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RELATED CORRESPONDENCE

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' MOTION TO COMPEL ANSWERS TO  
APPLICANTS' NINTH SET OF INTERROGATORIES  
TO CASE AND REQUEST TO PRODUCE

Pursuant to 10 C.F.R. § 2.740(f), Texas Utilities Electric Company, et al. ("Applicants") hereby move the Atomic Safety and Licensing Board to compel CASE to provide responsive answers to Applicants' ninth set of interrogatories and request to produce. As demonstrated below, CASE has not adequately responded to Applicants' interrogatories and request to produce as required by Commission regulations.

I. INTRODUCTION

On April 16, 1984, Applicants filed their ninth set of interrogatories to CASE and requests to produce. These requests sought information relating to a matter now referred to as the "T-shirt incident" and also sought supplementation of CASE's responses to certain of Applicants' previous interrogatories. In accordance with Applicants' agreement with CASE, Applicants

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requested supplementation only with respect to unresolved issues, as set forth in the Board's March 15, 1984, Memorandum (Clarification of Open Issues). On May 30, 1984, CASE filed its answer to Applicants' ninth set. Therein, CASE acknowledged that its answer was late, indicating that it had mistakenly believed these interrogatories all dealt with the subject of intimidation, as to which the Board had previously accepted CASE's tentative response to certain interrogatories pending the availability of further information. However, Applicants do not premise the instant motion on CASE's tardiness. We believe that irrespective of this fact CASE's responses to several discovery requests were inadequate and warrant Board attention. For the reasons discussed below, it is important that Applicants be provided with the information requested as soon as possible and we believe this is the most efficient means to resolve these questions. CASE may, of course, supplement its responses to Applicants' requests in its response to this motion. In this way some of Applicants' objections may be obviated.

## II. APPLICANTS' MOTION TO COMPEL

### A. Standards Governing Discovery

Discovery "is intended to insure that the parties . . . have access to all relevant, unprivileged information prior to the hearing . . . ." <sup>1</sup> Indeed, discovery in modern administrative

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<sup>1</sup> Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 582 (1975).

practice is to be liberally granted "to enable the parties to ascertain the facts in complex litigation, refine the issues, and prepare adequately" for the hearing. As to the scope of permissible discovery, it is well-settled that

Interrogatories seeking specification of the facts upon which a claim or contention is based are wholly proper, and that the party may be required to answer questions which attempt to ascertain the basis for his claim or, for example, what deficiencies or defects were claimed to exist with respect to a particular situation or cause.<sup>2</sup>

This is particularly important in NRC practice because contentions provide only general notice to an applicant of the issues an intervenor seeks to raise. "It is left to the parties to narrow those issues through use of various discovery devices so that evidence need be produced at the hearing only on matters actually controverted . . . ."<sup>3</sup>

In accordance with the above principles, answers to interrogatories must be complete, explicit and responsive.<sup>4</sup> The Commission's Rules of Practice state that "an evasive or

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<sup>2</sup> Pilgrim, supra, 1 NRC at 582 (footnote omitted).

<sup>3</sup> Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 334-35 (1980).

<sup>4</sup> 4A Moore's Federal Practice ¶33.26, at 33-150. "The Commission's regulations are based upon and drawn generally from the Federal Rules of Civil Procedure governing discovery, Rules 26 through 33, and, in the main, employ language identical with, or similar to the language of the Federal Rules upon which the process is based. Accordingly, guidance may be had from the legal authorities and court decisions construing the Federal Rules on discovery." Pilgrim, supra, 1 NRC at 581.

incomplete answer or response shall be treated as a failure to answer or respond."<sup>5</sup> Intervenors in NRC proceedings have a responsibility to specify the facts, i.e., the data, information and documents, if any, upon which they intend to rely so that parties may be advised in advance with regard to the nature of the intervenor's case.<sup>6</sup>

Finally, when applying these principles, the Board should keep in mind the observation of the Licensing Board in the Tyrone proceeding:

The Applicants in particular carry an unrelieved burden of proof in Commission proceedings. Unless they can effectively inquire into the positions of the intervenors, discharging that burden may be impossible. To permit a party to make skeletal contentions, keep the bases for them secret, then require its adversaries to meet any conceivable thrust at hearing would be patently unfair, and inconsistent with a sound record.<sup>7</sup>

As demonstrated below, CASE's answers to a number of interrogatories and requests to produce fail to satisfy these principles. Accordingly, Applicants move the Board to compel CASE to provide complete, explicit and responsive answers to Applicants' discovery requests.

B. Discovery Requests As To  
Which Replies Are Inadequate

1. Applicants' first set of interrogatories

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5 10 C.F.R. §2.740(f).

6 Pilgrim, supra, 1 NRC at 586.

7 Northern States Power Co. (Tyrone Energy Park Unit 1), LBP-77-37, 5 NRC 1298, 1300-1301 (1977) (citations omitted).

Interrogatory 2 of Applicants' first set requests, inter alia, that CASE provide for inspection and copying any documents relied upon in the testimony of their witnesses. CASE replied that it has already provided this material except for the log books maintained by Darlene Stiner and relied upon by her in the February and March hearings. CASE states that it will transmit "copies" of these books to Applicants. However, Applicants had originally requested, and we believe CASE had agreed to provide, the original of Mrs. Stiner's log book for inspection. CASE's offer to provide a copy of that log book is not responsive to Applicants' original request. Accordingly, Applicants move that the Board compel CASE to provide to Applicants the original of Mrs. Stiner's log book for inspection. We may also wish copies of the books, but wish first to inspect the originals.

Interrogatory 13 of Applicants first set of interrogatories requests that CASE identify the provisions of 10 C.F.R. Part 50, Appendix B which CASE contends Applicants have not satisfied, specify the manner in which CASE believes Applicants have not satisfied those provisions, and provide the basis for CASE's assertions. CASE's reply to this interrogatory is that it contends that Applicants have failed to satisfy "virtually all" of the provisions of Appendix B, that CASE has not performed a "detailed analysis" of the way in which CASE believes Applicants have not satisfied those provisions, and that CASE generally objects to having to prepare such an analysis.

Each of these responses is inadequate. CASE claims that Applicants have not satisfied "virtually all" of the provisions of Appendix B, yet fails to specify even one specific provision. Such an answer is hardly complete, explicit or responsive and wholly fails to give Applicants' notice of CASE's position. Such responses are clearly inadequate in NRC practice. (See Tyrone, supra, 5 NRC at 1300-01.) In addition, CASE's response to the request for specification of how CASE contends Applicants have not satisfied the provisions of Appendix B is similar inadequate, as is CASE's general objection to providing a response to this interrogatory. (See 10 C.F.R. §2.740b(b) which provides that "the reasons for objection shall be stated in lieu of an answer" when objecting to an interrogatory (emphasis added). In short, CASE's lack of specificity in responding to these interrogatories does not satisfy its discovery obligations and the Board should order CASE to provide responsive answers.

Finally, we note that normal precepts of fairness dictate that the Board compel CASE to provide adequate responses. First, Applicants are seeking supplementation of their interrogatories only with respect to the remaining issues in the proceeding. Thus, we are not unduly burdening CASE by seeking elaboration of CASE's position on issues previously addressed and disposed of by the Board. Second, the Board should assume that if CASE is pursuing issues under the guise of Contention 5, then CASE must have identified provisions of Appendix B which it believes Applicants have not satisfied for each of the remaining issues.

Fairness dictates that Applicants be apprised of those positions promptly to enable preparation for the remainder of the proceeding. Accordingly, we move the Board to order CASE to provide complete, explicit and responsive answers to these interrogatories.

2. Applicants' third set of interrogatories

Interrogatory 4 in this set of interrogatories seeks information similar to that requested in Interrogatory 13 of Applicants' first set of interrogatories. Thus, CASE's reply simply refers to the response to question thirteen of the first set. For the reasons set forth above, Applicants believe the Board should also compel CASE to provide an adequate response to this interrogatory.

Interrogatory 11 of Applicants' third set requests that CASE identify the I&E Reports, other than those previously identified by CASE, on which CASE intends to rely. CASE's reply simply refers to those I&E Reports already admitted into evidence and adds that "perhaps" it would rely upon additional reports not yet admitted. Clearly, such a general reply is inadequate to give Applicants notice of the issues CASE may raise with respect to these I&E Reports.

The Board has already stated its intention to consider relevant I&E Reports which are submitted for the record. (See Memorandum and Order (Additional Scheduling Order), January 4, 1984 at 7). The Board has invited all parties to submit additional reports for the record. Applicants' request that CASE

supplement its previous response to this interrogatory is intended to give Applicants notice of the particular reports in which CASE intends to rely. If CASE does not intend to rely on any other I&E Report, then it should so state. However, if, as CASE suggests, there are other I&E Reports it intends to rely upon, it is imperative that CASE provide a detailed answer to this interrogatory to avoid surprise to Applicants and the Staff. Accordingly, we move the Board to compel CASE to provide a response to this interrogatory promptly.

3. Applicants' fifth set of interrogatories

Interrogatories 2-5 and 3-5 request that with respect to the I&E Reports identified by CASE in Applicants' third set of interrogatories that CASE specify which provisions of 10 C.F.R. Part 50, Appendix B CASE contends Applicants have not satisfied. CASE simply objects to responding to this interrogatory without providing any reason for its objection.

As already discussed, the Board has invited the parties to identify I&E Reports which they believe the Board should consider. The instant interrogatory merely asks that CASE specify the manner in which it intends to utilize those I&E Reports, consistent with the Board's invitation, by identifying the provisions of Appendix B which CASE believes those reports demonstrate Applicants have not satisfied. In addition, CASE has provided no reason for its objection, contrary to the



requirements of the NRC Rules of Practice. Accordingly, the Board should order CASE to respond promptly to this interrogatory.

CASE also objects to responding to Interrogatory 5-5c, which seeks CASE's description of trends which CASE contends demonstrate that Applicants' QA/QA program is inadequate. CASE refers to its pleading dated May 21, 1984, where it seeks, in effect, reconsideration of the Board's March 15, 1984 Memorandum (Clarification of Open Issues) with respect to the filing of expected findings of fact on this issue (at 20). CASE seeks to be permitted not to file findings on this subject until after the hearings have been closed.

CASE's response is unacceptable. As the Board found in its March 15, 1984, Memorandum, it is imperative that CASE file findings regarding this matter to avoid surprise to Applicants and the Staff and permit them to respond to this argument. CASE's proposal is contrary to the Board's valid concern that Applicants and the Staff would be unaware of the particular trends CASE claims exist until after the hearings have closed and would be unable to respond on the record in this proceeding. As Applicants have previously argued, it is unacceptable for parties to raise in proposed findings (as CASE proposes to do here) new arguments and allegations not previously identified for litigation. See, e.g., Applicants' Motion for Reconsideration of Memorandum and Order (Quality Assurance for Design), January 17, 1984, at 18-19. Although not fully agreeing with Applicants in

this regard, the Board has concluded that a remedy for preventing a party from raising new arguments for the first time in their proposed findings is to identify those positions through discovery. (See Memorandum and Order (Reconsideration Concerning Quality Assurance for Design), February 8, 1984 at 8.) To this end Applicants are seeking now information regarding CASE's position on this, and other topics. The Board should warn CASE that failure to respond to these interrogatories will constitute a waiver of CASE's ability to raise this issue (and others) in the future, including in proposed findings.<sup>8</sup> The Board should order CASE to respond to this interrogatory promptly and to provide the expected findings called for by the Board in its March 15, 1984, Memorandum.

Finally, CASE's responses to Interrogatories 22-5 through 24-5 are dependent upon its reply to Interrogatory 5-5c. Accordingly, the Board should also compel responses to Interrogatories 22-5 through 24-5.

4. Applicants sixth set of interrogatories

Interrogatories 1-6.d and 1-6.e request that CASE specify the violations in I&E Reports which CASE contends have been inadequately resolved by the NRC Staff. CASE's reply is that there are instances in which CASE disagrees with the resolution

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<sup>8</sup> Applicants mention this situation here because CASE has already been directed by the Board to provide expected findings in this area. However, the same considerations apply equally to all discovery requests by Applicants and our discussion here should be applied to each request for which we are seeking an order to compel.

by the NRC Staff, but CASE has not made an analysis of this at this time and generally objects to having to do so. CASE does not provide any reason for its objection. As Applicants have already discussed, the NRC Rules of Practice require that responses to interrogatories be full and complete unless a specific objection is made and the reasons for the objection are presented. 10 C.F.R. § 2.740b(b). CASE's reply clearly does not satisfy this requirement. Accordingly, the Board should compel CASE to respond to these interrogatories.

Interrogatories 6-6 through 11-6 request that CASE specify whether it intends to rely upon any NCRs, DDRs or CARs and, if so, to describe the allegations CASE intends to raise with each of those documents. CASE's replies to these interrogatories are again general objections to having to respond, without any specification of the reasons for those objections. Again, such general objections are inadequate and the Board should compel prompt responses.

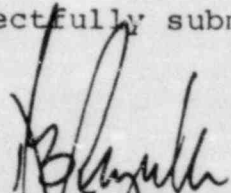
Finally, interrogatories 30-6 and 31-6 seek information regarding CASE's reliance on the "trend analyses" prepared by the NRC Staff. Again, CASE claims it has not performed an analysis of this matter and generally objects to having to do so at this

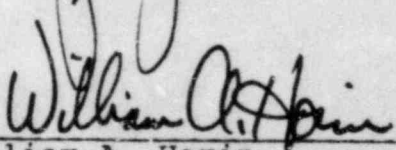
time. As already demonstrated, such general objections are insufficient under the NRC Rules of Practice. In addition, although CASE describes in general terms what it intends to demonstrate with these trend analyses, it fails to respond to one aspect of the question posed in the interrogatory, viz., the "information in those trend analysis on which CASE will rely". In this regard CASE has provided no response to the interrogatory. Accordingly, the Board should compel CASE to provide full and responsive answers to these interrogatories.

III. CONCLUSION

For the foregoing reasons, Applicants move the Board to order CASE to provide full and responsive answers to Applicants' ninth set of interrogatories and requests to produce.

Respectfully submitted,

  
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Nicholas S. Reynolds

  
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June 11, 1984

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of	)	
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TEXAS UTILITIES ELECTRIC	)	Docket Nos. 50-445 and
COMPANY, <u>et al.</u>	)	50-446
	)	
(Comanche Peak Steam Electric	)	(Application for
Station, Units 1 and 2)	)	Operating Licenses)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Motion to Compel Answers to Applicants' Ninth Set of Interrogatories to CASE and Request to Produce" in the above-captioned matters 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.

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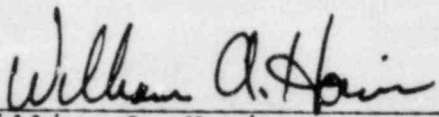
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