Filed: March 1, 1985

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' RESPONSE TO CASE's "MOTION FOR ESTABLISHMENT OF AN EVIDENTIARY STANDARD AND REQUEST FOR BOARD DIRECTED INDEPENDENT INSPECTION"

Introduction

Set forth below pursuant to 10 CFR § 2.730 is the Applicants' answer to CASE's "Motion for Establishment of an Evidentiary Standard and Request for Board Directed Independent Inspection" (the "Motion"). The Motion was filed under date of February 4, 1985. By an order issued telephonically on February 13, 1985, the Board extended the time for Applicants' response to and including March 1, 1985. For the reasons set forth below, the Applicants say that the Motion should be denied.

The Nature of the Pending Motion

The Motion makes four separate and distinct requests of the Board. Requested are two findings (one declaratory) and two orders. Request No. 1 asks this Board to find or declare "that based on evidence now available to it there is substantial doubt that Applicant has implemented an effective QA/QC program and thus substantial doubt that the plant 'as built' is safe." Motion at 1 (emphasis added). Request No. 2 asks this Board to find "that there is a need for an independent reinspection of the plant."[1] Id. Request No. 3 is for an order commanding the Applicants "to file a plan for [an independent] reinspection with the Board consistent with specific criteria [to be] adopted by the Board." Id. Request No. 4 is for an order that would "suspend all hearings (but not discovery) in Docket 2 (Harassment and Intimidation) until completion of the reinspection program." Id. As demonstrated below, Request Nos. 1 and 2 are procedurally out of order and lacking in substantive merit, Request No. 3 is beyond the jurisdiction

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[1] Despite the somewhat unstructured grammar in the second sentence of the Introduction of the motion, only one further finding is apparently requested (not three). The remaining enumerated requests for relief appear, as stated in the text, to be for orders based upon the requested finding (if made). In fact, the one enumerated finding requested might more appropriately be characterized as a conclusion to be derived from the requested declaratory finding.

of this Board to grant and Request No. 4, while clearly within the power of the Board to grant, makes no sense whether or not one assumes the granting of the other three requests. Our response is set forth in two parts below. Part I deals with the procedural and jurisdictional deficiencies of the Motion. Part II addresses the lack of substantive merit in Request Nos. 1 and 2, which are the basis for Nos. 3 and 4.

ARGUMENT

I. EACH AND EVERY ONE OF THE REQUESTS IS PROCEDURALLY DEFICIENT

A. Request Nos. 1 and 2 Are Made on the Basis of an Incomplete Record and as Such Constitute Invitations for the Board to Engage in What May Ultimately Turn Out to be Unnecessary and Useless Acts

The authorities relied upon by CASE fall far short of supporting their Request Nos. 1 and 2 for findings on an incomplete record. To be sure, the NRC Licensing Board has the power to issue declaratory judgments in appropriate circumstances. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station), CLI-77-1, 5 NRC 1, 4 (1977), affirming ALAB-321, 3 NRC 293, 298 (1976). For the run of NRC declaratory judgments, however, either no record is needed or there is no factual dispute. Here, the record is incomplete. It is also true that the recent Byron decision of the Appeal Board demonstrates the appropriateness of a Licensing Board making known its views on the incompleteness

of an evidentiary record though the parties have rested. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), ALAB-770, 19 NRC 1163, 1169 (May 4, 1984). In the instant proceeding, however, the parties have not rested; moreover, CASE seeks findings, not caveats. Neither the Appeal Board in Byron nor the Board in the orders cited by CASE in the companion docket to this[2] were dealing with a situation where the parties were in the middle of trying the relevant issue. In both of the cited situations, rather, the parties (including the Applicants) had completed their evidentiary presentations and rested; the declarations and suggestions of the tribunal were made after and in response to that state of the record. Per contra, no party has rested its case in this Harassment Docket. (Neither have they done so in the companion docket). Indeed, as CASE itself points out, there is a substantial amount of evidence yet to be taken in the Harassment Docket before the matter is ready for decision by this Board. Motion at 4 n.4, 5. More importantly, the basic "evidence" upon which CASE relies for the requested declaration and finding (i.e., the TRT report, Motion at 5) is not even yet formally part of any adjudicatory record.

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[2] LBP-83-81, 18 NRC 1410 (1983); LBP-84-10, 19 NRC 509 (Feb. 8, 1984).

All of the foregoing leads to the conclusion that the requests for a declaration and a finding or conclusion based thereon are simply premature at this time. Neither the Byron decision discussed above nor the order of the companion Board in the Comanche Peak proceeding provide authority for the course of action that CASE urges. The prior order by the companion Board in Comanche Peak represented advice to a party at an appropriate juncture in conformity with the later suggestions of the Appeal Board in Byron. Neither of these decisions stand for the proposition that a Licensing Board should be required to give what amount to periodic bulletins on demand of a party as to how the case is going at any given time. More importantly, to grant in full CASE's motion at this juncture would transgress the Appeal Board's admonition in Byron that Licensing Boards avoid "the rendition of final judgment in the face of unfolding developments." 19 NRC at 1169. Such gratuitous action as is requested by CASE will place the Board in a position of either crystal ball gazing as to the still missing pieces of evidence or simply declaring itself to be of a closed mind as to future developments. Neither course of action is, we submit, an appropriate one for an adjudicatory tribunal to undertake.

B. Request No. 3 Is Not Within the Jurisdiction or Power of the Board to Grant

By Request No. 3, CASE apparently asks this Board, assuming it grants Request Nos. 1 and 2, to order a reinspection of the facility. At some points in the Motion, CASE appears to ask only that the Board order the filing of a plan, e.g., Motion at 1, while at others ordering of the actual reinspection is requested, e.g., Motion at 3. Moreover, in Appendix A to the Motion, the Board is being requested to manage the reinspection that it is being asked to order the performance of.

In making this request, CASE ignores a fundamental precept governing the relationship of Licensing Boards to the NRC adjudicatory process. A Licensing Board has only the jurisdiction and power that the Commission delegates to it. E.g., Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), ALAB-739, 18 NRC 335, 339 (1983); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167 (1976); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-616, 12 NRC 419, 426 (1980); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980). The Commission has not delegated to this or any other Licensing Board the power to order reinspection of a facility. Neither does the Board have jurisdiction to oversee any reinspection that might be ordered by the Commission itself. CASE cites no authority

for the existence of such jurisdiction. As CASE acknowledges in its discussion of Zimmer and Midland, Motion at 28-31, both of the reinspection orders in those cases were orders of the Commission (the Commissioners themselves in Zimmer, and the Staff acting for the Commission on Midland). Neither reinspection order was issued by a Licensing Board. Contrary to the suggestion of CASE, Motion at 31, the companion board in this proceeding demonstrated a clear understanding of its jurisdictional limitations in the December 18, 1983, memorandum and order. LBP-83-81, 18 NRC 1410 (1983). In the Conclusion of that memorandum and order, the Board used the following language:

> "We shall ask the applicant to propose a plan to affect the Board's level of confidence in its design process for Comanche Peak . . . . Lesser measures might, possibly, succeed in affecting this Board's views, but we urge consideration by applicant of an independent design review with each of the following characteristics." 18 NRC at 1454 (emphasis supplied).[3]

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[3] At the outset of the memorandum portion of LBP-83-81 the Board summarized its decision as follows: "We suggest that there is a need for an independent design review and we require applicant to file a plan that may help to resolve our doubts." 18 NRC at 1412. The "requirement" to file a plan was not intended to require a reinspection plan but rather a proposed course of action which might include lesser measures as indicated in the portion of the Memorandum and Order quoted in the text. Indeed, the use of the word "require" in context appears to be a simple inadvertence, especially in light of the order itself which states the Applicants "may" file a plan. 18 NRC at 1456.

Furthermore in the later decision on motions for reconsideration, the Board made it clear that the Plan criteria set out in its prior memorandum and order as "just suggestions, not binding on either party." 19 NRC at 529. This language is hardly authority for the unprecedented action that CASE, by its Request No. 3, would now have this Board undertake.

In addition to inviting this Board to arrogate to itself authority that the Commission has not given it and to usurp authority that the Commission historically has reserved to itself, i.e., the ordering of reinspection, CASE also requests the Board to usurp the function of the Staff in the conduct of any reinspection at Comanche Peak. Motion at 36-43. Licensing Boards in operating license cases do not audit inspections as they progress. There is no precedent for such action and, indeed, the Board's jurisdiction does not extend that far. The authorities cited by CASE supposedly to the contrary are inapposite.

The portion of the Zimmer decision cited, Cincinnati Gas & Electric Company (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 658-61 (1983),[4] does little to aid CASE. First, there was no request there for a Board-ordered and Board-supervised inspection. Second, the

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[4] The cite in the Motion at 41 (16 NRC 215) is to the prior decision being quoted within the quote.

language quoted by CASE was dicta, unnecessary to the decision being made and untested on appeal, in a memorandum discussing the 10 CFR § 2.714(a) criteria for late-filed contentions. It was not a "similar request," Motion at 40, to that made here. Rather, the language quoted by CASE was in the context of the Board holding that Criterion 2 (availability of other means whereby the petitioners' interest would be protected, 10 CFR § 2.714(a)(1)(ii)) and Criterion 4 (the extent to which the petitioners' interest will be represented by existing parties, 10 CFR § 2.714(a)(1)(iv)) weighed in favor of the petitioner proffering the late-filed contentions as part of a motion to reopen the record in that case. There was no discussion or consideration of the Board's jurisdiction to order, nor any suggestion that the Licensing Board was ordering or supervising, inspection programs or anything remotely similar. Prescinding from these difficulties, a reading of that Zimmer decision also makes clear that the Licensing Board was not advocating "monitoring of the reinspection program," Motion at 40, but was simply stating that in the event the Licensing Board retained jurisdiction of the cause, an opportunity to litigate in an adjudicatory forum would still be extant.

The Midland decision cited by CASE, Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-82-35, 15 NRC 1060 (1982), was by a Licensing Board sitting, inter alia, as the

designated adjudicator of a Staff-issued order modifying a construction permit. This enforcement Board had plenary authority over the issues and adjudication of that Staff-initiated order. See 15 NRC at 1063, citing the Commission's Notice of Hearing of March 14, 1980, 45 Fed. Reg. 18214, March 20, 1980. The issue before the Board for litigation was whether the Staff-issued Order should go into effect, and all that the Board decided in that matter was that, on an interim basis, it should.[5] Exercised by the Board was nothing more than the jurisdiction explicitly delegated to it to decide issues in that enforcement proceeding. (Even then, however, the Board clearly left supervision of compliance with the Permit, as modified, with the Staff. 18 NRC at 1071.)

Neither of these two decisions will bear the distending required to make them applicable to CASE's unprecedented request.

We observe, finally, that no amount of gratuitous vilification of the Staff can change jurisdictional boundaries. A Licensing Board has considerable power; indeed, it has the ultimate power in the first instance to

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[5] Indeed, the recent Midland Licensing Board decision cited by CASE in Footnote 1 of its motion makes clear that the description of the limits of the 1982 decision in the text is wholly accurate. Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-85-2, 21 NRC ___, ___ (Slip Op. at 10) (Jan. 29, 1985).

make findings on contested issues without which an operating license cannot be issued. A Licensing Board does not, however, have the power to order the undertaking of specific activities by an applicant in order to satisfy the burden of proof. In this area, rather, the Board's power ends at the limit of suggestion. A fortiori, the Board is not a forum with authority to supervise on a daily, weekly, monthly (or other) basis the conduct of an inspection program.

C. Request No. 4 Has No Validity in Any Event

The fourth CASE request, for a stay of further proceedings in the Harassment docket, is, by its terms, dependent on CASE obtaining the order sought by Request No. 3. Denial of Request No. 3 therefore moots Request No. 4.

Even if the Board were to have and to exercise the power to allow Request No. 3 (thus presumably adopting CASE's prejudgment as to what must be done to satisfy the burden of proof), Request No. 4 would be no less moot. The grant of Request No. 3 means that the "as built" condition of Comanche Peak is to be decided "yea" or "nay" on the results of the reinspection. What happened during any prior inspections (and whether such inspections were tainted by harassment -- or anything else) would become irrelevant instanter. Indeed, the allowance of Request No. 3 would mandate that the "HITS" issues be dismissed from litigation.

II. REQUEST NOS. 1 AND 2 ARE WITHOUT SUBSTANTIVE MERIT

CASE urges no basis for the issuance of the orders to reinspect and suspend hearings other than the assumed making by the Board of the two findings that are the subject of Request Nos. 1 and 2. As a matter of logic, if the Board is unable to make either or both of these findings, then Request Nos. 3 and 4 become moot and the motion must be denied in toto.

The Board's ability to make either of the two findings is, in turn, wholly dependent upon the Board accepting two factual premises put forth by CASE, neither of which, we submit, is supportable at this juncture as a matter of law or of logic.

The first premise, as stated by CASE, is that "regardless of what transpires from now on in this part of the hearing Applicant will not be able to establish that it has built a safe plant by relying on its QA/QC program." Motion at 3. That is a "regardless" as big as a "never." Prescinding from the question of whether the Applicants in fact are attempting to rely solely upon the construction QA/QC program to prove the safety of the plant, the fact is that the record presently lies incomplete and this Board cannot at this juncture make the finding requested, i.e., that there is and always will be substantial doubt that the plant "as built" is safe simply because at this juncture questions have been raised as to QA/QC implementation. Not

only do applicants dispute that such a finding would be possible, but only abject prejudgment would permit such a "finding".[6]

The second CASE premise, which represents an even greater Kirkegaardian "Leap of Faith" than the first, is that the only way to prove that the plant is safe "as built" is by a "Complete Independent Reinspection". Motion at 28 ff. This is absurd and no qualified expert would so testify. Even if major defects in the implementation of the QA/QC program were to be established, even if the Applicants were to concede as much with respect to QA/QC implementation, the type of reinspection called for by CASE would not be required. There is no basis, even in this to-date-truncated record, for saying that QA/QC was deficient and ineffective in every respect. Much less does it follow that because QA/QC was ineffective, then the plant must be unsafe. A combination of reliance on QA/QC implementation, selective reinspection, document review and engineering analysis may well demonstrate to a trier of fact

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[6] CASE asks the Board to find as a matter of fact "that regardless of what transpires from now on in this part of the hearing[,] Applicant will not be able to establish that it has built a safe plant by relying on its QA/QC program." Motion at 3. That is prejudgment.

that the "reasonable assurance" standards of the regulations are met.[7]

In addition to these two major premises, CASE also advances a fallacious equitable argument for the relief it seeks. This is the argument that CASE is having its resources strained by going forward with the proceeding at this point, the same argument that CASE has made to this Board in an earlier motion for reconsideration. Time and again in NRC practice it has been held that the fact that one might be forced to continue in, or engage in future, litigation does not constitute legal injury of which cognizance must be taken in exercising discretionary powers by an NRC tribunal. Philadelphia Electric Co. (Fulton Generating Station, Units 1 & 2), ALAB-657, 14 NRC 967, 979 (1981) (requiring voluntary dismissal of CP applications to be "with prejudice" denied where only harm to intervenor shown to be prospect of future litigation if new application

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[7] In Byron for example, the reinspection undertaken by the Applicant was limited to inspector qualifications, utilizing a sampling approach (which provided under certain conditions for expansion of the sample). Byron supra, ALAB-793, CCH Nuclear Regulation Reports ¶ 30,897.01 at p. 31,507 (December 20, 1984). In Diablo Canyon the independent design verification program, conducted pursuant to Commission Order, included as to specific items a sampling approach, worst case analyses, or a selective examination of three specific safety-related systems. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-763, 19 NRC 571 (1984).

filed). Accord, Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133 (1981); Boston Edison Co., (Pilgrim Station, Units 2 & 3), LBP-74-62, 8 AEC 324, 327 (1975); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 779 (1977) (litigation expense not "irreparable injury" for purposes of obtaining stay). Cf. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621, 628 (1977) ("[M]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.") CASE's "equitable" argument is without validity. To borrow a phrase: With the exception of the Board members, "We are all volunteers here."

We have not reached the point in this country, contrary to what CASE may perceive or desire, when we will require the forfeiture of more than $4 billion prior to that time when it is definitively established that the issue of whether the plant may be safely operated can never be answered in the positive. And that state of affairs cannot arise until some defect has been found that cannot be overcome. ALAB-770, supra, 19 NRC at 1169. In short, the issue is "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." LBP-83-43, 18 NRC 122, 126 (1983).

(Emphasis added.)

CONCLUSION

The Motion should be denied in all respects.

Respectfully submitted,

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Dated: March 1, 1985

CERTIFICATE OF SERVICE

I, R. K. Gad III, one of the attorneys for the Applicants herein, hereby certify that on March 1, 1985, I made service of the within Applicants' Response to Case's "Motion for Establishment of an Evidentiary Standard and Request for Board Directed Independent Inspection" by mailing copies thereof, postage prepaid, to:

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