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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 OL-2
	)	
	)	and 50-446-2
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	[redacted]

CASE OPPOSITION TO STAFF MOTION
FOR INDEFINITE EXTENSION OF TIME

The Citizens Association for Safe Energy (CASE) opposes the NRC Staff's (Staff) extension of time request because it will produce a major delay in the resolution of critical issues whose determination will greatly advance a final licensing decision on the Comanche Peak nuclear power plant. In support of this opposition CASE relies on three principal arguments. First, delay in resolution of issues in Nuclear Regulatory Commission licensing proceedings is contrary to public policy and the unambiguous policies of the Nuclear Regulatory Commission. Second, the Staff does not have the right to postpone board resolution of a significant motion when its only purpose is to decide how they want to interpret the facts, already gathered, which are the subject of this motion. Third, even if the Staff has the right to delay board resolution of a motion pending the Staff's development of a position on the available facts it has waived that right in this proceeding.

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In our principal motion we have rpesented our basic argument that an early resolution of the motion is essential to protect CASE, the Board and other parties from wasted time and effort. We incorporate that argument here by reference. (CASE Motion, pp. 36-41).

A. Delay Is Contrary To The Public Interest And Nuclear Regulatory Commission Policy

In numerous filings and public statements Applicant has made clear that even a one-day delay in a licensing decision at CPSES would cost the utility and, if the state rate commission allows, its ratepayers, $650,000 to $1,000,000. These are extra costs which will be incurred whether the ultimate licensing decision is favorable or unfavorable to the utility. However, if, as we foresee, a decision against licensing is rendered there is an added public interest in an early decision. An early decision will avoid additional sunk costs. Even if the final decision is only a massive retrofit effort to correct construction defects, the earlier that retrofit rpogram is implemented, the less erroneous construction work will have to be undone. In short, delay has an even more serious impact on the public when the ultimate decision is license denial or a major rework. Surely no one would now seriously doubt that there is at least a substantial possibility that one of these two conclusions will emerge here.

We will not burden this record by citing the voluminous Commission and Atomic Safety and Licensing Appeals Board references to the evils of delay and the duty of the Atomic

Safety and Licensing Board and the parties to avoid delay. In the face of such a clear statement of policy we are frankly appalled that the Commission's own Staff would so casually propose an indefinite delay and do so with so little care for prescribing when that delay will end.

The Staff here offers no assurance that it can respond to the February 4 CASE motion by any particular time. In fact the filing is remarkably ambiguous on this point. The Staff lists several pre-conditions for its responding to the CASE motion:

1) Completion of an unknown number of SSERs "hopefully" by the end of March, 1985. (Staff Motion, p. 3)

2) Input from the two CPSES task forces to Mr. Noonan currently anticipated by the end of March. (Staff Motion, p. 3; Noonan affidavit, p. 3)

3) Staff consideration of the proper remedy to be adopted if the QA program is "indeterminate" which includes Staff assessment of Applicant measures taken, underway and to be proposed in the future. (Staff Motion, pp. 3-4) No date at all is proposed for when these might occur.

The Motion then, incredibly, states that the Staff is "hopeful that it will be in a position to respond to CASE's motion before the end of March 1985." (Staff Motion, p. 5) Assuming the quoted phrase does not contain one of two typos -- i.e. "hopeful" should read "doubtful" or "1985" should read "1986" -- the statement is ludicrous and reveals the Staff's intent to mislead the Board into accepting incrementally small but cumulatively large, extensions of time thus postponing for

months or more any action on the CASE motion. Such a tactic, if attempted by CASE would be viciously denounced by Staff and Applicant. Staff should be treated no better. The simple fact is that the Staff will not complete "its evaluation of Applicants' quality assurance program" and will not adopt "a final position regarding its adequacy" (Staff Motion, p. 4) for months, if not years. The bona fides of the Staff position would be less suspect if the motion had honestly admitted this reality.

The Noonan affidavit is itself a model of obfuscation. First, is Mr. Noonan really in charge? If so, why is he unable to state with any reasonable precision when persons who work for him -- like the two task forces, the SSER preparers (presumably the TRT) and those evaluating the corrective action proposals of the Applicant -- will complete their work? Chiefs make deadlines. Underlings have "hopeful" completion dates. Why doesn't the Staff produce the affidavit of the real person in charge to pin down when the work will be completed?[1] Or is Mr. Noonan really in charge but the affidavit was the work of Staff lawyers who were unwilling to let Mr. Noonan tell the whole truth which would abandon "optimistic" (Noonan affidavit, p. 3) best estimates which would not serve Staff counsel's strategy for

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[1] By letter dated January 14, 1985 served on the Board and parties CASE advised the Staff of its view that an affidavit articulating the basis for any claims regarding a need for delay from the person in charge should be filed with a request for an extension of time. Based on representations made by Staff counsel we assumed Mr. Noonan was in charge of all phases of the CPSES review and final decisions on licensing issues but the affidavit submitted neither confirms that fact nor reads like the views of someone in charge.

piecemeal extensions.

Second, the Noonan affidavit contains several unexplained anomolies. For instance, in paragraph 2 (pp. 1-2) he describes three TRT letters (September 18, November 29, 1984 and January 8, 1985). All are described as status reports and all as asking for additional information from Applicant but only the January 8 letter is described as presenting "preliminary views" regarding its content. That qualifier does not appear anywhere in the report which accompanies the letter or in the letter itself. In fact, in the January 9, 1985 Board Notification (BN 85-01) Mr. Darrell G. Eisenhut states:

> By Board Notification 84-160, the staff provided the Comanche Peak Technical Review Team (TRT) requests for additional information in the electrical/instrumentation, civil/structural, and test programs areas. By Board Notification 84-185, the staff provided the TRT's status on the protective coatings review and requests for additional information in the mechanical and miscellaneous areas. The TRT recently issued the above subject letter which provides the TRT's findings on the Quality Assurance/Quality Control at Comanche Peak. ... (emphasis added)

How did the January 8 letter and report become "preliminary"? We thought the draft letter (copy attached to our Motion) which ordered Applicant to take corrective actions was preliminary and the final letter was just that, final.

In addition, what significance is attached to the reference to the "letter"? The real meat was in the accompanying TRT findings. Is the Noonan affidavit deliberately ignoring that part of the whole document when it describes the transmittals? Surely the TRT findings are not preliminary, nor is additional information required by the TRT to complete its work. The additional information is for the Applicant to tell the Staff

what it is going to do about the problems found by the TRT. That is much different than the staff saying "we need more information" to decide whether Applicant has a problem.

In reality the Staff is attempting to accomplish through this illegimate delay that which it cannot win by legitimate argument. The facts as to the history and current status of the quality assurance breakdown are not disputed. The only reasonable question remaining is whether the plant can be salvaged through remedial efforts.

The Staff has, albeit de facto, withdrawn its reasonable assurance about Comanche Peak proffered in earlier proposed findings of fact (Staff Preliminary Proposed Findings of Fact, 9/4/84); yet it refuses to do so publicly and honestly. Instead it seeks to postpone the Board's function by continual foot-dragging and excuses until it can once again arrive -- by some twist of Staff reform plans and Applicant's new formal corrective efforts -- back at the formal position it has never budged from in front of the Board.

Without discovery, which may become necessary if this Staff minuet continues, we can only speculate on what is really going on. The best explanation that reconciles the facts is that at CPSES the Staff is faced with the hither to unthinkable -- a completed nuclear power plant which has been so poorly designed and built that the Staff cannot find a way to issue a credible "reasonable assurance" finding. All this delay is to allow those whose careers have been built on the premise that such an event would never occur to find a way out. There is no substantively defensible delay being sought here. The necessary facts are in

(as outlined in our motion) and they point to an inevitable conclusion. If the Staff can now give a best estimate of when it will complete the SSERs it can give a best estimate of what the present evidence means. It cannot be seriously questioned that if preliminary information indicated everything is okay with CPSES the Staff would promptly issue SSERs or give best estimates of its views and urge prompt resolution of outstanding issues. See Argument C infra. The Staff knows what the facts show and this Board should order them to divulge that conclusion now and resolve CASE's motion or resolve the motion without awaiting further Staff response.

B. The Board Should Not Await Staff Development Of Its Ultimate Position

The Commission has evolved a policy that in special cases the Board should postpone resolution of certain issues until the Staff has completed its work. Commonwealth Edison Company (Byron 1 and 2) ALAB-770, May 7, 1984, pp. 8-9. The policy is an exception to the general rule that licensing hearings should not be delayed awaiting information from the Staff and that Intervenors, although often relying on investigations by the Staff to confirm their concerns, must nonetheless rush to hearings without that information. The Staff now urges rejection of this principle on the basis that its opinions, as opposed to the facts underlying those opinions, must be available before a final decision on an Intervenor motion can be reached. We submit in such a case there is even more reason to adhere to the general Commission policy that hearings do not await completion of the

Staff review.

Admittedly the final Staff view on the ultimate issues in this case will be relevant. The question now is: whether those final positions are essential to resolve the present motion? We believe not. The issues presented by the motion are: whether the QA/QC program is indeterminate and what must Applicant do if it wishes to continue to seek a license for the plant in the face of that finding?[2] The Board must decide these issues and the opinion of the Staff will be but one expert's view. The real bases for resolution of the issues are the facts contained in Staff and other documents already released relating to the breadth and depth of the failure of the Applicant's QA/QC program to detect and correct construction defects. Thus the critical information required from the Staff is already available and nothing in the Staff Motion suggests to the contrary. The Noonan affidavit mentions that the TRT "completed the major portion of its onsite inspection activities by the end of October, 1984" (p. 1). We know Region IV has already concluded, based on its inspections, that a complete reinspection program is required. (January 18, 1985 letter to M.D. Spence from R. Martin) Only the headquarters Staff has found it necessary to layer on top of the

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[2] Contrary to the Staff assertions these are not the ultimate issues in the case. The ultimate issue is whether to license the plant. The CASE motion seeks early resolution of a much more preliminary issue: what kind of evidence must Applicant present if it is to prevail on the ultimate issue of whether the plant was built in accordance with appropriate design. Another penultimate issue is whether the design itself was acceptable and based on the most recent CYGNA letter the answer is that the design is not acceptable. Letter from N.H. Williams to J.B. George, February 19, 1985 (CYGNA letter 84042.035).

findings of the TRT, an SSER, a task force panel and indeterminate evaluations of Applicant's response proposals before deciding whether a complete reinspection is required. Whatever value those reviews may have for the Staff this Board has the necessary information before it now to resolve CASE's motion and should proceed to do so with or without a Staff response.

C. Even If The Staff Normally Has The Right To Delay Board Resolution Of Issues Pending Development Of Final Staff Positions, It Has Waived That Right Here

On September 20, 1984 the Staff offered into evidence in this proceeding what it purported was the Staff's final position on harassment and intimidation. TR. 18,033-34 That offer consisted of a report prepared by EG&G, a consultant to the TRT, and was based on a review of the evidentiary record developed during the summer of 1984 and other pre-existing Staff inspection reports and documents. CASE objected that the document could not be a final Staff position because the harassment and intimidation hearing was far from concluded and TRT and OI investigations were also not completed. (TR. 18,057-58; 18,061-62; 18,080-81) Staff counsel stated that while EG&G members would review subsequent transcripts and information this was the final position and it was unlikely to be changed. (TR. 18,043, 18,054) The Board Chairman stated that the document was received in evidence only because of the Staff representation that it was a final position and not an interim position (TR. 18,072-73, 18,078) although there was some question that it was the final Staff position (TR.

18,082-83).

By its actions with the EG&G report Staff made clear that it does not need to await even final SSERs, much less task force reviews,[3] to develop and state a final position. In fact there was no attempt by the Staff to even conduct any substantial independent evaluation of the EG&G report or present a separate Staff authored articulation of the Staff position on harassment and intimidation. How then does the Staff now insist on the multiple layers of review before articulating its final view on other TRT issues? As noted above the only difference in the two cases is that the EG&G report was supportive of licensing and the three TRT reports support the denial of a license and/or a reinspection program.

We believe this Board should reject any attempt by the Staff to establish the principle that it can take its positions based on the fashion and not the facts and thus delay taking positions on issues when the position will be unfavorable to Applicant and rush to present positions when they support Applicant. There is neither logic nor justice in such a policy. The Staff has

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[3] Significantly when the Harassment and Intimidation Panel was established no mention was made of the EG&G report or of the Staff representation that it was the final position of the Staff on the harassment and intimidation issue. Were the Staff operating honorably here the EG&G report would long ago have been withdrawn and subjected to the same scrutiny applied to other TRT reports that are more obviously unfavorable to the Applicant. Instead Staff representations of last September, the establishment of the Harassment and Intimidation Panel and the decision to allow Mr. Noonan to make the final decision on all of the licensing issues for the Staff have been allowed to remain unreconciled.

already represented that it does not need to await all Staff reviews to articulate its final positions even when, unlike the present situation, all the necessary relevant facts are not yet available. It should be held to that representation here.

D. Remedy

We request that the Board issue an order denying the Staff motion for extension of time and directing the Staff to file its response, if any, to the CASE Motion by March 1, 1985.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of CASE's Opposition To Staff Motion For Indefinite Extension Of Time have been sent to the names listed below this 4th day of February, 1985, by: Express mail where indicated by *; Hand-delivery where indicated by **; and First Class Mail unless otherwise indicated.

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