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 and 50-446
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	(Application for Operating Licenses)

APPLICANTS' ANSWER TO CASE'S MOTION FOR PROTECTIVE ORDER

Pursuant to 10 C.F.R. §2.730(c), Texas Utilities Generating Company, et al. ("Applicants"), hereby submit their answer to CASE's Motion for Protective Order, served August 12, 1982, as supplemented by letter from CASE dated August 19, 1982. For the reasons set forth below, Applicants urge the Atomic Safety and Licensing Board ("Board") to deny CASE's motion as beyond the jurisdiction of the Board or, in the alternative, as being without merit or substance.

I. BACKGROUND

During the evidentiary hearings conducted July 26-30, 1982, CASE identified and sought a subpoena for the attendence of Mrs. Darlene Stiner, a QC inspector at the Comanche Peak site. CASE stated that Mrs. Stiner possesses information relevant to matters at issue in Contention 5. The board granted the requested subpoena, Tr. 2964. Mrs. Stiner is scheduled to testify upon the resumption of the evidentiary hearings on September 13, 1982.

On August 11, 1982, Applicants' Counsel became aware that Mrs. Stiner had been engaged in efforts during working hours to

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compile certain information and documents from the Comanche Peak site, apparently for use by CASE in the evidentiary hearings. That day Applicants transmitted a telegram to CASE with regard to this matter, requesting that CASE direct its witness to refrain from such activities as inconsistent with the Board's limitations on discovery and as possibly jeopardizing Mrs. Stiner's employment. Mrs. Stiner was not served with a copy of the telegram because Applicants' counsel perceived the matter properly to be raised with and handled by CASE's representative.

Subsequently, on August 12, 1982, CASE filed a motion for "Protective Order". In that motion, CASE sought from the Board a protective order "to protect Mrs. Stiner from what is becoming obvious is the prelude to her being fired from her job at Comanche Peak in retaliation for her testifying" in the evidentiary hearings. CASE Motion at 1. CASE also apparently sought some relief for Mrs. Stiner's husband, Henry Stiner, in his efforts as an ex-employee of Brown & Root to obtain certain personnel files. On August 19, 1982, CASE supplemented its motion by letter to the Board in which it cited 10 C.F.R. §19.16(c) as supporting its motion and referrenced 47 Fed. Reg. 30452 (July 14, 1982) as revising and explaining the intent of the NRC employee protection regulations.

For the reasons set forth below, it is clear that the Department of Labor is vested with exclusive jurisdiction to make findings with regard to employee allegations regarding discrimination or termination. Accordingly, Applicants urge

the Board to deny CASE's motion as beyond the Board's jurisdiction. Further, even assuming arguendo that the Board has jurisdiction, the instant motion is without merit and the Board should deny it.

II. DISCUSSION

A. The Board Lacks Jurisdiction To Provide Relief Requested

1. Statutory Authority

Section 210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851, established measures for the protection of employees of NRC licensees from discharge or discrimination for, inter alia, testifying in NRC licensing proceedings. That section further provides, as follows:

> (b)(1) Any employee who believes he has been discharged or otherwise discriminated against may file ... a complaint with the Secretary of Labor (hereinafter in this Subsection referred to as the 'Secretary') alleging such discharge or discrimination.
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> ***
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> (2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint.---- [42 U.S.C. §5851(b).]

The legislative history of Section 210 also makes clear that an employee's remedy for discrimination or discharge for such reasons lies with the Secretary of Labor. See 1978 U.S. Code Cong. and Adm. News, p. 7303.

2. Regulatory Provisions

Section 19.16(c) of 10 C.F.R. establishes a general protection against licensees discharging or discriminating against employees who testify in NRC proceedings but does not

concern the remedy available to employees who believe they have been discharged or discriminated against for such actions. Such remedy lies with the Department of Labor.

The Commission recently amended its employee protection regulations, effective October 12, 1982, wherein it clarified the intent of those regulations and discussed the remedy available to employees who believe that they have been wrongfully discharged or discriminated against for testifying in NRC proceedings. 47 Fed. Reg. 30452 (July 14, 1982). Specifically, the Commission stated, as follows:

> The purpose of the final rule is to ensure that employees are aware that employment discrimination for engaging in a protected activity, for example, contacting the Commission, is illegal and that a remedy exists through the Department of Labor. [47 Fed. Reg. 30453 (emphasis added).].

The revised regulations, effective October 12, 1982, make clear the existence of an employee's exclusive remedy "through an administrative proceeding in the Department of Labor". See NEW 10 C.F.R. §50.7(b), 47 Fed. Reg. 30456.

The authority of the Commission to act in such cases arises following a determination by the Department of Labor on the employee's complaint against the licensee. Specifically, the Commission stated that:

> in addition to redress being available to the individual employee, the Commission may, upon learning of an adverse finding against an employer by the Department of Labor, take enforcement action against the employer .... [47 Fed. Reg. 30453 (emphasis added).] .

See also NEW 10.C.F.R. §50.70(c), 47 Fed. Reg. 30456.

Clearly, an employee's remedy for alleged discriminatory practices by an NRC licensee lies with the Department of Labor, pursuant to 42 U.S.C. §5851, and not with the NRC. This Board, being vested with only such authority as the Commission may delegate, accordingly, is not empowered to provide CASE with the relief it seeks. Thus, the Board should deny CASE's motion as being not within the Board's authority.

B. In Any Event, The Motion Is Without Merit

Assuming arguendo that the Board had jurisdiction over a claim under Section 210 of the Energy Reorganization Act, 42 U.S.C. §5851, nevertheless the Board should deny CASE's motion as being without merit or substance. As to Mr. Stiner, even CASE concedes that Mr. Stiner's efforts to reverse his terminations in 1980 and 1981 started "long before CASE had any idea Mr. and Mrs. Stiner would be testifying in these proceedings" (CASE Motion, at 1). Mr. Stiner's situation is purely a personnel matter between him and Brown & Root. His efforts to obtain his personnel records pre-date these hearings and therefore have no rational connection to them. Further, as a former Brown & Root employee who was fired for unsatisfactory job performance (and not matters related to these hearings), Mr. Stiner's election to testify in these hearings does not bring him within the scope of Section 210 of the Energy Reorganization Act.

As to Mrs. Stiner, the allegations raised by CASE are false. Applicants have taken no action "in retaliation for her testifying in the operating license hearings for Comanche Peak"

(CASE Motion, at 1). As is discussed in the attached Affidavit of C. T. Brandt, Applicants have treated Mrs. Stiner no differently since she elected to testify from any other employee. Her unusual requests for files and documents have been handled routinely, and she has received counseling on her activities. Further, in response to a request from Mrs. Stiner's doctor that her activities be assigned mindful of her pregnancy, Applicants have relocated Mrs. Stiner from her former office (approximately one-half mile from her area of inspection) to a new office (approximately 50 feet from her area of inspection). This move was intended to eliminate a substantial amount of walking by Mrs. Stiner during her pregnancy.

It is noteworthy that the Commission has recognized that engaging in protected activities under Section 210 of the Energy Reorganization Act does not exempt an employee from discharge for cause. Section 50.7(d) of the new regulations, 47 Fed. Reg. 30456, provides in pertinent part as follows:

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> An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations.

Thus, protected status for an employee does not relieve that employee from his or her obligation to perform the job competently and efficiently and with full dedication to it. Protected status also does not exempt the employee from counselling or instruction as to job performance.

At bottom, there is no basis for concluding that Applicants have engaged in illegal or improper activity in their handling

of Mrs. Stiner. Accordingly, CASE's motion should be denied.

III. CONCLUSION

For the foregoing reasons, Applicants urge the Board to deny CASE's motion for lack of jurisdiction over the subject matter or, in the alternative, for lack of merit.

Respectfully Submitted,

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