

9/3/82

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD 4:19  
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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  
(CPSES)

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

CASE'S ANSWER TO NRC STAFF'S RESPONSE  
TO ORDER TO SHOW CAUSE  
AND MOTION FOR RECONSIDERATION  
AND CASE'S MOTIONS

On August 4, 1982, the Board in these proceedings issued its Order to Show Cause why sanctions should not be imposed upon the NRC Staff for its refusal to obey the Board's orders to give the names of all letter-designated witnesses referenced in NRC Inspection Report 82-10/82-05 (Staff Exhibit 199).

In that Order, the Board gave the Staff twenty (20) days from the date of the Order (or until August 24, 1982) to show cause as directed and gave the other parties ten (10) days after the Staff's filing in which to respond thereto if they so desire (or until September 3, 1982). CASE is hereby filing this, its Answer to NRC Staff's Response to Order to Show Cause and Motion for Reconsideration, and CASE's Motions, pursuant to the Board's Order.

CASE agrees completely with the Board's assessment of what transpired in regard to this matter, and we will not reiterate that discussion here. Further, although we are not thoroughly familiar with the particular cases cited by the Board in its Order, we believe that the intent expressed in those cases, as indicated by the Board in its Order, is consistent with CASE's understanding of this matter and with fairness to all concerned.

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In our response, we will be referring to the following documents and will hereinafter refer to them only by their Exhibit numbers:

- CASE Exhibit 666 -- the prefiled testimony of Henry Stiner (filed 9/2/82) and attachments to his testimony:
- CASE Exhibit 666C - the so-called "sanitized" back-up notes for the NRC investigation of Mr. and Mrs. Stiner's allegations
- CASE Exhibit 666D - an analysis prepared by CASE in conjunction with Mr. Stiner's testimony which merely shows what was typed on the Investigation Report (Staff Exhibit 178) of Mr. and Mrs. Stiner's allegations, followed by the "sanitized" notes which pertain to each specific allegation -- CASE has made no conclusions in the analysis, but merely attempted to get everything grouped in a more easily followed manner.
- CASE Exhibit 667 -- the prefiled testimony of Darlene Stiner (filed 9/2/82) and attachments to her testimony
- Staff Exhibit 178 - Inspection and Enforcement (I&E) Report 81-12, the NRC investigation report regarding Mr. and Mrs. Stiner's allegations

CASE's position is completely contrary to that stated by the Staff. For the reasons set forth herein, CASE submits:

- (1) that the Staff did not act in full accordance either with the letter of the law or the spirit of established legal principles in declining to reveal the identify of the informants in question,
- (2) that disclosure by the Staff of the names of the letter-designated individuals is necessary unless the individuals themselves are called to testify in this regard, was appropriate in these particular circumstances, and would not cause irreparable harm to the Commission's ability to investigate future allegations of applicant and licensee misconduct, as claimed by the Staff,
- (3) that sanctions should be imposed upon the Staff for declining to comply with the Licensing Board's orders, and
- (4) that the Licensing Board should not reconsider and vacate its orders directing the Staff to disclose the names of its informants in this particular instance.

CASE will not at this time reiterate the Board's comments regarding what transpired in these proceedings; as stated previously, CASE is in full agreement with the Board's assessment of what happened in this regard and we fully support the Board's position in this regard.

We would point out that Mr. Atchison was specifically asked whether or not he had ever waived his confidentiality. He stated that he had not asked

for confidentiality on the second investigation, since he had already been terminated at that time. However, regarding the first investigation, he stated that when he talked with Mr. Driskil, he asked that his name remain confidential and that he never waived that request for confidentiality. (Transcript 3422, line 12, through 3423, line 15.) CASE submits there is a potential difference between the connotation in the mind of potential future employers between a QC inspector who made allegations to the NRC after he had been fired and one who made allegations to the NRC while still employed at the site. This one factor alone could in some instances be the deciding factor as to whether or not a potential employer might decide to hire Mr. Atchison. Further, the Staff apparently made no attempt to contact Mr. Atchison to determine whether or not he wanted to waive that confidentiality. This is in glaring contrast to the statements contained in the Staff's Response, beginning at the bottom of page 10 and continuing on page 11:

"...since returning from the hearing, the Staff has now had an opportunity to contact many of the individuals in question -- and three of them have expressly stated that they wish to preserve their anonymity.<sup>13</sup>

"<sup>13/</sup> ...In addition, six persons designated by letter in Staff Exhibit 178 have requested that their identities be withheld..."

In that instance, the Staff contacted individuals, apparently because the Staff was not certain whether or not those individuals desired confidentiality or considered that they had confidentiality (otherwise, why would it have been necessary for the Staff to contact them again?) -- individuals whose right to confidentiality is at best very questionable. This is in sharp contrast to the Staff's approach regarding Mr. Atchison, where an individual clearly comes under the definition of a whistleblower. Not only did the Staff apparently make no attempt to contact Mr. Atchison in this regard, they also did not avail themselves (as the Applicants did) of the legal tool available to them of taking Mr. Atchison's deposition wherein it might have been possible to clear up the

question of whether or not Mr. Atchison still desired confidentiality without it being obvious that he had made the earlier allegations. Further, the Staff chose not to discuss this matter with CASE, another avenue which was available in this regard.

It is therefore obvious that the Staff's protestations that confidentiality is necessary is limited by the Staff's determination, based on criteria apparently known only to the Staff. If one goes through the Staff's Response, page by page, and applies the statements made in defense of not providing the names of Individuals other than Mr. Atchison to the Staff's actions in regard to Mr. Atchison, it is obvious that the Staff has failed miserably to apply its own proclaimed noble criteria to Mr. Atchison -- despite the fact that Mr. Atchison is the only individual involved who is even alleged to be a whistleblower. Further, as pointed out by the Board in its Order (page 8):

"It is not clear that an informer's privilege could even be claimed by those officials and employees of the Applicants whom the investigator sought out to test a challenge of the execution of the QC program. They probably had a duty to respond fully to such an official investigation without any claim to immunity."

CASE cannot allow the Staff's statements in the footnote 8 on page 5 of their response to go unchallenged:

"Even the Intervenor had no interest initially in compelling the disclosure of the letter-designated individuals' identities (Tr. 2494). Mrs. Ellis, CASE's representative, stated 'we have no problem whatsoever with their remaining confidential, if that is their desire, because many times we realize that these people may jeopardize their jobs' (Tr. at 2501); only upon the urging of the Licensing Board Chairman did the Intervenor announce that they, too, would like to have the identities disclosed (Tr. 2501-03).

"At no time did the Intervenor or any other party object to the admissibility of Staff Exhibits 123, 178 or 199 on the ground that the documents were incomplete or irrelevant, or on any other grounds. Indeed, CASE sought to introduce the same documents into evidence (see generally Tr. 2327, 3026)."

CASE and the writer personally are astonished at the Staff's blatant and

deliberate misrepresentation of what was said in the July hearings by the writer. Although there have been other instances of the Staff's skewing of facts to suit their purpose, the portion quoted completely out of context of the transcript at 2501 has been distorted to the point of being unrecognizable even to the person who spoke the words. The intent of what I stated in the July hearings has been misrepresented as having the reverse meaning of what was actually intended. This cannot be excused by merely assuming that it was inadvertently quoted out of context. In order to arrive at the quoted portion of my statement, the Staff had to deliberately ignore the vitally important first portion of the same sentence, as demonstrated by this complete quote from the transcript at 2501:

JUDGE MILLER: "...What is your position on this on behalf of the Intervenors?"

MS. ELLIS: "...We have a sort of mixed position, I suppose, as one might expect.

"No, when someone comes forward with allegations and brings this to the attention of the NRC and requests an investigation, we have no problem whatsoever with their remaining confidential, if that is their desire, because many times we realize that these people may jeopardize their jobs and so forth.

"...On the other hand, in our mind it is a little bit different situation where in the case of Mr. Atchison he has said, 'Talk to such-and-such person. He can substantiate what I'm saying.'

"There it isn't the person that he said talk to who has come forward with the allegations. By answering their questions, they would not be jeopardizing themselves to the extent that someone who makes the allegations initially would be.

"We think that there is a difference there. And in that case we certainly feel that -- especially when allegations have been made to the extent that they have in these proceedings already concerning Mr. Atchison -- that they should come forward and that their names should be revealed.

JUDGE MILLER: "Well, unless there's some good reason shown. We would all respect or protect anyone who had any apprehensions.

"However, when you were starting to ask questions of Mr. Driskill, I believe that you were using 'they' several times, which is why I asked you, 'Let's start by identifying the 'they,' because we'd like to know and would like the record to show who we're talking about.'

MS. ELLIS: "So would I."

(Emphases added.)

Similarly, the Staff has deliberately misrepresented what Board Chairman Miller stated in the July hearings in this regard. The statement "only upon the urging of the Licensing Board Chairman did the Intervenors announce that they, too, would like to have the identities disclosed (Tr. 2501-03)" is far from accurate, as a thorough reading of the record clearly demonstrates. CASE had cross-examined Mr. Driskill prior to the discussion in the Transcript at 2501-03, and Judge Miller was making certain he had accurately assessed CASE's direction and intention in Transcript pages 2501 and continuing through 2504. His understanding of CASE's intent was entirely correct, as a thorough reading of the record will confirm.

Thus, the Staff's statement "After Messrs. Taylor and Driskill's testimony was admitted into evidence at the hearing session held on July 27, 1982 -- and upon the Licensing Board's own initiative<sup>8/</sup> -- the Licensing Board Chairman directed Mr. Driskill to disclose the identities of all the individuals designated by letter and title in Staff Exhibits 123 and 199 (Tr. 2479, 2735).<sup>9/</sup> Inasmuch as no party to the proceeding had ever requested that those identities be disclosed..." is also skewed and does not reflect the true facts.

The Staff's primary argument in this matter revolves around their allegation that "compliance with the Licensing Board's directive would effect a waiver of the 'informer's privilege' which is of fundamental importance to the Staff's investigative capability, could cause substantial harm to the Commission's ability to protect the public health and safety, and was unnecessary for the development of a factual record in the instant proceeding (Tr. 2484-87, 3047-48)." (Staff's Response, page 6.) CASE has in the past been aware that there were problems of accuracy with certain aspects of NRC investigations, but we were not able to prove that the problems existed. There was never enough hard evidence available to CASE to warrant our making a public statement to that effect -- until now.

CASE expects to show in the following that, contrary to the Staff's allegation as previously quoted, compliance with the Board's Order will not in and of itself effect a waiver of the "informer's privilege" which will be detrimental to the Staff's investigative capability. To the contrary, CASE now firmly believes that it is absolutely essential that the Staff be forced to obey the Board's directive in this instance in order to preserve and increase the Staff's investigative capability. We believe that it is absolutely imperative that the people identified by letter in the I&E Report be called to testify in these proceedings (indeed, some of them have already identified themselves in the Applicants' prefiled testimony) so that the Board and this Intervenor will be able to ascertain exactly how the NRC Staff investigators conducted their investigation and how the conclusions expressed in the I&E Reports were derived. We have heard the testimony of Mr. Driskill regarding the conduct of his investigation of Mr. Atchison's allegations. We now need to know from the individuals who were questioned regarding the I&E Reports referenced in Staff's Response what approach was taken by the investigators during the investigations.

CASE certainly has no desire to "cause substantial harm to the Commission's ability to protect the public health and safety." We believe it will be clear from the information contained herein that the compliance of the Staff with the Board's Order is essential to the Commission's ability to protect the public health and safety and that having the truth brought out in these proceedings will actually enhance the ability of the NRC in the future to receive and properly investigate allegations in the future.

We call the Board's attention to the items referenced on page 2 of this pleading, and in particular to CASE Exhibit 666, the testimony of Henry Stiner, page 2, beginning with line 13:

"...I am stating that the facts contained in the I&E Report (Staff Exhibit 178) do not reflect all of the allegations made to the investigators and in some cases do not appear to be supported by the 'sanitized' notes made

of the interviews to determine whether or not my allegations were true."

And on page 5, beginning with line 11:

"...I told them (the NRC investigators) that that was another allegation I wanted to make to them -- that they should investigate the NRC itself. I specifically told them that I did not want the NRC Resident Inspector out there told about my allegations before they actually checked out the allegations themselves.

"Q. And was Mr. Taylor told about your allegations before the investigators checked out your allegations?

"A. Yes. When Mr. Driskill came down to my house later to check into further allegations, I asked him if he told anybody in advance that he was coming to the plant. He stated that he had to tell Mr. Taylor that he was coming. I asked him if he told Mr. Taylor anything that I had told him (Mr. Driskill). He said that he had to tell Mr. Taylor kind of what was going on."

And regarding the "sanitized" statements and notes; from page 6, beginning with line 6:

"The notes were in some cases unreadable, some were not labeled as to even a letter designation, there were many omissions of allegations, and some of the information contained in the I&E Report did not match the investigator's own notes and in some cases, his notes even appear to contradict his own I&E Report."

We urge that the Board read the testimony of Mr. and Mrs. Stiner thoroughly (CASE Exhibits 666 and 667 and attachments) in conjunction with CASE's Answer herein. We believe it will make clear, based on the first-hand experience of these two individuals, that: (1) the NRC Staff's investigative capability is already extremely (and perhaps irretrievably) hampered by its past investigative practices and the perception of its investigative capability by potential whistleblowers and supportive witnesses; (2) bringing out the truth in these proceedings about the manner in which NRC investigations has been handled in the past will serve to increase the effectiveness of NRC investigations in the future; (3) it is absolutely imperative that the people named by the whistleblowers to the investigators and the individuals identified by letter designation in the I&E investigation reports (these may not be the same individuals) be called as witnesses in these proceedings in order to determine the approach

taken by the NRC investigators when conducting their investigations; (4) the Staff's compliance with the Board's directive is essential for the development of a factual record in these proceedings; (5) it is necessary for the Staff to supply the names of the Individuals identified by letter designation in the I&E Reports which have been admitted into evidence as Staff Exhibit 178 (regarding the Stiners' allegations) and Staff Exhibits 123 and 199 (regarding Mr. Atchison's allegations), with the exceptions as will be outlined following in order for the development of a complete and factual record in these proceedings.

Even without the testimony of Mr. and Mrs. Stiner, a careful review of Staff Exhibit 178, CASE Exhibit 666C, and CASE Exhibit 666D (which combines information from Staff Exhibit 178 and CASE Exhibit 666C) in and of itself raises grave questions about the manner in which the NRC investigation of the Stiners' allegations was handled. In addition to the concerns indicated by the Stiners in their testimony, CASE would note that there appears to be at least one allegation which was made which, as far as CASE is aware, has never been investigated. CASE calls the Board's attention to CASE Exhibit 666C-23. On the left-hand side of the page, where information obtained from Individual E appears to be, there is a notation: "CONCERN: CBI manufactured water tanks (2) one for ea. reactor at end floor buckled -- seams welded down (bad) won't hold wt. floor moves".

CASE shares the concern of the Board, as discussed in Transcript pages 2501-2504, that anyone who made allegations to the NRC should be protected should they so desire. Certainly the concern apparently expressed by Individual E would fall into that category. However, we also believe that it is of vital importance, not only in these proceedings, but in all future licensing proceedings of this type, that a thorough investigation be made of precisely how the NRC Staff investigations have been handled in the past, what criteria has been

used by the NRC investigators to arrive at their conclusions (or lack thereof), and how future investigations can be handled better in order to encourage whistleblowers to come forward freely to the NRC with legitimate concerns about construction or other practices which may affect the health and safety of the public.

The matter of sanctions against the NRC Staff is also somewhat of a dilemma for CASE. We are not exactly certain, for example, just what options are open to the Board in this regard. We do not believe the goal of CASE to bring out the truth in these proceedings would be best served by not allowing the Staff to cross-examine or to file motions. Neither, however, do we believe that goal could be served by allowing the Staff to continue to defy the Board's directives and withhold information which we believe is vital to these proceedings by withholding the identities of the individuals contained in Staff Exhibits 123, 178, and 199<sup>1</sup> and thereby enabling the NRC investigators to escape close scrutiny of the Board and the Intervenor in these proceedings regarding the conduct of their investigations.

The Board Chairman (Transcript page 3045, beginning with line 24) referred to Staff Exhibit 199 as "The most interesting investigative report that it has been my pleasure to see in a long time, where serious allegations either way cannot be substantiated or refuted." We call the Board's attention to the following I&E Reports in which the results of investigations of allegations are also contained: 77-02, 78-17, 79-22, 79-26, 80-02, 81-04. These reports have been introduced into evidence as Staff Exhibits 59, CASE Exhibit 236, CASE Exhibit 252 (may be the same as Staff Exhibit 121), Staff Exhibit 122, and Staff Exhibit

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<sup>1</sup> In Footnote 9 on page 5 of its Response, the Staff pointed out that "The Licensing Board Chairman also ordered the Staff to disclose the names of individuals identified by letter in Investigation Report 81-12, admitted into evidence as Staff Exhibit 178 (Tr. 2336), concerning the unrelated allegations made by another individual..." (the Stiners). The Staff then alleges that the "facts and arguments set forth herein apply also to the Licensing Board's orders compelling disclosure of the identities of individuals referred to in Staff Exhibits 123 and 178."

149, respectively. We believe that those reports will also prove interesting to the Board.

Based on the information now in hand, CASE hereby moves that:

- (1) The Board not strike the testimony of the Staff's witnesses from the record of these proceedings, but rather that the Board carefully consider all the testimony in the proceedings and let the facts determined go to the weight of the Staff's testimony;
- (2) The Board recall Messrs. Driskill and Taylor to the stand to answer questions regarding Staff Exhibit 178 (the Investigative report of the Stiners' allegations);
- (3) The Board order the Staff to supply the names of all individuals identified by letter designation in the Staff Exhibits 123, 178, and 199, with the following exceptions:
  - (a) If the Staff alleges that any such individual has requested confidentiality, the Board appoint an independent outside NRC representative to ascertain from said individual whether or not he/she does indeed desire confidentiality, how the NRC investigator conducted his investigation, what specifically the individual was asked and how it was asked, what specifically the individual was told about confidentiality, his/her rights, penalties for perjury (if a signed statement was taken), whether or not a signed statement was taken at the time said individual was interviewed, and all other pertinent details.
  - (b) That the independent representative appointed by the Board be someone completely outside of the Region IV office, with no direct ties or interest in the Comanche Peak proceedings.
  - (c) That the Board then decide, based on the information relayed by

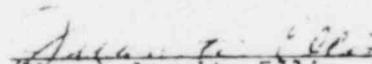
said independent representative, whether or not such individual's testimony is necessary to a complete and true record in these proceedings.

- (d) That the Staff be ordered to provide the names and back-up unexpurgated notes regarding all other such individuals.

CASE will accept the Board's judgement in this regard if the above conditions are adopted by the Board. We want to re-emphasize that we do not want to dilute the effectiveness of NRC investigations of allegations or to endanger the livelihood of any whistleblower who may make allegations to the NRC. However, we believe it is absolutely imperative that the truth come out in these proceedings. We believe this procedure will allow all of these matters to be considered.

- (4) The Board call all the individuals (with the above-referenced exceptions) to testify in these proceedings regarding Staff Exhibits 123, 178, and 199.
- (5) That the Board consider reopening the investigation of previous allegations (as discussed in the I&E Reports referenced on page 10 at the bottom, continuing on top of page 11, of this pleading) should it be determined that improprieties exist in past investigations in this regard.

Respectfully submitted,

  
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(Mrs.) Juanita Ellis, President  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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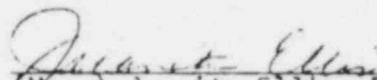
Docket Nos. 50-445  
and 50-446

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of  
CASE's Answer to NRC Staff's Response to Order to Show Cause and Motion for  
Reconsideration, and CASE's Motions

have been sent to the names listed below this 3rd day of September, 1982, by:  
Express Mail where indicated by \* and First Class Mail elsewhere.

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

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