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9/25/85

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CASE'S MOTION FOR RECONSIDERATION OF
BOARD'S 8/29/85 MEMORANDUM AND ORDER
(PROPOSAL FOR GOVERNANCE OF THIS CASE)

AND/OR

MOTION FOR A PROTECTIVE ORDER

CASE (Citizens Association for Sound Energy), Intervenor herein, hereby files this, its Motion for Reconsideration of Board's 8/29/85 Memorandum and Order (Proposal for Governance of This Case) and/or Motion for a Protective Order /1/.

As summarized on pages 22-26, CASE seeks reconsideration of portions of the following items in the Board's Order: page 3, first full paragraph; item 6 on page 5; footnote 6 on page 6; first full paragraph on page 8. We address each of these portions (although not in the order listed) in the following discussions. Should the Board not reconsider regarding the

/1/ Applicants sought an extension of time to file a Motion for Reconsideration (or clarification or other appropriate pleading) of the Board's 8/29/85 Memorandum and Order until 9/25/85. Neither CASE in the main docket nor the NRC Staff had any objections (with the understanding that the same extension would apply to each of them), and on 9/9/85 the Board Chairman granted Applicants' request and asked that Applicants memorialize such agreement; Applicants did so in their 9/17/85 letter to the Board. It is now our understanding that no agreement was reached by Applicants with CASE in Docket -2; for the record, CASE considers that there are still two dockets unless and until the Board rules otherwise.

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Motions for Summary Disposition, CASE also seeks a protective order against having to respond to any future Motions for Summary Disposition filed by Applicants or NRC Staff.

1. **The Board should reconsider its position regarding Applicants' responses to CASE's Motions for Summary Disposition and Applicants' responses to CASE's responses to Applicants' Motions for Summary Disposition.**

The Board discussed the Motions for Summary Disposition in its 8/29/85 Memorandum and Order, where the Board recognized that "Applicants failed to fulfill" their previous plan (bottom of page 2 continued on page 3). The Board also stated:

> "Although we reject the Plan [Applicants' new Plan] as the sole basis for litigation, Applicants' commitment to the Plan is substantial and its careful implementation would provide important new information. Hence, it would not be proper to require Applicants to respond to intervenors' pending summary disposition motions before they can complete work on their Plan."
> -- Order at page 3, emphases added.

> "6. We will await the CPRT's consideration of the summary disposition questions raised by Applicants and by CASE, notwithstanding Applicants' request that we no longer consider entering summary disposition in their favor on the basis of these motions."
> -- Order at page 5, emphasis added.

> "Despite these reservations [which are detailed earlier in the Board's Order] it is appropriate to defer consideration of issues raised by CASE in its summary disposition motions. **If Applicants are successful**, then **the completed plan** will withstand challenges brought by CASE. One form of challenge CASE might bring is a statement that it intends to prove a certain fact about the plant and that, assuming that fact to be true, Applicants plan has not adequately responded to that fact. Another form of challenge is that there are specific reasons (set forth) that Applicants' plan, as implemented, is not adequate to carry their burden of proof to demonstrate the safety of the plant. Still other challenges are

possible, which is precisely the state of the world whenever a company prepares its responses to a complex set of allegations. Although this undoubtedly will make things difficult for Applicants, it is nevertheless the only fair way to proceed at this time."

-- Board Order at page 8, emphases added

There are two distinct types of the various Motions for Summary Disposition discussed here (Motions for Summary Disposition filed by Applicants and Motions for Summary Disposition filed by CASE); however, the underlying case law and reasoning applies to both. In addition, the specific agreement of the Board and parties regarding Applicants' Motions for Summary Disposition /2/ must be considered in regard to those Motions, their responses, and the Board's ultimate decision. CASE has already discussed some aspects of these, and we do not repeat all of our arguments here, but incorporate them herein by reference /3/.

/2/ See Board's 6/29/84 Memorandum and Order (Written-Filing Decisions, #1: Some AWS/ASME Issues), pages 1 through 3.

See also Applicants' confirmation of such agreement, in the first paragraph of page 3 of Applicants' 11/13/84 Answer to CASE's Motion and Offer of Proof Regarding CASE's First Motion for Summary Disposition Regarding Certain Aspects of the Implementation of Applicants' Design and QA/QC for Design.

/3/ See:

CASE's 2/1/84 Answer to Motions for Reconsideration of Board's Memorandum and Order (Quality Assurance for Design) by Applicants and NRC Staff, especially second full paragraph on page 5 through page 6, page 7, third full paragraph through first two sentences of second paragraph on page 9, first two full paragraphs on page 11, first full paragraph on page 14 through first full paragraph on page 15, attached Affidavits of CASE Witnesses affidavits of CASE Witnesses Jack Doyle (page 10, lines 2 through 12, of affidavit) and Mark Walsh (page 10, line 16, through page 11, line 6, of affidavit);

CASE's 2/10/84 Partial Answer to Applicants' Plan to Respond to Memorandum and Order (Quality Assurance for Design);

CASE's 3/5/84 Answer to Applicants' Plan to Respond to Memorandum and Order (Quality Assurance for Design);

(continued on next page)

There is no question that CASE has met its burden of going forward (a fact which it appears is not challenged even by the Applicants /4/). As discussed in the following, the questions now are: How much can the Board reasonably expect from this Intervenor and its witnesses? How many times must we prove our case? How many bites at the apple is the Licensing Board going to allow Applicants? Must we continue to prove the same things over and over again, to the point that CASE's due process rights have been irreparably and finally damaged, to the point that any decision by the Board favorable to granting a license will not withstand appeal, and/or to the point that the severely limited resources of CASE and its witnesses have been totally depleted and we can no longer continue? If the Board does not either require Applicants to respond to CASE's Motions for Summary Disposition and CASE's answers to Applicants' Motions for Summary Disposition, or find that Applicants are in default and rule accordingly, what is there to prevent Applicants from filing motions for summary

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/3/ (continued from preceding page):

CASE's 4/12/84 Response to [Supplement to] Applicants' Plan to Respond to Memorandum and Order (Quality Assurance for Design);

CASE's 8/15/85 Proposal Regarding Design/Design QA Issues in Response to Applicants' 6/28/85 Current Management Views and Management Plan for Resolution of All Issues;

CASE's 8/19/85 Offer of Proof of Lack of Independence of Applicants' Latest Plan (CPRT Plan), especially last paragraph bottom of page 17 continued top of page 18, and last paragraph on page 20 through first full paragraph on page 21.

/4/ See Applicants' 8/28/85 Response to CASE's (1) Motion for Board to Order Applicants to Supply Documents to Board; (2) Motion for Immediate Board Order for Applicants to Preserve Evidence and Offer of Proof in Support Thereof; (3) CASE's Offer of Proof of Lack of Independence of Applicants' Latest Plan (CPRT Plan); and (4) CASE's Proposal Regarding Design/Design QA Issues in Response to Applicants' 6/28/85 Current Management Views and Management Plan for Resolution of All Issues, middle paragraph on page 7.

disposition in the future, CASE's having to expend an enormous amount of limited resources in responding, only to have Applicants again ask that the Board not rule on the motions and responses, etc., etc., ad infinitum? Where is the fairness in this process? Where is the precedent in NRC regulations or the law for such a process?

Nuclear Regulatory Commission (NRC) regulations regarding responses to Motions for Summary Disposition are set forth in 10 CFR 2.749 and have been further clarified and confirmed by various rulings in NRC proceedings. While discovery prior to responding to a motion for summary disposition (when necessary to full consideration and decision on the issues) is clearly appropriate, it is not appropriate for a party to avoid responding altogether, as Applicants are attempting to do /5/.

Included in applicable NRC precedents is a ruling by the Atomic Safety and Licensing Board in the Comanche Peak proceedings /6/. The Board's 3/5/82 ruling was in regard to accepted Contentions 2 and 7 of CFUR (Citizens for Fair Utility Regulation). Applicants had filed a motion for summary disposition of Contentions 2 and 7. CFUR withdrew from the proceedings (for financial reasons), and stated in its 2/23/82 motion for voluntary withdrawal that it "respectfully prays . . . that this Board, rather than dismissing CFUR's Contentions Two, Three and Seven, adopt said

/5/ It should be noted that Applicants have not sought discovery regarding CASE's Motions for Summary Disposition, and it is long past time for them to do so. (Further, we believe that CASE's Motions contain all necessary documentation and/or references).

/6/ March 5, 1982 Board Order (Granting Summary Disposition of Contentions 2 and 7).

contentions as their own" /7/. The Board rejected CFUR's request and stated, in part /8/ (emphases added):

> "Once a motion for summary disposition has been made and supported by affidavits, the opposing party may not rely upon mere allegations or statements of concern, but rather must demonstrate by affidavit or otherwise that a genuine issue exists as to a material fact /2/. If a party is otherwise entitled to summary disposition, it would distort our regulations to abort this result by permitting an opposing party simply to withdraw the contention without prejudice. . .
>
> "Motions for summary disposition under Section 2.749 are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, and Federal court decisions interpreting that rule may be relied upon in NRC proceedings /3/. To defeat a motion for summary disposition, an opposing party must present facts in an appropriate form. Conclusions of law and mere arguments are not sufficient /4/. The asserted facts must be material and of a substantial nature /5/, not fanciful or merely suspicious /6/. A party cannot go to trial on the vague supposition that 'something may turn up,' /7/ or on the mere hope that on cross-examination the movant's evidence will somehow be discredited /8/.
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> "In its recent Statement of Policy, the Commission directed licensing boards to use procedural tools available to expedite the hearing process, stating:
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> > "'In exercising its authority to regulate the course of a hearing, the boards should encourage the parties to invoke the summary disposition procedure on issues where there is no genuine issue of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues.' /9/
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> "/2/ Florida Power & Light Company (Turkey Point Nuclear Generating, Units 3 and 4), LBP-81-14, 13 NRC 677, 687 (1981); aff'd. ALAB-660, 14 NRC ___ (1981).

/7/ CFUR's February 23, 1982 Motion for Voluntary Withdrawal of Contentions 2, 3, 5 and 7, at page 2.

/8/ Excerpted from pages 3 through 5 of the Board's 3/5/82 Order, emphases added.

"/3/ Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 878-79 (1974).

"/4/ Pittsburg Hotels Association, Inc. v. Urban Redevelopment Authority ofPittsburg, 202 F. Supp. 486 (W. D. Pa. 1962), aff'd. 309 F. 2nd 186 (3rd Cir. 1962).

"/5/ Egyes v. Magyar Nemzeti Bank, 165 F. 2d 539 (2nd Cir. 1948); Beidler and Bookmeyer v. Universal Ins. Co., 134 F. 2d 828, 831 (2nd Cir. 1943).

"/6/ Griffin v. Griffin, 327 U.S. 220, 236 (1946); Banco de Espana v. Federal Reserve Bank, 28 F. Supp. 958, 973 (S.D. N.Y. 1939) aff'd. 144 2nd 433 (2nd Cir. 1940).

"/7/ Moore's Federal Practice 56.15(3).

"/8/ Radio Music Hall v. United States, 135 F. 2d 715 (2nd Cir. 1943); Orvis v. Brickman, 95 F. Supp. 605 (D. D.C. 1951).

"/9/ Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981)."

Applicants themselves argued, in their 1/26/82 Motion for Summary Disposition of CFUR's Contentions 2 and 7 (excerpted from pages 4 and 5, emphasis added):

"Fundamental precepts of the administrative process mandate that CFUR be required in response to this motion to present material and disputed facts in affidavit form supporting its position at this stage of litigation or that the Board rule favorably on Applicants' motion. To permit otherwise would be to countenance unnecessary litigation and unwarranted delay. In this regard see 10 C.F.R. 2.749(b), where it is stated that:

> "'When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of this answer; his answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact. If no such answer is filed, the decision sought, if appropriate, shall be rendered.'" (Emphasis added.)

". . . the Commission's summary disposition procedures set forth in 10 C.F.R. 2.749 'provide in reality as well as theory, an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues.'" (citing Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC at 550 (1980).

". . . The Commission [in its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (May 20, 1981)] noted that it will seek to avoid delays in the licensing process by utilizing existing procedures consistent with the Commission's commitment to a fair and thorough hearing process. In this regard the Commission urged both its Licensing and Appeal Boards to employ procedural tools available to expedite the hearing process. Id. at 453. Among the tools which the Commission urged to be used by the Boards are the summary disposition procedures, so that where there is indeed no genuine issue of material fact to be heard, evidentiary hearing time is not devoted to such issues. Id. at 457. Accordingly, upon a finding of no genuine issue of material fact with respect to Contentions 2 and 7, the Board should grant the instant motion for summary disposition."

Thus, in addition to the clear intent of other NRC regulations and precedents, the Board's 3/5/82 ruling established precedent and case law in these particular proceedings.

Applicants have utilized these NRC regulations and precedents to their advantage in these proceedings. They were successful in achieving summary disposition of CFUR's Contentions 2 and 7 /9/; and they were very willing to utilize these NRC regulations and precedents to put CASE at a significant disadvantage regarding the filing of CASE's Proposed Findings on Welding Issues /10/. Applicants were also ready to take advantage of NRC regulations and precedents when they initially filed their seventeen Motions for Summary Disposition regarding design/design QA issues last year -- but only as long as it was to their advantage and suited their own purposes. When it became apparent to Applicants that they were in deep trouble and

/9/ It should be noted that CFUR withdrew from the proceedings without filing any response to Applicants' Motion for Summary Disposition; therefore, the validity of Applicants' statements in that pleading was not challenged.

/10/ See especially Board's 10/31/84 Memorandum (Multiple Filings), first two full paragraphs on page 2.

were unable to adequately support their position in the face of CASE's responses to Applicants' Motions, and in the face of CASE's own Motions for Summary Disposition, Applicants changed their position and now wish to ignore NRC regulations and precedents.

Further, since the Board has not gone along with Applicants' proposal that Applicants be allowed to withdraw their motions for summary disposition upon a ruling by the Board that only the Applicants' Case Management Plan and CPRT Plan be considered, Applicants now apparently plan to perform damage control and untimely amend their Motions /11/. It also appears to CASE that Applicants plan to amend only because of the Board's refusal to consider only the CPRT, rather than because of any desire for the Board to have the truth (otherwise they would have amended a long time ago, and prior to the Board's 8/29/85 Memorandum and Order, such as in response to the Board's 5/24/85 Memorandum and Order (Case Management Plan) at pages 3 and 4). This is important because it goes to the credibility of Applicants' representations to the Licensing Board and to Applicants' new management's ability to understand and willingness to disclose its understanding of the plant condition and of prior management actions.

With regard to their not answering CASE's Motions for Summary Disposition, Applicants have failed totally to carry their burden of proof and have disregarded NRC regulations and precedents -- without any showing of good cause.

/11/ See Applicants' 7/5/85 First Partial Response to Ripe Discovery Requests, page 5, Footnote 2.

There are two matters of special concern to CASE in the Board's 8/29/85 Order on page 5 (item 6). First, the Board discusses only the summary disposition questions raised by Applicants and by CASE as issues regarding which the Board will await the CPRT's consideration. CASE strongly objects to this limitation. Applicants' 1984 Plan responding to the Board's 12/28/83 Memorandum and Order (Quality Assurance for Design) was basically a three-pronged effort: Cygna was to perform an independent design review; an academic expert with impeccable credentials was to review the basic engineering principles; and Applicants filed seventeen Motions for Summary Disposition /12/. Applicants chose for their Motions for Summary Disposition only seventeen of about thirty or so of the Walsh/Doyle allegations discussed in CASE's 8/22/83 Proposed Findings of Fact and Conclusions of Law (some of which have not yet been ruled upon by the Board). CASE agreed to that limitation only in conjunction with Applicants' complete Plan. As noted by the Board, Applicants have failed to fulfill that Plan. CASE therefore considers that **all** of the Walsh/Doyle allegations covers in CASE's properly filed 8/22/83 Proposed Findings of Fact and Conclusions of Law (Walsh/Doyle Allegations) must now be dealt with by Applicants; otherwise, the Board should rule favorably on any of the Walsh/Doyle allegations not adequately addressed by Applicants. CASE moves that the Board clarify its Order to so indicate.

/12/ See Applicants' 2/3/84 Plan to Respond to Memorandum and Order (Quality Assurance for Design), 3/13/84 Supplement to Applicants' Plan to Respond to Memorandum and Order (Quality Assurance for Design), Tr. 13,798-13,803, and Board's 6/29/84 Memorandum and Order (Written-Filing Decisions, #1: Some AWS/ASME Issues) at pages 1 through 3.

We are including Applicants' response to the Board's Order on A500 steel as one of the Motions for Summary Disposition, since the Board treated it as such.

/13/ Board Order, last sentence bottom of page 2 continued on top of page 3.

Second, the Board seems to be under the impression that the CPRT is indeed going to consider the summary disposition questions raised by Applicants and by CASE. However, there is nothing to support such an assumption. The CPRT Plan does not purport to, and in fact does not, deal with the specific issues duly raised in the Walsh/Doyle allegations (which include, but are not limited to, the issues discussed in Applicants' seventeen Motions for Summary Disposition) /14/. Further, it is clear from the wording of the contracts /15/ that Applicants have no intention of having the CPRT deal with those specific issues. It appears that the Board has made portions of its rulings based on some possible future action by Applicants which may never materialize.

The current situation can perhaps best be demonstrated by putting the shoe on the other foot. Suppose that, when Applicants filed their seventeen Motions for Summary Disposition last year, CASE had not asked for discovery but instead had postponed answering for months, promising all the while that we were going to answer the Motions; then we finally had said, "We're not going to answer Applicants' Motions for Summary Disposition. Instead, we have a plan for the review of the matters raised in Applicants' Motions for Summary Disposition. Now, please understand, we're not going to address the

/14/ It should also be noted that it was CASE Witness Mark Walsh who first raised the issue of inadequate design of cable tray supports, during the May 1984 hearings. This had not previously been identified as a problem by Cygna, Applicants, or the NRC Staff.

/15/ Attached to CASE's 8/19/85 Offer of Proof of Lack of Independence of Applicants' Latest Plan (CPRT Plan). See also discussion at pages 8 through 10 of CASE's 8/19/85 Offer of Proof in Support of CASE's 8/14/85 Motion for Immediate Board Order for Applicants to Preserve Evidence.

issues raised directly; in fact, we are going to avoid the specific issues as much as possible. Instead we're going to hire new attorneys and new consultants, and we'll get back with you in about six or eight months or so (even though it's already been eight to twelve months since CASE's Motions for Summary Disposition were filed)." Obviously, this would not have been allowed; it is ludicrous to even think that such a ploy on the part of an intervenor would have been tolerated for a minute.

Applicants cannot be allowed to pick and choose which NRC regulations they wish to comply with and when they wish to comply. Applicants also should not be allowed to change their position in these proceedings at will, without good cause, and without prior leave of the Board. As late as January 25, 1985, they were still indicating that they planned to respond to the summary disposition motions /16/.

CASE submits that what Applicants propose (and what the Board appears to be ready to allow Applicants to do) regarding the Motions for Summary Disposition (especially those filed by CASE) is clearly contrary to all applicable NRC regulations and precedents, and to what has been established as case law in these very proceedings. Further, it is contrary to any semblance of fairness, and will severely and irreparably damage CASE's due process rights.

There is an additional aspect which must be considered. CASE fully expects that Applicants will again attempt to utilize summary dispositions when it again suits their purpose. There is every reason to believe that,

/16/ See Applicants' 1/25/85 letter to the Board, memorializing Dr. McCollom's orally granting Applicants' request to postpone temporarily their filing of two such documents.

should the Board's 8/29/85 ruling in this regard be allowed to stand, CASE will again have to expend our limited resources in responding, only to have Applicants again fail to meet their burden -- thus damaging CASE's due process rights yet again. And the Board has put no safeguards in place to prevent this from occurring -- as many times as Applicants think they can get away with it.

For these reasons, CASE moves that the Board grant CASE a protective order so that we do not have to respond to any Motions for Summary Disposition which may be filed by Applicants or the NRC Staff until such time as Applicants and NRC Staff have (1) responded substantively to CASE's answers to Applicants' Motions for Summary Disposition and (2) answered substantively and in proper form CASE's First, Third, and Fourth Motions for Summary Disposition (filed 10/6/84, 11/2/84, and 1/14/85, respectively) /17/. CASE further moves that, should the Board not grant this motion and rules instead that CASE will be required to answer any future Motions for Summary Disposition filed by either Applicants or the NRC Staff, the Board will rule without Applicants having the right to respond to CASE's answer (or, at a minimum, that Applicants be required to file any such response in a timely fashion and in strict compliance with the requirements set forth in the Board's 10/31/84 Memorandum (Multiple Filings) or forfeit any right to respond).

/17/ Should Cygna desire to have its views considered by the Board, it should also have to answer substantively and in proper form for each applicable Motion for Summary Disposition.

There are two separate aspects of the issues involved: the plant as it was; and the plant as it will be /18/. The Board appears to be considering only the plant as it will be /19/. CASE is entitled to a ruling on the summary disposition motions (both Applicants' and CASE's) based on the conditions at the plant, including the documentation of those conditions, at the time each Motion was filed. This is especially important at this point in time. Even if Applicant's and/or the CPRT went in now and took down every pipe support and every cable tray support and replaced them with new designs, this would still not answer the questions of how these inadequate and erroneous designs could have come about, who was responsible for them, management's responsibility for the problems, or how widespread and serious other design problems are at the plant. Further, it would not provide any assurance that other designs which currently exist at the plant or new designs which may be decided upon by Applicants will be any more adequate or any less erroneous than the previous designs. And it would not answer the questions duly raised by CASE and its witnesses in these proceedings.

CASE is entitled to expect that at some point in the ultimate rulings of the Board, it will issue a ruling on these Motions for Summary Disposition (both Applicants' and CASE's) based on the record at the time

/18/ It should be recognized and remembered that, were it not for CASE, the plant as it was and the plant as it is and will be, would have (in large part at least) been one and the same -- perhaps with disasterous consequences by now. For instance, in regard to design issues, not only Applicants but the NRC Staff as well were ready to write off the design issues raised by CASE Witnesses Jack Doyle and Mark Walsh in September 1982 (see NRC Staff Exhibit 201 (Testimony of NRC Staff Witnesses Tapia and Chen), and discussion at Tr. 5324-5396 and 5407-5426).

/19/ Order at page 3, first full paragraph, and page 5, item 6, and especially page 8, first full paragraph.

those motions were filed and upon Applicants' sworn Affidavits at that time -- not after Applicants have been allowed to change their sworn Affidavits and not after they have made any subsequently developed changes in the documentation, the installed equipment, or anything else covered in the Motions.

Further, CASE is entitled to expect a ruling from the Board on whether, based on the Board's determination of the Summary Disposition motions, a license would have been denied at that point in time.

We expect both at some point in these proceedings.

Applicants should not be allowed to come back at this late date and change their sworn affidavits (attached to their Motions for Summary Disposition) without prejudice /20/. These were to have been evidentiary affidavits, as agreed by the Board and all parties, and should be considered as such. As such, they should be preserved as evidentiary (as agreed upon by the Board and all parties), thus allowing their use as evidence in future Findings of Fact. Further, if the Board allows Applicants to change their affidavits, at a minimum Applicants should be required to demonstrate good cause and to state precisely why it is now necessary to make each such change. In addition, CASE should have the right to respond to all such changes. We so move.

/20/ As we have stated before, should Applicants persist in their request that the Board allow Applicants to withdraw their Motions for Summary Disposition (upon a ruling by the Board that only the CPRT Plan need be considered), and the Board grants Applicants' request, it is CASE's intention at that time to move that the Board accept CASE's responses to Applicants' Motions for Summary Disposition as Motions for Summary Disposition from CASE.

On page 8 (first full paragraph of its Order), the Board indicates certain challenges which might be brought by CASE to Applicants' new Plan, when it is completed (some months from now) /21/. It appears to CASE that what we have already done in our three Motions for Summary Disposition (and what has in effect also been done in CASE's answers to Applicants' Motions for Summary Disposition) is to bring statements that we intended to prove (and have in fact proved) certain facts about the plant and that, assuming those facts to be true, Applicants' plant (rather than just its Plan) is not adequate and Applicants have not adequately carried their burden of proof to demonstrate the safety of the plant; further, it is already apparent that Applicants' plan, if it is implemented as now set up, will not have adequately responded to those facts.

In short, it appears to CASE that we have already presented Applicants with challenges to which neither they nor the NRC Staff have adequately responded and which Applicants now propose to ignore. What reason is there to believe that, once we have gone through the whole process of gathering, analyzing, and properly presenting new information to the Board regarding Applicants' this-year's plan and the results of that plan, Applicants will be required to respond adequately (or even substantively) to such new information?

/21/ We note in passing that in the last sentence of that paragraph, the Board indicates that "this will undoubtedly make things difficult for Applicants" without recognizing the extreme and additional burden which will be placed on CASE by allowing Applicants this third bite at the apple.

CASE also moves that the Board reconsider and at this time (in accordance with NRC regulations and case precedent) rule that each of Applicants' Motions for Summary Disposition are denied, since there is obviously widespread disagreement on substantive issues in each. We also would like the Board's assurance, however, that the affidavits attached to those Motions will be retained as evidentiary (as discussed previously); if both cannot be done, we would prefer to have the affidavits retained as evidentiary.

In the last sentence on page 2 continued on page 3 of its 8/29/85 Order, the Board recognized (almost in passing) that Applicants' 1984 Plan was "a plan which the Applicants failed to carry out." CASE submits that the Board's statement is not adequate to cover what Applicants have done. The Board should find, and CASE moves that the Board rule, that Applicants have defaulted on their 1984 Plan and, further, that this fact decreases the credibility of Applicants and their case. CASE further moves that the Board rule that Applicants' unwillingness and/or inability to respond to CASE's answers to Applicants' Motions for Summary Disposition and to CASE's three Motions for Summary Disposition, coupled with the inadequacy of the CPRT's review of the specific issues raised by the Walsh/Doyle allegations, weights heavily against Applicants and constitutes an admission by Applicants of inadequate and/or erroneous pipe support design and raises additional questions regarding the design of the rest of the plant.

With regard to CASE's three Motions for Summary Disposition, Applicants are clearly in default under all NRC regulations and precedents. CASE moves that the Board so rule. CASE further moves that the Board rule that Applicants' failure to respond bears adversely upon Applicants' credibility.

Should the Board not order Applicants to respond to CASE's answers to Applicants' Motions for Summary Disposition or to CASE's three Motions for Summary Disposition, CASE is at a minimum entitled to utilize each of these for discovery as requests for admissions to Applicants under 10 CFR 2.742. If the Board does not reconsider and order Applicants to so respond, CASE moves that the Board so order.

Should the Board not grant any of CASE's motions herein regarding the Motions for Summary Disposition, we respectfully request that the Board clarify exactly what administrative procedures will be followed regarding summary dispositions in these proceedings.

There is one final matter regarding the Motions for Summary Disposition which CASE wishes to discuss. One of the most attractive benefits of Applicants' 1984 Plan and particularly those Motions, for the Board and all parties, was that (had Applicants followed it through as they promised) it would have avoided the necessity of holding long and exceedingly difficult hearings on much of the detailed, complex, technical design issues, thereby expediting the proceedings considerably.

Throughout these proceedings (until the Board's 12/28/83 Order) Applicants have pushed the Board and parties to rush and urged that the Board close the record. The Board has correctly noted (last sentence on page 2 continued top of page 3) that Applicants failed to fulfill their 1984 Plan. However, the Board has not correspondingly noted that the delay caused by Applicants' failure has been necessitated by Applicants, not CASE. CASE has fully met its burden of going forward, and CASE requests that the Board recognize this in its Order.

2. **The Board should reconsider its Order at page 6, footnote 6, regarding discovery.**

The Board stated (page 6, footnote 6):

> "CASE's motion to preserve pipe supports and other components being removed from the plant . . . does not appear to be a motion for discovery since it does not announce any intention to collect data about the affected components in the near future."

Although the Board's statement regarding the concerns raised in that particular motion is accurate, the Board is not correct in its assumption that CASE does not want discovery and does not intend to collect data about the affected components in the near future.

In fact, CASE has already filed discovery regarding this matter and attempted to begin collecting such data. This is one of the matters which we will be addressing shortly regarding outstanding discovery matters, regarding which we expect to have to file a Motion to Compel. We call the Board's attention especially to CASE's 2/25/85 Fourth Set of Interrogatories to Applicants and Requests to Produce re: Credibility, which state, in part /22/:

> Questions 24a-h (pages 32 and 33) requested information and documentation regarding supports in the North Yard Tunnel which it is CASE's understanding have been changed due to design changes.
>
> Then Question 24i (page 33) asked:
>
> "(i) How many other hangers/supports have been modified or redesigned in response to the Walsh/Doyle allegations?

/22/ See also: CASE's 2/25/85 Fourth Set of Interrogatories to Applicants and Requests to Produce re: Credibility, questions 1 (pages 3 through 10), 2(7) (pages 13 and 14), 6(6) and 6(7) (pages 18 and 19), 9aa (page 23), 24 (pages 32 and 33); CASE's 8/27/85 Interrogatories to Applicants and Requests to Produce, 6/13/85 Tr. (A.M.), question 20 (page 6); CASE's Interrogatories Regarding Premature Implementation of CPRT (filed in Docket -2, but requested to be responded to in the Main Docket also), questions 1 through 7.

"(ii) Supply a list of all such supports, each support's location, the system each support is part of, whether or not each support is safety-related, and the class of each support, and the system of which each support is a part.

"(iii) Provide drawings and calculations (the ones just prior to the change, and the ones where the change was made) for each support/hanger listed in (ii) preceding. Also provide any other documents (as defined on page 2, item 3, of this pleading) relating to such change.

"(iv) For each support/hanger listed in (ii) preceding, state exactly how the suport was changed and the specific reason for the change."

For these reasons, CASE moves that the Board reconsider this portion of its Order to reflect the correct facts and to confirm CASE's right to discovery regarding this matter.

3. The Board should reconsider its Order at page 6, footnote 6, regarding the preservation of evidence.

In its Order at page 6, footnote 6, the Board denied CASE's motion to preserve pipe supports and other components being removed from the plant. CASE asks that the Board reconsider this portion of its Order and grant the following amended request: That the Board order Applicants to retain in retrievable condition, in some retrievable location, with fully retrievable documentation, all pipe supports and cable tray supports which they remove as part of the CPRT effort.

To allow such potentially significant evidence of deficiencies in design and construction to be destroyed at this time is similar, CASE believes, to allowing a bookkeeper whose books are being audited to destroy his old ledgers because he is preparing new ones; this obviously would not

be allowed. Further, CASE submits that for the Board to allow such evidence to be destroyed at this point in time would, in effect, be a prejudgement that Applicants are going to follow their CPRT Plan to completion (although precedent in these proceedings clearly indicates the contrary), that their Plan is going to be successful, and that there will be no need to litigate what is currently in place at the plant.

Were the Board to grant CASE's amended request, it would not delay the CPRT efforts in any way; however, it will preserve the evidence and allow CASE to pursue with Applicants and NRC Staff the possibility of performing destructive testing on the welds, checking the documentation on the supports, and other possibilities. Without an order from the Board to preserve this potentially significant and important evidence, there is no assurance that the evidence will not be destroyed -- forever. CASE moves that the Board reconsider and grant our amended request.

In conclusion, for the reasons set forth herein, CASE moves that the Licensing Board reconsider portions of its 8/29/85 Memorandum and Order (Proposal for Governance of This Case) as listed below:

1. The Board should reconsider its position regarding Applicants' responses to CASE's Motions for Summary Disposition and Applicants' responses to CASE's responses to Applicants' Motions for Summary Disposition (see pages 2 through 18 of this pleading);
2. The Board should reconsider its Order at page 6, footnote 6, regarding discovery (see pages 19 and 20); and
3. The Board should reconsider its Order at page 6, footnote 6, regarding the preservation of evidence (see pages 20 and 21).

CASE specifically moves that the Board:

Regarding the Motions for Summary Disposition (Applicants' and CASE's), Rule that Applicants are in default in regard to their responses to CASE's answers to Applicants' Motions for Summary Disposition and in regard to CASE's First, Third, and Fourth Motions for Summary Disposition; and find that there are inadequate and/or erroneous pipe support designs at Comanche Peak, and further, that this raises additional questions regarding the design of the rest of the plant.

Should the Board be unable to make such determinations on the merits based on the information before them, CASE moves that the Board:

1. Clarify its Order at page 5 (item 6) to reflect that all of the Walsh/Doyle allegations covered in CASE's 8/22/83 Proposed Findings of Fact and Conclusions of Law (Walsh/Doyle Allegations)

must now be dealt with, one way or another, by Applicants (rather than just the issues covered by Applicants' seventeen Motions for Summary Disposition) (see especially discussion at page 10 of this pleading);

2. Recognize that the CPRT Plan as it presently stands does not purport to, and in fact does not, deal with the specific issues duly raised in the Walsh/Doyle allegations (which include, but are not limited to, the issues discussion in Applicants' seventeen Motions for Summary Disposition);

3. Grant CASE a Protective Order so that we do not have to respond to any Motions for Summary Disposition which may be filed by Applicants or the NRC Staff until such time as Applicants and NRC Staff have (1) responded substantively to CASE's answers to Applicants' Motions for Summary Disposition and (2) answered substantively and in proper form CASE's First, Third, and Fourth Motions for Summary Disposition (filed 10/6/84, 11/2/84, and 1/14/85, respectively);

4. If it does not grant the immediately preceding motion and rules instead that CASE will be required to answer any future Motions for Summary Disposition filed by either Applicants or the NRC Staff, rule without Applicants having the right to respond to CASE's answer (or, at a minimum, that Applicants be required to file any such response in a timely fashion and in strict compliance with the requirements set forth in the Board's 10/31/84 Memorandum (Multiple Filings) or forfeit any right to respond);

5. Confirm that at some point in time it will make a ruling on the Motions for Summary Disposition in question (both Applicants' and CASE's) based on the record at the time those motions were filed;

6. Confirm that at some point in time it will make a ruling on whether, based on the Board's determination of the Summary Disposition motions in question (both Applicants' and CASE's) based on the record at the time those motions were filed, a license would have been denied at that point in time;

7. Rule that Applicants cannot now change their sworn affidavits (attached to their Motions for Summary Disposition) without prejudice;

Rule that Applicants' sworn affidavits (as attached to their Motions for Summary Disposition, as well as any revisions) are to be considered as evidentiary affidavits, thus allowing their use as evidence in future Findings of Fact;

Rule that, if the Board allows Applicants to change their affidavits, at a minimum Applicants must demonstrate good cause and state precisely why it is now necessary to make each such change;

Rule that CASE will have the right to respond to all such changes;

8. Rule that each of Applicants' Motions for Summary Disposition are denied, since there is obviously widespread disagreement on substantive issues in each (should such denial mean that the affidavits attached to those Motions will not be retained as evidentiary, we withdraw this request);

9. Rule that Applicants have defaulted on their 1984 Plan, and further, that this fact decreases the credibility of Applicants and their case;

10. Rule that Applicants' unwillingness and/or inability to respond to CASE's answers to Applicants' Motions for Summary Disposition and to CASE's three Motions for Summary Disposition, coupled with the inadequacy of the CPRT's review of the specific issues raised by the Walsh/Doyle allegations, weighs heavily against Applicants and constitutes an admission by Applicants of inadequate and/or erroneous pipe support design and raises additional questions regarding the design of the rest of the plant;

11. Rule that Applicants are in default regarding CASE's three Motions for Summary Disposition, and further, that Applicants' failure to respond bears adversely upon Applicants' credibility;

12. Should it not order Applicants to respond to CASE's answer to Applicants' Motions for Summary Disposition or to CASE's three Motions for Summary Disposition, rule that CASE is entitled to utilize each of these for discovery as request for admissions to Applicants under 10 CFR 2.742;

13. Should it not grant any of CASE's motions herein regarding the Motions for Summary Disposition, please clarify exactly what administrative procedures will be followed regarding summary dispositions in these proceedings;

14. Recognize that the delay caused by Applicants' failure to fulfill their 1984 Plan has been necessitated by Applicants, not CASE;

Regarding discovery,

15. Reconsider its Order at page 6, footnote 6, regarding discovery, to reflect the fact that CASE has already begun attempting to collect data about the pipe supports and other components being removed from the plant, and confirm CASE's right to discovery regarding this matter;

Regarding the preservation of evidence,

16. Reconsider and grant the following amended request: That the Board order Applicants to retain in retrievable condition, in some retrievable location, with fully retrievable documentation, all pipe supports and cable tray supports which they remove as part of the CPRT effort.

Respectfully submitted,

Juanita Ellis

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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	}{	Docket Nos. 50-445-1
COMPANY, et al.	}{	and 50-446-1
(Comanche Peak Steam Electric	}{	
Station, Units 1 and 2)	}{	

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of CASE's Motion for Reconsideration of Board's 8/29/85 Memorandum and Order (Proposal for Governance of This Case) and/or Motion for a Protective Order

have been sent to the names listed below this 25th day of September, 1985, by: First Class Mail

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