

11/04/82

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))

Docket Nos. 50-445
50-446

NRC STAFF ANSWER TO CASE MOTIONS
SEEKING ADMISSION OF DOCUMENTS

I. INTRODUCTION

On October 18, 1982, CASE filed "CASE's Response to Board's Directive Regarding CASE Exhibits." ("CASE's Response") Although not designated as such, CASE's filing is actually a motion (CASE's Response, at 47), in which CASE moves "that the Board accept into evidence the requested documents from CASE's Exhibits 190A through 649." Id. Stating that "we have now been able to cut down the number of these documents drastically..." (CASE's Response, at 23), CASE seeks to have approximately two hundred and fifty (250) exhibits admitted into evidence, in addition to the hundreds of CASE exhibits already admitted into evidence.^{1/}

^{1/} According to the Staff's records, the last CASE exhibit is number 728K. However, not all of the numbered CASE exhibits have been received into evidence. At the close of the June hearings, a total of one hundred and eighty-nine (189) CASE exhibits had been received into evidence. On July 19, 1982, CASE filed Exhibits 190-649, a portion of which have been introduced into evidence. Later exhibits proffered by CASE were numbered sequentially after number 649. CASE itself has not indicated in its filing the total number of CASE exhibits received into evidence. The Staff estimates that this number totals approximately six hundred and seventy (670) exhibits, including the exhibits to the deposition of Jack Doyle, which was received into evidence.

DESIGNATED ORIGINAL

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On October 23, 1982, CASE filed "CASE's Motion for Reconsideration of Board's Ruling Regarding Attachments to Deposition/Testimony of CASE Witness, Jack Doyle" ("CASE's Motion"). In this motion, CASE requests that the Atomic Safety and Licensing Board ("the Board") reconsider its ruling at the September hearing session requiring that clean copies of Applicants' documents admitted as exhibits to the testimony of CASE's witness Jack Doyle replace the marked-up copies of those documents proffered by CASE. Tr. 5778. Specifically, CASE requests that the Board:

reconsider its previous ruling in this regard to the following extent:

- (1) That the clean copies of the documents be provided as the Board has ordered; but
- (2) That CASE be allowed to provide as an addenda a typed statement, referencing each pertinent drawing, listing Mr. Doyle's handwritten notes from the drawings.

CASE's Motion, at 7. For the reasons set forth below, the Staff opposes CASE's response requesting the admission of documents and CASE's Motion for Reconsideration.

II. BACKGROUND

A. General

Hearing sessions in this proceeding have been held on December 2-3, 1981; June 7-11, 1982; July 26-30, 1982, and September 13-17, 1982.^{2/} The June, July and September hearing sessions were devoted almost exclu-

^{2/} For detailed information regarding the evidence presented at these hearing sessions, see the "NRC Staff Response to Memorandum and Order of September 22, 1982," October 12, 1982 (at pp. 2-10).

sively to one contention (Contention 5),^{3/} with the exception of a half-day during the June hearing session for consideration of a "Board Question"^{4/} and a day in the September session (the afternoon of September 16 and the morning of September 17, 1982) for consideration of Contention 22.^{5/} The record to date includes almost 6000 transcript pages. The Applicants have introduced approximately one hundred and fifty-three (153) exhibits and the Staff has introduced approximately two hundred and three (203) exhibits, including testimony. According to the Staff's estimate, CASE has introduced into evidence approximately six hundred and seventy (670) exhibits, including testimony.^{6/} Almost all of the parties' exhibits and testimony concern only Contention 5.

B. CASE's October 18, 1982 Filing Regarding Admission of Documents

At the hearing session held June 7-11, 1982, CASE, as part of its cross-examination of the other parties' witnesses, introduced into evidence one hundred and eighty-six (186) exhibits. None of these exhibits had been pre-filed by CASE, despite the Board's directive requiring the

^{3/} Contention 5 generally asserts that the Applicants' quality assurance/quality control ("QA/QC") program during construction was deficient and that operating licenses accordingly should not be issued.

^{4/} Evidence was presented by the Applicants and the Staff in response to questions asked by the Board regarding deletion of the "Boron Injection Tank."

^{5/} Contention 22 asserts that the Applicants have failed to comply with the requirements of 10 C.F.R. Part 50, Appendix E because of certain alleged deficiencies in the Comanche Peak Emergency Plan.

^{6/} See footnote 1, supra.

pre-filing of documents such as testimony.^{7/} As a result, considerable hearing time was consumed in the authentication of these documents, which consisted almost entirely of Applicants' construction records, such as drawings and non-conformance reports ("NCR's"), along with some Staff inspection reports. In order to avoid a repetition of this "filibustering" (Tr. 2069), the schedule adopted for the next hearing session required that the parties pre-file not only testimony, but exhibits as well. Tr. 1539-43; 1841-1843. In addition, the Board requested that "all exhibits be previously displayed to opposing counsel, numbered and listed with sufficient descriptive material indicating also whether or not there are objections, and if so the nature of the objections, so that we will be able to proceed in advance. . ." Tr. 1842.

On July 19, 1982, only seven days before the next hearing session, CASE filed, "CASE Summary of Exhibits," along with approximately four hundred and fifty (450) exhibits which CASE intended to introduce at the hearing session commencing July 26, 1982. The proposed exhibits consisted of hundreds of Applicants' construction records, such as NCR's, DDR's ("Deficiency & Disposition Reports"), DR's ("Deficiency Reports"), and logs of NCR's, DDR's and DR's, as well as hundreds of NRC documents (inspection reports, and memoranda and analyses), all relating to Comanche Peak. In addition, CASE filed a one hundred and eighty-four (184) page

^{7/} See "Revised Schedule," March 25, 1982, at 2. In accordance with this schedule, on May 24, 1982, the Applicants and the Staff pre-filed written direct testimony to be presented at the June hearing session. CASE did not pre-file or present any written testimony at that hearing session.

"summary" (Exhibit 203), apparently prepared by CASE, of the NRC inspection reports included as CASE exhibits.

Despite the massive amount of documents requiring analysis before the July 26, 1982, hearing session, on July 23, 1982, the NRC Staff, in response to the Board's request, filed its objections to the introduction of these documents.^{8/} The Staff there noted its general objections, stating:

The Staff objects generally to the introduction by CASE of any of the NRC documents listed as CASE Exhibits (Nos. 198-304) on the grounds that CASE has not stated the purpose to be served by introduction of these documents. It is not evident whether CASE intends to rely upon these documents as part of its direct case or during cross-examination of the other parties' witnesses. If the documents are intended to be part of your direct case, the Staff notes that these documents are not discussed by CASE's witnesses in their testimony and therefore, are objectionable on the grounds that they are not relevant to that testimony.

Letter at 1. The Staff also noted that a number of the NRC inspection reports included as CASE exhibits were also NRC Staff exhibits. Letter at 2. With respect to these documents, the Staff stated "While the Staff does not object to the admissibility of such documents, the Staff objects to the introduction of the same documents the Staff intends to introduce." Id. Insofar as the other inspection reports were concerned, the Staff objected to the introduction by CASE of such reports on the grounds of lack of relevancy, because there was no indication by CASE of the subject of the reports or their relevance to Contention 5. Id., at 2. The Staff set forth specific objections to CASE Exhibits 203, 298, 303 and 304. Letter, at 2.

^{8/} See Letter dated July 23, 1982, from NRC Staff Counsel to Mrs. Ellis.

At the July hearing session, CASE cross-examined the other parties' witnesses, presented direct testimony of its own witnesses, and introduced into evidence not only their testimony, but numerous exhibits as well, including a number of the documents pre-filed by CASE on July 19, 1982. With respect to the massive exhibits proffered by CASE, which CASE did not introduce as part of either its own direct case or through cross-examination, the Board clarified for CASE the procedure for the introduction of documentary evidence. See e.g., Tr. 2062-2066. The Board determined that inasmuch as the CASE exhibits consisting of Applicants' and Staff documents did not present questions of authentication, it would not be necessary for CASE to introduce such documents through the Applicants' or Staff's witnesses. Tr. 2066-2067.^{9/} Of course, the Board noted that dispensing with this requirement did not answer the question of the admissibility of the proposed CASE exhibits. Tr. 2067. In response to the Board's inquiry whether the other parties had any objections to the introduction of such documents by Mrs. Ellis "without concern about foundation proof" (Tr. 2069), the Staff agreed that the NRC inspection reports appeared to be authentic. Tr. 2073. Applicants did not generally object to the introduction of the proposed CASE exhibits on the grounds

^{9/} Ordinarily, a party may not introduce documents into evidence for the truth of the matters asserted in the absence of a sponsoring witness. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-27, 4 AEC 652, 658 (1971); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-81-32, 14 NRC 381, 541-542 (1981). See discussion on pp. 14-15, infra.

of authenticity (Tr. 2075) and later stipulated to the foundation proof for the introduction of such documents. Tr. 3000.

The Board emphasized to CASE the need to "get a manageable group of documents, eliminating the repetitive aspects, looking at the relevance . . . and not just overwhelm the record." Tr. 3010. The Board also noted that "the relevancy really does trouble the Board" (Tr. 3014) and questioned whether by merely introducing, for example, hundreds of NCR's, "have you really made any showing that's of significance in deciding the QA/QC Contention 5 and the requested operating license for this plant." Tr. 3014. The Board required CASE to make a showing of the relevancy of the proffered documents (Tr. 3034) and to "consolidate them . . . and eliminate duplication. . ." Tr. 3532. CASE failed to do this at the next hearing session in September and at CASE's request at the end of that session, the Board allowed CASE until October 18, 1982, to comply with these directives. Tr. 5773.

C. CASE'S Motion for Reconsideration

On September 2, 1982, CASE filed, as part of the testimony to be presented by its witnesses at the September hearing session, "CASE Exhibit 669 and attachments: Deposition of Jack Doyle."^{10/} That exhibit consists of a two-volume transcript of the deposition of Jack Doyle, totalling approximately three hundred and eighty (380) pages, as well as

^{10/} See "Testimony of CASE Witnesses and Motion for Subpoena," September 2, 1982. The Staff's copy of this filing did not include a copy of the transcript of the Doyle deposition. However, the Staff had purchased the transcript of that deposition.

approximately three hundred (300) exhibits included as attachments to the deposition transcript.^{11/} At the Applicants' suggestion (Tr. 3588-3589), the Board allowed Mr. Doyle's deposition to serve as "his direct testimony in this case and the cross-examination...at the deposition stand as his cross-examination in this case..." Tr. 3592, 3626, 3630. The Board ruled that any additional matters such as the "supplemental testimony" of Mr. Doyle filed at the September 13, 1982 hearing session^{12/} would be subject to cross-examination. Tr. 3593. With respect to the exhibits to Mr. Doyle's deposition, the Board stated: "Unless there is some pretty solid reason otherwise, the Board would regard those as being not testimony, which would be part of the transcript numbers, but rather will be exhibits." Tr. 3627.

Subsequently, during cross-examination by CASE of the Applicants' rebuttal panel to CASE witnesses Messrs. Walsh and Doyle, it became apparent that certain of the Applicants' documents offered into evidence by CASE as exhibits to the Doyle deposition contained markings by Mr. Doyle. Tr. 5189-5190. The Board requested that CASE provide clean copies of such documents^{13/} noting:

^{11/} Apparently CASE originally perceived Mr. Doyle to be a "hostile witness," since CASE took the deposition of Mr. Doyle on August 19-20, 1982, under a subpoena issued by the Board. See the Licensing Board's Subpoena, August 12, 1982, and CASE's "Notice of Deposition," August 16, 1982. CASE later identified Mr. Doyle as its own witness (See "Testimony of CASE Witnesses and Motion for Subpoena," September 2, 1982), and he testified at the September 13, 1982, hearing session as a witness for CASE. Tr. 3632-4011; 4706-4761.

^{12/} See CASE Exhibit #683.

^{13/} The Applicants later agreed to provide such "clean" copies of these documents. Tr. 5776.

We do not desire to have documents handed in -- we don't have time to examine hundreds of them that you produce from time-to-time with your representations that they are authentic documents, and we find out that your witnesses have made notes on them.
Tr. 5190.

Later, at the close of the September hearing session, on September 17, 1982, CASE requested that the Board in essence, reconsider its previous ruling regarding the CASE exhibits included as attachments to the Doyle deposition and permit Mr. Doyle to "look back through them and see if there's any vital information in them..." Tr. 5776. The Board denied this request (Tr. 5776-5777), noting that the Doyle testimony had been admitted into evidence and CASE could not change the testimony of its witnesses after they had testified, absent a motion "that somebody made an outrageous error." Tr. 5777. The Board ruled that the clean copies of the Applicant documents would replace the documents with markings made by Mr. Doyle. Tr. 5778. The Board endorsed the suggestion of Applicants' counsel that Applicants would provide Mrs. Ellis with such clean copies, and that "they try to stipulate as to the authenticity of the clean copies, and handle it among ourselves." Tr. 5778.

III. DISCUSSION

A. Rules of Evidence in NRC Proceedings

Although every party to an NRC proceeding "shall have the right to present such oral and documentary evidence and rebuttal evidence and conduct such cross-examination as may be required for full and true disclosure of the facts" (10 C.F.R. § 2.743(a)), not all evidence offered

by a party is admissible. Section 2.743(c) of the Commission's regulations provides that "Only relevant, material and reliable evidence which is not unduly repetitious will be admitted" in the proceeding. The Commission states in Appendix A to 10 C.F.R. Part 2 that:

In passing on objections, the board, while not bound to view proffered evidence according to its admissibility under strict application of the rules of evidence in judicial proceedings, should exclude evidence that is irrelevant to issues in the case ...^{14/}

10 C.F.R. Part 2, Appendix A, V.(d)(7). Moreover, 10 C.F.R. § 2.757 specifically empowers licensing boards to exclude evidence in NRC proceedings on the grounds that it is cumulative or repetitive. In particular, this provision of the regulations states (in pertinent part):

§ 2.757 Authority of presiding officer to regulate procedure in a hearing.

To prevent unnecessary delays or an unnecessarily large record, the presiding officer may:

- (a) Limit the number of witnesses whose testimony may be cumulative;

^{14/} The Commission's regulations do not expressly address the use and applicability of the Federal Rules of Evidence ("Federal Rules") in resolving evidentiary disputes in NRC adjudicatory proceedings. In addition, the Atomic Safety and Licensing Appeal Board ("Appeal Board") has stated that it is "guided by the rules and practices of the Federal Courts," although it does not follow the Federal Rules completely. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565, 568 n.13 (1977); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 411-412 (1976). Before guidance is taken from the Federal Rules, there must be an "inquiry into whether the situations are truly similar." Midland, supra, 5 NRC at 568 n.13. Therefore, while not dispositive of disputes regarding the admissibility of evidence, the Federal Rules of Evidence may be relied upon to provide guidance as to the resolution of evidentiary disputes in NRC licensing hearings where the substantive policies behind the Federal Rules are relevant in the context of these hearings.

- (b) Strike argumentative, repetitious, cumulative, or irrelevant evidence;
- (c) Take necessary and proper measures to prevent cumulative cross-examination; and

* * *

When judged by the standards described above, as applied by applicable NRC case law, all of the categories of exhibits proffered by CASE should be excluded.^{15/}

B. CASE Exhibits 190A Through 197E

This category consists of approximately forty (40) exhibits, which are audits by Texas Utilities Services, Inc., ("TUSI") of the Comanche Peak constructor, Brown & Root, Inc. According to CASE:

It is the belief of CASE that a thorough evaluation of the issues raised in Contention 5 concerning the Applicants' QA/QC programs can only be made by examining the trends of noncompliance that have emerged during the construction phase at Comanche Peak. The QA audits contained in CASE Exhibits 190A-197E are clear indications of such trends, and therefore, are pertinent and necessary to the evidentiary record upon which the Board must rely to render a decision. They are a vital part of the total picture which CASE will present in its proposed findings of fact and conclusion of law.

CASE's Response, at 4. The Staff objects to the admission of these documents on the grounds that they are repetitious and cumulative. 10 C.F.R.

^{15/} Since CASE has "analyzed" the exhibits in categories, the Staff generally utilizes these same categories in discussing the admissibility of these exhibits. Some of the exhibits included in these categories have already been introduced into evidence or have been withdrawn by CASE; the Staff's discussion does not, of course, apply to such exhibits.

§§ 2.743(c), 2.757(b). The Staff has performed "trend analyses," provided testimony about such trends^{17/} and introduced the actual trend analyses into evidence.^{18/} In these circumstances, the exhibits proffered by CASE are cumulative and repetitious and would only serve to needlessly clutter the already unusually large record. Accordingly, pursuant to 10 C.F.R. §§ 2.743(c) and 2.757(b), the Board should exclude these exhibits.

C. CASE Exhibits 202 and 203

According to CASE, "these items were included primarily for the benefit of the Board as handy reference items. . ." CASE's Response, at 4. As explained below, the Staff objects to these exhibits on the grounds that they are not reliable evidence and are in fact misleading.

1. Exhibit 202

This exhibit consists of one page, apparently prepared by CASE, which is based on information provided by the NRC Staff in response to Interrogatory 9 of CASE's Third Set of Interrogatories to the NRC Staff. In this exhibit, CASE has quoted part of NRC Staff Answer 9, in which the Staff explained the meaning of the abbreviations used in an attachment to

^{17/} See NRC Staff Exhibit 180, "Supplemental Testimony of William A. Crossman, Robert C. Stewart and Robert G. Taylor Regarding Annual Assessments of Applicants' Performance (Contention 5)."

^{18/} See NRC Staff Exhibits 15, 181-195.

the 1979 Staff Trend Analysis for Comanche Peak (Staff Exhibit No. 195). The Staff does not believe this exhibit constitutes material or reliable evidence, in that it consists of extracts from a Staff answer to a CASE interrogatory and CASE has provided only a portion of the Staff's answer. Moreover, the evidence is cumulative since the Staff's testimony (Exhibit 13, pp. 10-12) provides an explanation of these very same terms. In these circumstances, the Staff submits that the Board should exclude CASE Exhibit 202.

2. Exhibit 203

This exhibit, totalling one hundred and eighty-four (184) pages, consists of a purported "Summary of I&E Reports" apparently prepared by CASE. It contains CASE's synopsis of scores of NRC inspection reports for Comanche Peak, almost all of which are already in evidence.^{19/}

The Staff objects to the admission of this exhibit on the grounds that it is cumulative, repetitious and misleading and lacks a proper sponsor. First of all, since almost all of the inspection reports purportedly "summarized" by CASE in this exhibit are already in evidence, there is no need to have a "summary" of the reports. Secondly, CASE has only included excerpts from such reports constituting "Problems Involved." Since the reports "summarized" by CASE include not only negative findings,

^{19/} It appears that CASE has proffered those inspection reports not already in evidence. (See III.D, below).

but positive observations concerning construction as well, a "summary" such as this, limited to only "problems," is misleading.

More importantly, the "summary" contains inaccuracies. For example, on p. 110, CASE lists inspection report "79-28/79-29," with a date of "12/16/77" and describes the "Problem Involved" as concerning plans by Texas Utilities Generating Company ("TUGCO") "to include in their QA program a procedure to assure that the nondestructive examination (NDE) reports, to be submitted by Westinghouse for preservice inspection, are reviewed and any indication evaluated to Section XI, ASME B&PV Code Requirements." Id. There is no inspection report for Comanche Peak numbered "79-28/79-29." There is an inspection report "79-29/79-28," dated January 18, 1980, (not "12/16/77" as indicated by CASE). Also, the Staff has not found in inspection report 79-29/79-28 any problem of the nature described by CASE. The inaccuracy in this one entry casts doubt on the accuracy of the entire "summary" and accordingly it should not be admitted into evidence.

Further, as the Staff pointed out in its July 23, 1982, objections, "the Staff considers this document to be in the nature of testimony. As such, it is necessary to have a witness with appropriate qualifications to sponsor it." Letter, at 2. As stated by the Appeal Board, "The presence of . . . a sponsor is necessary to permit [a] proffered statement to be meaningfully tested for reliability." Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-27,

4 AEC 652, 658 (1971);^{20/} Metropolitan Edison Company (Three Mile Island Nuclear Station), LBP-81-32, 14 NRC 381, 541-542 (1981).^{21/} Although the Licensing Board may have dispensed with this requirement insofar as authentic Applicant and Staff documents proffered by CASE are concerned, it has made no such ruling regarding a document such as Exhibit 203. CASE is seeking to introduce through its representative, Mrs. Ellis, evidence which she, as a layman, lacks the expertise to explain. As such, this exhibit must be excluded. Diablo Canyon; Three Mile Island.

D. CASE Exhibits 204 Through 297

CASE has withdrawn those inspection reports which the Staff introduced into evidence. However, CASE seeks to introduce thirty-three (33) other inspection reports to "contradict what was stated in testimony by the

^{20/} In Diablo Canyon, the Appeal Board excluded evidence based on the lack of a sponsor. In that case, the proffered sponsor was a layman seeking to enter data into evidence which he did not have the expertise to explain. Id.

^{21/} In Three Mile Island, the intervenor attempted to introduce into evidence, without a sponsor, a document called "the Udall Committee staff report" (a document prepared by the Majority Staff of the Committee on Interior and Insular Affairs of the U.S. House of Representatives, "Reporting of Information Concerning the Accident at Three Mile Island," March 1982). The Licensing Board denied the intervenor's motion to admit the document, explaining that "Throughout the proceeding...we reminded the parties...that they could present witnesses on the disclosure issue, including the Udall Committee Staff report, if they had a sponsoring witness and presented it on a timely basis.... We explained why it was not permissible simply to take official notice over objections, of other investigations, such as the Udall Report, for the truth of the matters asserted." Id., at 541.

Applicants' or Staff witnesses, to support what CASE's witnesses have stated in testimony, or to complete the record in some particular regard where the record would otherwise be incomplete." CASE's Response, at 5. CASE states that it has "only included a few examples in the I&E reports to illustrate some of the areas with which we are concerned and to which we will refer in our proposed findings." CASE's Response, at 6.

The Staff continues to object to the introduction of these inspection reports.^{22/} Although CASE has provided in its Response, a "Brief Description of Pertinent Information," in the Staff's view, this information does not establish the relevancy of these reports to Contention 5. The Staff submits that each and every inspection report related to Comanche Peak is not automatically relevant to Contention 5. The fact that CASE desires to quote the report or portions thereof in its proposed findings of fact does not establish relevance.

Moreover, CASE has completely failed to specify in what way these reports "complete the record in some particular regard..." CASE's Response, at 5. Exhibits 204, 205, 206, 207 and 208 pre-date the

^{22/} In the Staff's July 23, 1982, letter, the Staff objected, on the grounds of lack of relevancy, to the introduction by CASE of NRC inspection reports other than those included as Staff Exhibits. Letter, at 2. According to the Staff's review of CASE's Response, the particular exhibits in question, consisting of NRC inspection reports not introduced by the Staff, are as follows: Exhibit 204, 205, 206, 207, 208, 211, 215, 218, 220, 222, 223, 225, 227, 230, 234, 236, 247, 248, 253, 267, 278, 279, 284, 286, 287, 288, 290, 292, 293, 295, and 296.

construction permits for Comanche Peak. Activities conducted prior to the granting of the construction permits may be relevant to the question whether the QA/QC program met the requirements for granting construction permits. However, the issue in Contention 5 is whether the QA/QC program during construction was sufficient to permit issuance of operating licenses.

Further, most of these inspection reports appear to contain "unresolved items,"^{23/} rather than actual inspection findings such as violations or deviations.^{24/} In order to make the record complete, inclusion of the inspection reports proffered by CASE containing "unresolved items" would necessitate inclusion of those reports closing out the unresolved items. The Staff's review of the reports proffered by CASE indicates there are a number of inspection reports not already in evidence which close out the matters raised in the reports proffered by CASE. The Staff does not wish to further burden the record, and

^{23/} As defined in NRC inspection reports, "Unresolved items" are "matters about which more information is required in order to ascertain whether they are acceptable items, items of noncompliance, or deviations." See, for example, NRC Staff Exhibit 70 (Inspection Report 79-18), p. 14, and NRC Staff Exhibit 13, at pp. 10-12.

^{24/} In the Staff's testimony discussing its inspection and investigation findings with respect to the specific construction activities mentioned in Contention 5 (Staff Exhibit 13), the Staff did not consider an "unresolved item" to be an inspection finding.

therefore is not seeking to introduce these reports at this time. However, in the event the Board admits the reports proffered by CASE, the Staff would reserve the right to move the admission of those inspection reports (not already in evidence) which close out the matters raised in the reports CASE seeks to introduce.

Finally, CASE's stated purpose in introducing these reports is to support the testimony of its own witnesses or to contradict the testimony of the Applicants' and Staff's witnesses. CASE's Response, at 5. If that is in fact CASE's purpose, CASE should have utilized these reports during the course of the testimony of its own witnesses or during the cross-examination of the other parties' witnesses. For CASE to wait until this stage of the proceeding is not timely nor fair to the other parties. Three Mile Island, LBP-81-32, 14 NRC at 541.

E. CASE Exhibits 298 through 304

There are only two exhibits in this category (Exhibit 298 and 301) which CASE has not withdrawn or which are not already in evidence. The Staff objects to the admission of both of these exhibits for the reasons specified below.

Exhibit 298

This document is entitled "[NRC Staff] Summary of Caseload Forecast Panel Meeting and Facility Tour at Comanche Peak," July 7, 1982. As the Staff noted in its July 23, 1982, objections, this summary "relates to

the progress of Comanche Peak construction." (Letter, at 2). As the Staff further noted:

Contention 5 concerns the quality of construction. The Atomic Safety and Licensing Board has repeatedly ruled that matters which have a bearing on the schedule of this proceeding are outside the scope of Contention 5. See "Protective Order," March 23, 1982, and "Order (Following Conference Call)," April 2, 1982. Accordingly, the Staff objects to the admission of this document on the grounds that it is not relevant to Contention 5.

Letter at 2. As CASE acknowledges, at the July hearing, the Board sustained the Staff's objection (on the grounds of lack of relevance) to CASE's attempt to cross-examine the Staff's panel on this document. Tr. 2416. CASE continues to assert that "there are some items which are contained in it which need to be in the record . . ." CASE's Response, at 22. However, this mere assertion does not show how this document, previously determined not relevant to Contention 5, is in fact relevant to that contention. Accordingly, this document should be excluded.

Exhibit 301

CASE describes this document as "Chapter 0800-0850 (NRC) Notice of Violation - Guidance (cont.), Oct. 1975." CASE's Response, at 23. The exhibit consists of two pages from Chapter 0800, "Enforcement Actions," of the NRC Inspection and Enforcement Manual. CASE makes no showing of its relevance to Contention 5. Rather, CASE merely states its intention to "cross-examine the NRC Staff's Walsh/Doyle rebuttal panel on this."

Id.

The NRC Staff objects to the admission of this document. Although cross-examination of the NRC Staff's "Walsh/Doyle rebuttal panel" was

suspended, no determination has been made if and when such cross-examination will resume. If cross-examination of this panel is not resumed, CASE's limited purpose in introducing this document will no longer obtain. If, on the other hand, cross-examination of that panel does resume, a determination as to the relevance of this document to that panel's testimony can await such cross-examination. Accordingly, there is no reason to admit the document into evidence at this time.

F. CASE Exhibits 305 through 570 and 626 through 628

In this category of exhibits, CASE seeks to introduce approximately one hundred and thirteen (113) of Applicants' construction records ("NCR's, DDR's, DR's) and logs of such records. CASE seeks to use "document pages . . . generally . . . to contradict what was stated in testimony by the Applicants' or Staff's witnesses, to support the testimony of CASE's witnesses, or to complete the record in some particular regard where the record would otherwise be incomplete." CASE's Response, at 24.

The Staff objects to the admission of these documents on the grounds that they are cumulative and repetitious and lack relevance to Contention 5. CASE has already succeeded in introducing scores of such records in evidence. See for example CASE Exhibits 4-189. Merely introducing more of such records does not supply the relevance, which the Licensing Board deemed lacking, with respect to these additional records.

Tr. 3014. The Licensing Board has questioned whether CASE can make a showing of relevancy by merely "[s]aying it 10 times or 20 times . . ."

Tr. 3014. The Staff agrees with the Licensing Board's earlier observa-

tion that these documents, in and of themselves, do not constitute proof, but merely raise questions. Tr. 3015.

Moreover, as the Licensing Board noted, the relevance of a document such as an NCR is not readily apparent, particularly in the absence of the disposition of the specific NCR. Tr. 3019. Judge McCollom has stated "without having the solution there and to be able to judge on the basis of an engineering solution, to me, the NCR's as a list is misleading." Tr. 3019. Other Licensing Boards have also recognized, in considering issues relating to the adequacy of a QA/QC program, that scores of construction records are not necessarily relevant and that such records may be excluded. Houston Lighting and Power Company (South Texas Nuclear Project, Units 1 and 2), Docket Nos. 50-498 OL/50-499 OL, Operating License Proceeding, Tr. 6673 (June 25, 1981). Based on the foregoing, the Board should exclude these exhibits.

G. CASE Exhibits 572 through 616

Included in this category, are approximately twenty-one (21) documents, relating to the survey by the American Society of Mechanical Engineers ("ASME") of Brown & Root at Comanche Peak. Since there has been extensive testimony on this subject,^{25/} as well as cross-examination,^{26/} these exhibits are cumulative and repetitious. According to CASE's "Brief Description

^{25/} See Applicants' Exhibit #46, "Testimony of Roger F. Reedy Regarding ASME Survey of Brown and Root at Comanche Peak."

^{26/} See, e.g., Tr. 2042-2062.

of Pertinent Information," some of these documents (Exhibits 591 and 610) "seem to contradict (or at least raise some questions about the accuracy of) testimony in the hearings by the Applicants' panel . . ." CASE's Response, at 39. The Licensing Board has pointed out, however, that raising questions doesn't constitute evidence. Tr. 3015. Accordingly, these exhibits should be excluded.

H. CASE Exhibits 617 through 629

CASE seeks to introduce documents (or portions thereof), consisting of various Comanche Peak construction records, such as a report from TUGCO to the NRC (Exhibit 617), internal memoranda of Applicants (Exhibit #619) and logs of DR's DDR's and NCR's (Exhibits 626, 627, 628). As CASE itself acknowledges, documents such as these do not constitute proof, but, at most, raise questions "which CASE believes must be examined in the evaluation of the QA/QC program at CPSES." CASE's Response, at 43. Inasmuch as the Licensing Board has rejected the notion that documents merely raising questions constitute proof (Tr. 3015), these documents must be excluded.

I. CASE Exhibits 629 through 645; 646-649

CASE describes this category of exhibits as "Applicants' Design/Construction Significant Deficiency Analysis Reports, items which Applicants felt were potentially reportable under 10 C.F.R. § 50.55(e)," and "TUGCO/TUSI QA Nonconformance Reports." CASE's Response, at 44, 46. CASE states that, "Taken as a group, the SDAR's [Significant Deficiency Analysis Reports] graphically demonstrate many of the points CASE

intends to make in its proposed findings of fact and conclusions of law . . ." Id., at 45.

CASE also states that it:

[B]elieves that these documents are clearly pertinent and absolutely necessary to the evidentiary record. The failure of the Applicants and the NRC Staff to include candid and detailed information about these problem areas should not be used to render the record in these proceedings incomplete and inaccurate by their omission . . .

CASE's Response, at 46. The Staff objects to the admission of these documents. The record is already full of hundreds of documents relating to construction deficiencies. Simply adding many more such documents will only further burden this already unusually large record. These exhibits are unduly repetitious and should not be admitted. 10 C.F.R. §§ 2.743(c), 2.757(b).

Moreover, the Staff objects to CASE's implication that the Staff has failed to include in its testimony "candid and detailed information" about "problem areas." The Staff has provided extensive testimony and exhibits, all of which include "detailed and candid information" about the specific construction activities originally specified in Contention 5 or later raised by CASE at the hearing. The Staff has not attempted to address each and every NCR or other such construction records related to Comanche Peak construction. Moreover, the Board itself has indicated that it does not desire this type of information in the record. Tr. 3015-3016. The fact that CASE seeks to overwhelm the record with this kind of information does not amount to an omission on the part of the other parties.

J. CASE's Motion for Reconsideration

At the close of the September hearing session, the Licensing Board agreed with Applicants' counsel that CASE and the Applicants should handle themselves the question of providing clean copies of the Applicants' documents offered by CASE as exhibits to the testimony of CASE witness Mr. Doyle. Tr. 5778. CASE was apparently not willing to handle this matter as the Licensing Board suggested. Rather, CASE has filed a Motion for Reconsideration, in which it now claims that the Licensing Board's ruling that "clean copies [of these documents] will replace the copies that have any kind of markings on them" (Tr. 5778), "deprives the record in this proceeding of a very important part of Mr. Doyle's testimony wherein he explains his concerns about specific drawings." CASE's Motion, at 6. According to CASE, the Licensing Board's ruling deleted "vital portions of Mr. Doyle's concerns." CASE's Motion, at 7.

The gist of CASE's Motion for Reconsideration is that the Applicants and the Staff should have realized before the September hearing session that the documents contained markings by Mr. Doyle. According to CASE, the Applicants and the Staff also should have objected to their admission at the time Mr. Doyle's testimony was admitted into evidence. The Staff submits that this argument is simply without merit under the circumstances of this case. For here, as soon as the Licensing Board was informed of such markings (not by CASE but by Applicants' counsel), the Board properly determined that such marked-up documents, which were offered by CASE as authentic documents, should be excluded from the record.

CASE has been allowed a great deal of latitude in introducing documents into evidence. For example, CASE has been permitted to have its witnesses testify without having prefiled testimony as required by the Licensing Board, and to enter into evidence exhibits without sponsoring witnesses. However, as the Licensing Board has rightly determined, CASE should not be permitted to offer into evidence as authentic documents of the Applicants and Staff, documents which in fact contain markings by CASE's witnesses. Tr. 5190. Nor should CASE be allowed to change the testimony of its witnesses after they have testified. Tr. 5777.

In arguing that the Licensing Board should reconsider these rulings, CASE suggests that the only reason it offered Mr. Doyle's deposition into evidence as his testimony was because of the suggestion of Applicants' counsel. In fact, CASE originally planned to have Mr. Doyle's deposition serve as his testimony. In CASE's September 2, 1982 filing of its witnesses' testimony, CASE included, as Mr. Doyle's testimony, the transcript of his deposition. At the suggestion of Applicants' counsel, it was agreed that the direct and the cross-examination of Mr. Doyle in his deposition would serve as direct and cross-examination testimony. Tr. 3588-3589.

According to CASE. Mr. Doyle's deposition and exhibits were offered and accepted into evidence "as a package in their entirety." CASE's Motion, at 6. However, CASE also states in its motion that such exhibits were admitted "for clarification only." CASE's Motion, at 3. The Licensing Board made clear that the Board regarded the exhibits "as not

being testimony." Tr. 3627. If, as CASE claims, the markings by Mr Doyle on the documents contain "vital information," CASE should have elicited such information from Mr. Doyle as part of CASE's direct examination of him rather than burying such information in scribbles on the other parties' documents. In conclusion, none of the assertions in CASE's motion warrant reconsideration by the Licensing Board of its ruling regarding the exhibits to Mr. Doyle's deposition/testimony.

IV. CONCLUSION

For the reasons stated above, the Staff urges the Licensing Board to exclude from the record the exhibits proffered by CASE in its October 18, 1982, Response and to deny CASE's Motion for Reconsideration.

Respectfully submitted,

Marjorie U. Rothschild

Marjorie U. Rothschild
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 4th day of November, 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, Units 1 and 2)

}
Docket Nos. 50-445
50-446
}

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO CASE MOTIONS, SEEKING ADMISSION OF DOCUMENTS" in the above captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 4th day of November, 1982.

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