

RELATED CORRESPONDENCE

11/15/84

DOCKETED
USNRC

UNITED STATES OF AMERICA NOV 16 11:14
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

BRANCH

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

Motion to Modify Order

On October 4, 1984, the Atomic Safety and Licensing Board ("Licensing Board") ordered that Messrs. Roth, Norris and Lipinsky be called as witnesses to testify with respect to the matters delineated in the order. The Licensing Board further ordered that these witnesses will be sequestered so that none will hear the testimony of the others. Counsel on behalf of Oliver B. Cannon & Son, Inc. and Messrs. Norris and Lipinsky moves the Licensing Board to modify its sequestration order to limit its applicability to (i) Mr. Norris only, or in the alternative, (ii) permit Mr. Roth to sit at counsel's table during the testimony of Mr. Trallo. In support of the motion, counsel states:

1. Sequestration of witnesses in NRC proceedings is not common. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-365, 5 NRC 37, 38 (1977). Such a measure should be applied with a sensitive concern for the special nature of NRC proceedings. Consumers Power Company (Midland Plant, Units

8411190193 841115
PDR ADOCK 05000445
G PDR

DS03

1 and 2), ALAB-379, 5 NRC 565, 568-69 (1977). An atomic safety and licensing board must specify its reasons for such action to insure adequate appellate review. ALAB-365; ALAB-379; and Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-373, 5 NRC 415 (1977). The usual reason for sequestering witnesses is that such action is necessary because their credibility is at issue. ALAB-373 at 416.

2. The Licensing Board's October 4, 1984 Memorandum does not articulate the reasons for sequestering Messrs. Roth, Lipinsky and Norris. Hence, it is defective since it cannot serve as a basis for appellate review. Counsel assumes, however, that the sequestering order was motivated by concerns of witness credibility. On that assumption, the Board can only justify sequestering Mr. Norris because of its perception that Mr. Norris testified in an inconsistent manner. (But see, the Motion to Strike filed by counsel with respect to Mr. Norris' October 1 and 2 testimony.) No basis exists to suggest a credibility question with respect to the testimony of Messrs. Roth and Lipinsky. The Licensing Board did not seek to bar these witnesses from discussions among themselves and reading of the relevant transcripts. Moreover, the Licensing Board acknowledged in its October 4 Memorandum that it expected these witnesses to testify "to the truth, without regard to their professional positions or financial interests." In these circumstances, the October 4 Memorandum is overbroad inasmuch as there is no basis to sequester Messrs. Roth and Lipinsky and

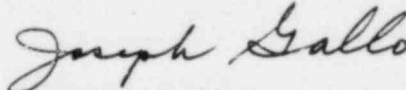
it should be modified to exclude these witnesses. ALAB-379 at 570.

3. Good reason exists to impose witness sequestration orders only in compelling circumstances because such an order by clear implication impugns the integrity of the witness. That is, the fact that a tribunal finds sequestration necessary implies that if the witnesses concerned hear the testimony of others they will alter and shade their testimony to comport with what they heard. Such an implication is completely unwarranted with respect to Messrs. Roth and Lipinsky. Moreover, in NRC hearings the unfettered availability of experts to counsel is deemed essential. ALAB-379. Counsel needs the assistance of these witnesses during the course of the hearings. Admittedly the testimony at issue is less technical than in the usual case; however, quality control and assurance questions involving safety-related protective coatings raise technical issues that are inextricably linked with the Cannon intimidation issue. Moreover, because of counsel's brief involvement in this case, assistance will undoubtedly be needed to clarify factual matters that may arise during cross-examination. Counsel recognizes that Mr. Trallo will be available for assistance since he is not subject to the sequestration order. However, his assistance will not be available at the time of his testimony. Moreover, the assistance of Mr. Trallo alone is likely to be insufficient. Mr. Lipinsky is the QA/QC expert not Mr. Trallo. Mr. Roth

speaks for O.B. Cannon & Son, Inc., not Mr. Trallo. Thus, the assistance and availability of all three witnesses is required by counsel.

For the foregoing reasons, the Licensing Board should modify its sequestration order to exclude Messrs. Roth and Lipinsky. In the alternative and only if the Board denies the primary request for relief, the order should be modified insofar as permitting Mr. Roth to assist counsel during the presentation of Mr. Trallo's testimony.

Respectfully submitted,



Joseph Gallo
Counsel to O.B. Cannon
& Son, Inc., and Messrs.
Norris and Lipinsky

ISHAM, LINCOLN & BEALE
1120 Connecticut Avenue
Suite 840
Washington, D.C. 20036
Phone: (202) 833-9730

DATED: November 15, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Motion to Modify Order" in the above-captioned matter were served upon the following persons by deposit in the United States mail, first class, or as otherwise indicated by hand delivery*, this 15th day of November, 1984.

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

* Herbert Grossman, Esquire
Alternate Chairman
Atomic Safety and Licensing
Board
U. S. Nuclear Regulatory
Commission
Washington, D.C. 20555

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

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

Mr. William L. Clements
Docketing & Services Branch
U. S. Nuclear Regulatory
Commission
Washington, D.C. 20555

* Stuart A. Treby, Esquire
Office of the Executive
Legal Director
U. S. Nuclear Regulatory
Commission
Washington, D.C. 20555

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

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

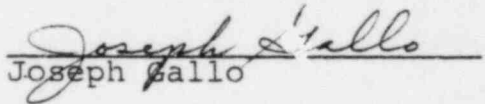
* Nicholas S. Reynolds, Esquire
McNeill Watkins, II, Esquire
Bishop, Liberman, Cook,
Purcell & Reynolds
1200 17th Street, N. W.
Washington, D.C. 20036

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

* Anthony Z. Roisman, Esquire
Executive Director
Trial Lawyers for Public
Justice
2000 P Street, N. W.
Suite 600
Washington, D.C. 20036

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

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


Joseph Gallo

DATED: November 15, 1984