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October 31, 1984

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD \*84 NOV -1 A10:59

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

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CASE'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM NRC STAFF

The NRC Staff claims the right to withhold from discovery notes taken by persons at EG&G or working with EG&G that reflect conversations between Staff personnel and the authors under the alleged authority of 10 C.F.R. Part 2, §2.740(b)(2). (Staff Third Response to CASE Discovery (10/29/84)) The portion of the regulation relied upon by the Staff deals with "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding" and on its face has nothing to do with conversations between experts and those directing them as to what to prepare and how to prepare it, particularly where the notes are made by persons other than lawyers and reflect what they perceived to be their assignment. Moreover, the Staff objections relate to several conversations in which lawyers were only a part of the Staff representation and some notes which apparently do not

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distinguish between Mr. Treby and Mr. Ippolito.<sup>1/</sup> In short, the section cited is unrelated to the actual documents for which privilege is claimed.

In addition, the Staff cannot argue here that the documents it seeks to withhold are even part of the work product privilege since they have represented that the EG&G Report was being prepared in the ordinary course of the Staff work (as required by federal law) of investigating issues raised about CPSES and not in anticipation of litigation. Notes taken in the regular course of doing business are not immune from discovery (Advisory Committee Note to Rule 26(b)(3), 48 F.R.D. at 501):

Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other non-litigation purposes are not under the qualified immunity provided by this subdivision.

Even were no hearings being held on harassment and intimidation, the Staff would be required to conduct an investigation of harassment and intimidation matters.

Staff claims that prior to seeing the EG&G Report it did not even have a position on this issue and thus it cannot legitimately claim the special work-product privilege on behalf of the attorney working for a party because in the adversarial sense the Staff was not a party. The lawyers could not have been disclosing case strategy because their client did not have a position for which they could be developing strategy. In urging this Board to postpone all hearings until completion of the TRT

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<sup>1/</sup> There is no question that Mr. Ippolito and other non-lawyer Staff employees are not "representatives" of the Staff within the meaning of §2.740(b)(2).

Review (of which the EG&G Report is a part) the Staff argued that it could not have an overall position until the entire TRT Review was completed and essentially downgraded the EG&G Report to the views of some experts rather than the Staff position. See NRC Staff Motion for Postponement of Hearing (10/23/84); TR. 19,320-321, 323 (T.C. 10/11/84). Attorney work product simply does not reach communications with such experts.

A more disturbing aspect of the Staff position is that it is wholly inconsistent with earlier Staff positions. First, in a remarkable and unacceptable turnabout in position the NRC Staff now claims that the EG&G Report was tied to the Staff's adversarial position in this proceeding -- a point of view rejected on the face of the EG&G transmittal memo in which it is represented to be a portion of an ongoing Staff investigation into matters at CPSES and is released as a board notification. (Board Notification, 84-157 (9/17/84) In fact, the document was offered purely as the experts' own views, untainted by any adversarial intent. Staff counsel said (TR. 18,033):

The report was produced by a team of professionals in various disciplines under the direction of EG&G Idaho, Inc., whom the NRC contracted with to investigation [sic] the work climate at Comanche Peak Steam Electric Station and to develop an independent expert opinion as to whether or not a climate of intimidation was created among QA/QC personnel by CPSES Management such that the safety of the plant might be compromised. (Emphasis added)

The EG&G Report was represented as being so independent that it took three weeks for the Staff to review it and decide if they would adopt its conclusions. (TR. 18,033-034) If the report is truly independent then the conversations whose contents are being withheld cannot possibly be privileged.

Second, Staff counsel, in arguing for inclusion of the EG&G Report as late pre-filed testimony, represented that the Staff lawyers were totally removed from the process of developing the evidence (TR. 18,070-071):

MR. TREBY: ... These are independent experts. We've had minimal contact with them. My only contact has been to mail out transcripts as they have been reproduced and we would have no difficulty with people having a meeting.

Mr. Mizuno reminds me that we had --

MR. MIZUNO: One briefing session ourselves.

JUDGE BLOCH: The Staff was present at one briefing.

MR. TREBY: Well, it was a conference call in which we asked some questions as to what they were filing and made a suggestion with regard to format.

This alleged detachment was apparently also an explanation for why the Staff counsel did not share with the parties the completed analyses by EG&G or its agents of the 1979 and 1983 Survey, both of which would have been valuable for Dr. Goldstein to review in preparing his testimony. See TR. 18,058-059 where CASE expresses its concern that relevant data was withheld from it. Now Staff argues that several meetings occurred and that the contact was more than "minimal". Staff cannot have it both ways. Having once represented that the EG&G Report was an independent study with which Staff had "minimal" contacts it cannot now claim that those contacts are privileged because they represent attorney's thought processes.

Even if the Staff could somehow convert notes made by "independent experts" from "minimal" conversations with Staff members (apparently including some lawyers) regarding a report

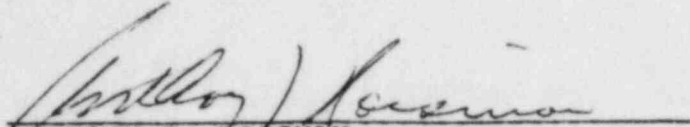
being prepared as part of the Staff's statutory obligations and as part of the data needed to formulate a Staff position on the merits of the issues into attorney work product<sup>2/</sup> there is a compelling need for the data. The Staff is offering EG&G as independent. Of crucial significance is how the EG&G position was shaped by the Staff and to what extent they sought to do a thorough on-site analysis as described by Dr. Goldstein and were directed or prevented from doing so. These matters go directly to the weight and credibility of the EG&G Report and the notes taken by EG&G personnel represent the best evidence of what directions they were given. This need is particularly relevant to the Staff which stands in the hearings as above the confrontational position of the parties and holds itself out as a neutral protector of the public interest. That aura and the implied weight it carries may be wholly inappropriate if the EG&G Report was prepared with some severely limiting conditions imposed by the Staff.

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<sup>2/</sup> It is apparent from reading the Staff description of the documents that much, and maybe all, of the material is unrelated to attorney work product either because it is notes of statements made by non-lawyers or does not reflect any mental impressions, conclusions, opinions or legal theories of an attorney. Thus, at a bare minimum, the Staff must produce redacted versions of the notes taken by the EG&G personnel and cannot exclude the entire document.

For the reasons stated we urge the Board to direct the Staff  
to produce the withheld information.

Respectfully submitted,



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CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of CASE's Motion to Compel Production of Documents From NRC Staff have been sent to the names listed below this 31st day of October, 1984, by: Express mail where indicated by \*; Hand-delivery where indicated by \*\*; and First Class Mail unless otherwise indicated.

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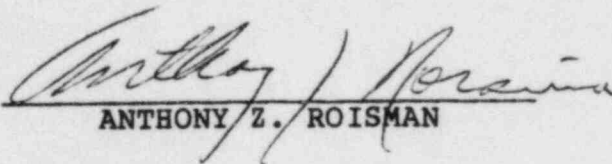
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