November 27, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' ANSWER TO
CASE'S MOTION FOR ISSUANCE OF SUBPOENAS

Pursuant to 10 C.F.R. §§ 2.720 and 2.730, Texas Utilities Generating Company et al. ("Applicants") hereby oppose the November 18, 1981 Motion by the Citizens Association for Sound Energy ("CASE") requesting that the Atomic Safety and Licensing Board ("Board") issue Board subpoenas calling certain individuals as Board witnesses. Applicants submit that CASE has failed to demonstrate that this is the extraordinary situation where such Board action would be appropriate.

CASE moved the Board to issue subpoenas to certain employees, officers and former officers of Applicants requiring them to appear as witnesses at the forthcoming hearings. CASE intends that they will testify as to the direct testimony and cross-examination of each in various rate cases which have transpired over the last three years. CASE also moved the Board to subpoena two public officials, one of the State Public Utility Commission ("PUC") and the other of the City of Dallas, to identify and testify as to

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the authenticity of certain documents from earlier state and Dallas city rate proceedings.

CASE's Motion Should Be Denied

CASE's motion for issuance of these subpoenas should be denied. First, the issue raised by CASE (financial qualifications) is not of such significance as to warrant the issuance of Board subpoenas. Second, CASE's motion is dilatory, would lead to presentation of cumulative material, and involves irrelevant matters or matters of such marginal relevance that it would be a waste of time to allow CASE to pursue its intended tack.

Significance of Issue. CASE states in its motion that it is unable to pay witness fees and expenses (as required by 10 C.F.R. §2.720(b)) to those witness it seeks to cross-examine at the hearing. To avoid this liability and its responsibilities as a party, yet still have its way, CASE requests that the Board call such persons as Board witnesses. However, CASE has failed to meet the criteria set forth by the Appeal Board in Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603 (1977), to govern such extraordinary requests. Accordingly, this request is simply an attempt by CASE to obtain indirectly that federal financial assistance which it is prohibited by law from receiving directly, and should be denied.

Of course, the Board has the authority to call its own witnesses, 42 U.S.C. §2201(c); 10 C.F.R. §2.718(b), but it should not (and may not) use this authority to render indirect financial support to an intervenor. The Commission has stated that Congress has precluding public funding of

intervenors, and the Comptroller General has issued a similar opinion. See Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-80-19, 11 NRC 700, 702-03 (1980); Houston Power & Light (Allens Creek Nuclear Generating Station Unit 1), ALAB-625, 13 NRC 1, 14 (1981).

The Appeal Board has stated that Boards, in their discretion, may issue Board subpoenas sought by intervenors claiming lack of resources in limited situations where the evidence involved is "relevant and important for . . . resolution of a significant contested issue." Midland, supra, 5 NRC at 608 (emphasis added). It also stated that other factors to consider in this regard are whether it is a "close case involving key safety or environmental issues," and whether a party objects to presentation of the evidence in question. Id.

Applying the criteria set forth in Midland, supra, it is clear that the Board should not subpoena the individuals identified in CASE's motion as Board witnesses. First, the evidence in question is either irrelevant or of such marginal relevance as to be inadmissible (see discussion, infra), and is not important for resolution of the issue of Applicants' financial qualifications.

Second, the question of financial qualifications is not a "key safety or environmental" issue. In fact, the Commission has stated that "existing financial qualifications review has done little to identify substantial health and safety concerns at nuclear power plants." 46 Fed. Reg. 41786 (August 18, 1981). The Commission also has "tenta-

tively concluded that the present financial qualifications review can appropriately be eliminated for electric utility applicants, which can be presumed to be able to meet the financial demands of constructing and operating nuclear power plants." Id. at 41788. Obviously the Commission would not propose to eliminate financial qualifications from NRC review if it was a "key" issue.

Finally, the fact that Applicants object to the motion should be reason enough to deny CASE's request, especially in view of the bases for the objection, as discussed above. For all of these reasons, it would be inappropriate for the Board to grant CASE's motion.

Admissibility of Evidence. It is obvious from CASE's motion and other recent pleadings that it intends to recount the details of numerous rate cases of Applicants before the Texas PUC and the City of Dallas. Such a tack by CASE is dilatory and not designed to lead to the presentation of admissible evidence.

It will take many days (if not weeks) of trial to complete the record on financial qualifications if CASE is permitted to rehash in depth various rate cases involving Applicants. It is the results of the rate cases that are material before the NRC, and Applicants will present these results in their direct case. The minutia of the rate cases are not relevant or material.

Viewed in this light, Applicants question the relevancy and hence admissibility of the testimony CASE would adduce through the witnesses it seeks to have subpoenaed. FED.R.

EVID. 401. NRC Rules of Practice provide that a presiding officer may require a showing of relevance before he issues a subpoena and, if such a showing is not made, he may decline its issuance. 10 C.F.R. §2.720 a). In the context of the present motion, relevancy should be determined by reference to Commission regulations setting forth the requirements Applicants must satisfy to show they are financially qualified to operate Comanche Peak. Those regulations state that Applicants ordinarily have to demonstrate that they have "reasonable assurance" of obtaining funds (a) to operate the plant for each of the first five years of operation and (b) to decommission the facility. 10 C.F.R. §50.33(f) and C.F.R. Part 50, Appendix C. To demonstrate such "reasonable assurance," Applicants must only establish the existence of a reasonable financing plan under the circumstances. Matter of Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 18 (1978).

Applicants will satisfy this burden by setting forth its financial plan for meeting the estimated costs. That plan includes the filing of rate requests with the Texas PUC, which regulates sale of electricity for five of the six Applicants. */ The PUC is required by law to fix overall revenues at a level which will permit them to recover their operating expenses together with a reasonable return on their invested capital, and to set "just and reasonable rates" for

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*/ The sixth Applicant (TMPA) will recover costs through rates established unilaterally.

electric utilities. Texas Public Utility Regulatory Act, §§ 38 and 39, Article 1446(c) of Vernon's Annotated Texas Statutes.

When viewed in this light, testimony before the Texas PUC in past rate cases simply has no bearing on whether Applicants are and will be financially qualified to operate and decommission Comanche Peak. Under Commission regulations, the inquiry in this proceeding is whether Applicants are reasonably assured of an adequate level of revenues. The answer to that inquiry brings into play the extent to which the PUC will allow them to recover those revenues from their customers. If Applicants can show that they have recovered and are likely to continue to recover such costs through PUC rulings, then the Board need not inquire any further into those collateral proceedings. Matter of Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), LBP-77-68, 6 NRC 1112, 1162-64, aff'd, ALAB-491, 8 NRC 245 (1978). Thus, because granting CASE's motion would lead to irrelevant and inadmissible testimony, the motion should be denied.

In any event, even if the testimony may be relevant, it is excludable if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. FED.R. EVID. 403. Clearly any testimony CASE would adduce from the individuals which it would have the Board subpoena is substantially outweighed by the facts that it would be cumulative to the material points made by Applicants in

their direct case, and would result in unnecessary delay and expenditure of time. For these reasons alone, CASE's motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Answer to CASE's Motion for Issuance of Subpoenas" in the above-captioned matter were served upon the following persons by deposit in the United States mail, first class postage prepaid, same-day delivery (*), or overnight delivery (**) this 27th day of November 1981:

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