

05/07/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	}	
TEXAS UTILITIES GENERATING COMPANY,	}	Docket Nos. 50-445
<u>ET AL.</u>	}	50-446
(Comanche Peak Steam Electric	}	
Station, Units 1 and 2)	}	

NRC STAFF ANSWER TO CASE'S MOTION FOR RECONSIDERATION
OF BOARD'S ORDER DURING CONFERENCE CALL OF 4/22/82

I. INTRODUCTION

On April 26, 1982, CASE filed "CASE's Motion for Reconsideration of Board's Order During Conference Call of 4/22/82" ("CASE's Motion"). In this motion, CASE requests that the Atomic Safety and Licensing Board ("the Board"):

- (1) Reconsider its 4/22/82 telephone conference Order granting only two additional weeks for discovery on Contention 5 while maintaining the June 7, 1982 hearing date, and grant CASE's 4/20/82 Motion for sixty days for Additional Time for Discovery on Contention 5;
- (2) Recognize the fact that Applicants and NRC Staff have deliberately withheld documents from CASE in these proceedings; and
- (3) Take immediate steps to see that such abuses of the discovery process by Applicants and NRC Staff cease, including the promise of strong sanctions for all future violations. (CASE's Motion, at 8).

For the reasons set forth below, the Staff objects to CASE's Motion and urges that it be denied.

II. BACKGROUND

CASE's 4/20/82 Motion, to which CASE refers, sought, inter alia, an extension of time of at least sixty (60) days for discovery on Contention 5. See "CASE's Motion for Additional Time For Discovery on Contention 5," April 20, 1982. On April 22, 1982, the Board convened a conference call of the parties to hear oral argument on the motion. On the basis of the conference call (in which all the parties participated), and the filings, the Board modified the previous schedule governing discovery on Contention 5. In its "Order (Amending Revised Schedule)", April 23, 1982, the Board amended the schedule to 1) provide an additional two weeks for the conduct of discovery on Contention 5 and 2) extend, accordingly, the date on which discovery ends on Contention 5 (i.e., the deadline for filing answers to discovery). Order, at 1. Although the Board noted that discovery on Contention 5 will not end until May 17, 1982, the Board directed the parties:

"... to use their best efforts to respond promptly (preferably within ten days) to discovery requests filed by April 22, 1982." (Order at 2).

The Board also noted that the evidentiary hearing on Contention 5 will take place beginning June 7, 1982, as scheduled. Id.

II. DISCUSSION

CASE's Motion is the last in a series of motions by CASE seeking either postponement of the hearing or extension of the period provided

for completing discovery.^{1/} In support of its Motion for Reconsideration, CASE relies on essentially the same grounds presented in its previous motions, namely that the Board is pursuing a "premature hearing" on Contention 5 and that additional time is needed to conduct further discovery on documents recently provided to CASE in response to previous discovery requests, which according to CASE, were "deliberately withheld." Since CASE has presented no new grounds in support of its motion, the Staff continues to oppose CASE's Motion.^{2/}

Having been denied the full extension of time it sought, CASE has however, seen fit to launch a series of broadside attacks against the integrity of not only the parties but the Board also, which in the Staff's view must not go unanswered. In addition, in CASE's Motion, CASE displays not only a willingness to attack the integrity of the Board and the other parties, but a fundamental misunderstanding of the discovery process in general and discovery against the Staff in particular, which has served to undermine the discovery process which CASE so vigorously maintains the other parties have abused. As shown below, ample time has been provided for discovery on Contention 5 and the Staff

^{1/} See "CASE's Motion for Postponement of Hearings", October 26, 1981; "CASE's Motion for Extension of Time for Discovery on Contention 5," March 1, 1982; "CASE's Motion for Reconsideration of Extension of Time For Discovery on Contention 5," March 22, 1982; "CASE's Motion for Additional Time For Discovery on Contention 5," April 20, 1982.

^{2/} Had the Staff the opportunity to file a written answer to CASE's April 20, 1982 Motion (the Board's April 22, 1982 Conference Call considering CASE's Motion was convened before the expiration of the time period provided for answering the Motion), the Staff would have opposed such motion, as it did orally during the conference call.

has cooperated with CASE to provide CASE with basic information to aid discovery.

A. Ample Time Has Been Provided for Discovery on Contention 5

CASE alleges in its latest motion, as it has in the past, that the Board is pursuing "a premature hearing on Contention 5" (CASE's Motion at 7). According to CASE:

"... the Board must grant its request for substantive additional time for discovery on Contention 5 in order to comply with the explicit directives of the NRC." (CASE's Motion, at 7).

The Board's rulings concerning the schedule on Contention 5, including the latest Board Order which is the subject of CASE's Motion for Reconsideration, do not sustain CASE's allegations. The fact that the Board did not grant CASE all the relief it sought does not perforce mean that the Board has "trampled on CASE'S rights," as CASE asserts. (CASES's Motion, at 8). The Board has twice modified the schedule governing discovery on Contention 5, resulting in a seven week extension of time for completing discovery.^{3/} Since none of the other parties has requested further time for completing discovery on Contention 5, the Board's actions have clearly accomodated CASE. Any further extension of

^{3/} Under the schedule originally adopted by the Board, discovery on Contention 5 was to be completed by March 29, 1982. See "Order Cancelling Scheduled Evidentiary Session", February 9, 1982, at 1.

time would result in a stay of the hearing scheduled to commence June 7, 1982, a fact not even acknowledged by CASE.^{4/}

CASE initiated discovery against the Applicants on Contention 5 on July 7, 1980,^{5/} almost two years ago. Between December 31, 1980, when the Board consolidated intervenors on contentions^{6/} (including Contention 5), and December 1, 1981, when the Board "severed" consolidation on Contention 5,^{7/} CASE could have continued discovery on Contention 5 through the lead intervenor on that contention ("ACORN" and later "CFUR"). There was no discovery by any of the intervenors on that contention during that entire one year period, despite the fact that the intervenors were free to pursue discovery on that contention if they so

^{4/} 10 C.F.R. § 2.788(e) sets forth the criteria which must be satisfied to warrant issuance of a stay of an initial decision. In the Staff's view, they can also be applied to stays of hearings prior to initial decisions. See Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), "Order Relative to Motion for Continuance," dated May 9, 1979, slip. op. (Unpublished Order). CASE's motion fails to acknowledge that further time for discovery would result in a stay of the hearing, let alone satisfy the requirements for a stay.

^{5/} See "CASE's First Set of Interrogatories to Applicant," July 7, 1980; "Applicant's Answers to CASE's First Set of Interrogatories and Requests for Clarification," July 23, 1980; "CASE's Second Set of Interrogatories to Applicant's and Requests to Produce," December 1, 1980, and "Applicant's Answers to CASE's Second Set of Interrogatories and Objection to Rewording of Contention 5," December 22, 1980.

^{6/} See the Board's "Memorandum and Order," December 31, 1980, at 12.

^{7/} See December 1, 1981 Prehearing Conference Transcript, at 101 and the Board's "Order Subsequent to Prehearing Conference of December 1, 1981," December 18, 1981, at 4.

chose. In fact, in the Board's "Scheduling Order", July 23, 1981, the Board, in addition to establishing a schedule to govern discovery and hearing on Contentions 9, 22, 23, 24 and 25, and Board Question No. 2, directed the parties to:

"...conduct seasonably and conclude discovery on the remaining SER-related issues." Scheduling Order, at 2.

The issues raised by Contention 5, whether the Commission can make the findings required by 10 CFR 50.57(a), are certainly "SER-related", and all parties were on notice back in July 1981 to diligently pursue discovery on such issues. Then as now, however, CASE saw no need to take seriously either the directions or schedule of the Board, and did not file any more interrogatories on Contention 5 until January 4, 1982. In fact, CASE did not even begin its discovery against the Staff on this contention until February 10, 1982, almost two years after that contention was admitted as an issue in controversy. CASE's lack of diligence in pursuing discovery on Contention 5 even though a two-year period has been provided for discovery on that contention, does not justify either more time for further discovery or a postponement of the hearing on that contention.

In addition, contrary to CASE's claims that the explicit directions of the Commission mandate a further extension of time for discovery on Contention 5, if the Board granted the relief CASE seeks, its action would be in direct conflict with the Commission's policy (previously cited by the Board) that the licensing process move along at an expeditious pace

consistent with the demands of fairness.^{8/} CASE would have the parties engage in endless rounds of discovery, which would only end when CASE believes that it has arrived at the "truth" (CASE's Motion at 8). Neither this supremely subjective standard for the conduct of discovery nor the kind of delay it necessarily entails should be endorsed in this proceeding.

B. CASE Does Not Understand the Nature and Purpose of Discovery or the Rulings of the Board Concerning Discovery

CASE's Motion and its discovery in this proceeding reveal an intervenor laboring under a serious misconception of the nature and purpose of discovery. As the Board noted almost a year ago concerning the purposes of and reasonable limitations upon discovery:

The purpose of discovery is to expedite hearings by the disclosure of information in the possession of the parties which is relevant to the subject matter involved in the proceeding, so that issues may be narrowed, stipulated or eliminated and so that evidence to be presented at hearing can be stipulated or otherwise limited to that which is relevant. Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), 14 NRC 150, at 155 (1981), citing Commission "Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, supra. (emphasis added).

The discovery filed by CASE and CASE's many motions seeking further time for discovery show that CASE essentially views discovery as a means to delay the hearing and to broaden the issues to be considered at hearing. With respect to discovery on Contention 5, that contention concerns

^{8/} See "Order" March 8, 1982, at 2, citing "Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981).

whether alleged defects in the Comanche Peak construction QA/QC program prevent the Commission from making the findings necessary to issue operating licenses. As part of discovery on this contention, CASE has sought to probe such clearly irrelevant matters as whether the Board is being provided with information which may have a bearing on the schedule adopted by the Board, construction problems at South Texas, and the Staff's "Caseload Forecast Panel." All of these issues have been properly determined by the Board to be outside the scope of Contention 5.^{9/} CASE's repeated attempts, as part of its discovery on Contention 5, to launch "collateral inquiries" (Board Order of April 2, 1982, supra) can only be interpreted as an effort to undermine the proper discovery process.

CASE has also mischaracterized the Board's April 23, 1982 Order as having:

"... in effect rewarded the Staff for their abuse of the discovery process while at the same time penalizing CASE." (CASE's Motion, at 5). (emphasis in original).

The Board's Order of April 23, 1982, provided at CASE's request, two additional weeks for filing discovery on Contention 5, and also adjusted the deadline for completing discovery by two weeks (i.e., answering discovery requests). This adjustment in the schedule for completing discovery applies to all parties and not just the Staff.^{10/} However, the extension

^{9/} See "Protective Order," March 23, 1982, and "Order (Following Conference Call)," April 2, 1982.

^{10/} The Staff has, consistent with the Board's direction, used its best efforts to respond promptly to CASE's discovery requests filed by April 22, 1982. By letter sent express mail on May 4, 1982, the Staff responded to certain interrogatories in CASE's Third Set of Interrogatories and on May 7, 1982, responded (also by express mail) to the other interrogatories in the third set.

of time for filing still further discovery on Contention 5 will benefit mainly CASE, and not the Staff, since the Staff does not plan to file any further discovery against CASE on Contention 5. CASE's answers to the Staff's previous interrogatories have convinced the Staff that any such further interrogatories would not produce information from CASE which would, consistent with the purpose of discovery, "narrow and clarify the basic issues . . ." Susquehanna, ALAB-613, supra at 322.

C. The Staff Has Cooperated With CASE to Provide CASE With Basic Information to Aid Discovery

CASE's claims that the Staff has abused the discovery process, and that "CASE has had to ferret out for ourselves. . ." "new and significant information" relating to Contention 5. (CASE's Motion, at 5). In fact, even before discovery on this contention began, the Staff willingly provided CASE with much of the information upon which it relies in support of its contention. In December 1979, before CASE was made a party to this proceeding, at the request of Staff counsel, the NRC's Region IV office put CASE (and the other intervenors) on its distribution list for Inspection and Enforcement ("I & E"), reports relating to Comanche Peak, although such reports are available for inspection and copying in the local public document room. See letter dated December 14, 1979, to Juanita Ellis, from Counsel for NRC Staff. In addition, consistent with the Licensing Board's Memorandum and Order, supra, "encouraging voluntary discovery," the Staff has voluntarily responded to CASE's interrogatories without insisting that, as is required by 10 C.F.R. § 2.720(h)(2)(ii), the Board first find that answers to such interrogatories are "necessary to a proper decision . . . and not reasonably obtainable from any other

source." 10 C.F.R. § 2.720(h)(2)(ii). The Staff has objected to only a few of CASE's interrogatories, although, strictly speaking, many fail to satisfy the criteria in 10 C.F.R. § 2.720(h)(2)(ii). Concerning CASE's requests for documents from the Staff, even though the Rules of Practice call for Staff documents to be made available for inspection and copying only in the Public Document Rooms, the Staff, consistent with the Licensing Board's direction,^{11/} has copied and provided to CASE by mail or in person,^{12/} documents sought by CASE. The Staff has most recently agreed, in response to Interrogatories 30 and 31 of CASE's third set of interrogatories, to copy and send CASE (at no charge to CASE) all the publicly available documents within the scope of those interrogatories. There is no requirement that the Staff do so since such documents are available for inspection and copying in the Public Document Room.^{13/} For its part, CASE has never acknowledged in any of its motions or letters to the Board claiming that the Staff has abused the discovery process, any of the Staff's efforts to provide it with basic information

^{11/} In its "Order Subsequent to Prehearing Conference of December 1, 1981," dated December 18, 1981, the Board directed the parties to:

"... provide each other with basic information to aid in discovery. . ." Order, at 4.

^{12/} As CASE has acknowledged, Staff Counsel provided CASE with copies of "Trend Analyses" for Comanche Peak at a meeting in NRC's Region IV offices on April 13, 1982.

^{13/} A demand for documents is satisfied before the Commission, as in court, by producing them for inspection and copying. Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 338 (1980).

to aid discovery. To the contrary, CASE has come to the Board claiming that it had not "received" Staff documents, even though it had already been notified as it requested, that a document was available for inspection and copying. In an effort to refrain from what the Board calls "who struck John,"^{14/} the Staff has not, and will not, burden the record by describing these instances. Suffice it to say that the basic facts concerning the Staff's responses to CASE's discovery, as outlined above, which CASE simply ignores, do not sustain CASE's claims that the Staff has abused the discovery process by not providing documents to CASE.

Concerning CASE's claim that the Staff has deliberately withheld information, the information in question consists of internal memoranda containing "Trend Analyses" of Comanche Peak construction for the years 1976, 1977, 1978 and 1979. These documents were provided to CASE as soon as their existence was determined, on April 13, 1982, based on a determination such documents were within the scope of Interrogatory 1 of CASE's First Set of Interrogatories and Requests to Produce to NRC Staff, ("CASE's First Set") February 10, 1982. That interrogatory requested whether the Staff conducted any official or unofficial "audits to detect trends that may be detrimental to safe station operation at CPSES [Comanche Peak]" and that any documents relating to such audits be provided. (CASE's First Set, at 2). The Staff inspector responding to this interrogatory did not, at the time the Staff's answers were prepared and filed, think of the internal memoranda containing trend analyses subsequently provided, since in inspection terminology, an "audit" consists of a

^{14/} See Prehearing Conference Transcript, supra, at 101.

formal inspection involving review of all "Construction Deficiency Reports." Such "audit" would be documented in an official, publicly available Inspection and Enforcement Report. In contrast, the internal memoranda provided to CASE merely document the Comanche Peak project inspectors' opinions about overall construction at the facility for a given year. Such documents are not technically official or unofficial "audits" referred to by CASE in its interrogatories. When, as part of the Staff's preparation of its testimony on Contention 5, the existence of such documents was recalled, they were immediately provided to CASE, since such documents could be interpreted to be within the scope of CASE's interrogatories. However, it could be argued that as internal memoranda containing the advice, opinions and recommendations of individual Staff members, such documents could properly be withheld. Porter County Chapter of the Izaak Walton League of America Inc. v. United States Atomic Energy Commission, 380 F.Supp. 630 (N.D. Ind. 1974). In these circumstances, for CASE to argue that such documents were deliberately withheld, is specious, particularly since they were provided well before the original April 22, 1982 deadline for filing discovery. In fact, despite CASE's claims that its rights to pursue discovery have been curtailed by "the Staff's deliberate withholding of information," CASE had sufficient time to file (on April 20, 1982), over sixty (60) interrogatories to the Staff concerning the documents,^{15/} which the Staff is in the process of answering.

^{15/} See "CASE's Third Set of Interrogatories and Requests to Produce to NRC Staff," supra, April 20, 1982.

III. CONCLUSION

Based on the foregoing, the Staff objects to CASE's Motion on the grounds that 1) CASE has presented no new information which would justify reconsideration by the Board of its ruling on CASE's Motion for Additional Time, 2) CASE has engaged in unsupported and unjustified attacks on the integrity of the parties and the Board. Accordingly, the Staff urges that the Board deny CASE's Motion.

Respectfully submitted,

Marjorie U. Rothschild

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Dated at Bethesda, Maryland
this 7th day of May, 1982.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of

TEXAS UTILITIES GENERATING COMPANY, et al.

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

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Docket No. 50-445
50-446

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ADDITIONAL ANSWERS TO CASE'S THIRD SET OF INTERROGATORIES ON CONTENTION 5" and "NRC STAFF ANSWER TO CASE'S MOTION FOR RECONSIDERATION OF BOARD'S ORDER DURING CONFERENCE CALL OF APRIL 22, 1982" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or through deposit in the Nuclear Regulatory Commission's internal mail system(*), or by express mail(**), this 7th day of May, 1982:

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