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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
TEXAS UTILITIES ELECTRIC)	50-446
COMPANY, ET AL.)	
)	(Application for
(Comanche Peak Steam Electric)	Operating Licenses)
Station, Units 1 and 2))	

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APPLICANTS' MOTION FOR RECONSIDERATION
OF MEMORANDUM AND ORDER (MORE DETAIL
ON INDIVIDUAL PIPE SUPPORTS)

By Memorandum and Order of October 18, 1984, the Atomic Safety and Licensing Board ("Board") Chairman ordered Applicants to provide additional detailed information regarding Applicants' Motion for Summary Disposition Regarding Stability of Pipe Supports, filed June 17, 1984. The Board Chairman stated that the Board "is unable to reach a reasoned decision . . . without further information with which to evaluate the concerns of the Board, as expressed in our previous orders." Memorandum and Order at 1. The Board did not further particularize its concerns. The Board also provided the Intervenor a "full month"

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to "respond" to the information to be provided by Applicants. For the reasons set forth below Applicants move the Board to reconsider several aspects of its Memorandum and Order.¹

I. BACKGROUND

On December 28, 1983, the Board issued its Memorandum and Order (Quality Assurance for Design) in which it concluded, at 22-29, that the record was insufficient to resolve certain allegations regarding support stability. The Board subsequently proposed, in its Memorandum and Order (Reconsideration Concerning Quality Assurance for Design), February 8, 1984 (at 16), a method to resolve the Board's concerns, including a series of questions to be addressed by Applicants. Applicants committed to provide additional information on the stability question in their Plan,² which the Board agreed should be adequate to provide the Board with the necessary assurance (Tr. 10,339-40).

By agreement of the Board and parties the summary disposition process was employed to resolve these issues in order to avoid lengthy hearing sessions and thereby to facilitate the expeditious resolution of the outstanding pipe support design issues (Tr. 13,797-13,804). Applicants filed their motion for summary disposition on stability on June 17, 1984. During the course of the next four months CASE requested through informal

¹ At Applicants' request, the Board Chairman extended to November 5, 1984, the time to submit this motion.

² Applicants' Plan to Respond to Memorandum and Order (Quality Assurance for Design), February 3, 1984, at 5, Item 2.

discovery, and Applicants provided, additional information regarding the stability issue. Applicants provided all information requested by CASE on this topic. Simultaneous with CASE's discovery, Applicants met with and provided additional information to the NRC Staff regarding the stability question. CASE also received the information provided to the Staff. CASE filed its answer to Applicants' motion for summary disposition on October 15, 1984. Applicants have not yet responded to CASE's answer, nor has the NRC Staff answered Applicants' motion.³

On October 18, the Board issued its Memorandum and Order.

II. APPLICANTS' MOTION FOR RECONSIDERATION

The Board's new questions will serve to broaden the issues and impose even further unwarranted delay in the process. The Board's rationale for the requests is only that the information is necessary "to reach a reasoned decision" and "to evaluate the concerns of the Board, as expressed in [the Board's] previous orders." Because the new questions will impose a significant burden on Applicants, and because the questions focus on Board concerns rather than specific issues raised by the parties, the Board should reconsider its Memorandum and Order.

The Board should be fair and efficient in the conduct of the proceeding and should avoid undue delays, as mandated by Commission Policy and the Rules of Practice. This includes the

³ The Staff has indicated their answer will be filed in mid-December 1984.

obligation not to unduly tax the resources of any party, including Applicants in NRC cases, with inquiries into "Board concerns" that transcend issues raised by the parties. Unless Boards exercise judicial restraint and follow both the letter and the spirit of 10 C.F.R. §2.760a, cases will drag on interminably and the issues in litigation will no longer be those raised by the parties.

A. The Board's Request
Improperly Expands the Issues

Licensing Boards are to resolve only those issues properly placed in contention or raised sua sponte. See Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1113-14 (1981); 10 C.F.R. §2.760a. Further, the Commission has dictated that Licensing Boards are to conduct proceedings efficiently so that they move along at an expeditious pace, consistent with the demands of fairness.⁴ In the present situation, the issue of the potential instability of particular types of supports was raised by CASE and litigated by the parties. However, the Board has since expanded those specific issues far beyond the initial allegations. This broadening and deepening of the issues is contrary to the proper role of Licensing Boards in NRC proceedings.

⁴ Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981); 10 C.F.R. §2.718.

In its December 28, 1983, Memorandum and Order the Board raised certain questions concerning the potentially unstable supports which were the subject of CASE's allegations. The Board specified in its Memorandum and Order (Reconsideration Concerning Quality Assurance for Design), February 8, 1984 (at 16), the information it believed was necessary to resolve the stability issue, as follows:

What is needed is a review of a detailed, worst-case sample of about 5 of the 30 cases of instability investigated by the Staff. Thus, the Board will become informed in detail of the relationship between the design process and the stability of pipe supports. [Memorandum and Order (Reconsideration Concerning Quality Assurance for Design) at 16.]

The Board went on to pose seven questions which it believed should be answered with respect to the identified cases of potential instability.

Applicants' motion for summary disposition responded to the Board's stated concerns. Therein, Applicants evaluated four categories of potentially unstable supports. Each of the types of potential instability investigated by the Staff is encompassed in these four categories. Further, Applicants responded to each of the Board's questions with respect to those supports. Applicants believe they have been fully responsive to the Board's original request for further evidence on the stability issue. Now, however, without any explanation as to why Applicants'

response did not satisfy the Board's original questions (see also discussion infra at 9-11), the Board has raised more questions to satisfy unspecified Board "concerns".⁵

Such Board inquiries are inconsistent with Commission policy and practice and the regulatory scheme contemplated by Congress. In fact, the effect of the Board's approach to litigation is to add another party (the Board), one who can rule on its own requests for discovery, sanction conduct it feels interferes with its theories, and redefine issues as it chooses. Such a role for a Licensing Board is inherently unfair to Applicants and directly conflicts with the Board's responsibilities in an operating license proceeding established by the Rules of Practice (e.g., 10 C.F.R. §2.760a), with which the Board is bound to comply, Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 and 20, ALAB-696, 16 NRC 1245, 1263 (1982)). If there is any doubt that such is the case, one need only compare the specific issues which were litigated and addressed in the parties' proposed findings on this topic, with the issues and questions posed by the Board in its memoranda and orders on the stability question, and particularly the latest requests in the Board's Memorandum and Order. Clearly, Applicants are faced with

⁵ Not only are the particular questions posed by the Board in its latest Memorandum and Order new, but the class of supports for which the Board seeks information is far broader than those originally placed in issue by the parties (or initially subject to Board inquiry).

resolving far more questions and issues on this topic now, after the Board has taken over pursuit of the topic to satisfy "Board concerns".

Accordingly, Applicants move the Board to reconsider its instant inquiry. Applicants submit the Board should withdraw its Memorandum and Order.

B. The Board's Request is Not Timely

As already noted, Licensing Board proceedings are to be conducted efficiently and expeditiously, consistent with the demands of fairness. However, the Board's instant request for additional information is inconsistent with these requirements. The request not only is not timely and will create delay, but on its face it is not an efficient means of resolving Board "concerns". Although it is not clear what is the actual source of the Board's "concerns", we can see no justification for seeking this information at this time.

As discussed below, it is difficult to determine exactly what the basis for the Board's questions is (see discussion, at 9-11). It appears most likely that the source of the Board's questions is Applicants' motion itself, given that is the only pleading cited by the Board. That motion was filed on June 17, 1984. The Board's present request was issued on October 18, 1984, over four months after Applicants' motion. If Applicants' motion is indeed the basis for the Board's "concern", such delay

is unfair.⁶ Had the Board originally believed, four months ago, that more was needed to respond to the Board's "concerns", the Board was obligated, in the interest of fairness, to provide Applicants with timely notice. The numerous extensions of time afforded CASE to respond to Applicants' motions (CASE's answer on this motion was filed almost four months after Applicants' motion) have already created substantial delay in resolving these issues. For the Board to wait until now to expand the issues and seek further information (and to also afford CASE a month to file a "response" (see discussion infra at 12-14)), is inconsistent with the Board's responsibility to avoid delay.⁷

The other possible source for the Board's questions is CASE's answer to Applicants' motion. Although the Board does not expressly cite to CASE's answer in support of its request, it appears that the Board's questions may be derived from CASE's answer. However, CASE on discovery did not delve into these

⁶ In this regard it is not clear what the Board meant by its comment that it was issuing its "request at an early time in the interest of expedient resolution of the case." Memorandum and Order at 3.

⁷ That the Staff has not filed its response is no justification. As the Board has already acknowledged, its own review of these issues may proceed without Staff answers (Tr. 13,924). Indeed, the Board's responsibility to avoid delay extends to every aspect of the proceeding, not selected portions. Thus, if the Staff is tardy it does not justify disregarding the other parties' and the Board's independent obligations. See Statement of Policy, CLI-81-8, supra, 13 NRC at 454 (Delay caused by the Staff is to be reported to the Executive Director of Operations, who, in turn, is to apprise the Commission).

details, and thus neither should the Board.⁸ So postured, the Board should not intercede in such a manner lest the Board's role as the independent trier of fact be compromised.

In sum, the Board's instant request is inconsistent with the Board's responsibility to conduct these proceedings efficiently, fairly and without delay. Indeed, the timing of the Board's request, coming as it does four months after Applicants filed their motion, is itself unfair to Applicants. Accordingly, we move the Board to reconsider its Memorandum and Order and to withdraw its requests for information.

C. The Board Has Not Demonstrated A
Need For The Requested Information

Should the Board nonetheless believe that its request for information would not improperly broaden the issues and is not untimely, the Board should nonetheless recognize that it has not explained why the requested information is necessary for its decision on the issues before it. The Board stated only that it will be "unable to reach a reasoned decision . . . without further information with which to evaluate the concerns of the Board, as expressed in [the Board's] previous orders." However,

⁸ In CASE's answer it repeatedly complains of not having certain "documentation" (see, e.g., CASE answer at 4, 19, 22, 35, 36, 43). However, CASE ignores the fact that it could have but did not request such information during informal discovery on this issue. (Applicants provided CASE with all the information it did request regarding stability.) The Board should not cure CASE's own shortcoming by seeking this information now and affording CASE an opportunity "to respond".

the Board does not indicate why it cannot reach a reasoned decision. It neither identifies particular inadequacies in Applicants' motion, nor the specific "concerns" which it is unable to "evaluate".

In its December 28, 1993, Memorandum and Order (Quality Assurance for Design) the Board raised certain questions regarding the pipe support stability issue. Applicants noted their intent to address further the stability issue in their Plan to Respond to Memorandum and Order (Quality Assurance for Design), filed February 3, 1984. In fulfillment of that commitment, Applicants provided additional information regarding the stability issue and responded to each of those questions in its motion for summary disposition.

It is only reasonable and fair that the Board explain in some detail the reasons for its requests. In the first instance, these issues concern complicated technical and procedural questions which can best be resolved if the Board indicates its concerns ab initio. Applicants have been inundated in this proceeding with Board questions and inquiries of unprecedented volume and scope. Few days pass without the Board calling for further submittals from Applicants (but never from intervenor). The Board should not (and, we trust, does not) perceive its role as one of taking the intervenor's issue and running with it. This is inherently unfair and unauthorized under Commission policy and regulations. However, the net effect of the Board's Memorandum and Order is to do just that.

In sum, if the Board declines to withdraw its present inquiry for the reasons discussed previously, the Board should modify its Memorandum and Order to explain the basis for the requests. In particular, the Board should identify the particular Board "concerns" which it believes have not been satisfied. This will provide Applicants an opportunity to assure the Board and Applicants are proceeding upon a proper understanding of the record in the first instance, and will provide Applicants fair notice of the issues the Board believes are in the case. This will assure that Applicants' response is properly targeted.⁹ The Board must recognize that Applicants' resources also are finite and are being unfairly and unnecessarily taxed by the boundless inquiries of the Board.

D. "Response" by CASE Not Warranted

The Board ordered that CASE be given "a full month" after receiving the information to be produced by Applicants "to respond". Memorandum and Order at 3.¹⁰ Affording CASE such an

⁹ For example, it appears the Board believes that the issuance and approval of a CMC for construction constitutes engineering approval of the design (see Memorandum and Order at 2, first question). As demonstrated in Applicants' Motion for Summary Disposition Concerning Quality Assurance for Design, July 3, 1984, at 51-53, CMC's are not approved designs until they have been design reviewed and approved by the original design organization. Thus, it is not clear what information the Board requires to answer its unspecified concern.

¹⁰ The Board also states that CASE is to respond not only to Applicants' statement of material facts "but to all relevant information in Applicants' filing." Memorandum and Order at 2-3. At a minimum, CASE should not be given a second
(footnote continued)

opportunity will result in unnecessary delay and is contrary to the stated purpose of the Board's request.

As we have noted, the Board is required to conduct the proceeding fairly, but expeditiously, and without delay. Providing CASE a month after Applicants produce the requested information "to respond" is not compatible with this responsibility. By doing so the Board assures that at least another month will be added to the schedule for resolution of these issues. Yet no justification for such a delay is presented. Further, the Board's stated reason for requesting additional information is to resolve Board concerns. It is inconsistent, therefore, to then ask CASE to respond to the information.¹¹

(footnote continued from previous page)

opportunity to answer Applicants' motion even if it is permitted to "respond" to whatever material is provided by Applicants. CASE took four months to respond to Applicants' motion. It has, therefore, had ample opportunity to prepare its answer. No justification exists for providing a wholesale "second chance."

¹¹ The Board should note that CASE was given every opportunity to request information on discovery regarding this and all other motions for summary disposition. Applicants provided the material requested by CASE. Thus, CASE has had a full opportunity to investigate and argue its position on the issues it believes are important.

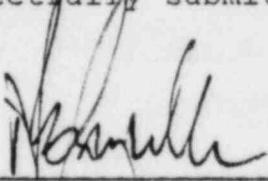
In sum, we move the Board to reconsider its determination that CASE should be given an opportunity "to respond" to material which may be provided. CASE's response would cause delay and simply is not warranted given the Board's rationale for its requests. Accordingly, the Board should amend its Memorandum and Order to eliminate the opportunity for CASE "to respond" to material provided by Applicants.¹²

¹² At a minimum, the Board should significantly reduce the time for CASE "to respond", and require that CASE demonstrate the relevance and safety significance of its response to the issues at hand and explain why CASE could not have asked for this information itself during informal discovery. The Board should not accept any "response" which does not adequately answer these questions.

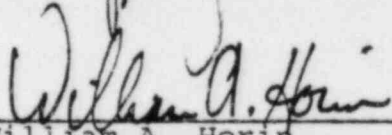
III. CONCLUSION

For the foregoing reasons the Board should reconsider the decision to issue its Memorandum and Order (More Detail on Individual Pipe Supports). Applicants submit that the Board should withdraw its Memorandum and Order. Alternatively, the Board should explain in reasonable detail the necessity for its inquiry. In any event, the Board should decline to afford CASE yet another opportunity to respond either to Applicants' motion or to the information which may be provided in response to the Board's inquiry.

Respectfully submitted,



Nicholas S. Reynolds



William A. Horin

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

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NUCLEAR REGULATORY COMMISSION

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) Docket Nos. 50-445 and
TEXAS UTILITIES ELECTRIC) 50-446
COMPANY, et al.)
) (Application for
(Comanche Peak Steam Electric) Operating Licenses)
Station, Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Motion for Reconsideration of Memorandum and Order (More Detail on Individual Pipe Supports)", in the above-captioned matter was served upon the following persons by express delivery (*), or deposit in the United States mail, first class, postage prepaid, this 5th day of November, 1984, or by hand delivery (**) on the 6th day of November, 1984.

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

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

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

Mr. William L. Clements
Docketing & Service Branch
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

**Stuart A. Treby, Esq.
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
7735 Old Georgetown Road
Room 10117
Bethesda, Maryland 20814

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

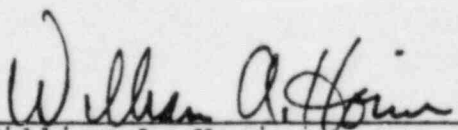
Robert D. Martin
Regional Administrator,
Region IV
U.S. Nuclear Regulatory
Commission
611 Ryan Plaza Drive
Suite 1000
Arlington, Texas 76011

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

* Elizabeth B. Johnson
Oak Ridge National Laboratory
Post Office Box X
Building 3500
Oak Ridge, Tennessee 37830

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

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


William A. Horin

cc: John W. Beck
Robert Wooldridge, Esq.