399

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF REPLY TO APPLICANTS' RESPONSE TO APPEAL BOARD ORDER OF JANUARY 2, 1985

Gregory Alan Berry
Counsel for NRC Staff

February 1, 1985

DS07

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF REPLY TO APPLICANTS' RESPONSE TO APPEAL BOARD ORDER OF JANUARY 2, 1985

Gregory Alan Berry
Counsel for NRC Staff

February 1, 1985

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF REPLY TO APPLICANTS' RESPONSE
TO APPEAL BOARD ORDER OF JANUARY 2, 1985

I. INTRODUCTION

On December 28, 1984, Applicants filed a notice of appeal [1/] of the Licensing Board's Memorandum (Concerning Welding Issues). [2/] That Memorandum addressed certain welding issues raised in connection with the underlying operating license proceeding. Because of its "doubt that the [Welding Order] is now appealable," the Appeal Board directed Applicants to show cause why their appeal should not be dismissed. January 2, 1985 Order at 1. The Appeal Board indicated that upon receipt of Applicants' submission, it would determine whether responses from the Intervenor and Staff are necessary. Id. On January 11, 1985, Applicants filed a response to

---

1/ Although characterized as "exceptions" to that Memorandum, the Appeal Board opted to treat Applicants' filing as a notice of appeal made pursuant to 10 C.F.R. § 2.762(a). See Order at 1. (unpublished) (January 2, 1985) ("January 2, 1985 Order").

2/ LBP-84-55, 20 NRC ___ (December 18, 1984) ("Welding Order"), modified, LBP-85-___, 20 NRC ___ (January 16, 1985).

the January 2, 1985 Order. See Applicants' Response to Appeal Board Order of January 2, 1985 (January 11, 1985). Three days later on January 14, 1985, the Appeal Board directed Intervenor and the Staff to file replies to Applicants' submission by January 23, 1985. 3/ The Staff has reviewed Applicants' Response in which they argue the Licensing Board's Welding Order is appealable as of right and, in the alternative, petition for directed certification. For the reasons set forth in this Reply, the Staff urges the Appeal Board to dismiss Applicants' appeal and deny the petition for directed certification.

II. BACKGROUND

In September 1982, hearings were held to consider allegations raised by Intervenor Citizens Association for Sound Energy in support of its Contention 5. 4/ Among the witnesses testifying for Intervenor

---

3/ On January 22, 1985, the Appeal Board extended the filing deadline to February 1, 1985. See Order (unpublished) (January 2, 1985).

4/ CASE's Contention 5 reads as follows:

> The Applicants' failure to adhere to the quality asusrance/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) and training and organization of QA/QC personnel, have raised substantial questions as to the adequacy of the construction of the facility. As a result, the

(FOOTNOTE CONTINUED ON NEXT PAGE)

were Henry Stiner and his wife, Darlene Stiner. Mr. and Mrs. Stiner described various welding practices at Comanche Peak Steam Electric Station (CPSES) which they alleged violated applicable procedure; among them the Stiners listed "weave welding," "downhill welding," "plug welding," and "weld rod control." At the conclusion of the hearings, the Licensing Board requested the parties to submit proposed findings of fact. Intervenor did not file proposed findings on the welding issues; consequently, the Licensing Board held in a Proposed Initial Decision 5/ that its failure to do so "constitutes abandonment of this portion of its case." Proposed Initial Decision, LBP-83-43, 18 NRC 122, 130 (July 29, 1983). The Licensing Board stated, however, that it had considered each of the abandoned allegations to determine whether any of them raised serious health or safety concerns requiring the Licensing Board to exercise its sua sponte authority. Id. The Licensing Board concluded that based on the state of the record it was unable to make that determination with respect to several allegations, including the welding allegations raised by the Stiners. Id. Instead of dismissing the allegations, however, the Licensing Board required that information needed to make that judgment be provided. Id. at 130-131.

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

> Commission cannot make the findings required by 10 C.F.R. § 50.57(a) necessary for issuance of an operating license for Comanche Peak. See 18 NRC at 125.

5/ The Licensing Board elected to issue a Proposed Initial Decision because "[t]wo of the three members of this Board were added to it

(FOOTNOTE CONTINUED ON NEXT PAGE)

Each of the parties moved the Licensing Board to reconsider its July 29, 1983 Partial Initial Decision. In a September 23, 1983 Memorandum Order, the Licensing Board took the following actions which are relevant to our purposes here: (i) the finding that Intervenor's had abandoned those allegations with respect to which it did not file proposed findings was affirmed, Memorandum and Order (Emergency Planning, Specific Quality Assurance Issues and Board Issues), LBP-83-60, 18 NRC 672, 680-81 (1983) and (ii) Applicants' argument that the Licensing Board lacked authority to consider abandoned allegations without first complying with the sua sponte provisions of 10 C.F.R. § 2.760a was rejected. Id. at 675. The Licensing Board stated that it had been persuaded by the Staff that Intervenors' failure to file findings on certain quality assurance issues did not preclude it from satisfying itself that its record was complete. Id. Consequently, in order to have a "satisfactory understanding of the quality assurance contention," id. (footnote omitted), the Licensing Board held additional hearings in February, March, and April 1984 on the issues of weave welding, repair of "plug welds," downhill welding, and weld rod control. At the February 23, 1984 hearing session, Intervenor sought to introduce evidence relating to the preheat practice of welders at CPSES. Applicants, supported by the Staff, moved to exclude such evidence on the ground that the issue of preheat had not

---

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

after the hearings on the matters we address." 18 NRC at 124. In view of this circumstance, and because the "record is complex," the

(FOOTNOTE CONTINUED ON NEXT PAGE)

been raised by Intervenor in a timely fashion. Tr. 9948 (Mr. Reynolds). Applicants' motion was granted by the Licensing Board. Tr. 9949. In an attempt to foreclose the Licensing Board from referring a matter with "possible safety implications" to the Staff for investigation, Id., however, Applicants withdrew their objection to the admission of evidence relating to preheat and elected to litigate the issue before the Licensing Board. Id.

After the hearings concluded and the parties had filed their proposed findings of fact, the Licensing Board, on December 18, 1984, issued its Welding Order. In the Welding Order, the Licensing Board found in Applicants favor on the issues of downhill welding, weave welding, and weld rod control. With respect to the preheat and repair weld issues, the Licensing Board postponed a final decision pending further information from the Staff. On December 28, 1984, Applicants filed a notice of appeal of the Licensing Board's Welding Order. On January 7 and 10, 1985, motions for reconsideration and clarification of the Welding Order were filed by Intervenors and the Staff, respectively. The Licensing Board issued a ruling on the Staff's motion on January 16, 1985. 6/

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

Licensing Board determined that it was appropriate "to invite comments on our tentative conclusions before we become committed to them." Id.

6/ In its Motion for Clarification, the Staff requested, inter alia, the Licensing Board to modify its finding that Applicants had committed "a significant violation of Appendix B," Welding Order at 69, to conform to the evidence in the record. The Licensing

(FOOTNOTE CONTINUED ON NEXT PAGE)

III. THE LICENSING BOARD'S DECEMBER 18, 1984 WELDING ORDER IS NOT APPEALABLE AS OF RIGHT

As Applicants acknowledge, only final actions of a licensing board are appealable. See Applicants' Response at 8. The test of "finality" for purposes of appellate review "is essentially a practical one." Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975). The Appeal Board has stated that "a licensing board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory." Id. In Applicants' view the Licensing Board's Welding Order is final for appellate review purposes because "it makes findings and issues orders disposing of a discrete segment of this case." 7/ Applicants' Response at 9. This argument is without merit.

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

Board granted the Staff's request that the finding in question be corrected to read "there is a possibility that there was a violation of Appendix B, and that this matter is still under Staff review." Compare NRC Staff Motion for Clarification of the Board's Memorandum (Concerning Welding Issues) at 6, with, Memorandum (Clarification of Welding Issues Order of December 18, 1984), slip op. at 2 (January 16, 1985). This circumstance is relevant to the Appeal Board's consideration of Applicants' appeal and is discussed at pp. 11, 12 infra.

7/ Applicants assume that an order disposing of a "discrete" segment of a proceeding is to be equated with an order disposing of a "major" segment of the case. See Applicants' Response at 8-10.

(FOOTNOTE CONTINUED ON NEXT PAGE)

The requirement that a ruling dispose of a "major segment" of the case in order to be considered final for review purposes is a qualitative standard. The Appeal Board's decision in Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156 (1980), illustrates this point.

In Sheffield, the Appeal Board concurred in the Licensing Board's determination that in a proceeding convened to consider an application to renew a license to operate a radioactive waste burial site and to amend the license to increase the size of the burial site, a subsequent order granting applicant's motion to withdraw the application to amend the license was a final order for purposes of appellate review because it disposed of a "very major segment" of the proceeding. 12 NRC at 160. The reason the Appeal Board stated that it could not "be seriously disputed" that the Licensing Board's order disposed of a "very major segment of the proceeding" is not difficult to discern. The proceeding involved in that case was convened to consider two separate and distinct questions: (i) whether the license to operate the radioactive waste burial site should be renewed and (ii) whether the license should be amended to permit the licensee to increase by more than ninefold the size of its waste burial site. To put it another way: The proceeding involved in

---

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

This assumption is not correct. Only the latter type of order, i.e., one disposing of a "major" segment of the proceeding, is considered final for purposes of appellate review. E.g., Nuclear Engineering Co. (Sheffield, Illinois, Low-level Radioactive Waste

(FOOTNOTE CONTINUED ON NEXT PAGE)

Sheffield had two segments; one to determine whether the Applicants' license should be renewed and the other to determine whether the license should be amended. Obviously, and as the Appeal Board determined, an order eliminating from consideration one of the two principal purposes of a proceeding necessarily disposes of a "major segment" of the proceeding.

By contrast, the Licensing Board's Welding Order addresses only one of several aspects of Intervenor's Contention 5 which, it should be noted, encompasses many issues regarding the adequacy of CPSES from a construction and quality assurance/quality control standpoint. These issues include the alleged harassment or intimidation of Joseph J. Lipinsky; the alleged intimidation of protective coatings inspectors, alleged quality assurance deficiencies in Applicants' start-up test program; alleged improper quality control approval inspection travelers relating to the reactor cavity of fuel pool liners; the applicability of certain provisions of the AWS Code to the design of welds; and the proper design of pipe supports including the application of certain provisions of the ASME Code and the effect of piping stresses on pipe support design; and whether there have been widespread welding deficiencies not identified or corrected by QA/QC. The last item listed was the particular Contention 5 issue (or rather sub-issue) addressed by the Licensing Board in its Welding Order.

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

Disposal Site), ALAB-606, 12 NRC 156 (1980), Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), (October 11, 1983) (unpublished memorandum).

Thus, the Licensing Board's Welding Order at most addresses only a major issue in the underlying operating license proceeding; it does not dispose of a major segment of the proceeding. Applicants fail to appreciate that only the latter type of orders satisfy the Davis-Besse finality test. The simple fact is that in view of the order issued by the Appeal Board in an earlier stage of this proceeding, none of the matters involved in the Welding Order or the remaining unresolved Contention 5 issues constitute a major segment of this case. In Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), (October 11, 1983) (unpublished order), this panel expressed "substantial doubt" that a partial initial decision addressing only one of "many pending issues" was subject to immediate review. Id., slip op. at 3. In that order, the Appeal Board opined strongly that a ruling disposing of a "very small portion of the quality assurance questions put before the Board for resolution" does not meet the Davis-Besse finality test. Id. This is precisely the situation presented here. The Licensing Board's Welding Order addressed only one of many pending issues related to Intervenor's quality assurance contentions put before the Licensing Board for resolution. While the matters addressed in that decision may be important or significant, that circumstance alone is not sufficient to transform an otherwise interlocutory order into one that is final for purposes of appellate review. Id.

To support their contention that the Welding Order disposes of a major segment of the case and thus is final for purposes of appellate review, Applicants also cite the length of the Welding Order (79 pages), the numbers of witnesses involved (16), and the length of the evidentiary

record (more than 2500 transcript pages). See Applicants' Response at 9. The Staff finds no merit in this argument. Admittedly, the evidentiary record culminating in the Welding Order is substantial; but the length of the evidentiary record for many of the remaining unresolved issues could be of similar or greater length. Thus, under Applicants' standard, a ruling on any of the remaining unresolved issues would be final for purposes of appellate review. The Staff submits that a finality determination based on the quantitative standard proposed by Applicants rather than the qualitative standard implicit in Sheffield, supra, would lead to the piecemeal review of this proceeding; precisely the evil that the rule against interlocutory appeals is designed to combat. See e.g., Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 (1983); 10 C.F.R. § 2.730(f).

Applicants' assertion that the Licensing Board's Welding Order should be reviewable immediately because "legitimate interests may be furthered" by immediate review of the Licensing Board's finding that Applicants committed a "significant violation of Appendix B to 10 C.F.R. Part 50" by failing to conduct a prompt investigation into possible undocumented repair welds, Applicants' Response at 9-10, requires brief comment. Other than its own interest in obtaining immediate review of the Welding Order, the Staff notes that Applicants have not identified any "legitimate interests that may be furthered" by interlocutory review of a determination which, as Applicants acknowledge, "is not dispositive of the question of the acceptability of the plant" id. or of its eligibility for an operating license. It is not enough for Applicants to assert "that this finding is

significant," id., because as the Appeal Board has observed, an otherwise interlocutory order will not be deemed final merely because "a significant issue is involved." Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), slip op. at 3 (October 11, 1983). 8/

Finally, the Appeal Board should note that Applicants' claim that the Licensing Board's finding of a violation of 10 C.F.R. Part 50, Appendix B requires immediate review because "legitimate interests" are implicated has been mooted by the granting of a Staff Motion for Clarification filed with the Licensing Board. In that motion, the Staff requested the Licensing Board to conform its finding to the evidence by modifying its Welding Order "to indicate that there is the possibility that there was a violation of [10 CFR Part 50], Appendix B, and that this matter is still under Staff review." NRC Staff Motion for Clarification of the Board's Memorandum (Concerning Welding Issues) at 6 (January 10, 1985). The Licensing Board has granted the Staff's request. See Memorandum (Clari-

---

8/ Applicants' reliance on Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 and 2), ALAB-301, 2 NRC 853 (1975), is misplaced. In that case the Appeal Board held that a partial initial decision that makes findings on site-related issues but does not authorize any construction activities "should be deemed appealable to the same extent as a partial initial decision which has the greater immediate effect of permitting the issuance of a limited work authorization." Id. at 854. The Appeal Board reached this conclusion because "legitimate interests may be furthered by a prompt determination whether the proposed location for the facility has features which might render it unacceptable from an environmental or safety standpoint." Id. It is clear from the foregoing, however, that the Appeal Board did not, as Applicants suggest, hold that any ruling involving any significant issue or interest is appealable as of right. Rather, the Appeal Board's holding was limited expressly to "partial initial decisions of this variety," i.e., findings on site-related issues in construction permit proceedings. Id. (emphasis added).

fication of Welding Issues Order of December 18, 1984), LBP-85-___, 20 NRC ___, slip op. at 2 (January 16, 1985). Accordingly, the finding of which Applicants complain has been rescinded and there is no longer any need for the Appeal Board's involvement in the proceeding, if ever there were.

IV. THE LICENSING BOARD'S DECEMBER 18, 1984 WELDING ORDER DOES NOT WARRANT DIRECTED CERTIFICATION

In the alternative, Applicants seek directed certification of the following issues: (i) whether a licensing board is empowered to require the litigation of issues abandoned by an intervenor without complying with the sua sponte provisions of 10 C.F.R. § 2.760a; (ii) whether a licensing board may require the litigation of a "tangential issue" raised for the first time during the hearing without first determining that there was good cause for lateness; and (iii) whether a licensing board may consider in its ultimate conclusion of law evidence related to issues of the type described in (i) and (ii) above. Applicants' Response at 12-13.

At the outset, the Staff notes that the Appeal Board's January 2, 1985 Order directed Applicants to show cause why the Welding Order was immediately appealable as of right. January 2, 1985 Order at 2. As the Staff interprets that order, the Appeal Board did not contemplate that Applicants were to supplement their appeal with an alternative petition for directed certification. Nevertheless, the Staff has reviewed Applicants' petition for directed certification and, as explained below, does

not find it sufficient to warrant the Appeal Board's involvement in the proceeding at this time.

As Applicants concede, "interlocutory appellate review of licensing board orders is disfavored and will be undertaken as a discretionary matter only in the most compelling circumstances." Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 (1983) (footnotes omitted); accord Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478-483 (1975). In Palo Verde, the Appeal Board stated that the directed certification authority contained in 10 C.F.R. § 2.718(i) will be exercised "only upon a clear and convincing showing that the licensing board order under attack either '(1) threatens the party adversely affected by it with serious and irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affects the basic structure of the proceeding in a pervasive or unusual manner.'" 18 NRC at 383, quoting, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

The Appeal Board has emphasized on several occasions that because directed certification is an extraordinary remedy requiring extraordinary circumstances, see, e.g., Palo Verde, supra; Marble Hill, supra; Public Service Co. of New Hampshire (Seabrook Stations, Units 1 and 2), ALAB-734 18 NRC 11, 15 (1983), a showing that the licensing board may have committed legal error is insufficient to demonstrate that the basic structure of the proceeding has been affected in a pervasive or unusual manner. Virginia Electric and Power Co. (North Anna Station, Units 1 and 2), ALAB-741, 18 NRC 371, 374 (1983); Seabrook, 18 NRC at 15. Nor is the

requirement satisfied by a showing that the consequence of the ruling complained of is "the litigation of issues that counsel believes should not be tried[.]" Palo Verde, 18 NRC at 384. Application of these principles leads to the conclusion that Applicants' request for directed certification should be denied.

Applicants argue that the "basic structure of the proceeding has been affected in a pervasive and unusual manner" because the Licensing Board considered evidence relating to certain welding issues which Intervenor failed to address in proposed findings filed at an earlier stage in the proceeding, and received evidence relating to preheat (another aspect of welding) offered during the hearing which had not been identified previously by Intervenor. See Applicants' Response at 12. According to the Applicants, "the Licensing Board's view of its role pervades this case, yet will evade effective and meaningful Appeal Board review if not scrutinized now, and is capable of repetition in other cases." Id. at 15. Immediate review is imperative, in Applicants' view, to "alleviate any unnecessary litigation and any improper precedent." Id. at 15-16.

To be sure, the Licensing Board's denial of Applicants' request to dismiss certain welding issues abandoned by Intervenor and its receipt of evidence relating to preheat offered by Intervenor during the course of the proceeding has had a discernible bearing on the course of the proceeding, namely the litigation of issues which in Applicants' judgment should not have been tried. To suggest that the basic structure of the proceeding has been affected in a pervasive or unusual manner thereby, however, "is manifestly wide of the mark." Arizona Public Service Co. (Palo Verde Nuclear Generating Stations, Units 2 and 3), ALAB-742, 18

NRC 380, 384 (1983). As the Appeal Board stated in Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113 (1982), "a licensing board order may well be in error but, unless it is shown that the error fundamentally alters the very shape of the ongoing adjudication, appellate review must await the issuance of a final licensing board decision." (Emphasis added). The fact that the Licensing Board's Welding Order may in some respect "conflict with Commission case law, policy, or regulations and [] effectively expand[s] the scope or length of the licensing proceeding" does not warrant the granting of a petition for directed certification. Id. For this reason, Applicants' petition for directed certification to review the Licensing Board's interpretation of its authority under the Commission's Rules of Practice should be denied. 9/

V. THE LICENSING BOARD RULINGS CHALLENGED BY APPLICANTS DO NOT CONFLICT WITH THE COMMISSION'S RULES OF PRACTICE

The Appeal Board has indicated that a response in opposition to a petition for directed certification is incomplete if it does not address "the petitioner's claim of Licensing Board error" and "the reasons advanced in support of the relief sought by the movant." Public Service

---

9/ Applicants contend also that in the event they prevail on Contention 5, the issues sought to be considered here will evade review. Applicants' Response at 16. This argument cannot be the basis for granting Applicants' petition because, even if true, it is not persuasive. The same argument applies to any party affected by an interlocutory ruling that prevails on the merits. Thus, if Applicants' petition were accepted for this reason, the prohibition against interlocutory review would be rendered meaningless.

Co. of New Hampshire (Seabrook Stations, Units 1 and 2), ALAB-734, 18 NRC 11, 14 n.4 (1983); accord Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 374 n.3 (1983). To fulfill its responsibility to address the merits of Applicants' petition for directed certification, the Staff will explain why the Licensing Board did not exceed its authority in not dismissing certain of Intervenor's welding allegations and permitting Intervenor to introduce evidence related to preheat.

A. The Licensing Board Was Not Required To Dismiss Issues Which Intervenor Failed To Address In Its Proposed Findings of Fact

Applicants contend that the Licensing Board erred in not dismissing Intervenors' allegations relating to weave welding, downhill welding, repair welding, and weld rod control. At the heart of Applicants' argument is a simple but erroneous premise: That a party's failure to file proposed findings of fact on particular issues requires a Licensing Board to dismiss those issues from the case. Neither the Commission's Rules of Practice nor the agency's case law supports this position.

Section 2.754(b) provides that "[f]ailure to file proposed findings of fact, conclusions of law or briefs when directed to do so may be deemed a default, and an order or initial decision may be entered accordingly." 10 C.F.R. § 2.754(b). This regulatory provision empowers, but does not require a Licensing Board to ignore the issues for which no proposed findings were filed. The Commission itself has made this clear: "The boards, in their discretion, may refuse to rule on an issue in their initial decision if the party raising the issue has not filed

proposed findings of fact and conclusions of law." Statement of Policy On Conduct of Licensing Proceedings, 13 NRC 452, 457 (1981) (emphasis added). Consistent with applicable rules, the manner in which a party's failure to file proposed findings of fact should be treated is, like other procedural matters, left to "the good sense, judgment, and managerial skills of [the] presiding board[.]" Id. at 453. In the case at bar, the Licensing Board did not elect to exercise its authority to refuse to rule on the welding issues which Intervenor failed to address in its proposed findings of fact. Instead, the Licensing Board's decided to consider the welding allegations raised by Intervenor to obtain a "satisfactory understanding of the quality assurance contention" (of which the welding allegations are a part). 18 NRC at 675. In doing so, the Licensing Board did not abuse its discretion. 10/ See Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-242, 8 AEC 847, 849 (1974) (licensing board commended for addressing in "comprehensive fashion" issues raised by an Intervenor that failed to file proposed findings of fact). To be sure, Applicants would have preferred that the Licensing Board refuse to consider further Intervenors' welding allegations. The fact that the

---

10/ The decision in Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346 (1983), is not to the contrary. In San Onofre, the Appeal Board upheld the Licensing Board's determination that it need not rule on the adequacy of applicants' emergency plans because that issue was not embraced in Intervenor's proposed findings of fact. 18 NRC at 371-72. In other words, the Appeal Board upheld the licensing board exercise of its discretion not to rule on issues not addressed in a party's findings of fact. Unlike San Onofre, in this case, the Licensing Board opted not to exercise its discretion to consider Intervenor's welding allegation even though those issues were not addressed in its proposed findings of fact.

Licensing Board did not exercise its discretion in accordance with Applicants' desire does not constitute reversible error.

Additionally, because a licensing board has an obligation to ensure that an adequate record is compiled with respect to the issues put before it for resolution, see e.g., Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 2 and 3), ALAB-443, 6 NRC 741, 752 (1977), the Licensing Board, having elected to consider Intervenor's welding allegations, did not exceed its authority in requesting that additional information be submitted before it made a final decision on the merits of those allegations. However, the mere existence of this authority does not always require its exercise. Indeed licensing boards should be reluctant to embark upon the course charted by the Licensing Board in this case. There are sound policy reasons why a licensing board should not construe its general obligation to ensure that an adequate record is compiled as a warrant to go beyond the record extant by scheduling additional hearings in search of additional evidence on the very issues that Intervenor failed to address in its proposed findings of fact. If an Intervenor knew that instead of being penalized for not filing proposed findings of fact, it would be given an opportunity to present and respond to additional evidence, there would be little incentive for it to comply with an order directing it to file proposed findings of fact. If that were to happen, the quality of initial decisions would suffer because a licensing board would be deprived of the assistance of an interested party "in determining what issues in fact exist between the parties, and what issues are either not actually in dispute or not relevant

to the eventual decision which must be rendered." Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 24 (1983).

B. The Licensing Board Did Not Err By Permitting Intervenor To Present Evidence Relating To Preheat

Applicants contend that in permitting Intervenor to present evidence relating to the preheat practices of welders at CPSES, the Licensing Board required the litigation of a tangential issue raised for the first time during the hearing. According to Applicants, the Licensing Board erred because it admitted evidence on this issue without first determining whether Intervenor had good cause for not raising the issue at an earlier stage of the proceeding. The Staff does not agree with Applicants' characterization of the Licensing Board's action. The Licensing Board did not "require" the litigation of the issue of preheat. In fact, the Licensing Board granted Applicants' motion to exclude all of Intervenor's evidence relating to preheat. The preheat issue was litigated only because Applicants withdrew their motion to strike and elected to litigate the issue. See pp. 4, 5 supra.

At the February 23, 1984 hearing session, Intervenor witness Henry Stiner sought to supplement his previous testimony concerning welding practices at CPSES with additional testimony relating to CPSES welders' preheating practices. 11/ Applicants, supported by the Staff, moved to strike Mr. Stiner's testimony on this item because it related to an

---

11/ "Preheat" refers to the practice of heating the metal to the temperature specified in the applicable procedure prior to commencing welding activity.

issue which had "never been raised in this case before." Tr. 9949. The Licensing Board granted Applicants' motion. Id. At the same time, however, the Licensing Board indicated that the "Staff should investigate" Mr. Stiner's preheat concern because it appeared to have "possible safety implications." Id. At that point, Applicants withdrew voluntarily their motion to strike and opted to litigate the preheat issue. 12/ By withdrawing their objection to Intervenor's preheat evidence, Applicants waived their right to appeal the admission of that evidence. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 411 n.46 (1976). Thus, the question whether the Licensing Board erred in considering evidence related to preheat practices at CPSES is not properly before the Appeal Board.

While it is not the case here, the Staff agrees that as a general practice licensing boards should not require the litigation of a matter that is only remotely related to an issue encompassed by an admitted contention. In determining whether evidence should be admitted on a matter not directly related to an issue in the case, a licensing board should consider whether the probative value of evidence to be adduced

---

12/ Applicants imply that they were forced to litigate the issue of preheat. Applicants' Response at 5, n.4. This is not true. The Licensing Board did not force, coerce, or otherwise threaten Applicants into withdrawing its motion to strike. Rather Applicants made a tactical decision to litigate the issue of preheat because they thought that by doing so, they would foreclose the Licensing Board from considering the results of any Staff investigation into preheat practices at CPSES. Tr. 9949 (Mr. Reynolds). In short, the reason that evidence related to preheat was admitted is that Applicants, deeming it advantageous to do so, made a strategic decision to withdraw its objection (an objection that the Licensing Board was prepared to sustain) to the admission of that evidence.

outweighs its potential for causing undue delay, unnecessary expense, or an unwarranted expansion of the proceeding; evidence should be excluded where its probative value does not predominate. See Consumers Power Co. (Big Rock Point Nuclear Power Plant), ALAB-795, 20 NRC ___, slip op. at 3 (January 9, 1985) (licensing board's decision to permit litigation of certain issues pertaining to facility's emergency plan questioned because "it is difficult to see how the expansion of a fuel pool could ever properly implicate the facility emergency plan"). The Staff believes that the Licensing Board would do well to keep these principles in mind as it considers the remaining Contention 5 issues left to be resolved in this case.

VI. CONCLUSION

The Licensing Board's Welding Order addressed matters comprising only a small portion of the quality assurance contention pending before the Licensing Board. Since the ruling did not dispose of a major segment of the case, it is not a final order for purposes of appellate review. Nor does the Welding Order have a pervasive or unusual affect on the basic structure of the proceeding warranting the Appeal Board's discretionary intercession into the proceeding. Accordingly, for all the reasons stated in this brief, Applicants' appeal should be dismissed and the petition for directed certification should be denied.

Respectfully submitted,

Gregory Alan Berry
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 1st day of February, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF REPLY TO APPLICANTS' RESPONSE TO APPEAL BOARD ORDER OF JANUARY 2, 1985" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 1st day of February, 1985:

Alan S, Rosenthal, Esq., Chairman*
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. W. Reed Johnson*
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Thomas S. Moore, Esq.*
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

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

Dr. Walter H. Jordan
Administrative Judge
881 W. Outer Drive
Oak Ridge, TN 37830

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

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

Nicholas S. Reynolds, Esq.
William A. Horin, Esq.
Bishop, Lieberman, Cook, Purcell & Reynolds
1200 17th Street, N.W.
Washington, DC 20036

Mr. James E. Cummins
Resident Inspector/Comanche Peak Steam Electric Station
c/o U.S. Nuclear Regulatory Commission
P. O. Box 38
Glen Rose, TX 76043

Lanny Alan Sinkin
Executive Director
Nuclear Information and
Resource Service
1346 Connecticut Avenue, N.W.
4th Floor
Washington, DC 20036

Atomic Safety and Licensing
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Robert D. Martin
William L. Brown, Esq.
U.S. Nuclear Regulatory Commission
Regional Administrator, Region IV
611 Ryan Plaza Drive, Suite 1000
Arlington, TX 76011

Mr. Michael D. Spence, President
Texas Utilities Electric Company
Skyway Tower
400 North Olive Street, L.B. 81
Dallas, TX 75201

Billie Pirner Garde
Citizens Clinic Director
Government Accountability Project
1901 Que Street, Northwest
Washington, DC 20009

Ellen Ginsberg, Esq.*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing
Appeal Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Robert A. Wooldridge, Esq.
Worsham, Forsythe, Sampels & Wooldridge
2001 Bryan Tower, Suite 2500
Arlington, TX 75201

Elizabeth B. Johnson*
Administrative Judge
Oak Ridge National Laboratory
P. O. Box X, Building 3500
Oak Ridge, TN 37830

Herbert Grossman, Alternate Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Gregory Alan Berry
Counsel for NRC Staff