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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' MOTION FOR RECONSIDERATION
OF BOARD ORDER GRANTING DISCOVERY
ON CROSSOVER LEG RESTRAINTS

I. INTRODUCTION

In Notice of Violation 50-445/84-08-02, the NRC reported that certain QC inspections of the Unit 1 Main Coolant System crossover leg restraint installations have not been made. Subsequently, Citizens Association for Sound Energy ("CASE") moved for discovery regarding the matter. Over Applicants' objection, the Licensing Board on October 5, 1984 issued Memorandum and Order (Discovery on Cross-Over Leg Restraints), granting CASE's discovery motion. The Board concluded that "there is sufficient importance to the allegation in the violation for us to permit discovery," Memorandum and Order at 1, and that the "violation relates to the open item concerning the adequacy of documenting of deficiencies through inspection checklists," Id. at 2.

Applicants hereby request that the Board reconsider its ruling. In the Applicants' view, neither CASE in its Motion nor the Board in its Memorandum and Order has sufficiently

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demonstrated that the crossover leg restraint matter has significance which would justify discovery and litigation in this proceeding. To the contrary, the facts of record in the Notice of Violation and in the Applicants' responses thereto demonstrate that the matter has no safety significance. The Board should, therefore, not allow discovery on the matter or otherwise raise it as an issue.

II. ARGUMENT

The Licensing Board, in its October 5, 1984 Memorandum and Order, failed to support its decision to allow discovery on Notice of Violation 50-445/84-08-02. As noted in the Applicants' original response to CASE's discovery motion,[1/] Commission precedent provides clear guidance to licensing boards that, in the context of general quality assurance contentions, undue attention should not be focused on individual, isolated construction or quality assurance deficiencies. See e.g., Union Electric Co., (Callaway Plant, Unit 1), ALAB-740, 18 NRC 345, 346 (1983). Such deficiencies are not unusual and are independently irrelevant to the ultimate question of whether the plant has been constructed properly. Litigation of every reported or alleged deficiency would be immensely time consuming, extremely expensive, and inconsistent with an applicants' right to an expeditious hearing and a timely licensing decision. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-

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1/ "Applicants' Response to CASE Motion for Discovery Regarding Inspections of Main Coolant System Crossover Leg Restraints," September 14, 1984.

8, 13 NRC 452, 452-53 (1981); see also 10 C.F.R. Part 2, Appendix A at Section V. The Board's decision is contrary to this policy and precedent, and reflects an unfair and unreasonable balancing between the need for timely licensing and the importance of the issue on which discovery is sought.

Given the large number of NRC inspections of Comanche Peak which have been conducted and which will be conducted, a clear showing of the programmatic significance of a single notice of violation or alleged deficiency should be required prior to admitting it for litigation and allowing discovery. However, the Board in this case has never required CASE to make any showing as to the significance of the Notice of Violation and has provided little rationale for its decision to allow CASE discovery. The Licensing Board instead concedes that "[d]iscovery relating to this matter will assist the Board in assessing its significance." Memorandum and Order at 2. This is a wholly inadequate justification for admitting an issue into the proceeding and an improper use of discovery.

In the face of countless inspections and contrary precedent and policy, the Board has granted CASE discovery and litigation of a single Notice of Violation related to only four open inspection checklists. The Board defends its decision to allow discovery by writing that "this (sic) particular checklists seems (sic) to have been misplaced in the shuffle." Memorandum and Order, at 2. We believe that the Board's decision is in error. Even assuming one set of inspection checklists was lost

in the "shuffle", one such incident is irrelevant in the larger context without some showing of programmatic significance. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Station, Units 1 and 2), ALAB-756, 18 NRC 1340, 1345 (1983). One case-specific incident, written-up in a notice of violation, cannot alone support a finding that litigation of the matter is justified. In granting discovery the Board appears not to have employed a balanced perspective. The Board has thereby apparently demonstrated an acceptance of interminable litigation of the minute details of any NRC Staff finding concerning the vast Comanche Peak QA program.2/

The NRC Staff in issuing the Notice of Violation classified the particular incident involving the crossover leg restraints as a Severity Level IV incident. 10 C.F.R. Part 2, Appendix C, Section III defines a Severity Level IV violation as one which is:

> . . . less serious but . . . of more than minor concern; i.e., if left uncorrected could lead to a more serious concern.

2/ Applicants find the Board's action to be particularly disturbing because the Board has attempted to justify permitting discovery and litigation of this matter based on a rationale developed solely by the Board and not articulated by the Intervenor. We believe that it is inappropriate for the Board to resolve a dispute between the parties by developing and adopting a rationale not advanced by the Intervenor with the result that yet another issue must be addressed and completion of the proceeding is even further delayed. This in effect substitutes the Board for the parties in the advocacy of positions and the framing of issues.

The facts in the case of the crossover leg restraint inspection checklists, as reported by the Applicants to the NRC's Region IV, make it abundantly clear that the Notice of Violation is based on case-specific circumstances and that the circumstances will not lead to a more serious concern. In Applicants' supplemental response to Region IV regarding the Notice of Violation, B. R. Clements to R. L. Bangart, September 7, 1984, TXX-4294 ("Supplemental Response"), Applicants explained that the necessary construction work on the restraints has not yet been completed, and therefore, certain required inspections, including those at issue here, have not been performed.3/ The fact that there is remaining construction work is documented in a test procedure deviation. The Applicants will perform the construction work at an appropriate time and will, at that time, perform the necessary field inspections. There is simply no safety significance to the fact that inspections have not been completed where the necessary construction work remains to be performed.4/

Further, in its Memorandum and Order the Board discussed the fact that there is no documentation for the Applicants' initial decision to perform installation of the shims during the hot functional test program. Memorandum and Order at 2. The Board's

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3/ The remaining construction work on the crossover leg restraints is installation of the shims and torquing of the bolts. These operations should be done with the pipes in a hot condition. Supplemental Response, Appendix A, Item B, at 2.

4/ The Applicants' Response and Supplemental Response to the Notice of Violation were attached to the Applicants' September 14th response to the CASE discovery request.

quest for such construction documentation, however, is totally unnecessary and far beyond the bounds of Contention 5. The Applicants' Supplemental Response explains that the shims on the crossover leg restraints are optimally installed after the pipes have been heated and have experienced the inevitable thermal growth. Supplemental Response, Appendix A, Item B, at 2. The construction decision is on its face reasonable. In order for this Board to reach its decision on quality assurance in this proceeding the Board is not required to inquire further into the propriety of one of countless construction decisions related to the timing of a specific construction activity. Nor does Appendix B require Applicants to document every such construction decision. The Board is simply in error in its suggestion in its Memorandum and Order that the fact that Applicants have not provided the NRC with documentation of one construction decision somehow justifies discovery on Notice of Violation 50-445/84-08-02.

Finally, in granting discovery on this matter "in order to assist the Board in assessing its significance," Memorandum and Order at 2, the Board has distorted the use of discovery. Under the Commission's Rules of Practice discovery should begin only after issues in controversy have been identified and admitted pursuant to either 10 C.F.R. § 2.714 or § 2.760a. See 10 C.F.R. § 2.740(b)(1).5/ The issue raised here by CASE from the Staff's

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5/ Similarly, the Appeal Board has held that contentions should never be conditionally admitted into litigation, subject to later receipt of additional information. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 466

Notice of Violation has never previously been admitted in this proceeding. CASE has never filed a § 2.714(a) petition to add a late contention and the Board has never made findings prerequisite to raising a § 2.760a sua sponte issue. Instead the Board merely claims that the Notice of Violation "relates to the open item concerning the adequacy of documenting of deficiencies through inspection checklists." Memorandum and Order at 2.6/ However, the records retrieval "open item" was established by Memorandum and Order (Records Retrieval), LBP-84-8, January 30, 1984. LBP-84-8 did not admit records retrieval as an issue in this proceeding. Instead, records retrieval was merely identified by the Board as an area where the Board questioned the "adequacy of the record." LBP-84-8 at 1. Moreover, the Board's findings in LBP-84-8 were "preliminary, tentative, and non-binding." Id. The Board's findings do not rise to the level of admitting a new issue upon which the Board may appropriately grant discovery. The Board has therefore erred in granting discovery prior to admitting - based upon a proper showing by CASE - an issue into the proceeding.

(1982), reversed in part on other grounds, CLI-83-19, 17 NRC 1041 (1983). It reasonably follows that issues should not be conditionally admitted for discovery purposes in order to assist the Board in deciding whether the issue has any significance. Prior to discovery, issues must be admitted pursuant to § 2.714 or § 2.760a.

6/ Applicants assume that this terse characterization of the open item refers to Item FF of the Board's Memorandum and Order (Clarification of Open Issues), March 15, 1984; see also Memorandum (Records Retrieval), LBP-84-8, January 30, 1984.

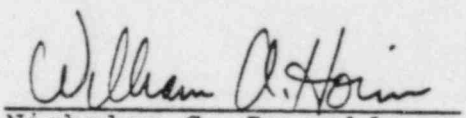
If the Board permits discovery on this Notice of Violation, it will establish a precedent that will allow the Intervenor merely to bring a notice of violation or other alleged construction deficiency to the Board's attention. Discovery will then be automatically forthcoming, without any showing by the Intervenor pursuant to § 2.714, and without a Board finding pursuant to § 2.760a, in order that the Board may decide whether or not a significant issue exists. Such a procedure ignores the fact that the purpose of discovery is to serve as an aid to parties in litigation of admitted issues. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455-46 (1981). The procedure employed by the Board here inappropriately eliminates all thresholds on admitting issues into the proceeding and will subject the Applicants to endless and unnecessary discovery and litigation.

In sum, the Board in its Memorandum and Order provides insufficient justification for its decision and makes no finding that the crossover leg restraint Notice of Violation raises any programmatic quality assurance issue. Instead, the Board incorrectly would allow discovery in order to determine whether such concerns exist. In light of the clearly enumerated facts regarding Notice of Violation 50-445/84-08-02, we submit that discovery on and litigation of the matter are inappropriate. The Notice of Violation is based on case-specific circumstances and has no overall safety significance, and there is no basis upon which to conclude otherwise.

III. CONCLUSION

Applicants request that the Board reconsider its decision to allow CASE discovery on Notice of Violation 50-445/84-08-02. Every isolated inspection report or notice of violation issued by the NRC with respect to Comanche Peak should not become the subject of discovery and litigation in this proceeding.

Respectfully submitted,



Nicholas S. Reynolds
William A. Horin
David A. Repka
BISHOP, LIBERMAN, COOK,
PURCELL & REYNOLDS
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 857-9817

Counsel for Applicants

October 19, 1984

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NOTICE OF APPEARANCE

Pursuant to 10 C.F.R. § 2.713(b) the undersigned hereby enters an appearance in the above-captioned proceeding.

Name: David A. Repka

Bar Admissions: District of Columbia Court of Appeals

Address: Bishop, Liberman, Cook, Purcell and Reynolds
1200 Seventeenth Street, N.W.
Washington, D.C. 20036

Phone: 202-857-9800

Party: Texas Utilities Electric Company, et al.

David A. Repka

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Motion for Reconsideration of Board Order Regarding Discovery on Crossover Leg Restraints" and "Notice of Appearance" in the above-captioned matter were served upon the following persons by hand delivery,* or by Federal Express**, or by deposit in the United States mail***, first class, postage prepaid, this 19th day of October, 1984.

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

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

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

***Mr. John Collins
Regional Administrator, Region IV
U.S. Nuclear Regulatory Commission
611 Ryan Plaza Drive
Suite 1000
Arlington, Texas 76011

***Chairman, Atomic Safety and Licensing Appeal Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

***Mr. William L. Clements
Docketing & Service Branch
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Stuart A. Treby, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
7735 Old Georgetown Road
Bethesda, Maryland 20814

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

***Renea Hicks, Esq.
Assistant Attorney General
Environmental Protection
Division
P.O. Box 12548
Capitol Station
Austin, Texas 78711

***Lanny A. Sinkin
114 W. 7th Street
Suite 220
Austin, Texas 78701

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

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

William A. Horin

William A. Horin

cc: Homer C. Schmidt
Robert Wooldridge, Esq.
David R. Pigott, Esq.