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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of
TEXAS UTILITIES ELECTRIC
COMPANY, et al.
(Comanche Peak Steam Electric
Station, Units 1 and 2)

Docket Nos. 50-445/2
50-446/2

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NRC STAFF'S PROPOSED STANDARD FOR LITIGATING
ALLEGATIONS OF INTIMIDATION

I. INTRODUCTION

On May 8, 1984, Applicants proposed a standard to be applied in adjudicating allegations raised by CASE regarding a series of incidents which collectively are being referred to by the parties and Board as "harassment and intimidation." Applicants' Proposed Standard For Litigating Allegations of Intimidation dated May 8, 1984 (hereinafter "Applicants' Filing"). The Board has afforded the other parties the opportunity to provide their views on a standard to be applied in adjudicating the "harassment and intimidation" issue. Set forth below is the NRC Staff's view on the scope of this issue as it relates to the implementation of 10 C.F.R. Part 50, Appendix B, and reasonable assurance that Comanche Peak can operate without undue risk to the health and safety of the public raised by Contention 5.

II. DISCUSSION

A. Proposed Standard

The harassment and intimidation issue is relevant in this proceeding only as it relates to whether the Applicants' quality assurance program

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complies with the requirements of 10 C.F.R. Part 50, Appendix B and the required finding on construction in accordance with Contention 5.

Therefore the starting point for developing a standard for litigating this issue is the requirements of Appendix B. This appendix establishes quality assurance requirements for all activities affecting the safety relating functions of identified structures, systems and components of nuclear power plants. As used in this appendix, "quality assurance" comprises all those planned and systematic actions necessary to provide adequate confidence that a structure, system, or component will perform satisfactorily in service. Key requirements of the appendix are: (1) "the authority and duties of persons and organizations performing activities affecting the safety-related functions of structures, systems, and components shall be clearly established and delineated in writing," (2) "the program shall be documented by written policies, procedures, or instructions," and (3) "the persons and organizations performing quality assurance functions shall have sufficient authority and organizational freedom to identify quality problems, to initiate, recommend, or provide solutions, and to verify implementation of solutions." 10 C.F.R. Part 50, Appendix B.

The standard for litigating assertions of harassment and intimidation should be whether the Applicants have committed any acts or made any statements which resulted in the written quality assurance program not being implemented such that the quality assurance program was inadequate to provide reasonable assurance that the plant can be operated without endangering the health and safety of the public. The Staff agrees with the Applicants that the ultimate determination the Board must make in this proceeding is whether, as raised in Contention 5, there is reasonable

assurance that the activities authorized by the operating license can be conducted without endangering the health and safety of the public. Applicants' Filing at 9-10. Thus, an important factor to consider is whether, despite the alleged intimidation incidents, there is adequate evidence that the plant's hardware nonetheless has been constructed in such a manner that there is reasonable assurance that the plant can operate without endangering the health and safety of the public.^{1/} Further, the Staff agrees that it is unreasonable to expect any quality assurance program to function in a perfect fashion. Compare Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983); Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-77, 18 NRC 1365, 1368, n.6 (1983).

The Staff disagrees with the Applicants' proposed elements 2 and 3 of its proposed standard for litigation. As noted above, the allegations raised by CASE involves a series of incidents collectively referred to by the parties and Board as "harassment and intimidation." However, the Applicants' proposed elements of "fear" and "harmful effects" need

^{1/} The Staff notes that allegations of intimidation and harassment of Applicants' personnel, if proven, may constitute a violation of the Commission's regulations and lead to the instigation of enforcement action by the Staff against Applicants. However, a Staff finding that Applicants violated the Commission's regulations does not, per se, automatically preclude the Board from finding in favor of the grant of an operating license for CPSES pursuant to 10 C.F.R. § 50.57(a), and the Staff granting an operating license to Applicants. Rather, the Applicants' operating license should be denied by the Board only if the Board determines that, upon consideration of the totality of the evidence in the record, that there has been a pervasive breakdown in the Applicants' quality assurance procedures of such dimensions as to raise legitimate doubt as to the over all integrity of the facility and its safety-related structures and components. Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983).

not be present in all the incidents. Rather, some incidents may involve acts or statements which resulted in a quality control inspector not identifying quality problems as a result of a supervisor discouraging him from doing so or appealing to a sense of team spirit. The promise of a benefit for not following the written procedures of the quality assurance would be equally harmful. These elements may raise questions of management style. In the Staff's view, the question of management style is not the relevant issue. The relevant issue is whether acts of harassment and intimidation affected the Applicants' quality assurance program such that the program was inadequate to provide reasonable assurance that the plant can operate without endangering the health and safety of the public.

B. Litigation of Intimidation

The Applicants raise three points regarding the litigation of this issue. First, Applicants, while acknowledging that they have the ultimate burden of proof in this proceeding, note that CASE also bear evidentiary responsibilities. These responsibilities involve going forward with sufficient evidence to establish a prima facie case to put the Board and parties on notice as to the matter in controversy. The Staff agrees that CASE must go forward with sufficient evidence to establish the specifics of the matters in controversy. At that point, the Applicants have the burden of proof to resolve the matter in controversy in their favor. The Staff disagrees that the Applicants' burden is solely to rebut the claims of CASE and disprove allegations of harassment and intimidation. Rather, given the scope of Contention 5, the Staff submits that the Applicants must not only disprove specific assertions of harassment and intimidation but must further prove on the record as a whole that it has an adequate

quality assurance program which fully satisfies the requirements of Appendix B of 10 C.F.R. Part 50.

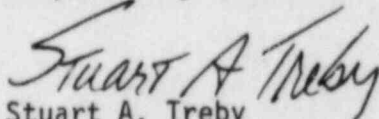
A second point raised by Applicants concerns the use of hearsay evidence. The Staff agrees with the Applicants' agreement that for the use of hearsay evidence to be admissible in NRC licensing proceedings, that evidence must be reliable. However, the Staff disagrees that hearsay evidence involving exchanges between individual relating to a claim of intimidation is, by definition, automatically so unreliable that such evidence may not be admitted in administrative proceedings. The Board is capable of judging the weight to be accorded to such evidence.

The third point relates to the prompt disclosure by CASE of its claims and the identities of its witnesses. The Staff agrees that disclosure of these matters is appropriate.^{2/}

III. CONCLUSION

The Board should adopt the standard set forth above to govern the litigation of the harassment and intimidation issue. Further, the Board should give consideration to the Staff's views set forth above regarding evidentiary questions which may arise in the litigation of this issue.

Respectfully submitted,


Stuart A. Treby
Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland
this 12th day of June, 1984

^{2/} The Staff notes that disclosure of some of these matters have been the subject of discussion and correspondence between the parties.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S PROPOSED STANDARD FOR LITIGATING ALLEGATIONS OF INTIMIDATION" 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 12th day of June, 1984:

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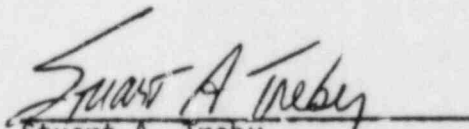
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