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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
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TEXAS UTILITIES ELECTRIC COMPANY, ET AL.	)	Docket Nos. 50-445-2 and 50-446-2
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	(Application for Operating Licenses)

APPLICANTS' RESPONSE TO CASE'S PROPOSED SCHEDULE AND PROCEDURES REGARDING INTIMIDATION ISSUE

Texas Utilities Generating Company, et al. (Applicants) hereby respond to the proposed schedule and procedures relating to the intimidation issue submitted by CASE on June 1, 1984. Applicants are unable to agree in major respects with CASE's proposal. In the spirit of attempting to reach an accomodation over procedural matters, however, we will describe our major problems with CASE's proposal and offer an alternative schedule and procedures. We understand that a conference call regarding this matter is scheduled for June 14.

The problems inherent in CASE's proposal: There are three major problems with CASE's proposal. First, the schedule itself is far too extended in that it does not appear to lead to the commencement of hearing until late August at the earliest. Second, CASE's proposal that Applicants' witnesses must be deposed before CASE witnesses can be deposed is simply

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unrealistic. Applicant does not know who its witnesses will be until it knows, by deposition of CASE witnesses, the incidents, dates, times and people involved in CASE's allegations. CASE has the burden of going forward with respect to this issue.[1/] Third, it is premature to establish a firm schedule for trial of this issue until all parties have a better idea of the scope of the issue itself. The Board's rulings on the question of the standard to be used for the issue of intimidation and on the question of utilizing hearsay in the trial of this issue will have a major impact on the actual scope of the evidence to be presented.

We turn now to a more detailed discussion of these problems and suggestions as to how they might be alleviated in ways that can accomodate CASE.

Use of depositions: The major element of CASE's proposal consists of the attempt to utilize the deposition process in substitution, in major part, for the hearing process. In essence this would lead to trial (by deposition) without the benefit of pre-trial discovery. We must emphasize our belief that the use of depositions for the purpose of creating a record upon which decisions can be based is not appropriate. Much irrelevant and objectionable material will undoubtedly be contained in the depositions and would have to be the subject of numerous motions to strike if the depositions were to be offered as evidence.

1/ See Applicants' Proposed Standard, filed May 8, 1984.

In the spirit of cooperation we are willing to reexamine the situation at the conclusion of the deposition process. All parties must remain free, however, to create whatever record at the hearing they deem appropriate. In this regard we wish to emphasize that Applicants do have some knowledge of the events about which several of CASE's potential witnesses will testify.2/ Applicants intend to directly challenge the credibility of each one of these witnesses and therefore expect that their testimony will have to be heard before the Board in any event.

Our major concern with CASE's proposal relates to the extended schedule involved. Despite the submittal of a data request on April 9, 1984, which sought to obtain an indication of the witnesses, incidents and facts that CASE intended to prove, we were not provided with any responsive material until June 1 (telephone) and June 4 (letter). The responsive material consists only of a list of potential witnesses, categories of potential witnesses and some documents. We now have a very hazy and preliminary idea of the potential scope of this issue.

While we now have a preliminary list of potential witnesses, we still do not know the specific incidents, dates and facts that CASE alleges it will prove.3/ Without this information it is

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2/ Applicants know of the likely testimony of Charles Atchison, William Dunham, Robert Hamilton, Dobie Hatley, Susan Neumaier, and Henry and Darlene Stiner.

3/ CASE has not yet answered our request that they ". . . provide a summary of testimony that CASE intends to elicit from the person, including a list of facts that CASE intends to establish through the person's testimony." Applicants' Eighth Set of Interrogatories, p. 4.

simply impossible for Applicants to know what witnesses they will present or even to know who their potential witnesses with respect to these incidents might be.

CASE's representatives indicated to us that the reason they seek to depose Applicants' witnesses first is their concern that Applicants' witnesses might "tailor" their testimony. This concern has equal validity on either side.4/ If CASE continues to insist that Applicants' case must be put on first, then Applicants would suggest that the record be closed as it now exists. If CASE does not wish to present any further evidence which Applicants may seek to rebut, so be it. Applicants are satisfied with the present state of the record.

Rulings which may affect the scope of this issue: Clearly the Board's ruling on the standard to be utilized will affect the scope of this issue. Since CASE intends to respond to our proposed standard by June 12, we would request an opportunity to reply within three working days, (i.e. by June 15).

4/ We do not mean to suggest bad faith on either side. Rather we suggest that neither side has any ground for undue suspicion. We note the CASE desires to have ample time to "prepare" their own witnesses before they are deposed.

We feel compelled to respond briefly here to footnote 6 of CASE's pleading. As we have explained to CASE, we specifically recited at our informal meeting on May 30 that an additional report was then being made available to Mrs. Ellis. We accept their observation that they made no note of this statement. We have since discovered that the additional report was not made available until the day after our meeting. The reason it was not provided to Mrs. Ellis on May 25 along with other materials was because an expurgated copy was not available that afternoon.

Second, the Board's response to our request that hearsay be rejected with respect to this issue (see Applicants' Proposed Standard, filed May 8, 1984, p. 15) will have a major impact on the scope of the evidence to be presented. Where allegations of incidents of intimidation are involved, the only probative evidence is the testimony of persons with direct knowledge of the incidents. For one person to testify that he "heard" of an act or "heard" that a member of management had used certain allegedly threatening words, adds nothing of probative value to the testimony of a person with direct knowledge of the incident. This is to be distinguished, of course, from the testimony of a person who relates his own personal observations or his own personal attitude, based in part upon things which he or she has been told or has heard. Depending upon the nature of the testimony and whether or not a reasonable person standard is adopted, such testimony about an individual's personal attitude and direct observations may be relevant.

We note that CASE's description of potential witnesses includes newspaper reporters, members of Congress, investigators and others. Some of these persons may have direct, relevant and competent testimony but it appears to us that most will not. While the Board cannot now make rulings on specific testimony, it can offer general guidance. We ask therefore that the Board issue a generic ruling 1) that persons who are not (and were never) employed at Comanche Peak and who have no direct knowledge of conditions at Comanche Peak are not competent to testify, on

the basis of what other persons employed at Comanche Peak may have told them, about conditions at Comanche Peak or about specific incidents occurring at Comanche Peak and 2) that only persons having direct knowledge about specific incidents of alleged intimidation will be allowed to testify about such incidents. Such rulings would, in all likelihood, significantly restrict the scope of potential evidence in this proceeding and properly so.

Second, we ask the Board to make clear that this is, as CASE has described it, a "people" issue and not a technical issue. To the extent that CASE witnesses may address technical concerns, i.e. concerns that specific jobs were not done correctly (e.g. the Walsh-Doyle allegations), these concerns have been, or will be, covered elsewhere. The issue we are concerned with is whether the QA/QC program meets the requirements of Appendix B in the face of allegations of a pattern of intimidation intended to undermine that program.

The actual schedule: If the type of hearsay that we consider to be objectionable at the trial of this issue is excluded, Applicants believe that the entire deposition process can be accomplished in two to three weeks. We do not agree with the extended post-deposition procedures recommended by CASE. Since we believe that no party should be committed to the very abbreviated hearing contemplated by CASE, we think that at this point it would be most appropriate for the parties to be able to review the situation at the conclusion of depositions and that

the hearing be scheduled to commence approximately one week thereafter. During this week (or earlier) motions with respect to the relevancy of certain witness' testimony in their entirety can be offered. The only other post-deposition filings authorized should be summary disposition motions. Filing of proposed findings of fact should follow the hearing. Our suggestion would be that no formal procedural steps beyond the deposition process be established now, but that the Board and the parties retain the week of July 30 for the commencement of the hearing on intimidation, and plan to litigate the issue through to conclusion in consecutive hearing sessions. This would allow for three weeks of depositions (assuming June 25 start) including the open week of the July 4 which CASE has requested, and would accomodate CASE's attorney's unavailability during the week of July 23.

CONCLUSION

Wherefore, the Board should 1) rule that hearsay will not be accepted to establish or support facts that can be established through the testimony of witnesses with direct knowledge; 2) require that depositions commence the week of June 25; 3) indi-

cate that depositions will proceed commencing with CASE witnesses and 4) schedule the hearing on the intimidation issue to commence July 30.

Respectfully submitted,

Nicholas S. Reynolds

Leonard W. Belter

BISHOP, LIBERMAN, COOK,
PURCELL & REYNOLDS
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 857-9800

Counsel for Applicants

June 11, 1984

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Applicants' Response to CASE's Proposed Schedule and Procedures Regarding Intimidation Issue in the above-captioned matter were served upon the following persons by overnight delivery (*), or deposit in the United States mail, first class, postage prepaid, this 11th day of June, 1984, or by hand delivery (**) on the 12th day of June, 1984.

**Peter B. Bloch, Esq.
Chairman, Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Dr. Walter H. Jordan
881 West Outer Drive
Oak Ridge, Tennessee 37830

**Herbert Grossman, Alternate Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. John Collins
Regional Administrator, Region IV
U.S. Nuclear Regulatory Commission
611 Ryan Plaza Drive
Suite 1000
Arlington, Texas 76011

Chairman, Atomic Safety and Licensing Appeal Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. William L. Clements
Docketing & Service Branch
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

**Stuart A. Treby, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C 20555

Chairman, Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Dr. Kenneth A. McCollom
Dean, Division of Engineering
Architecture and Technology
Oklahoma State University
Stillwater, Oklahoma 74074

Renea Hicks, Esq.
Assistant Attorney General
Environmental Protection
Division
P. O. Box 12548
Capitol Station
Austin, Texas 78711

**Anthony Z. Roisman, Esq.
Trial Lawyers for Public
Justice
2000 P Street, N.W., Suite 611
Washington, D.C. 20036

Lanny A. Sinkin
114 W. 7th Street
Suite 220
Austin, Texas 78701

**Ellen Ginsberg, Esq.
Atomic Safety & Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Leonard W. Belter

cc: Homer C. Schmidt
Robert Wooldridge, Esq.
David R. Pigott, Esq.