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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

MOTION TO STRIKE

Oliver B. Cannon & Son, Inc., ("Cannon") and John J. Norris through their attorneys, Isham, Lincoln & Beale, move the Atomic Safety and Licensing Board (the "Board") to strike the testimony of John J. Norris appearing on pages 18670 through 18903 and pages 19034 through 19139 of the hearing transcript. The totality of the circumstances surrounding this testimony, as reflected in the transcript pages in question, reveals a basic lack of procedural fairness that has prejudiced Cannon and Mr. Norris and that can best be remedied by striking these transcript pages. We believe that this unfair prejudice and the confusion apparent in much of the record in question outweigh the probative value of the testimony and bring this Motion within the principle of Rule 403 of the Federal Rules of Evidence.

Mr. Norris was called to the stand as a Board witness and subjected to extremely lengthy, detailed and vigorous examination by the Board and counsel for Intervenors. On the second day of his testimony, the Board Chairman voiced the

observation that he was disturbed by what appeared to him to be inconsistencies in Mr. Norris' testimony (Tr. 19118, 19133). This led to the Board permitting Mr. Norris to retain counsel before proceeding with further examination. The Chairman offered Mr. Norris the opportunity to go over the transcript with his counsel and correct it (Tr. 19118). After examining the transcript, we believe that the remedy of striking the portions in question would be more appropriate.

Examination of the record by Mr. Norris and his counsel has left them uncertain whether his testimony does in fact contain inconsistencies. What is readily apparent throughout the record is a great deal of confusion on the part of both the questioners and the witness. This confusion renders the testimony of little probative value and was clearly caused by the procedural circumstances surrounding the witness' questioning. It was due in the first instance to a lack of preparation. Mr. Norris was called as a Board witness. He was not represented by counsel and had not consulted counsel in preparation for his appearance in the hearing room (Tr. 18672). He did not know what he would be questioned about and above all he did not understand the detailed nature of the questioning to which he would be subjected (Tr. 19190-91). He had not brought with him the numerous documents that would have been necessary to refresh his memory on the long and complicated sequence of meetings and conversations that he was questioned about, and he had not reviewed those documents before testifying (Tr. 18675-76, 18780, 18873, 19053). Mr. Norris had not even

attempted to review and clarify in his mind the sequence of events about which he was questioned, which would have been necessary at a minimum for him to have given complete and accurate answers.

Furthermore, these problems were exacerbated by the nature and manner of the lengthy and vigorous questioning to which Mr. Norris was subjected, particularly by the Board. The Board was understandably under the same sort of handicap that Mr. Norris was with respect to the availability of documents necessary to understand the sequence of events in which they were interested. Mr. Norris repeatedly pointed out that the facts about which he was being questioned could only be ascertained after an examination of a sheaf of documents not present in the hearing room (Tr. 18675-76, 18780, 18873, 19053). The examination nonetheless continued, attempting to reach conjectures on the basis of the inadequate documents at hand (see Tr. 18781-82). The result was a wandering, repetitive examination that skipped back and forth between different points, often ill-defined, in a long and complicated sequence of telephone calls, memoranda, letters and meetings. The examination frequently came back to the same point from a different angle. In sum, this type of examination is quite likely to confuse the witness and betray him into what may be perceived as inconsistent statements.

The question here is certainly not the Board's discretion to call and examine on its own authority a witness that it believes necessary to enlighten it on a material

matter. The question is the reasonable exercise of that discretion. Cf. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1152 (1981). We believe that in this circumstance the Board should have taken on itself the role of looking after its witness. The examination of Mr. Norris should have been terminated and he should have been encouraged to retain counsel at an early time on the first day when the Board determined it would be necessary to treat him as a hostile witness.

The result of this process is that Mr. Norris made a considerable effort to be cooperative and to testify fully and accurately on matters within his knowledge and for his pains his reputation is today under a cloud in the eyes of the Board. We believe that it would be both difficult and essentially unproductive to attempt to go back through the transcript page by page and attempt to clarify the record. It is really not clear whether the record contains inconsistencies. It is certainly clear that the record reflects a great deal of confusion on the part of all concerned. The unfair prejudice to Cannon and Mr. Norris, coupled with the confusion which is likely to make the record misleading as a guide to the trier of fact, surely outweighs the probative value of the testimony elicited. For that reason we submit that it would be appropriate to exclude the testimony under

Rule 403 of the Federal Rules of Evidence. 1/ Mr. Norris will be available for examination again. Both he and the Board will have the advantage of being able to refer to the relevant documents. In these circumstances, a full and accurate record can be compiled, and we submit that the interests of justice will best be served if that record is started afresh.

1/ Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A trial court has broad discretion in balancing these elements. Liew v. Official Receiver and Liquidator, 685 F. 2d 1192, 1195 (9th Circuit, 1982). Although the Federal Rules of Evidence are not directly applicable to Commission proceedings, the adjudicatory boards often look to them for guidance. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 365n. (1983).

For the reasons stated, this Motion should be granted.

Respectfully submitted,

Joseph Gallo

Peter Thornton

Counsel to Oliver B. Cannon & Son, Inc.

ISHAM, LINCOLN & BEALE
1120 Connecticut Avenue, N.W.
Suite 840
Washington, D.C. 20036
(202) 833-9730

and

ISHAM, LINCOLN & BEALE
Three First National Plaza
Chicago, Illinois 60602
(312) 558-7500

Dated: October 22, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Motion to Strike" and Notices of Appearance of Joseph Gallo and Peter Thornton in the above-captioned matter were served upon the following persons by hand-delivery* or by deposit in the United States mail, first class, postage prepaid, this 23rd 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

*Herbert Grossman, Esq.
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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 & Services 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
Washington, D.C. 20555

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

*Anthony Z. Roisman, Esq.
Executive Director
Trial Lawyers for Public Justice
2000 P Street, N.W.
Suite 600
Washington, D.C. 20036

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

Joseph Gallo
Joseph Gallo