. Doyle had made notes. This was the second time an objection would have been in order. To the contrary, the Board Chairman clearly indicated to CASE that if the deposition were accepted on the

basis indicated, that was it; there would be no more cross-examination, redirect examination, no changes.

Thus, Applicants were well aware on August 19 that Mr. Doyle had made notes on many of the drawings which were included as part of his deposition attachments. (Further, the NRC Staff had access to this same information, since they ordered a copy of Mr. Doyle's deposition from the court reporter shortly after the taking of the deposition.) Yet Applicants did not object to the inclusion of Mr. Doyle's notes during the deposition; they did not object to the inclusion of Mr. Doyle's notes at the time his deposition was admitted into evidence (at the suggestion of the attorney for the Applicants, tr. 3588/23-3589/5) rather than testifying from scratch in the hearings.

It was not until Thursday, September 16, that Applicants indicated any concern for the record regarding Mr. Doyle's notes on the drawings (tr. 5183/22-5190/10). It was brought out in the redirect examination of Mr. Finneran by Mr. Reynolds; the document discussed was Attachment 11-XX of Exhibit 669B which was in the same series as Attachment 11HH, which was the subject of the specific discussion CASE had with Mr. Doyle during the deposition regarding the notes on the drawings. (See discussion bottom half of page 2 of this pleading.)

The manner in which Applicants' concern was expressed left the impression that they had been unaware previously (at the two times when an objection would have been proper and timely) that Mr. Doyle had made notes on the drawings, giving the erroneous and false impression that CASE had in some way deliberately sought to mislead the parties and the Board in these proceedings. The Board Chairman, in fact, reprimanded CASE about our "representations that they are authentic documents, and we find out that your witnesses have made notes on them. We don't appreciate that, so cooperate with having them deleted and get clean copies." (Tr.-5190/19-25.) Although CASE should perhaps have made a special effort to inform the Board of the notes on the drawings, it was certainly not our intention to mislead the Board.

This was another of several instances in these proceedings when CASE, without benefit of counsel and lacking experience in legal maneuverings such as this, was unable to adequately respond quickly on our feet. It was our recollection that this had been discussed in the deposition originally, but we did not have that information available readily at our fingertips and had not really anticipated any problem with it or analyzed the documents in that light, since anyone who read Mr. Doyle's deposition would have been aware of the facts of the matter; certainly the Applicants were. Also, it was obvious that the Board Chairman did not wish to pursue the matter further at that point and Applicants were told to proceed with their re-direct examination (tr. 5190/24-5191/2).

CASE did attempt to raise this issue again on Friday, September 17 (see discussion, tr. 5775/24-5778-14). We suggested that Mr. Doyle be allowed to look back through the handwritten notes and see if there were any vital information in them which should be included to make his testimony complete. We further suggested that we be allowed to include maybe one page which stated that there is a difference between what Mr. Doyle had in his deposition and what is included as his testimony and attachment in the hearing.

The Board denied both these suggestions and stated that:

"People have all testified. The exhibits and depositions have all been used and ruled on...Since it's in evidence, it constitutes his testimony now, no matter what anyone said...the evidence and testimony comes in here at an evidentiary hearing, and you don't have the power to change it...You can't rewrite history. Whatever it is, it is. Whatever they said, they said...It's already in the record. It's already testimony, and we have to have this rule; not only to you, it applies to all of them...The clean copies will replace the copies that have any kind of markings on them..."

If, as stated above, the exhibits and depositions have all been used and ruled on, is in evidence, constitutes his testimony now, is already in the record, is already testimony, how can documents which were originally attached and accepted as a part of Mr. Doyle's deposition testimony then be changed, especially when there was specific discussion during the deposition regarding them?

Had CASE been aware that Mr. Doyle's testimony would be altered by excluding portions of it which were included in his original deposition and accepted without cross-examination or objection by either Staff or Applicants (although Applicants were well aware of the notes Mr. Doyle made on the drawings), we would have not agreed to Applicants' suggestion that Mr. Doyle's deposition be accepted as his testimony without further cross-examination. We would instead have insisted that we be allowed to ask Mr. Doyle questions for the record based on his complete concerns, as expressed in the deposition not only in his deposition answers but in the attachments which he brought to the deposition which were included as a vital and an integral part of that deposition. It was our understanding, and it is clear in the record, that Mr. Doyle's deposition and its attachments were being introduced and accepted in the record as a package in their entirety (tr. 3587/16-3592/14, 3626/2-3630); there was no indication at the time this agreement was made that any portion of Mr. Doyle's deposition, including the attachments, would be deleted.

CASE submits that the Board's ruling, in this particular instance and in these particular circumstances, have accomplished what the Board has stated cannot be done -- that this ruling has in effect rewritten history and deprives the record in these proceedings of a very important and necessary part of Mr. Doyle's testimony wherein he explains his concerns about specific drawings. We further submit that the manner in which Applicants brought this matter to the attention of the Board was highly prejudicial to CASE and unfair to Mr. Doyle.

We can appreciate the Board's desire to have clean copies admitted into evidence to prevent anyone from misconstruing the drawings. However, CASE submits that this can and should be done without depriving the record of this vital portion of Mr. Doyle's testimony and concerns.

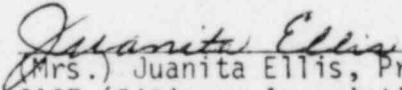
MOTION FOR RECONSIDERATION

For the reasons set forth herein, CASE hereby moves that the Board reconsider its previous ruling in this regard to the following extent:

- (1) That the clean copies of the drawings be provided as the Board has ordered; but
- (2) That CASE be allowed to provide as an addenda a typed statement, referencing each pertinent drawing, listing Mr. Doyle's handwritten notes from the drawings.

This will: satisfy the Board's intent that clean copies of the drawings be included in the record; and at the same time avoid changing history by deleting vital portions of Mr. Doyle's concerns; and preserve Mr. Doyle's actual original deposition/testimony in the record.

Respectfully submitted,



(Mrs.) Juanita Ellis, President
CASE (Citizens Association for Sound Energy)
1426 S. Polk
Dallas, Texas 75224
214/946-9446

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD ⁸² OCT 26 P2:44

In the Matter of
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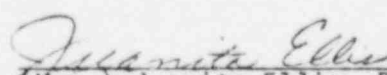
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SECRETARY
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Docket Nos. 50-445
and 50-446

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of
CASE'S MOTION FOR RECONSIDERATION OF BOARD'S RULING REGARDING ATTACHMENTS TO DEPOSITION/
TESTIMONY OF CASE WITNESS JACK DOYLE
have been sent to the names listed below this 23rd day of October, 1982, by:
Express Mail where indicated by * and First Class Mail elsewhere.

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| * Administrative Judge Marshall E. Miller
U. S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Washington, D. C. 20555 | David J. Preister, Esq.
Assistant Attorney General
Environmental Protection Division
P. O. Box 12548, Capitol Station
Austin, TX 78711 |
| * Dr. Kenneth A. McCollom, Dean
Division of Engineering, Architecture,
and Technology
Oklahoma State University
Stillwater, Oklahoma 74074 | * Ms. Lucinda Minton
Panel Law Clerk
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555 |
| * Dr. Richard Cole, Member
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555 | Atomic Safety and Licensing
Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555 |
| * Nicholas S. Reynolds, Esq.
Debevoise & Liberman
1200 - 17th St., N. W.
Washington, D. C. 20036 | Atomic Safety and Licensing
Appeal Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555 |
| * Marjorie Ulman Rothschild, Esq.
Office of Executive Legal Director
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555 | Docketing and Service Section
Office of the Secretary
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555 |



(Mrs.) Juanita Ellis, President
CASE (Citizens Association for Sound Energy)