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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEALS BOARD

In the Matter of	)	
	)	
TEXAS UTILITIES ELECTRIC COMPANY, et al.	)	Docket Nos. 50-445-OL and 50-446-OL
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	February 1, 1985

CASE'S OPPOSITION TO APPLICANT'S REQUEST FOR APPELLATE RELIEF

The Citizens' Association for Sound Energy ("CASE") asserts that Texas Utilities Electric Company's ("TUEC") untimely attempt to interject the Appeals tribunal into the ongoing operating licensing hearing is for the sole purpose of preventing the Licensing Board from carrying out its lawful duties and responsibilities, which are to reach an informed decision on issues properly in contention regarding the implementation of the quality assurance/quality control program at the Comanche Peak nuclear plant.

CASE urges the Appeals Board to dismiss the request for appellate review outright as untimely, illogical and improper.

I. INTRODUCTION

On December 18, 1984, the Licensing Board issued a Welding Memorandum and Order concerning, inter alia, welding issues timely raised by CASE in support of its properly admitted contention on the implementation of the QA/QC program at Comanche Peak. Applicant prevailed on the issues considered.

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Notwithstanding their success, on December 28, 1984, Applicant filed exceptions to the Licensing Board's memorandum, which the Appeals Board has treated as a Notice of Appeal.

The issues raised on appeal dispute (1) the Board's right to pursue issues defaulted by Intervenor for failure to file findings of fact, (2) the Licensing Board's finding of a significant violation of 10 C.F.R. Part 50 Appendix B because an unauthorized practice (of unauthorized weld repairs) was deemed to be of "substantial extent", (3) the finding of a clear violation of Appendix B by Applicant in its failure to promptly identify deficiencies and for not trending potentially significant deficiencies, and (4) the propriety of the Licensing Board's pursuit of an improper welding practice (failure to check preheat) which first arose in the hearings on welding issues and QA/QC controls over welding.

On January 2, 1985, the Atomic Safety and Licensing Appeal Board ("Appeal Board") directed the Applicant to show cause why its December 28, 1984 Exceptions to Licensing Board's Memorandum Concerning Welding Issues ("Notice of Appeal") should not be dismissed.

Applicant's response to the Appeal Board's Order of January 2, 1985 ("Show Cause Response") was filed January 11, 1985. In its response, Applicant defends its Notice of Appeal by asserting that the Licensing Board's Welding Memorandum is a partial initial or final decision, and therefore appealable as a matter of right. Applicant also expands its plea for interjection of the Appeal Board by seeking directed certification of three issues which they claim first arose out of the Welding

Memorandum.

CASE opposes both attempts by the Applicant to interrupt the Licensing Board hearing.

For reasons stated below, CASE requests that the Appeal Board dismiss Applicant's Notice of Appeal as premature and deny Applicant's request for directed certification because (1) it is untimely, (2) it does meet the criteria for discretionary interlocutory review, and (3) it requests the Appeal Board to arrest the lawful authority and responsibility of the Licensing Board.

II. BACKGROUND

The instant dispute arises from Applicant's distress over the Licensing Board's wording in a recent order, and its procedural treatment of sub-issues of a properly admitted contention. This contention, as admitted, states:

> The Applicants' failure to adhere to the quality assurance/quality control provisions required by the construction permits for Comanche Peak, Units 1 and 2 and the requirements of Appendix B of 10 C.F.R. Part 50, and the construction practices employed specifically in regard to concrete work, mortar blocks, steel, fracture toughness testing, expansion joints, placement of the reactor vessel for Unit 2, welding, inspection and testing, materials used, craft (as they may affect QA/QC personnel, have raised substantial questions as to the adequacy of the construction of the facility. As a result, the Commission cannot make the findings required by 10 C.F.R. 50.57(a) necessary for issuance of an operating license for Comanche Peak. [18 NRC at 125.]

In support of this contention, Intervenor timely submitted, among other evidence, the testimony of a former welding quality control inspector and a former welder, Henry and Darlene Stiner. Their testimony contained allegations of specific practices which violated site welding and QA/QC procedures, harassment and

intimidation, and other examples of their own experiences at the Comanche Peak site which were indicative of violations of 10 C.F.R. Part 50, Appendix B.

The Stiners' allegations have been divided, by agreement of the parties, and for the efficiency and organization of litigation. The Stiners' welding allegations were first litigated in September, 1982, with findings filed in February, 1983. On July 29, 1983, the Licensing Board issued its first of three memoranda concerning, inter alia, the welding issues. Proposed Initial Decision (concerning Aspects of Construction Quality Control, Emergency Planning and Board Questions) LPB-83-43, 18 NRC 122 (1983).[1]

In its first decision, the Board found CASE had abandoned the welding issues for failure to file proposed findings on this issue. (18 NRC at 124 and 130)[2]

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[1] The procedure of the issuance of a "proposed" decision instead of an initial decision was chosen by the Licensing Board in order to obtain comments from the parties, particularly because two of the Board's members were recently appointed and the record was complex. LBP-83-43.

[2] Although it is true that CASE did not file complete provisional proposed findings of fact and did not file any regarding some issues (including the welding issues) addressed during the 1982 hearings, it was for good cause.

Applicant had filed a pleading with the Licensing Board which made extremely serious charges of misconduct by CASE. CASE believed itself in danger of literally being banished from the hearings or subject to criminal prosecution were Applicant's charges allowed to stand unrefuted on the record. CASE also believed that Applicant was going to use the filing as the foundation for the firing (or laying off) of three employees (potential CASE witnesses) whose affidavits CASE had recently filed with the Licensing Board. (cont'd.)

The Board subsequently reconsidered its Proposed Initial Decision and issued a Memorandum and Order, LPB-83-60, 18 NRC 672 (1983) also dealing, inter alia, with the welding issues. The Board upheld its initial ruling that CASE was in default, however, stated that it required answers to certain questions regarding the welding issues "in order to have a satisfactory understanding of the quality assurance contention." (18 NRC at 675)

After receiving further testimony from all parties on the welding quality assurance/quality control questions in March of 1983 and observing the demeanor of the witnesses, the Licensing Board again accepted findings from all parties on the remaining welding issues. On December 18, 1984, the Licensing Board issued the decision for which Applicant now seeks Appeal Board review.

Although the Applicant prevails on the welding issues (that

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2 cont'd./ In the February 21, 1983 CASE response to Applicant's February 8, 1983 pleading, CASE summarized its dilemma:

> Applicant's 2/8/83 Answer to CASE Motion (and Supplement) for Protective Orders was deliberately phrased in such a way that CASE would have only two options: 1) to answer it (thereby robbing CASE of valuable and needed time to work on the provisional proposed findings of fact); or 2) to continue to work on the provisional proposed findings of fact and risk being discredited in the eyes of the Board and all who received a copy of Applicant's Answer. Either option would be unacceptable to CASE, and either option chosen by CASE would work to Applicant's benefit.... CASE urges that the Board not allow Applicant to benefit at CASE's expense by their attempts to discredit CASE or to rob CASE of valuable and necessary time for preparing its provisional proposed findings of fact. (Emphasis in the original)

The Board did not grant CASE's plea, and therefore now benefits from its attack (later stricken) on Intervenor.

is, the Board finds that "there is a reasonable assurance that these allegations are not reflective of any condition that could adversely impact the safe operation of the plant" (Welding Memorandum at 77), the Licensing Board makes several conclusions which Applicant considers adverse and therefore objectionable. This includes a finding that some of Applicant's actions (in regard to QC inspectors improperly doing repair welds of craft's mis-drilled holes) constituted a clear violation of Appendix B to 10 C.F.R. Part 50, and that the Applicant "failed to create any deficiency paper" (regarding the improper weld repair Mrs. Stiner made at the direction of her supervisor), and that they "conducted no contemporaneous investigation of the extent of this improper practice, therefore making trending of this practice impossible." (Id. at 69-71) These findings, according to the Licensing Board, will be considered in a later decision encompassing all of the evidence in the record in the adequacy and implementation of Applicant's QA/QC program.

Following the issuance of the Welding Memorandum the Applicant filed an unusual request with the Appeal Board which is now being treated as a Notice of Appeal.

Applicant understandably does not appeal the conclusion of the Board on the welding issues -- they prevailed. Nor does it assert in its appeal that the Licensing Board reached the wrong decision on the evidence in the record. Nor does it claim that there was, and is, more evidence available that the Licensing Board should have considered, but didn't.[3]

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[3] CASE, who does dispute the factual findings, has already (cont'd.)

What Applicant does now protest is the litigation procedure being used for 18 months by all parties, and the utilization of some of the evidence produced in these hearings upon which the Licensing Board now reaches an opinion that there were violations of 10 C.F.R. Part 50 Appendix B.

III. Applicant's Appeal Is Untimely

Applicant is 18 months late in objecting to a procedural decision on the conduct of the hearings, and premature in its appeal of the Board's finding of two or three violations of the Quality Assurance/Quality Control criteria.

Even if the Appeal Board would find that Applicant has a legitimate claim to an appeal, it cannot find that such a claim is timely, and therefore must dismiss it.

Applicant claims that the Welding Memorandum is a final decision because it disposes of a major segment of the case and

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3 cont'd./
filed a Motion for Reconsideration of the Welding Memorandum. Interestingly, Applicant does not oppose CASE's Motion for Reconsideration on the grounds that CASE should have filed a Notice of Appeal, nor does it even request the Licensing Board toll its consideration of Intervenor's motion until the Appeal Board reaches a decision on whether or not the Welding Memorandum is appealable. Instead, Applicant's aggressively argue that the Licensing Board's findings (in favor of Applicant) are correct, and should not be reconsidered or modified:

> From the foregoing, Applicants maintain that CASE's Motion raises nothing that calls into question the conclusions reached in the licensing board's Welding Decision. Accordingly, the Licensing Board should deny CASE's Motion [for Reconsideration]....

Applicant's Reply to CASE's Motion for Reconsideration of Licensing Board's Memorandum (Concerning Welding Issues, January 22, 1985), p. 22.

therefore appealable as a matter of right. (Show Cause Motion at 8-10) It is not, however, the decision that they wish to appeal, but only a few paragraphs in that decision regarding the Board's observation that Applicant's QA/QC program failed in regards to two of the welding issues raised by the Stiners (repair of misdrilled holes which were not identified, evaluated for generic impact or trended). As discussed below the proper time to dispute the factual QA/QC findings will be when the overall decision is issued, incorporating the isolated findings objected to and other findings on the QA/QC program adequacy.

As to the objections regarding procedures, the Applicant has known for some time that the Board intended to deal with each allegation separately and then issue an ultimate decision on the adequacy of the QA program.

Since the July 29, 1983 Proposed Initial Decision on, inter alia, welding issues, the Licensing Board has put Applicant on notice of its view of the QA/QC program and its implementation, and how the Board intended to deal with allegations and the overall QA/QC program.

> A problem identified by the quality assurance program may cause concern for the public safety if it cannot be satisfactorily resolved. A program may also cause concern if it identifies an extraordinarily large number of deficiencies, casting doubt on the plant's design and construction processes. Additionally, if a quality assurance program identifies extraordinarily few deficiencies or if we were to find that substantial numbers of deficiencies have been overlooked, that may raise questions about the adequacy of the quality assurance program. At this stage, we are not evaluating the overall efficacy of the quality assurance program, but rather, whether any of the alleged deficiencies are sufficiently serious and uncorrectable that the plant, due to those deficiencies, cannot operate with the requisite degree of safety.

> In other words, we have considered each allegation independently, without regard to whether it may represent a pattern related to the adequacy of the quality assurance program. In addition, there are particular allegations which have been or will be the subject of hearings held after September 17, 1982. These questions are not resolved by this decision. (Emphasis added) (pp. 4-5)

Had any doubt remained regarding the Licensing Board's intention, it would have been cleared up by the Board's September 23, 1983 Memorandum and Order (Emergency Planning, Specific Quality Assurance Issues and Board Issues), which the Board filed following receipt and consideration of comments which the Board had invited from the parties (NRC Staff, Applicant, and CASE). The Licensing Board stated:

> This decision is called a 'Memorandum and Order' because its effect is to affirm the declaration of a default on some issues and to make interim factual findings that do not dispose of any contentions. Hence, this is an interlocutory order that does not conclude the evidentiary record on any contention. (footnote omitted)

Finally, following extensive filings by the parties, the Licensing Board issued its March 15, 1984 Memorandum (Clarification of Open Issues). In that Memorandum the Board reiterated its procedural intentions.

> This opinion is issued, at the request of all the parties, for the purpose of clarifying the issues that are open in this proceeding....
>
> For the most part, these matters arise from our prior decisions.... Because we chose to issue a Proposed Decision, followed by a decision on the objections filed by the parties, followed by a further decision on a motion for reconsideration, the parties have sought our assistance in simplifying the accumulated effect of our orders.
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> Before these hearings are concluded, the parties and the Board will face their hardest task: assembling the kaleidoscope of facts into meaningful overall conclusions about the safety of the physical plant and the adequacy of management of the design and construction process. Although we are litigating many subissues, that should not obscure the overall licensing concerns from view. Our clarification

> of the subissues does not remove these overall concerns from the proceeding, and we foresee the possibility that some evidentiary hearing sessions will be needed to resolve these more global issues.

Applicant again chose not to attempt an interlocutory appeal regarding the procedural issues under discussion in the current Motion.

If Applicant cannot get an appeal as a matter of right, it seeks directed certification regarding the conduct of a hearing that has already been held. On this item Applicant is too late. If it objected to the hearing being held in the first place the time to have sought certification was before the hearing, not now after the evidence is on the record, findings written, and a decision issued. If Applicant objects to the conduct of further hearings in this category, the time to take that action is when those hearings are scheduled.[4]

Ironically, Applicant has been the prime beneficiary of the proceedings it now seeks to have declared unauthorized. The Appeal Board should recognize that the evidence upon which the Licensing Board stands in their favor was produced during the rounds of hearings Applicant now seeks to claim are invalid.

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[4] Applicant's claim to appellate intervention is premised on the assertion that there are numerous other open items in the same category as the welding issues. However, as the record clearly indicates the "open items" cited fall into the category of issues which have been fully litigated except for the consideration of what each issue means in the context of the adequacy of the quality assurance program. The exception to that is the question of deficiencies in the quality assurance program's documentation and record retrievability which have not been litigated, and the protective coatings issues. The design and design QA issues are being dealt with through summary disposition, and the harassment and intimidation issues are ongoing.

In describing the basis for its conclusion the Licensing Board plainly points to the testimony of witnesses presented "... to respond to the allegations of Mr. and Mrs. Stiner ... during the second round of hearings on these allegations." (emphasis added) (Welding Memorandum, p. 5).

Notwithstanding its opportunity to supplement the record, had Applicant disagreed with the Board's procedures, it should have filed an appeal with the Appeal Board following the Board's September 23, 1983 Memorandum and Order. Applicant's current appeal is late filed by about sixteen months.

Applicant had a second opportunity to file an appeal to the procedures being employed by the Board following the Licensing Board's October 25, 1983 Memorandum and Order of September 23, 1983). The Licensing Board stated in that Order (pages 2 and 3):

> I. Board Involvement in Defaulted Issues
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> We are not persuaded by applicant's arguments on this issue. Within the scope of an admitted contention, the Board is not just an umpire calling balls and strikes. We must assure that relevant and material evidence bearing on the admitted contention is sufficiently well developed so that we can prepare a reasoned decision resolving the issues before us.5/ In this case, we have sworn testimony concerning an admitted contention about quality assurance deficiencies; the Board must be satisfied that the allegations in this testimony have been adequately answered. Furthermore, in light of our conclusion that we are properly concerned about the completeness of the record, there is no reason that we are required to bar intervenor from helping us to pursue our interest. (footnote omitted)

5/ See Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 751-52; South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1163 (1981). We consider this such a basic principle governing our proceedings, that we did not think it necessary to provide these citations in our previous opinion.

In sum, had Applicant disagreed with the Board's decisions, it should have filed an appeal with the Appeal Board at the appropriate times -- certainly not at this late date. Applicant's current ploy to obtain an advisory opinion from this Court should not be granted by the Appeal Board.

IV. APPLICANT HAS FAILED TO SHOW CAUSE WHY ITS NOTICE OF APPEAL SHOULD NOT BE DISMISSED

The federal regulations governing the conduct of licensing hearings provide for appeal of initial decisions. 10 C.F.R. 2.762 states:

> Within ten (10) days after service of an initial decision, any party may take an appeal to the Commission by filing a notice of appeal....

The Appeal Board has clarified that a party's right to an appeal must be premised on (1) a requirement of finality of the decision to be appealed and (2) the requirement of some discernible injury. If the Appeal Board does not dismiss the Notice of Appeal without review it must still dismiss it because Applicant has not shown cause for its consideration under the criteria established for appeal rights.

A. The Welding Decision Is Not A Final Agency Action

The Appeal Board found that the test for finality for appeal purposes is essentially a practical one. For the most part, a Licensing Board's actions are final when it either disposes of a major segment of a case or terminates a party's right to participate. Toledo Edison Co. (David-Bessee Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975).

The Welding Memorandum obviously does not terminate a party's right to participate, nor does it dispose of a major segment of a case.[5]

Applicant's attempt to reach finality by stating that the Welding Memorandum "makes findings and issues orders disposing of a discrete segment of this case." (Show Cause Motion at 9) In Applicant's judgment, the issues addressed in the Welding Memorandum and their resolution "can proceed independent of other issues." What they really mean is that they wish to dispose of a single statement based on one piece of evidence taken in the context of litigation of one sub-issue of one contention in the overall operating license case. They do not want to appeal the conclusion of the Board on the allegations.[6]

Applicant is correct that the Welding Memorandum "makes findings and issues orders disposing of a discreet segment of this case" (Show Cause Motion at 9), but, even these findings are obviously not intended to be the final or even partial initial decision on the overall quality control/quality assurance contention.

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[5] The Welding Decision is only a sub-part of Contention Five (supra at 2-3).

[6] A good example of the lengths to which Applicant is willing to stretch to recruit appellate review is evidenced by their citation to a phrase in the Welding Memorandum in which the Licensing Board allegedly refers to the Welding Memorandum as a "partial initial decision." (Welding Memorandum at 19) However, a review of the full text cited by Applicant reveals that the wording on which they now attempt to rely to prove finality is, in fact, Applicant's own wording. THe Licensing Board said that it "found it appropriate to use Applicant's proposed partial initial decision as the framework within which to write our decision...." (Emphasis added)

That final decision will encompass a complex combination of larger issues, such as management attitude toward its QA/QC program, harassment and intimidation, and technical issues (welding, liner plates, paint coatings, documentation, electrical systems, etc.), and sub-issues of each of those technical issues.

By law and by logic the Appeal Board cannot interfere with the Licensing Board's judgment of an interlocutory finding simply because one party does not agree with one negative paragraph in one ruling on one sub-issue of the case.

If such a motion were entertained, the floodgates of interlocutory appeals would surely open wide. Even the entertainment of such an appeal flies in the face of the Appeal Board's long-stated disinclination to interfere with the Licensing Board's conduct of the licensing hearings.[7]

The Appeal Board should dismiss the Notice of Appeal as premature.

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[7] Applicant also reaches new limits of abuse of the interlocutory process by employing this forum to clarify the Board's intentions. In their Show Cause Memorandum Applicant states, "Unlike its earlier decisions regarding this issue, the Licensing Board's Welding Decision did not state its view that the decision was interlocutory." (p. 6) If there was a doubt as to the Board's intention in this regard, Applicant had only to pick up the telephone and inquire what the Board's intentions were, or they could have filed a motion for reconsideration, or a request for clarification, or scheduled a conference call with all the parties. Instead they have filed a Notice of Appeal on a presumption of what the Licensing Board meant by what it did. Applicant's failure to seek an answer is telling. They must have known that such a request would remove any ambiguity in the Board's ruling, thereby washing away their pebbles of legitimacy.

B. The Applicant Has Not Suffered Any Injury From The Welding Memorandum

Applicant has, to date, significantly prevailed on the welding issues. The Board has found CASE's witnesses not credible, their testimony inconsistent, and concludes that the issues raised by their allegations do not affect the "reasonable assurance" of the Licensing Board with regard to the safety of the plant. (Memorandum at 77)

It is difficult to imagine a more sweeping victory.[8] Clearly, Applicant must be satisfied with the result of the Licensing Board's review of the record before it on these issues.

The Appeal Board has previously precluded a party from appealing the reasoning of an issue with which it is satisfied with the result. Consumers Power Corp. (Midland Plant, Units 1 and 2), ALAB-282, 2 NRC 9, 10 at n.1 (1975); an appeal will lie only from unfavorable action taken by the Licensing Board, not from wording of a decision with which a party disagrees, but which has no operative effect (emphasis in the original); Duke Power Company (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-482, 7 NRC 979, 980 (1978); Appeal Board holding that a party may not file exceptions to a decision if it is not aggrieved by the result. Rochester Gas & Electric Company, et al. (Sterling Power Project, Nuclear Unit 1), ALAB-502, 8 NRC 383, 393 (1978). There is no right to an administrative appeal on every factual finding.

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[8] CASE is, as previously stated, seeking a reconsideration of the Board's decision, and ultimately may file an appeal on those issues.

Tennessee Valley Authority (Hartsville Nuclear Plants, Units 1A, 2A, 1B & 2B), ALAB-467, 7 NRC 459, 461 at n. 5 (1978).

While the Licensing Board's finding of a violation of 10 C.F.R. Part 50, Appendix B, reflects negatively on Applicant, the finding could not have come as a shock to Applicant. It is only one conclusion of a decade of similar findings by the NRC Staff.

For example, in 1976 an internal NRC trend analysis of Comanche Peak stated:

> "During the early part of 1976, it became apparent to the principal inspector that the effectiveness of the licensee's QA/QC Program was in a state of degradation as a result of a domineering and over-powering control by the contractor's site construction management. (NRC Trend Analysis 1976, Staff Exhibit 184, p. 1, Hems e, f, and g)

In 1979 the NRC found that the QA/QC program was ineffective because the Applicant

> has been led down a poor path by Brown and Root during past years. It appears to [the RRI] that Brown and Root has, in many instances, provided construction procedures to fulfill Appendix B that provide a minimum amount of direction to the construction force and yet comply to the words, if not the spirit of Appendix B.
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> What I have begun to see, but have difficulty proving is that the Brown & Root construction philosophy is to build something anyway they want to and then put it up to the engineer to document and approve the "as built" condition. If the engineer refuses, he is blamed for being too conservative and not responsive to the client's needs and thus the driving force behind my request for a special engineering audit of site operations.
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> Only recently has there been a real effort on the part of the licensee itself or on the part of Brown & Root, to write explicit instructions to the line inspectors on what they were to inspect. Previously, the procedures were frequently pretty general, again not too bad if the inspectors were knowledgeable in the subject being inspected but terrible if they are not. In a couple of cases I have been able to show them that their people are essentially incompetent, even though they have been through the site training and certified as competent.

* * * * *

> ... too often an installation clearly accomplished other than as originally designed and buildable has been approved the licensee's onsite engineering are as fulfilling requirements. In effect, the engineer has approved a non-conforming condition in advance of QC being called. QC has been signing for the as-built condition and the underlying problem is not addressed. (NRC Staff Exhibit, p. 2(f))

The report continues on page 3 about trends indicative of poor performance,

> It seems likely to me that the licensee will use his full powers to be less open with us in the area of identified construction deficiencies than he has in the past. I think he will take maximum advantage of part 50.55(e) and the [NRC] guidance to go through the necessary formalities but avoid, if at all possible, having to report to us. (supra)

In 1980, the first annual Systematic Assessment of Licensing Performance report (IE Report #80-25, NRC Staff Exhibit 181), continued to report problems with the QA/QC program, unqualified personnel, and attitude toward regulations. The report concludes the following about the effectiveness and attitudes of licensing personnel in complying with NRC requirements:

> Licensee construction and engineering management -- the NRC personnel stated that it appears there is a continuing tendency to engineer away construction problems rather than enforce compliance to drawings and specifications.

Again the Applicant promised to reform and correct its programmatic and personnel weaknesses by taking unspecific "management action with the engineering and construction personnel to alleviate this situation."

In 1982 a special Construction Appraisal Team (CAT) also identified significant deficiencies in the QA/QC program. In its report (Staff Exhibit 206) the team identified the following construction program weaknesses:

1. Results of the inspection indicated a breakdown in fabrication, installation, and inspection in the heating, ventilation, and air conditioning (HVAC) systems.

2. A number of examples were identified of failure to meet criteria for separation of safety-related cables from mechanical structures and piping, and separation of redundant trains of safety systems....

3. The licensee's quality assurance program did not ensure that certain hanger, support, electrical and mechanical equipment was installed to the latest design documents, and commensurately that an appropriate inspection was conducted to the latest design documents.

4. Findings also indicate a number of instances where nonconforming conditions were identified; however, various methods (e.g., punchlists, inspection reports, verbal, and other informal methods) were used to address and resolve these nonconformances. These methods do not comply with requirements to identify nonconforming conditions and provide corrective actions to prevent recurrence.

5. The licensee's Quality Assurance audit program should have been more effective in detecting and obtaining correction of deficiencies in safety-related work; such as those in the HVAC system, mechanical equipment, and electrical components.

In summary, the identified weaknesses require increased dedication by management at all levels to assure completed installations meet design requirements and that inspection documentation reflects that the completed installations have been adequately inspected to the latest design document.

Finally, several weeks ago the Technical Review Team (formed to conduct an extensive inspection and investigation of allegations of hardware and QA/QC problems) released a 25-page summary of its findings which, according to the January 8 report, indicate:

A. TUEC failed to periodically assess the overall effectiveness of the site QA program in that there have been no regular reviews of program adequacy by senior management. Further, TUEC did not assess the effectiveness of its QC inspection program.

B. During the peak site construction period of 1981-2, TUEC employed only four auditors, all of whom had questionable qualifications in technical disciplines. Although charged with overview of all site construction and associated vendors, these Dallas based auditors provided only limited QA surveillance of construction activities.

C. Repetitive NCRs were issued that identified the need to retrain construction personnel in the requirements and contents of QA procedures. One corrective action request (CAR) dealing with inadequate construction training and records remained open for one year. The identical problem was identified in a subsequent CAR, which still had not been closed at the time of the TRT's onsite review.

D. The TRT found many examples of incomplete and inadequate workmanship and ineffective QC inspection in TUEC's evaluation of the as-built program. (See Section 4 for a detailed discussion.)

E. Some craft workers newly assigned as QC inspectors were in a position to inspect their own work and records. Site management did not view this lack of separation between production and inspection roles as a potential conflict-of-interest.

F. There were potential weaknesses in the TUEC 10 CFR 50.55(e) deficiency-reporting system. Applicable procedures did not identify what types of deficiencies constituted significant breakdowns in the QA program, nor how they should be evaluated for reportability to the NRC. Evaluation guidelines for reporting hardware deficiencies lacked clarity and definitive instructions and the threshold for reporting deficiencies was too high.

G. The TUEC exit interview system for departing employees appeared to be neither well structured nor effective, as evidenced by the lack of employee confidence, limited implementation, failure to document explanations and rationale, and failure to complete corrective actions and to determine root causes.

H. The B&R corrective action system was generally ineffective and was bypassed by the B&R QA Manager.

I. The TUEC corrective action system was poorly structured and ineffective.

The Board's findings of a specific violation with a potential generic impact is not enough harm to warrant appellate review of the Welding Memorandum. Indeed, the Appeal Board has clearly articulated that it does not expect nuclear power plant construction to be perfect. Union Electric Company (Callaway Plant, Unit 1) ALAB-740 (1983), p. 2. Thus, the only harm which could arise from the Board's finding of violation of Appendix B will be if, when it later considers that violation in the context of the entire record on quality assurance/quality control program implementation, Applicant does not prevail on the overall contention.

In sum, Intervenor submits that whatever harm flows from the Board's conclusions regarding violations of Appendix B are potentially curable in the ongoing licensing proceeding by either the introduciton of credible hard evidence properly submitted through a Motion to Re-Open the Record on those issues, if there is any; or appealable if the ultimate conclusion of the Licensing Board is to deny a license based, in part, on the conclusions now objected to.

V. Applicant Has Not Demonstrated That Discretionary Interlocutory Appeal Is Warranted

Applicant has not, and cannot demonstrate, that the Welding Memorandum is appealable as a matter of right (supra, pp. 12 to 14). Anticipating failure on that argument, Applicant then pleads that the Board grant discretionary interlocutory review of the Welding Memorandum pursuant to 10 C.F.R. 2.718(i).

That section of the federal regulations delineates the power of a presiding officer to "certify questions to the Commission for its determination, either in his discretion or on direction of the Commission."[9]

In a 1982 ruling the Appeal Board strongly reiterated its position in the denial of "the seventh motion for directed certification in the recent months" by patiently explaining that

> interlocutory appellate review of licensing board orders is disfavored (footnote omitted) and will be undertaken as a discretionary matter only in the most compelling circumstances. (Citing) Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483-86 (1975).
>
> More specifically, in the exercise of our directed certification authority conferred by 10 C.F.R. 2.718(i), we will step into a proceeding still pending below only upon a clear and convincing showing that the Licensing Board ruling under attack or either (1) threaten(s) the party adversely affected by it with immediate and serious irreparable impact, which, as a practical matter, could not be alleviated by a later appeal or (2) affect(s) the basic structure of the proceeding in a pervasive or unusual matter. (Emphasis added) Arizona Public Service Company, et al. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, September 19, 1983.

Applicant has not heeded the admonitions of the Appeal Board to all parties to licensing proceedings instructing them to "exercise in the future a greater measure of circumspection insofar as requests for interlocutory appellate review are concerned." (Id.)

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[9] A request for directed certification must be premised on a denial of such a request by the presiding officer, in this case the Licensing Board. To the best of CASE's knowledge, Applicant has sought no such certification for the instant motion from the Licensing Board.

Clearly this Board intended its Palo Verde, supra decision to apply to cases such as this. We include here the instructions which should have been heeded by Appellant prior to its filing which has had exactly the effect which the Appeal Board explained it sought to avoid -- that is, a waste of everyone's time on "insubstantial directed certification requests." (Id.)

> Understandably, parties and their counsel are displeased whenever a licensing board enters an interlocutory order that appears to affect their interests adversely and, in their judgment, is plainly wrong to boot. And, no doubt, such an order will be found especially frustrating if its consequence is, for example, the litigation of issues that counsel believes should not be tried, the summary dismissal of issues that counsel is convinced are entitled to evidentiary consideration, or the infelicitous scheduling of the hearing on an issue. But, to repeat what we have said on so many prior occasions, in the overwhelming majority of instances the party simply must await the licensing board's initial decision before bringing its complaint to us (assuming that the grievance has not been mooted by intervening developments). The failure to accept this fact of adjudicatory life -- judicial as well as administrative -- has the unfortunate effect of diverting attention from the progress of the licensing board proceedings where it belongs. (emphasis added)

A. There Is No Immediate And Serious Irreparable Impact Which Cannot Be Later Cured

CASE does not believe that Applicant has presented any evidence that it has been "threatened with immediate and serious irreparable impact, which, as a practical matter, could not be alleviated by a later appeal." Marble Hill, supra. Indeed the instant motion by Applicant, its December 28, 1984 Notice of Appeal, evidences the fact that it believes the impact of the Licensing Board's Welding Memorandum is curable through regular appeal channels.

Further, Applicant has not demonstrated that it has or will suffer any impact whatsoever by the Board's ruling, much less the requisite "immediate and serious irreparable impact" required for interlocutory appellate review. (Id.)

The parties and the Appeal Board are left to wonder just what horrible calamity will instantly befall Applicant in a proceeding now suspended at its own request if interlocutory review is not granted. We can imagine none.

B. Applicant Has Not Presented Clear And Convincing Evidence That The Issues It Seeks Directed Certification On Affect The Basic Structure Of The Proceeding In A Pervasive Or Unusual Manner

Applicant raises three issues for interlocutory review claiming "they have already affected the proceeding in a pervasive manner and are likely to be repeated."[10] Those issues all deal with a Licensing Board's right to consider safety issues raised during the course of litigation. They are:

1. Whether in an operating license proceeding, the Licensing Board has authority to require issues abandoned by intervenor to be litigated nevertheless, without declaring a sua sponte issue and complying with 10 C.F.R. §2.760a? If so, what is the practical effect of an intervenor abandoning an issue?

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10 As stated previously (supra, p. 7), the time for Applicant to raise its complaint was either before the hearings occurred, or before the next hearing occurs (if there is one), not now while hearings are suspended at the request of the Applicant. (Transcript of January 17 meeting between Applicant and TRT).

2. Whether in an operating licensing proceeding, the Licensing Board has the authority to require full litigation of a tangential issue raised for the first time during hearings, without a finding of, inter alia, good cause for lateness pursuant to 10 C.F.R. §2.714(a)(1), or without declaring a sua sponte issue and complying with 10 C.F.R. §2.760a?

3. Whether in an operating license proceeding, without declaring a sua sponte issue, the Licensing Board can retain for inclusion in its ultimate conclusion of law an abandoned segment of the case and an issue filed late with no finding of good cause for lateness?

However, Applicant does not offer a scintilla of evidence on how the raised issues affect the basic structure of the proceeding, nor demonstrate how the affect -- if there is one -- is either pervasive or unusual. In fact, Applicant does not even substantiate that the issues raised (sua sponte authority) are grounded in the record of this case. CASE asserts they are not.

The Licensing Board made its position clear on its procedure in its September 23, 1983 Memorandum and Order:

> ... we no longer consider that our remaining questions on these quality assurance issues are in the nature of preliminary inquiries concerning potential sua sponte issues. Since the quality assurance contention still is pending, we need not decide whether our questions are 'important' safety issues -- as used in the sua sponte section of the procedural rules -- but only whether we require answers in order to have a satisfactory understanding of the quality assurance contention.
>
> Because of this change in the Board's analysis, statements in our proposed decision about whether or not we will declare a 'sua sponte' issue should be interpreted as statements about whether or not we require a more complete record.

In other words, the Licensing Board is following the instruction of the Appeal Board regarding the litigation of complex quality assurance/quality control contentions.

In the decision of Commonwealth Edison Company (Byron Units 1 and 2) ALAB-770, May 7, 1984 ("Byron") the Licensing Board denied an operating license because it could not make a finding that there was "reasonable assurance that any and all serious construction infirmities have been detected and rectified." (Id. at 8) The Appeal Board agreed that the Licensing Board was correct to not authorize license issuance under those circumstances, but disagreed with the Board's issuance of a final decision denying the license outright.

The Appeal Board then established the exact licensing model which Applicant now seeks to have the Appeal Board interfere with.

> ... we think that the Board should have adopted the alternative of informing the parties now of the substance of [its] views on the quality assurance issues, retaining jurisdiction over them, and providing for further proceedings before [it] when the various inspections, investigations and remedial actions become ripe for consideration. (Id. at 10)

The Board noted that under those circumstances the Applicant could have sought interlocutory review, although warning that "Indeed, it is a general rule that, irrespective of how detrimental to its interests an interlocutory order might be, a party must abide the event of final action on the matter before pressing for appellate relief." (Id. at 11)

There is nothing more certain in the Comanche Peak litigation than an acknowledgement that the various inspections,

investigations, and remedial actions are not yet ripe for final consideration by the Licensing Board, much less for appellate review.

C. The Licensing Board's Conduct Is Proper In Regard To The Issues Raised By Applicant

Applicant has framed the three issues for which they seek directed certification as questions over a Licensing Board's sua sponte authority. They even assert that the Licensing Board has flaunted a Commission directive in its pursuit of "tangential" issues in the licensing proceeding. (Show Cause Motion at 8). In reality, however, the Licensing Board's pursuit of information to insure a complete record is not only acceptable conduct, it is exactly the instructions set forth by the Appeals Board since at least 1973, and mandated in Byron, supra.

Applicant's query in their first issue submitted for directed certification, whether the Board "has the authority to require issues abandoned by intervenor to be litigated nevertheless, without declaring a sua sponte issue and complying with 10 C.F.R. 2.760a?" As the Appeal Board will surely realize, there is a significant distinction between issues properly in the case as admitted contentions and issues imposed on the parties by the Licensing Board.

The Appeal Board has previously dealt with the effect of the failure of a party to file proposed findings. Previous decisions imply that there is discretion of the Appeal Board to consider an appeal even though no proposed findings were filed by the appellant. See, Florida Power & Light Company (St. Lucie Nuclear

Power Plant, Unit 2), ALAB-280, 2 NRC 3 (1975), and Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331 (1973); and Northern States Power Co. (Prarie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857 (1974).

The declaration of abandonment or default for failure to file findings is a discretionary sanction available to the judge to enforce the conduct of the parties in litigation, not as a tool to expand or narrow issues. The difference between a board's authority over the conduct of a hearing and its authority to expand or narrow issues is exactly the point raised in the Commission decision cited by Applicant. If a finding of abandonment or default for failure to file findings had the effect of striking from the record all testimony and evidence regarding an admitted contention, the discretionary authority to control the proceedings would expand the authority of the Board beyond that recognized by the Commission.

In 1981 the Commission ruled in this case, but on another question related but distinguishable, to a Licensing Board's sua sponte authority. The issue before the Commission in 1981 was whether admitted contentions, whose intervenor sponsor had been voluntarily dismissed from the proceeding, should proceed to hearing under the Board's sua sponte authority. The Commission stated that:

> At present, all an intervenor need do to support admission of a contention is set forth the basis for the contention with reasonable specificity. Mississippi Power and Light Company (Grand Gulf Nuclear Station, Unit 1 and 2), ALAB-130, 6 AEC 423, 426 (1973). Moreover, given the availability of summary disposition procedures, the admission of a contention does not automatically require exploration of that contention at hearing.

It is not the entry of Contention Five that is in question, only the manner of the disposition of its subparts. Nothing in CLI 81-36 suggests that a Board is required to exercise sua sponte authority to pursue resolution, it simply gives the Licensing Board the option of dismissing a contention through summary disposition. (Id. at 3)

This principle equally applies to the second issue raised by Applicant, whether "the Licensing Board has the authority to require full litigation of a tangential issue raised for the first time during hearings, without declaring a sua sponte issue or finding good cause for lateness." (Show Cause Memorandum at 13)

Applicant's issue is apparently based on their distress over the Board's consideration of the pre-heat issue, which arose in the course of litigation of the welding issues.

Far from being a tangential issue in this case, improper welding practices is precisely the subject at the heart of this subissue. Evidence regarding this, or other, improper welding practices discovered by the Staff surely must be part of the factors considered by the Licensing Board in its decision.

Applicant suggests that the parties, and the Board, are somehow bound to the evidence of specific QA/QC problems first introduced by Intervenor in support of its contention, and required to put blinders on to all subsequent evidence that supports Intervenor's contention which is developed in the hearings. Such an approach to litigation is absurd.

In the third issue Applicant suggests that a conclusion reached by the Board on evidence properly in the case must be excluded from any ultimate conclusions of law because either Intervenor did not file findings on that issue or because a specific incident developed in the hearings.[11]

The conclusion that has catapulted Applicant into filing the instant appeal is included below:

> ... we note that Applicants repeatedly testified that individuals are 'terminated' when they violate procedures.... Fred Coleman, who was a welder at the plant, testified that there were many misdrilled holes repaired in the Unit 1 cable spread room. Tr. 11542. Additionally, Mr. Coleman was not even aware that any form of paper, such as a Repair Process Sheet, was needed for him to repair such a hole. Tr. 11544-45. Nor have Applicants even attempted to explain this testimony of Mr. Coleman....
>
> The welding of misdrilled holes without authorization is further substantiated by a Staff inspection of 56 supports in the north cable spreading room. Staff found two plug welds in each of three supports, but none of these welds was properly documented. Addendum to page 27 of Staff Testimony at 1 (Gilbert)....
>
> We note that the Staff has requested and is evaluating an explanation of these undocumented repairs [in the north cable spreading room] from the Applicants. NRC Staff Proposed Findings of Fact on Weld Fabrication at 57. We will consider the Staff's analysis of the Applicants' response in this proceeding. We are particularly concerned about the extent to which welding procedures and, possible, QC procedures may have been ignored. The possibility of QC procedures being ignored is supported by the testimony of Mr. Fred Coleman, who stated that QC inspectors were present in the cable spreading room during the time he was welding misdrilled holes. (Tr. 11542)

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[11] CASE has not abandoned the issue of the adequacy of the QA/QC program -- including those that stem from the litigation of the Stiner's welding issues. As stated previously, the issue of the adequacy of the QA/QC concerns has not been addressed in findings or by a decision.

This evidence comes from a properly conducted hearing on properly admitted contentions.[12] It is the conduct of Applicant's employees with regard to the implementation of the QA/QC program at the plant that should be of concern to them, not the conduct of the Licensing Board who hears factual testimony about the QA/QC deficiencies at the Comanche Peak plant.

CONCLUSION

Applicant has failed to show cause why its Notice of Appeal should not be dismissed. It is untimely, both because it is premature to appeal specific factual findings which are to be later considered by the Licensing Board in another decision, and because it is exceedingly late to object to the conduct of a hearing held a year ago. Further, the appeal does not meet the appropriate criteria for either regular or discretionary interlocutory appeal.

Finally, the sole basis for the appeal -- the Board's observation of a specific violation of the QA/QC program, is based on facts presented by Applicant's own witnesses is a legitimately conducted hearing probing issues properly admitted into the operating license case.

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[12] The Welding Memorandum in dispute deals only with those welding concerns raised by CASE witnesses Henry and Darlene Stiner. Other welding concerns of other witnesses appeal in other portions of the record. Those include inadequacy of the vendor weld inspection program of CASE witness Charles Atchison, and the inadequacies of the liner plate welding and welding inspections brought to the hearing by CASE witness Sue Ann Neumeyer, and others.

CASE urges that the Appeal Board dismiss the appeal for reasons stated herein.

Respectfully submitted,

Juanita Ellis (SK)

Juanita Ellis, President
CASE
1426 S. Polk
Dallas, Texas 75224

On Brief:

Steve Kohn, Esquire
Government Accountability Project
1555 Connecticut Avenue, N.W.
Washington, D.C. 20036

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEALS BOARD

In the Matter of	)	
	)	
TEXAS UTILITIES GENERATING COMPANY, et al.	)	Docket Nos. 50-445-OL
	)	and 50-446-OL
(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 Opposition To Applicant's Request For Appellate Relief have been sent to the names listed below this 1st day of February, 1985, by: Express mail where indicated by *; Hand-delivery where indicated by **; and First-Class Mail unless otherwise indicated.

Alan S. Rosenthal, Chairman**
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20550

Dr. W. Reed Johnson**
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20550

Thomas S. Moore, Esquire**
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20550

Administrative Judge Peter B. Bloch**
U.S. Nuclear Regulatory Commission
4350 East-West Highway, 4th Floor
Bethesda, Maryland 20814

Herbert Grossman**
Alternate Chairman, ASLB Panel
U.S. Nuclear Regulatory Commission
4350 East-West Highway, 4th Floor
Bethesda, Maryland 20814

Dr. Kenneth A. McCollom, Dean
Division of Engineering, Architecture
and Technology
Oklahoma State University
Stillwater, Oklahoma 74074

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

Ms. Ellen Ginsberg, Law Clerk**
U.S. Nuclear Regulatory Commission
4350 East-West Highway, 4th Floor
Bethesda, Maryland 20814

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

Stuart Treby, Esquire
Geary S. Mizuno, Esquire
Office of Executive Legal Director
U.S. Nuclear Regulatory Commission
7735 Old Georgetown Rd.
10th Floor
Bethesda, Maryland 20555

Renea Hicks, Esquire
Assistant Attorney General
Environmental Protection Division
Supreme Court Building
Austin, Texas 78711

Juanita Ellis