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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '84 OCT 10 A11:13

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of	
TEXAS UTILITIES GENERATING COMPANY, et al.	Docket Nos. 50-445-1 OL and 50-446-1 OL
(Comanche Peak Steam Electric Station Station, Units 1 and 2)	

CASE'S MOTION FOR BOARD TO REFUSE
APPLICANTS' MOTION FOR SUMMARY DISPOSITION
REGARDING TRIP REPORT OF J. J. LIPINSKY

On October 2, 1984, CASE received Applicants' 9/29/84 Motion for Summary Disposition Regarding Trip Report of J. J. Lipinsky. It is noteworthy that Applicants' Motion was filed, not in the intimidation portion of these proceedings, but in the other portion. For the reasons stated herein, CASE (Citizens Association for Sound Energy), Intervenor herein, hereby files this, its Motion for Board to Refuse Applicants' Motion for Summary Disposition Regarding Trip Report of J. J. Lipinsky.

The Board is well aware of the background and details of the Lipinsky trip report (at this point, undoubtedly much more familiar than is CASE President Juanita Ellis, CASE's primary representative in these proceedings except for the intimidation portion). The Board is also aware of the fact that these proceedings have been basically broken up into two separate proceedings -- the intimidation portion and the remaining portion /1/. To avoid confusion, hereinafter in this pleading unless specifically

/1/ This occurred because of an apparent misunderstanding on the part of Mrs. Ellis, who would never have agreed to such a procedure had it been clear that such was intended, but who has to date accepted such procedure because it appeared that she was the only one who did not understand it that way.

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stated otherwise, whenever CASE is referred to it should be construed to mean that part of CASE which is involved in everything except the intimidation portion of the proceedings and for which Mrs. Ellis is the primary representative.

CASE is generally aware that there are also substantive issues being discussed in the intimidation portion of the proceedings as an integral and necessary part of that issue. CASE's primary representative has been able to assist in some small way by supplying documents when she became aware of some of the issues under discussion; however, there is no doubt that there is other necessary documentation which could, should, and would have been supplied to complete the record, had she not had to address all her time and energies to answers to Applicants' Motions for Summary Disposition and other matters, and had been more aware of the issues under discussion in the intimidation portion of the proceedings. She has not, in fact, even been able to find the time to read the transcripts of the intimidation proceedings, much less take the time to attend the intimidation hearings. The Board has ruled that the clock on CASE's responses to Motions for Summary Disposition will keep running and has not allowed Mrs. Ellis to deduct the weekend before or the time during the intimidation hearings, as has been the usual practice for these proceedings. CASE is, for all intents and purposes, currently engaged in the equivalent of hearings on the design/design QA/QC issues.

It should also be noted that, although other CASE Board members (Dr. and Mrs. Boltz) have sporadically attended portions of the intimidation hearings, they did so only occasionally and as casual observers and certainly not with the understanding that they might be called upon later to

provide background information necessary to answer a Motion for Summary Disposition.

Applicants had to have known that they were at least thinking of filing such a Motion for Summary Disposition. Had Applicants ever indicated to CASE's primary representative in the other-than-intimidation portion of the hearings that they had any intention of filing a Motion for Summary Disposition in that portion of the proceedings on matters which were under discussion in the intimidation portion, she would have insisted upon being given time to attend those proceedings. At a minimum, this would have afforded CASE the opportunity for argument regarding this matter -- in advance of hearings on those issues -- and the Licensing Board would probably have provided her with the opportunity to attend those hearings under such circumstances. However, Applicants did not so indicate to Mrs. Ellis, and the Board has now been robbed of the opportunity to have made that decision in advance of hearings, and Mrs. Ellis has now been robbed of the opportunity to have attended pertinent and material hearing sessions.

For these reasons, CASE's primary representative is not at all familiar even with who has testified in the intimidation portion of the proceedings, much less what their testimony was. Although she is aware that the Vice President of O. B. Cannon Company, apparently Applicants' Witness Brandt, and Board Witness Corey Allen have testified regarding intimidation/protective coatings, and that the Dunham DOL transcript has been accepted, that is about the extent of her knowledge in this regard (except for brief general comments heard about the hearings and newspaper reports). It would take quite a bit of time to obtain copies and review the necessary portions of the depositions/hearings transcripts to be able to adequately respond.

Moreover, the intimidation portion of these proceedings is right in the middle of litigation, and it is Mrs. Ellis' understanding that the Licensing Board has just issued subpoenas for the President of O. B. Cannon Company and for Mr. Lipinsky. It is obvious that testimony pertinent and material to the issues discussed in Applicants' Motion for Summary Disposition Regarding Trip Report of J. J. Lipinsky (which includes an affidavit by Mr. Lipinsky himself) has already been developed in the intimidation portion of the proceedings, and that additional substantive testimony is likely to be developed during the hearings, especially those at which the President of O. B. Cannon and Mr. Lipinsky testify.

Additionally, for CASE to respond to Applicants' Motion for Summary Disposition would take valuable and limited time away from pleadings regarding the design/design QA/QC portion of these proceedings. Although there are no hearings presently underway regarding these matters, the back-and-forth written pleadings are in effect replacing hearings and should be so considered.

Applicants' Motion will also obviously delay these proceedings, since (in addition to being allowed time to review the record), it will also be necessary for CASE President Juanita Ellis to attend the remaining hearings where O. B. Cannon representatives, Applicants' witnesses testifying regarding these matters, or other Board witnesses testify.

Further, it will be necessary to engage in discovery regarding many of the statements made in Applicants' pleading, a factor which would result in additional delay. Such discovery is absolutely essential since CASE does not intend to subpoena any present or former protective coatings QC inspectors to testify in future hearings on protective coatings; (and as far

as we are aware, there is no provision under NRC regulations which would even enable us to subpoena affidavits from such inspectors, even if we were inclined to do so, which we are not). /2/ /3/.

Applicants could have avoided many of these problems had they simply opened their collective mouth and advised Mrs. Ellis of their intentions. They did not. And they should not now be allowed to use this to their own advantage and to CASE's detriment.

CASE does not believe that it is appropriate, under these circumstances, to order it to answer Applicants' Motion, and CASE moves that the Board refuse Applicants' Motion under the provisions of 10 CFR 2.749(a), which states, in part:

/2/ In the past, we have simply defaulted on responding to Applicants' Motions for Summary Disposition on other protective coatings matters when the Board declined to allow us to obtain admissions and answers to interrogatories from Applicants. We have made the decision that we will not jeopardize the current or future livelihood of any CASE witnesses or have them jected to further intimidation and harassment, whether in hearings or by affidavit, by forcing them to come forward against their will, even if we were able to do so under a protective order or in camera. (Had there been any doubt regarding our decision in this regard, that doubt would have been removed by the unfortunate and unforgivable blunders of the NRC regarding the identification of CASE's Witness F in the intimidation hearings.)

To default on this issue, however, would be extremely prejudicial to CASE and very detimental to a complete record on this important issue. On the other hand, we do not intend to roll over and play dead on the Lipinsky Trip Report, and will attempt to comply with the Board's orders as necessary to adequately address this issue.

/3/ It should also be noted that Applicants' Statement of Material Facts Regarding Trip Report of J. J. Lipinsky As To Which There Is No Genuine Issue is not done in the usual format, in that there is absolutely no citation to any affidavit or attachment. This leaves CASE with the additional chore of having to dig through what appears to be about 250 pages or so to determine the basis for each of Applicants' statements. Although this may not be specifically contrary to NRC regulations, this is not the format which has been used before in these proceedings, and it certainly places an additional and unnecessary burden on this Intervenor and will require additional time, should the Board rule that we must respond to Applicants' Motion.

"The Board may dismiss summarily motions filed shortly before the hearing commences or during the hearing if the other parties or the board would be required to divert substantial resources from the hearing in order to respond adequately to the motion."

As discussed herein, although there are not actually hearings under way regarding the design/design QA/QC issues, the procedure currently under way is taking the place of hearings, and should be treated as though hearings were ongoing, to which CASE is already devoting almost all of its time.

We also make this motion under the provisions of 10 CFR 2.749(c), which states, in part:

"Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the presiding officer may refuse the application for summary decision or may order a continuance to permit affidavits to be obtained or make such other order as is appropriate and a determination to that effect shall be made a matter of record." /4/

Respectfully submitted,

Juanita Ellis

(Mrs.) Juanita Ellis, President
CASE (Citizens Association for Sound Energy)
1426 S. Polk
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214/946-9446

/4/ Should the Board decline to accept Mrs. Ellis' representations herein, please advise and she will supply a sworn affidavit.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	}{	
	}{	
TEXAS UTILITIES ELECTRIC	}{	Docket Nos. 50-445-1 and -2
COMPANY, et al.	}{	and 50-446-1 and -2
(Comanche Peak Steam Electric	}{	
Station, Units 1 and 2)	}{	

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of

CASE's Motion for Board to Refuse Appliants' Motion for Summary Disposition Regarding Trip Report of J. J. Lipinsky

have been sent to the names listed below this 6th day of October, 1984, by: Express Mail where indicated by * and First Class Mail elsewhere.

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