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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' ANSWER TO CASE'S
THIRD MOTION FOR SUMMARY DISPOSITION

Pursuant to 10 C.F.R. §2.749(a), Texas Utilities Electric Company, et al. ("Applicants"), hereby submit their answer to "CASE's Third Motion for Summary Disposition Regarding Lack of Independence and/or Credibility of Cygna," filed November 2, 1984 ("Motion"). For the reasons set forth below, Applicants oppose CASE's Motion and urge the Board to either deny or dismiss CASE's motion.

I. BACKGROUND

On November 5, 1983, Cygna Energy Services, Inc. ("Cygna") released its Phase 1 and 2 Report, which had been commissioned by Applicants at the request of the NRC Staff. This report was included with the issues to be litigated in this proceeding as an alternative means of assessing the safety of Comanche Peak, with

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out awaiting the conclusion of pending Office of Investigations ("OI") reports. (Memorandum (Procedure Concerning Quality Assurance), October 25, 1983.) The Cygna Phase 1 and 2 Report was litigated in hearings held in February, April and May, 1984. At those hearings both Cygna and CASE presented their positions. The Board subsequently ruled that the Staff's position on Cygna Phases 1 and 2, to be presented in the form of an SER Supplement, would be addressed by written filings. A decision as to whether additional hearings would be required would be made after the Staff's position was filed. (Tr. 14,103-06.)

In addition to the Cygna Phase 1 and 2 Report, Cygna issued a Phase 3 Report on July 16, 1984. The Phase 3 Report was initiated by Applicants as part of their Plan to respond to the Board's December 28, 1983, Memorandum and Order (Quality Assurance for Design). Therein the Board suggested that an independent design review be conducted to provide additional evidence regarding the quality of design and the design QA program (18 NRC at 1454-55). (See Applicants' Plan to Respond to Memorandum and Order (Quality Assurance for Design), February 3, 1984, at 8.) A determination as to the need, and if so the method, for litigating Phase 3 has not been made.

II. APPLICANTS' ANSWER TO CASE'S MOTION

Applicants submit that CASE's motion is an untimely attempt to seek reconsideration of the Board's decision regarding Cygna's independence. Applicants also submit that CASE either does not

present "material facts" which are appropriate for summary disposition or there exists a genuine issue regarding those "facts" and, thus, summary disposition may not be granted. The Board should deny CASE's motion on either or both of those bases. In the alternative, if the Board finds that CASE's motion is properly before it and presents "material facts" otherwise appropriate for summary disposition, the Board should dismiss CASE's motion as not presenting CASE's final position regarding Cygna's "independence and/or credibility."

A. CASE's Motion is Untimely

CASE's Motion seeks a Board determination that Cygna either lacks sufficient independence for the Board to rely on the results of the Cygna reports and/or is not credible. The premises for CASE's motion may be summarized, as follows: (1) in CASE's opinion Cygna's position regarding certain technical issues changed during the course of the Spring 1984 hearings and (2) Cygna's position on other technical issues relies, in part, on information developed by Applicants. CASE argues from those premises that Cygna is neither independent nor credible.¹

¹ CASE's Motion seeks alternative findings by the Board, i.e., CASE contends the Board should find that Cygna lacks "independence and/or credibility." In Applicants' opinion these questions are separate and distinct. Independence concerns the organizational and procedural strictures which assure that Cygna's opinions are objective. Credibility concerns whether Cygna's witnesses were truthful or reliable. However, CASE does not specify which of its arguments are relevant to which issue. Applicants submit that such lack of clarity and specificity should alone be
(footnote continued)

CASE's assertion that the Board should now find that Cygna lacks sufficient independence² is merely an untimely motion for reconsideration of the Board's ruling during the April, 1984, hearing. The Board stated at that time, as follows:

We don't think that there is a basic problem of lack of independence or integrity on Cygna's part and believe that they can be counted on to continue the review activities.
[Tr. 13,117]

CASE presents no justification for seeking reconsideration of that determination more than half a year later. In fact, CASE's principal arguments in its motion rely on testimony concerning Cygna Phases 1 and 2 presented prior to the Board's ruling. Thus, CASE has no justification for its tardiness in seeking reconsideration. Further, Applicants would be greatly prejudiced were the Board to now reconsider its prior ruling and afford CASE the relief (a wholly new independent review) it requests. The delay that would result if that relief was granted would impose substantial additional delay and major additional costs on Applicants.

(footnote continued from previous page)
sufficient grounds to deny CASE's motion (see 10 C.F.R. §2.749(a); see also Memorandum and Order (Written-Filing Decisions #1; Some AWS-ASME Issues), June 29, 1984 at 6).

² See note 1, supra.

In sum, to the extent CASE's motion would have the Board reconsider its prior ruling regarding Cygna's independence, it is untimely. CASE presents no justification for this untimeliness and the resultant prejudice to Applicants. Accordingly, the Board should deny CASE's motion.

B. CASE's "Material Facts" Are Not
Appropriate For Summary Disposition

CASE's statement of "material facts" presents "facts" which are inappropriate for summary disposition. In the first instance, many of CASE's so-called material facts are simply arguments, premised on opinions unsupported by any specific evidence. Specifically, material facts 1, 2, 6(i), 9(a) and (c), 10(d) and (e), 11(a), 12, 13, 14 and 15 are simply restatements of general arguments from CASE's affidavit. No demonstration is made or evidence presented in that affidavit to prove the validity of those claims. Such unsupported assertions are insufficient to establish material facts which are appropriate for purposes of summary disposition.

In addition, several of CASE's "material facts" (material facts 3, 4, 5 and 6) are simply interpretations of Cygna testimony, which CASE would have the Board believe was inconsistent. Such interpretations also are not facts on which the Board may premise a decision on summary disposition. Further, Cygna itself contended at the hearing, and Applicants agree, that Cygna's testimony was not inconsistent (see material facts 6(e) and 6(h)).

Thus, even if these "material facts" are considered by the Board to be appropriate for consideration on summary disposition, there is a genuine issue as to their validity and, thus, they may not be accepted by the Board for purposes of summary disposition.

A third category of "material facts" are those which concern Cygna's review and position regarding Applicants' motions for summary disposition (material facts 8 and 9(b), 10(a)-(c), (f)-(g), 13. CASE asserts that it was inappropriate for Cygna to have utilized or relied on Applicants' position regarding certain technical issues as presented in Applicants' motions for summary disposition. CASE does not demonstrate why this approach is not appropriate. If Cygna reviews analyses performed by Applicants and finds those analyses are sufficient to ascertain the adequacy of particular designs, Cygna is free to accept or reject those designs based on Applicants' analyses. For Cygna to do so affects neither its independence nor credibility. Accordingly, the Board should find that these facts, even if true, are not material to the issue which CASE addresses in its motion.

In sum, virtually all of CASE's "material facts" are either not facts on which the Board may base a summary disposition determination or they are not material to the matter on which CASE seeks summary disposition. Accordingly, if the Board finds CASE's motion is timely, it should nonetheless deny the motion on these grounds.

C. CASE's Motion Should Be Dismissed as Incomplete

Should the Board find that CASE's Motion is timely and the "facts" CASE presents are appropriate for summary disposition, it should nonetheless find that the Motion is incomplete and dismiss the Motion. As the Board found when it accepted CASE's first motion for summary disposition, such motions "should present the final position of CASE."³ However, CASE acknowledges in the instant motion that its position is premised on only a partial review of the Cygna Reports. (See Motion at 1, n.1; 12, n.2; 16 (regarding note 12 of Phase 3 Report)). The Board may not conclude, therefore, that the Motion represents the final position of CASE regarding Cygna's "independence and/or credibility." For Applicants and the Staff to address the motion in detail now, and for the Board to resolve it on the merits, would be an inefficient use of the Board's and parties' resources. Accordingly, if the Board finds CASE's Motion is timely and the "material facts" CASE presents are appropriate for consideration on summary disposition, the Board should nonetheless dismiss CASE's motion as not presenting CASE's final position on the questions as to which it seeks summary disposition.⁴

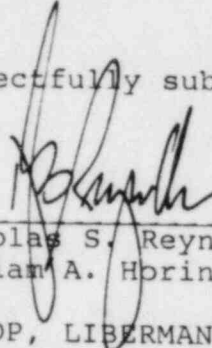
³ Memorandum (Challenge to CASE's Summary Disposition Motion), November 19, 1984, at 2.

⁴ To this end Applicants would agree with the Staff that it would not be appropriate to consider CASE's motion until the Staff submits its position on the Cygna reports (see NRC Staff's November 20, 1984 Response to CASE's Motion, at 5-6). Applicants maintain, however, that the more appropriate approach would be to deny CASE's motion for the reasons presented above in sections II.A and II.B.

III. CONCLUSION

For the foregoing reasons the Board should deny CASE's Third Motion for Summary Disposition. In the alternative the Board should dismiss CASE's motion as not presenting CASE's final position regarding the questions as to which it seeks summary disposition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer to CASE's Third Motion for Summary Disposition", 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 27th day of November, 1984, or by hand delivery (**) on the 28th day of November, 1984.

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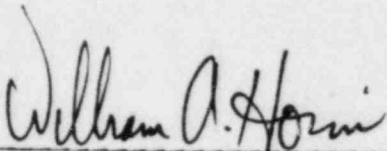
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