

September 3, 1982

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 RESPONSE TO CASE'S
MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

Citizens Association for Sound Energy ("CASE") has filed a Motion for Protective Order ("Motion") dated August 12, 1982. Attached to the Motion were two letters on Brown and Root letterhead, a Brown and Root memorandum, and what is identified by CASE as a handwritten summary by Mrs. Darlene Stiner recounting events occurring in early August ("Mrs. Stiner's Summary"). In its Motion CASE requests the Atomic Safety and Licensing Board ("Board") to issue a "protective order" pursuant to 10 C.F.R. Section 2.740(c), to prevent the alleged "harassment, discrimination and attempted intimidation" of Mrs. Stiner by Applicants.^{1/} Motion, p. 4. CASE also implies that it wishes the Board to prevent Applicants from terminating Mrs. Stiner's employment at Comanche Peak Steam Electric Station ("CPSES"). See Motion, pp. 1, 4. CASE supplemented its Motion by a letter to the Board, dated August 19, 1982, which

^{1/} CASE also requested that discovery be allowed on Interrogatory Sets Twelve and Thirteen, both dated August 9, 1982. This portion of CASE's request was granted by the Board in a telephone conference call on August 20, 1982 (Chairman Miller present).

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referred to a final Commission rule published in the Federal Register, regarding the protection of employees from retaliation by licensees and license applicants.^{2/} For the reasons set forth below, the Staff opposes CASE's Motion.

II. BACKGROUND

CASE filed a letter dated July 28, 1982 with the Board during the hearing session which commenced on July 26, 1982. In its letter, CASE requested the Board to issue subpoenas to 23 persons identified therein. One of the persons identified by CASE was Mrs. Darlene Stiner. The purpose of the subpoena was to compel Mrs. Stiner to testify at the CPSES licensing hearings regarding her knowledge of any matters relating to Contention 5, construction quality assurance ("QA") and quality control ("QC"). On July 29, 1982, CASE filed with the Board and parties the written testimony of Mrs. Stiner, which was identified by CASE as its Exhibit No. 161. Mrs. Stiner did not testify at the July 26, 1982 hearing session, due to the lack of time on the last day of the hearing session. However, CASE indicated that Mrs. Stiner will testify at the forthcoming hearing session. Tr. pp. 3530, 3532.

CASE now alleges that Mrs. Stiner has been "harassed" by Applicants as a "prelude to her being fired from her job at Comanche Peak in retaliation for her testimony" in this proceeding. Motion, p. 1. In support of this allegation, CASE contends that Mrs. Stiner requested orally, and then in writing, a copy of her non-ASME (American Society of Mechanical

^{2/} "Protection of Employees Who Provide Information", 47 Fed. Reg. 30452 (July 14, 1982).

Engineers) training files. Motion, p. 2. A copy of Mrs. Stiner's written request, dated August 9, 1982 is attached to the Motion.

Mrs. Stiner's request was denied by Mr. Ray Yockey, Manager, Personnel Services, Brown and Root, in a letter dated August 9, 1982. This letter is also attached to the Motion.

CASE also says that Mrs. Stiner requested, and was denied, a copy of a non-conformance report ("NCR") written by her. According to Mrs. Stiner, Brown and Root routinely provided her a copy of all NCRs written by her.^{3/} Mrs. Stiner's Summary, pp. 2-3.

Finally, CASE contends that Mrs. Stiner's work station has been changed four times in two days, and that she is now stationed in a building "away from everybody else." Motion, p. 2. According to CASE, Mrs. Stiner has been ordered by Applicants to "instruct someone else in her former duties," and has been given "less important" work assignments. Id. CASE accordingly requests a protective order, pursuant to 10 C.F.R. Section 2.740(c), to prevent further harassment and possible termination of employment of Mrs. Stiner. Motion, pp. 1, 4.

On August 19, 1982, CASE sent a letter to the Board calling their attention to 10 C.F.R. Section 19.16(c), and a final Commission rule regarding employee protection, which was published in the Federal Register

^{3/} CASE alleges that Mr. Stiner requested, and was denied, copies of his personnel records, and that he has been attempting to "correct what he considers to be his wrongful firing". Motion, pp. 1-2. A copy of a letter from Mr. Ray Yockey to Mr. Stiner, dated September 28, 1981, rejecting Mr. Stiner's request for reconsideration of his discharge, is attached to CASE's Motion. The Staff will not address CASE's allegations concerning Mr. Stiner, since its Motion requests a protective order only to protect Mrs. Stiner, and because Mr. Stiner's apparent 1981 discharge appears to be unrelated to his testifying at the CPSES operating license hearing.

and is scheduled to become effective on October 12, 1982. Presumably CASE believes that these citations are additional support for its Motion.

III. DISCUSSION

1. Section 2.740(c) Protective Orders May Be Granted Only To Protect Parties Or Witnesses From Discovery

10 C.F.R. Section 2.740 is entitled, "General provisions regarding discovery", and sets forth the rules regarding discovery in the Commission's adjudicatory proceedings. Section 2.740(c), entitled, "Protective Order," provides in relevant part:

- (c) Protective order. Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) That the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the presiding officer; (6) that, subject to the provisions of §§ 2.744 and 2.790, a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (7) that studies and evaluation not be prepared.

As suggested by its inclusion under the general rule governing discovery, a Section 2.740(c) protective order may be granted by the Board only with regard to matters relating to discovery. This interpretation of Section 2.740(c) is reinforced by the introductory phrase of the regulation, which states that a protective order may issue "[u]pon

motion by a party or the person from whom discovery is sought . . ."
Section 2.740(c) (emphasis added). Section 2.740(c) lists six possible protective orders which may be granted in appropriate situations. None of the six examples enumerated in this section authorize the grant of a protective order to prevent the firing or harassment of a witness. Moreover, all of the six examples involve protection from discovery, which strongly suggests that the Commission intended that protective orders only be issued with respect to discovery disputes. Section 2.740(c) simply does not authorize the issuance of a protective order in a situation not related to discovery.

2. Appropriate Procedures Are Available To Persons Who Believe They are Being Discriminated Against

Under Section 19.16(c) of the Commission's regulations, licensees may not discriminate against workers who file complaints with the Commission, or who testify at Commission proceedings:^{4/}

No licensee shall discharge or in any manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under the regulations in this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such worker on behalf of himself or others of any option afforded by this part.

10 C.F.R. Section 19.16(c). The NRC Office of Inspection and Enforcement may investigate on its own initiative any possible violations of Section

^{4/} Section 19.16(c) does not provide for the grant of a protective order; therefore CASE's citation to Section 19.16(c) as a legal basis for the grant of a protective order is incorrect. 42 U.S.C. § 5851.

19.16(c), or any other matters which may affect the public health and safety.^{5/}
10 C.F.R. Sections 2.200(a),(b), 2.201(a), 2.202(a), 2.205(a). Moreover,
any person may request the Director of the Office of Inspection and
Enforcement to institute a 10 C.F.R. Section 2.202 show cause proceeding
against a licensee or Applicant. 10 C.F.R. Section 2.206(a). That section
provides, in pertinent part:

Any person may file a request for the . . .
Director, Office of Inspection and Enforcement,
. . . to institute a proceeding pursuant to § 2.202
to modify, suspend or revoke a license, or for such
other action as may be proper. The requests shall
specify the action requested and set forth the
facts that constitute the basis for the request.

The Director of the Office of Inspection and Enforcement must either
institute the enforcement proceeding, or advise the requestor in writing
that no proceeding will be instituted in whole or part. The notification
must provide the reason for the Director's decision not to proceed.
10 C.F.R. Section 2.206(b). While the Commission may review the Director's
decision on its own motion, the requestor has no right of review before
the Commission. 10 C.F.R. Section 2.206(c)(1),(2). The sanctions which
may be imposed on licensees or applicants pursuant to a show cause order
include revocation, modification, or suspension of a license, or "such
other action which may be proper." 10 C.F.R. Section 2.202(a). "Such

^{5/} Section 19.16(c) by its terms apply only to licensee's employees.
Since Mrs. Stiner is not employed by Applicants, but by Applicants'
contractor, this section does not appear to extend protection to
Mrs. Stiner. However, the Atomic Safety and Licensing Appeal Board
has held that the Staff has authority to investigate and order pro-
tection of employees where the public safety and health may be affected,
even if a regulation does not precisely cover a particular situation.
See Union Electric Company (Callaway Plant, Units 1 and 2), ALAB-527,
⁹ NRC 126, 135-37 (1974).

other action" includes the power to order Applicants not to harass, discriminate against, or discharge its employees. See Union Electric Company (Callaway Plant, Units 1 and 2), ALAB 527, 9 NRC 126 (1974).^{6/}

As discussed earlier, a request for initiation of a show cause order may be filed by "any person". However, the Staff has not received from CASE or Mrs. Stiner a Section 2.206(a) request that a Section 2.202 show cause proceeding be instituted.

The regulatory scheme described above will be modified slightly on October 12, 1982, when the final Commission rule ("Rule") relating to protection of employees who provide information to the Staff becomes effective. 47 Fed. Reg. 30452 (July 14, 1982).

The Rule deletes the current Commission regulation on employee protection, 10 C.F.R. Section 19.16(c), and adds a new Section 50.7 to the Commission's regulations for domestic licensing of utilization facilities. Section 50.7 provides, in relevant part:

Discrimination by a Commission licensee, permittee, an applicant for a Commission license or permit, or a contractor or subcontractor of a Commission licensee, permittee, or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to privileges of employment. The protected activities are established in section 210 of the Energy Reorganization Act of 1974, as amended, and

^{6/} See also the Commission's Statement of Consideration regarding its final rule on employee protection, 47 Fed. Reg. 30453 (July 14, 1982); 124 Cong. Rec. S-15318 (Sept. 18, 1978)(Remarks of Sen. Hart).

in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

- (1) The protected activities include but are not limited to--
 - (i) Providing the Commission information about possible violations of requirements imposed under either of the above statutes;
 - (ii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements; or
 - (iii) Testifying in any Commission proceeding.

47 Fed. Reg. 30452, 30456.

Section 50.7(a) prohibits licensees and license applicants, and contractors or subcontractors for licensees and applicants, from discriminating against an employee for engaging in certain "protected activities", including testifying in Commission proceedings, and providing information to the NRC regarding violations of NRC regulations or statutory requirements.

If an employee believes he or she has been wrongfully discriminated against or discharged in violation of Section 50.7(a), the Rule directs him or her to file a complaint with the Department of Labor:

Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in the protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 30 days after an alleged violation occurs by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

Section 50.7(b), 47 Fed. Reg. 30452, 30456. Section 50.7(b) restates the remedy which is currently available under Section 210(a) of the Energy Reorganization Act of 1974. Section 210(a) provides that the Secretary of Labor is authorized to investigate allegations of licensees', applicants', and their contractors' discrimination against employees who provide information to the NRC.^{7/} The Section 210(a) remedy is currently available to Mrs. Stiner.

^{7/} Under Section 210(a) of the Energy Reorganization Act of 1974, Applicants and its contractor and subcontractors are prohibited from discharging or otherwise discriminating against any employee because that employee:

- (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act, or the Atomic Energy Act of 1954, as amended;
- (2) testified or is about to testify in any such proceeding; or
- (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

The Secretary of Labor is required by Section 210(b)(2)(A) to conduct an investigation of any complaint which may be filed by Mrs. Stiner. The investigation must be completed within 30 days of the receipt of the complaint. Within 90 days of the receipt of the complaint, the Secretary must issue an order on the record after notice of an opportunity for a formal adjudication. If the Secretary determines that a violation of Section 210(a) has occurred, he is authorized to order Applicants to "abate" the violation, and to require Applicants to rehire Mrs. Stiner, and to pay her back pay and attorney's fees. Section 210(b)(2)(B), Energy Reorganization Act of 1974.

Section 50.7(c) sets forth the remedies which may be imposed by the Staff, or in enforcement proceedings, for violations of Section 50.7(a):

A violation of [Section 50.7(a)] by a Commission licensee, permittee, an applicant for a Commission license or permit, or a contractor or subcontractor of a Commission licensee, permittee, or applicant may be ground for--

- (1) Denial, revocation, or suspension of the license.
- (2) Imposition of a civil penalty on the licensee or applicant.
- (3) Other enforcement action.

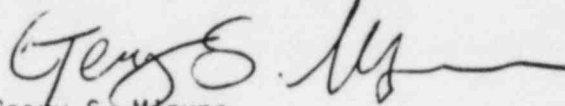
Section 50.7(c), 47 Fed. Reg. 30452, 30456. These remedies may be imposed only after following the procedures set forth in Sections 2.201, 2.202, and 2.205. In sum, if CASE or Mrs. Stiner believe that Mrs. Stiner has been discriminated against by Applicants or their contractor, they may file an appropriate request with the Office of Inspection and Enforcement, in accordance with the procedures set forth in 10 C.F.R. Section 2.2.206(a). In addition, they may file a complaint with the Secretary of Labor in accordance with the procedures set forth in Section 210(b), Energy Reorganization Act of 1974.

IV. CONCLUSION

For the reasons discussed above, a protective order directing Applicants and its contractor, Brown and Root, not to harass or discharge Mrs. Stiner, is not an appropriate remedy which may be granted

by the Board in this licensing proceeding. Furthermore, CASE and Mrs. Stiner have other remedies which they may pursue. Accordingly, the Staff respectfully urges that CASE's Motion be denied.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Geary S. Mizuno", with a long horizontal flourish extending to the right.

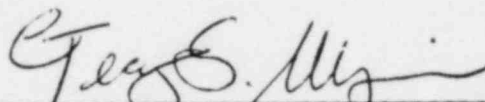
Geary S. Mizuno
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 3rd day of September, 1982

Atomic Safety and Licensing
Appeal Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Lucinda Minton, Esq.*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Lanny Alan Sinkin
838 East Magnolia Avenue
San Antonio, TX 78212



Geary S. Mizuno
Counsel for NRC Staff