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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD DEC 10 P3:03

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

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BRANCH

CYGNA RESPONSE IN OPPOSITION TO CASE'S THIRD
MOTION FOR SUMMARY DISPOSITION, REGARDING LACK
OF INDEPENDENCE AND/OR CREDIBILITY OF CYGNA

On November 2, 1984, CASE (Citizens Associaton for Sound Energy) filed its "Third Motion for Summary Disposition, Regarding Lack of Independence and/or Credibility of Cygna." By telephone conversations with Juanita Ellis of CASE and Peter Bloch, Chairman of the above-captioned Atomic Safety and Licensing Board ("Board") panel, it was agreed that Cygna Energy Services, Inc. ("Cygna") may have to December 7, 1984 to respond to the subject motion. Pursuant to the referenced extension of time, and 10 C.F.R. 2.749, Cygna hereby submits its opposition to the CASE motion for summary disposition.

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I.

THE ISSUES POSED BY CASE ARE NOT PROPER
SUBJECTS FOR SUMMARY DISPOSITION

The purpose of 10 C.F.R. 2.749 is to provide a mechanism to decide expeditiously issues concerning which there is no genuine issue of fact. In the present instance, CASE submits questions of "credibility" and "independence". The questions of credibility and independence are questions presented to a trier of fact based primarily on a witness's demeanor in a proceeding. There is no question that an Atomic Safety and Licensing Board may accord testimony the weight it believes the testimony deserves based on the demeanor of the witness. (Carstens v. NRC, _____ F.2d _____ (D.C. Cir. 1984) Slip Opinion of September 7, 1984 at P. 13-14.) It is submitted, however, that questions of credibility and independence are highly subjective and not amenable to disposition on the ground that there is no genuine dispute with respect to the basis for a decision.

Cygnia submits that CASE misconceives the nature of summary disposition. Summary disposition is not a shortcut to the resolution of disputed facts or contentions, it is for the disposition of issues of fact where there is no genuine dispute as to those facts and the hearing process is therefore unnecessary to resolve the issues presented. The present instance is not such a situation. CASE attempts to characterize its arguments as fact and presents them as

though they are uncontested. As reflected in the attached affidavit of Nancy Williams, Cygna disputes both the alleged facts and conclusions drawn by CASE.

The points raised in "CASE's Statement of Material Facts as to Which There is No Genuine Issue Regarding Lack of Independence and/or Credibility of Cygna" are not factual. The statements characterized as "fact" are arguments and conclusions. The statements contained in "Affidavit of CASE Witness Jack Doyle" are also primarily arguments and interpretations of the affiant based on his understanding of the record. Cygna does not dispute that CASE has a right to draw conclusions and express opinions based on their reading of the record, but such opinions and conclusions are properly directed to the evidentiary value to be accorded the Cygna testimony and the conclusions the Board may draw from that testimony. Such arguments are not the proper subject of a motion for summary disposition.

II.

THE BOARD HAS PREVIOUSLY RULED ON THE QUESTION OF CYGNA'S INDEPENDENCE

During the periods February 20-22, 1984 and April 24 through May 3, 1984, the Board heard extensive testimony from Cygna witnesses with respect to its draft Phase 1 and 2 report. The testimony and cross-examination focussed in large part on CASE questions arising out of the Phase 1 and 2

draft report but also addressed concerns that CASE had expressed at earlier stages of the proceeding.

During the course of those hearings, it was clear that the question of Cygna's independence in developing the Phase 1 and 2 report was squarely before the Board. The Board decided that issue. The Board stated that although Cygna personnel may have exercised poor judgment with respect to one transaction involving lists of documents, the Board was satisfied that Cygna would operate in an independent manner. (Tr. 13115-13117.) CASE's present motion does no more than attempt to revive the question decided in April, after many arduous days of examination of the Cygna product and its personnel. It is significant that with the exception of a few minor allegations, the affidavit of CASE witness Jack Doyle relies on exhibits and testimony that were before the Board at the time of its earlier decision in April, 1984. To the extent CASE relies upon its reading of the Phase 3 report, issued since those hearings, as will be discussed below, it can scarcely be said that the Doyle affidavit presents statements of fact as to which there is no genuine dispute.

The CASE motion should be denied as previously decided ~~or~~ dismissed as an inappropriate subject for summary disposition under 10 C.F.R. 2.749.

III.

THE ALLEGED FACTS CONTAINED IN THE CASE
STATEMENT OF FACTS AND SUPPORTING AFFIDAVIT
ARE DISPUTED BY CYGNA

Cygna submits herewith the Affidavit of Nancy H. Williams in Opposition to CASE's Third Motion for Summary Disposition. As reflected in that affidavit, Cygna disputes the "facts" alleged in CASE's motion. In large part, CASE has drawn conclusions from selected portions of the record. Cygna disputes the characterization and conclusions associated with those portions of the record. Cygna submits that its dispute is genuine and that even assuming for purposes of argument that the issues presented are appropriate for summary disposition, the depth of disagreement over CASE's alleged facts is such that summary disposition does not lie.

Cygna submits that the test to be applied to its product is not one of infallibility. The questions being reviewed are complex and highly sensitive to even slight changes in fact. By way of example, the issue of the U-Bolts is one that has been subjected to ever-increasing levels of scrutiny. As additional information has been developed, Cygna's position has changed with respect to the use of U-Bolts and their application in the Comanche Peak facility. Even as of this date, the work on this issue is not complete and previous positions may be subject to further modification. Cygna does not consider that such a situation

renders Cygna in any way less independent. As indicated by Judge Bloch, it is anticipated that conclusions and positions will change as new information is developed. (Tr. 9858.)

It should also be noted that the Board has not yet heard from the NRC Staff with respect to its position on either the Phase 1 and 2 report or the Phase 3 report. Until NRC Staff takes a position, it is premature to characterize any of the "facts" alleged in the CASE motion as being established beyond genuine dispute.

IV.

THE REQUIREMENT OF AN OPPOSING STATEMENT OF MATERIAL FACTS IS NOT APPROPRIATE

10 C.F.R. 2.749(a) indicates that a party opposing a motion for summary disposition should file, as a part of its response, a statement of countervailing material facts. Such a statement is not appropriate in this instance for the reason that such a statement would be no more than an argument contesting Mr. Doyle's various arguments and conclusions.

Because the subject of the motion, independence and credibility are not issues of fact, Cygna's position is stated in the form of this memorandum and the affidavit of Nancy H. Williams submitted herewith. Mrs. Williams' affidavit addresses CASE's allegations and places said obligations in their proper context. To the extent the Board

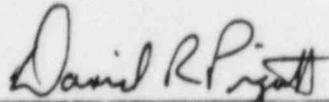
deems it necessary, Mrs. Williams' affidavit should be considered Cygna's statement of material facts. Mrs. Williams' statement, to the extent necessary, corrects and completes the items discussed in Mr. Doyle's affidavit and their statement of proposed material facts.

CONCLUSION

For the above reasons, the CASE motion should be denied or dismissed as the Board deems appropriate.

Dated: December 7, 1984.

DAVID R. FIGOTT
Of ORRICK, HERRINGTON & SUTCLIFFE



David R. Figott

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "CYGNA RESPONSE IN OPPOSITION TO CASE'S THIRD MOTION FOR SUMMARY DISPOSITION, REGARDING LACK OF INDEPENDENCE AND/OR CREDIBILITY OF CYGNA" and "AFFIDAVIT OF CYGNA WITNESS NANCY H. WILLIAMS IN OPPOSITION TO CASE'S THIRD MOTION FOR SUMMARY DISPOSITION" in the above-captioned matter were served upon the following persons by overnight delivery (*), or deposited in the United States mail, first class, postage prepaid, this 7th day of December, 1984.

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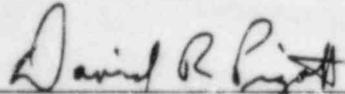
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