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USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'84 JUN 21 P4:41

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

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
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NRC STAFF ANSWER OPPOSING CASE'S REQUEST FOR DISCOVERY  
AGAINST THE STAFF AND MOTION FOR A PROTECTIVE ORDER

I. Introduction

On June 4, 1984, Intervenor CASE filed its "Request for Discovery of the Nuclear Regulatory Commission Staff" ("CASE's Request"). CASE's Request seeks discovery against the NRC Staff ("Staff") pursuant to 10 C.F.R. § 2.740 on the issue of harassment and intimidation. CASE's Request, p. 1. Discovery is proposed to be taken through oral examination pursuant to § 2.740a, written interrogatories under § 2.740b, and through production of documents under § 2.741. Id. While CASE's Request seeks discovery through interrogatories and depositions, as well as through production of documents, CASE did not file any interrogatories nor did it file any notices of depositions. Accordingly, CASE's only outstanding discovery request is for production of documents. For the reasons set forth below, the Staff opposes CASE's document request in its entirety.

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## II. Discussion

The Staff opposes CASE's document request because CASE's request is overly broad, it requests documents which are either in CASE's possession or available at the NRC's public document room ("PDR") in Washington, D.C., it requests intra-agency and/or pre-decisional materials which are not disclosable pursuant to 10 C.F.R § 2.790(a)(5), it requests materials which may adversely affect ongoing Staff inspections and OI investigations and are therefore non-discoverable pursuant to § 2.790(a)(7), and because CASE did not comply with the requirements of § 2.744(a) for those documents which it could not obtain pursuant to § 2.790.

While CASE acknowledges that discovery against the Staff is on a different footing than discovery against other parties (CASE's Request, p. 2, citing Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 323 (1980) ("Susquehanna")), a review of CASE's Request for documents establishes that CASE neither understands the import of the Commission's regulations governing discovery against the Staff, nor heeds the words of the Appeal Board in Susquehanna on this subject. Section 2.790 of the Commission's regulations routinely makes available, with limited exception, the Staff documents that are relevant to licensing proceedings in the NRC PDR. Susquehanna, 12 NRC at 323. Accordingly, 10 C.F.R. § 2.744 limits documentary discovery against the Staff "to items not reasonably obtainable from other sources", Id., unless the presiding officer determines, upon application by the requesting party and after in camera examination, that the document is relevant and

"necessary to a proper decision in the proceeding."<sup>1/</sup> Id., 10 C.F.R. § 2.744(c). A review of CASE's request for documents clearly establishes that CASE's Request does not comport with the requirements of 10 C.F.R. § 2.744.

CASE indiscriminately requests:

All information developed in connection with any inspections, evaluations, team reviews, or any other probe (by any name), which is not privileged by any member of the [NRC] staff ...

CASE's Request, p. 2. CASE clarifies this request by calling for production of all inspections by the Inspection and Enforcement Division ("IE"), the Office of Investigations ("OI"), and by special inspection teams such as the SIT, SALP, and the "Task Force sent to Comanche Peak last month." Id., pp. 2-3. CASE's request is overly broad. The Staff asserts that CASE seek documents which are entirely unrelated to the issue of intimidation, and therefore not necessary to a proper decision on this issue. For example, the SIT Report focused on allegations regarding design adequacy of pipe supports; intimidation was not the subject of inquiry by the SIT. Similarly, many matters reported on in the various inspection reports on CPSES, as well as the "task force" on CPSES, addressed problems with construction adequacy, or pre-operational testing adequacy, and do not address or investigate intimidation. Since many of the documents requested by CASE are "not necessary to a proper decision" on intimidation, see 10 C.F.R. § 2.744(c), the Staff opposes CASE's documentary request.

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<sup>1/</sup> Section 2.744(c) also requires the presiding officer to find that the document is exempt from disclosure under § 2.790, before the presiding officer can order the Staff to produce the document or information.

The Staff also asserts that the 10 C.F.R. § 2.744 requirement of unavailability of requested documents from other sources has not been met, since CASE possess, or has ready access to the material requested by it. The inspection reports, special reports (such as SIT Report, Staff Exhibit 207), the SALP Report, press releases, and agency briefing papers listed in CASE's Request are readily available to CASE, since all reports are in the PDR. Moreover, CASE is on the CPSES service list for distribution of documents at both NRR and Region IV; therefore CASE routinely receives these requested materials. CASE is also on Staff counsel's service list for CPSES, and it receives copies of all documents transmitted to the Board by Staff counsel in this proceeding. The Staff notes that the record in this proceeding includes a large number of NRC inspection reports submitted by CASE as proposed exhibits. Since the documents asked for by CASE are readily available to it, the Staff concludes that 10 C.F.R. § 2.744's requirement on non-availability from other sources has not been met, and CASE is not entitled to discovery on these items.

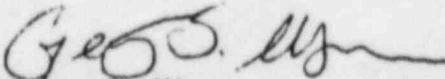
CASE also requests that the Staff provide "all internal reports prepared on the subject of harassment and intimidation," all notes to the file by inspectors, investigators or staff which are not privileged, notes of meetings, interview notes, statements, depositions, anonymous phone call tips, complaints, and "reports or memorandum prepared informally to be responsive to requests for explanations about ... harassment and intimidation by members of Congress or other elected or appointed officials." CASE's Request, pp. 3-4. The Staff objects to this portion of CASE's Request, since it asks for documents and information which are privileged and not subject to disclosure under § 2.790(a)(5)

and (7), and are not necessary to a proper decision on the issue of intimidation. Draft letters, memorandum, reports, and briefing papers are exempt from disclosure under § 2.790(a)(5), since the disclosure would impinge upon the agency's ability to conduct full and frank discussions on administrative actions. EPA v. Mink, 410 U.S. 73, 85-91 (1983); Kaiser Aluminum & Chemical Corp. v. U.S., 157 F. Supp. 939, 946 (Ct. Cl. 1958), see also Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 788, 792 (D.C. Cir. 1971). Disclosure of investigative notes and reports would interfere with the Staff's and OI's ongoing inspections and investigations into the area of worker intimidation, and are exempt from disclosure under § 2.790(a)(7) at this time. Moreover, the OI and/or Staff inspection reports on intimidation as released will contain the factual information contained in the requested notes and interview records, and there is no need for the underlying notes and interview records. Further, the Commission's regulation explicitly exempt from disclosure handwritten notes and drafts. 10 C.F.R. § 2.790, n.8. Accordingly, the Staff opposes CASE's documentary request in this regard.

### III. Motion for Protective Order

For the reasons set forth above, the Staff requests to Board to issue a protective order pursuant to 10 C.F.R. § 2.740(c) that the Staff need not respond to the document request in CASE's Request.

Respectfully submitted,

  
Geary S. Mizuno  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 13th day of June, 1984

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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TEXAS UTILITIES ELECTRIC  
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(Comanche Peak Steam Electric  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER OPPOSING CASE'S REQUEST FOR DISCOVERY AGAINST THE STAFF AND MOTION FOR A PROTECTIVE ORDER" in the above-captioned proceeding have been served on the following deposit in the United States mail, first class, or, as indicated by (\*) through deposit in the Nuclear Regulatory Commission's internal mail system, or (\*\*) expedited delivery this 13th day of June, 1984:

Peter B. Bloch, Esq., Chairman\*  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Herbert Grossman, Alternate Chairman\*  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Dr. Walter H. Jordan  
Administrative Judge  
881 W. Outer Drive  
Oak Ridge, TN 37830

Dr. Kenneth A. McCollom  
Administrative Judge  
Dean, Division of Engineering,  
Architecture and Technology  
Oklahoma State University  
Stillwater, OK 74078

Mrs. Juanita Ellis  
President, CASE  
1426 South Polk Street  
Dallas, TX 75224

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

Nicholas S. Reynolds, Esq.\*\*  
William A. Horin, Esq.  
Bishop, Liberman, Cook,  
Purcell & Reynolds  
1200 17th Street, N.W.  
Washington, DC 20036

Mr. James E. Cummins  
Resident Inspector/Comanche Peak  
Steam Electric Station  
c/o U.S. Nuclear Regulatory Commission  
P.O. Box 38  
Glen Rose, TX 76043

John T. Collins  
William L. Brown  
U.S. Nuclear Regulatory Commission  
611 Ryan Plaza Drive, Suite 1000  
Arlington, TX 76011

Mr. Michael D. Spence, President  
Texas Utilities Electric Company  
Skyway Tower  
400 North Olive Street, L.B. 81  
Dallas, TX 75201

Lanny Alan Sinkin  
114 W. 7th, Suite 220  
Austin, TX 78701

Atomic Safety and Licensing Board  
Panel\*  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Docketing and Service\*  
Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

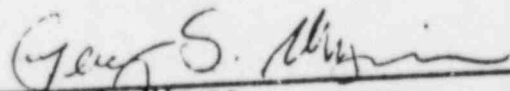
Billie Pirner Garde  
Citizens Clinic Director  
Government Accountability Project  
1901 Que Street, N.W.  
Washington, DC 20009

Robert A. Wooldridge  
Worsham, Forsythe, Sampels & Wooldridge  
2001 Bryan Tower, Suite 2500  
Dallas, TX 75201

Ellen Ginsberg, Esq.\*  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Atomic Safety and Licensing Appeal  
Board Panel\*  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

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

  
\_\_\_\_\_  
Geary S. Mizuno  
Counsel for NRC Staff