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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, Units 1 and 2)

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Docket Nos. 50-445
50-446

NRC STAFF'S ANSWER TO CASE'S MOTION
TO ADD NEW CONTENTION

I. INTRODUCTION

On August 26, 1982, Intervenor CASE filed, pursuant to 10 C.F.R. § 2.730(c), "CASE's Motion to Add New Contention 26." ("Motion"). In its Motion, CASE requests that the Atomic Safety and Licensing Board ("the Licensing Board"), "accept for litigation in these proceedings" (Motion, at 1), the following proposed contention:

"Contention 26: Applicants do not possess copies of the design criteria for pipe supports and components used at CPSES. Therefore, the requirements of 10 C.F.R. Part 50, Appendices A and B cannot be met." (Motion, at 1).

According to CASE, the proposed contention "may already be within the scope of CASE's Contention 5,^{1/} at least in part." (Motion, at 1).

1/ Contention 5 states:

The Applicants' failure to adhere to the quality assurance/quality control provisions required by the construction permits for Comanche Peak, Units 1 and 2, and the requirements of Appendix B of 10 C.F.R. Part 50, and the construction practices employed, specifically in regard to concrete work; mortar blocks; steel; fracture toughness testing; expansion joints; placement of the reactor vessel for Unit 2; welding; inspection and testing; materials used; craft labor qualifications and

(Continued)

As the basis for this proposed contention, CASE cites certain of the Applicants' answers to CASE's Twelfth Set of Interrogatories to Applicants'^{2/} in which Applicants stated that they did not possess certain documents requested by CASE. CASE suggests that "... Applicants are building secret pipe supports at Comanche Peak...", in violation of 10 C.F.R. Part 50, Appendices A and B. (CASE'S Motion, at 7-8).

For the reasons set forth below, the Staff submits that the issue raised in proposed Contention 26 (whether the Applicants possess certain documents on-site and whether the regulations require possession of such documents on-site) is distinct from the more general issue raised by CASE through the testimony of its witness Mr. Walsh concerning the Applicants' design of pipe supports and pipe frames. Further, CASE has not satisfied the requirements of 10 C.F.R. § 2.714 for admission of contentions, including the factors in 10 C.F.R. § 2.714(a) governing late-filed contentions. Accordingly, the Staff opposes CASE's Motion and urges that it be denied.

1/ (Continued)

working conditions (as they may affect QA/QC) and training and organization of QA/QC personnel, have raised substantial questions as to the adequacy of the construction of the facility. As a result, the Commission cannot make the findings required by 10 C.F.R. § 50.57(a) necessary for issuance of an operating license for Comanche Peak.

Evidence concerning Contention 5 was presented at hearing sessions held on June 7-11, 1982 and July 26-30, 1982. Additional evidence on Contention 5 will be presented at the hearing session to be held on September 13-17, 1982.

2/ See "CASE's Twelfth Set of Interrogatories to Applicants and Requests to Produce" ("CASE's Interrogatories"), August 9, 1982, and "Applicants' Responses to CASE's Twelfth and Thirteenth Sets of Interrogatories and Requests to Produce," August 23, 1982 ("Applicants' Responses").

II. BACKGROUND

At the evidentiary hearing session on July 29, 1982 concerning Contention 5, CASE presented as a new witness Mr. Mark Walsh (Tr. 3074-3198), who was not previously identified by CASE as a witness, as required by the Licensing Board. Mr. Walsh's testimony generally concerned Applicants' design of pipe supports and pipe frames for Comanche Peak, an issue not originally raised by CASE as part of Contention 5 or addressed by the Applicants and the Staff in their direct testimony on that contention. Presentation of evidence on Contention 5, including rebuttal testimony to the testimony of Mr. Walsh, was not completed at the July hearing session. Accordingly, the Board scheduled another hearing session to commence on September 13, 1982 to complete the presentation of evidence on Contention 5 and to consider evidence on the last remaining contention (Contention 22, which concerns emergency planning).

The Board's schedule allowed for certain additional discovery on Contention 5, pursuant to which CASE filed, on August 9, 1982, "CASE's Twelfth Set of Interrogatories to Applicants and Requests to Produce." CASE requested, in interrogatories 9, 10, 12, 16 and 17, that the Applicants provide for inspection and copying, the following documents: (Interrogatory 9), "The NPSI Design Criteria for pipe supports (the official one issued in May, 1981);" (Interrogatory 10), "... documents... which were used to define the meth used to determine the tensile force in the Richmond Inserts;" (Interrogatory 12), "The current Grinnell Design Criteria for pipe supports at CPSES;" (Interrogatory 16), "...the Hilti Allowables and, the procedures for the analysis;" (Interrogatory 17), "...FUB II and the instructions of [sic] how to use FUB II information..." CASE' Interrogatories, at 4-5.

In Applicants' August 23, 1982, responses to these interrogatories, Applicants stated that they did not possess copies of the documents requested in Interrogatories 9, 10, 12 and 17, although Applicants advised CASE where to obtain copies of those documents. Applicants' Responses at 4. Applicants responses did state, with respect to Interrogatories 10 and 16, that the only information in their possession is contained in the "PSE Design Manual."^{3/}

III. Discussion

The Requirements Of 10 C.F.R. § 2.714 Governing the Admissibility of Contentions

In order for proposed contentions, timely filed, to be found admissible, they must fall within the scope of the issues set forth in the Notice of Hearing initiating the proceeding,^{4/} and comply with the requirements of 10 C.F.R. § 2.714(b) and applicable Commission case law. The Commission's regulations in 10 C.F.R. § 2.714(b) require that a party file a list of contentions to be litigated, with their bases set forth with reasonable specificity.^{5/} The purpose of this requirement concerning basis and specificity is (a) to assure that the contention is

^{3/} During a conference call on August 20, 1982 between the Board and the parties (including CASE's representative, Mrs. Ellis), concerning, inter alia, CASE's Twelfth Set of Interrogatories, Applicants noted that some of the documents requested in those interrogatories contain proprietary information. CASE's Motion acknowledges Applicants' statements regarding the asserted proprietary nature of certain documents (Motion, at 2-3).

^{4/} Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976).

^{5/} E.g., Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546, et seq. (1980).

question raises a matter appropriate to litigate in a particular proceeding,^{6/} (b) to establish a sufficient foundation to warrant further inquiry into the subject matter addressed by the assertion, and (c) to put the other parties sufficiently on notice "so that they will know at least generally what they will have to defend against or oppose."^{7/}

A late-filed contention must comply with additional standards as well, and its admissibility is judged by a balancing of the five factors listed in 10 C.F.R. § 2.714(a)(1) of the Commission's regulations.^{8/}

6/ A contention must be rejected where:

- (a) it constitutes an attack on applicable statutory requirements;
- (b) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
- (c) it is nothing more than a generalization regarding the intervenor's view of what applicable policies ought to be;
- (d) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (e) it seeks to raise an issue which is not concrete or litigable.

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

7/ Id. at 20.

8/ Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364 (1981); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508 (1982).

The five factors are:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

In order for any judgment to be made concerning these five factors, the proponent of a late contention must affirmatively address them and demonstrate that, on balance, the late-filed contention should be admitted.^{9/}

Proposed Contention 26 Does Not Raise an Issue Which Is Appropriate for Litigation in this Proceeding

CASE's proposed Contention 26 does not raise an issue which is litigable in this proceeding. In its Motion, CASE is in essence questioning the truth of Applicants' answers to its interrogatories, since according to CASE:

"...at least some of the information sought by CASE in its request for documents is (or was) available on the site..." (emphasis in original) (Motion, at 3)

If CASE was dissatisfied with the Applicants' answers to CASE's interrogatories, the appropriate remedy would have been for CASE to file a motion to compel pursuant to 10 C.F.R. § 2.740(f) within ten (10) days after Applicants' filed their responses to CASE's Twelfth Set of Interrogatories. CASE failed to utilize the procedures set forth in the regulations to obtain the information it requested and now seeks to litigate in this proceeding whether Applicants did or did not actually possess that information. The regulations in 10 C.F.R. § 2.714 clearly do not contemplate litigating as a contention such a matter, which is actually a discovery dispute.

^{9/} Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980).

As an additional basis for this contention, CASE cites 10 C.F.R., Part 50, Appendices A and B. According to CASE:

"Applicants' statement in answer to CASE's requests for documents clearly shows that Applicants' are in violation of Criterion 1 of Appendix A, 10 C.F.R., Part 50, as well as Criterion VI of Appendix B, 10 C.F.R., Part 50, and other related Criteria. (Motion, at 8).

Whether or not the Applicants are presently in violation of the regulations because they do not possess certain documents on-site simply does not raise an issue which is proper for litigation in this operating license proceeding. If CASE believes that a failure to possess these documents on-site is a violation of the regulations or the provisions of the construction permits, CASE may request, pursuant to 10 C.F.R. § 2.206,^{10/} the Director of the Office of Inspection and Enforcement to institute a 10 C.F.R. § 2.202 show cause proceeding against the Applicants. If on the other hand, CASE is asserting that the cited regulations require that the Applicants possess on-site "design criteria for pipe supports" in order to obtain an operating license, CASE's proposed contention represents nothing more than a generalization regarding intervenor's view of what applicable policies ought to be. As such, it must be rejected.

Philadelphia Electric Co., ALAB-216, 8 AEC 13, 20-21.

^{10/} 10 C.F.R. § 2.206(a) 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.

It should be noted that the NRC Office of Inspection and Enforcement may investigate on its own initiative possible violations of the Commission's regulations.

The Factors In 10 CFR § 2.714(a) Governing Admission of Late-Filed Contentions Do Not Weigh In CASE's Favor

CASE has failed to even address, let alone demonstrate, that the factors specified in 10 C.F.R. § 2.714(a) weigh in favor of acceptance of proposed Contention 26. Needless to say, CASE, as the proponent of this new contention, must address each of those five factors and affirmatively demonstrate, that on balance they favor admitting the new contention as an issue in controversy in this proceeding. Duke Power Co., ALAB-615, 12 NRC at 352. Yet, CASE has made no endeavor to shoulder that burden. Indeed, CASE's motion is devoid of the slightest hint of a recognition that its fate hinges on the Section 2.714 factors.

The Appeal Board has stressed the necessity that:

... all participants in NRC adjudicatory proceedings - whether lawyers or laymen representing themselves or organizations to which they belong - familiarize themselves at the outset with the Commission's Rules of Practice. Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-609, 12 NRC 37, 38 fr. 1 (August 25, 1980). By doing so, ... participants will both (1) enhance their ability to protect adequately the rights of those they represent; and (2) avoid the waste of time and resources which inevitably accompanies the taking of action forbidden by the Rules. Ibid.

Duke Power Co. ALAB-615, 12 NRC at 352.

The motion filed by CASE, which does not even refer to 10 C.F.R. § 2.714(a), graphically illustrates this point. In short, CASE's motion is patently deficient and, as such, a fit candidate for denial, without even considering the factors in 10 C.F.R. § 2.714(a), which CASE simply ignored.

Those factors do not, on balance, weigh in favor of granting CASE's Motion. It could be argued, with respect to the first factor (good

cause, if any, for failure to file on time), that CASE did not know until it received Applicants' responses to its Twelfth Set of Interrogatories that Applicants' did not possess the requested documents. On the other hand, admission of this issue would broaden the issues, contrary to CASE's claim that proposed Contention 26 may be within the scope of Contention 5 (Motion, at 1). CASE completely fails to specify in what ways proposed Contention 26 is within the scope of Contention 5. The issue raised in proposed Contention 26 (whether Applicants' possess certain documents on-site and whether the regulations require possession of such documents on-site) is distinct from the more general issue raised by CASE as part of Contention 5 through the testimony of Mr. Walsh concerning the Applicants' design of pipe supports and pipe frames. The latter is the issue about which CASE has presented direct testimony and to which the Applicants and Staff have filed rebuttal testimony.^{11/} CASE now once again seeks to add yet another issue, in the form of a separate contention, which could only serve to delay the proceeding, inasmuch as it was not addressed at all in any of the previous testimony on Contention 5. As the Appeal Board noted in Houston Lighting and Power Co., ALAB-671, 15 NRC at 511:

When recently confronted in another proceeding with an intervention petition filed two weeks after the date for the commencement of the evidentiary hearing had been set, we had this to say:

^{11/} See Applicants' "Testimony of Kenneth L. Scheppele, Roger F. Reedy, Peter S. Y. Chang, John C. Finneran, Jr., and Gary Krishnan Regarding Walsh Allegations," pre-filed September 2, 1982, and "NRC Staff Testimony of Joseph I. Tapia and W. Paul Chen in Rebuttal to Testimony of Mark Anthony Walsh Concerning the Design of Pipe Supports," pre-filed September 2, 1982.

[Prior to the date of the filing of the untimely petition], the applicants and the staff had every right to assume that both the issues to be litigated and the participants had been established with finality. Simple fairness to them - to say nothing of the public interest requirement that NRC licensing proceedings be conducted in an orderly fashion - demanded that the [Licensing] Board be very chary in allowing one who had slept on its rights to inject itself and new claims into the case as last minute trial preparations were underway. [Citations omitted].

That observation has as much if not more force in this situation, where a party seeks to inject a new claim into the proceeding after the evidentiary hearing has already commenced and is nearly completed.

The other factors (ii)--the availability of other means to protect CASE's interests--and (iv)--the extent to which CASE'S interest will be represented by existing parties, are not directly relevant here. CASE has had an opportunity to present evidence on the issue from which proposed Contention 26 arose, namely, Applicants' design for criteria for pipe support and pipe frames.

In sum, a balancing of the five factors in 10 C.F.R. § 2.714(a) weighs against the late admission of proposed Contention 26. Good cause has not been established for this late filed proposed contention and because of the potential for delay, the Licensing Board should deny the motion based on the requirements of 10 C.F.R. § 2.714(a).

CONCLUSION

Based on the foregoing discussion, the Staff submits that this motion fails to meet the standards governing the admissibility of contentions. Accordingly, the motion must be denied.

Respectfully submitted,

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Dated at Bethesda, Maryland
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