

RELATED CORRESPONDENCE

August 2, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY AND LICENSING BOARDDOCKETED
USNRCIn the Matter of)
TEXAS UTILITIES ELECTRIC)
COMPANY, et al.)
(Comanche Peak Steam Electric)
Station, Units 1 and 2))Docket Nos. 50-445^{OL}
50-446^{OL}

'85 AUG -5 P3:56

Docket Nos. 50-445/2
50-446/2OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCHNRC STAFF RESPONSE TO APPLICANTS' STATEMENT OF
CURRENT VIEWS AND PROPOSED CASE MANAGEMENT PLAN *I. INTRODUCTION

On June 28, 1985, Applicants filed their "Current Management Views and Management Plan for Resolution of All Issues" (June 28, 1985) ("Applicants' Management Plan"). Applicants' Management Plan essentially discusses 5 subjects: (1) a statement of current management views on, inter alia, the adequacy of the record in this proceeding, and the past performance of Applicants' management. (Applicants' Management Plan, pp. 5-16); (2) a description of the Comanche Peak Response Team ("CPRT") and the CPRT Program (Applicants' Management Plan, pp. 16-27); (3) Applicants' specification of outstanding technical issues in Docket 1 of this proceeding, together with their position on the need to litigate those issues (Applicants' Management Plan, pp. 27-60); (4) Applicants' specification of outstanding intimidation and related technical issues in Docket 2, together with their position on the need to litigate those issues (Applicants' Management Plan, pp. 60-70); and (5) Applicants' suggested

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schedule for resolving substantive issues, and Applicants' views on discovery (Applicants' Management Plan, pp. 70-73).

The Staff herein provides its views regarding the Applicants' Management Plan.

II. BACKGROUND

On April 26, 1985, Applicants' filed a "Proposed Case Management Plan" ("Applicants' Proposed Management Plan"), which outlined a proposed procedure and schedule for defining the scope of issues requiring resolution in the two CPSES dockets. After receiving the responsive filings of the Staff ^{1/} and Intervenor CASE, ^{2/} the Board issued a "Memorandum and Order (Case Management Plan)" (May 24, 1985) ("Board Order"). The Board Order directed the Applicants to file by June 19, 1985 a "further elaboration" of Applicants' Proposed Management Plan, to address the following subject matters:

- (1) a statement of pending issues and their status (Board Order, p. 3).
- (2) a statement of current management views on the status of the plant, the adequacy of the record to date, adequacy of current management; and competence of previous management (Board Order, pp. 2, 3-4).
- (3) whether the record generated by Applicants' witnesses requires correction or clarification (Board Order, pp. 1-2).

^{1/} "NRC Staff Comments on Applicants' Proposed Case Management Plan" (May 10, 1985).

^{2/} "CASE's Answer To Applicants' 4/26/85 Proposed Case Management Plan (In Main Docket, 50-445 and 50-446) (May 13, 1985); "CASE's Proposed Management Plan (Docket 2)" (May 9, 1985).

- (4) the status of the Board's consideration of design issues, in light of the Board's discussion in LBP-84-10, 19 NRC 509 at 581 (1984). (Board Order, p. 2, n.2).
- (5) schedule for responses by the Staff and CASE to Applicants' filings (Board Order, p. 4).

On June 12, 1985, the Board granted the Applicants an extension of time until June 28, 1985, to respond to the Board Order of May 25, 1985. See "Memorandum and Order (Request for an Extension of Time) (June 12, 1985). Applicants' Management Plan was filed on June 28, 1985. CASE has filed responses to Applicants' Management Plan in both dockets of this proceeding. "CASE's Initial Response to Applicants' 6/28/85 Current Management Views and Management Plan for Resolution of All Issues" (July 29, 1985) (Docket 1); "CASE's Response to the Alleged Mootness of Docket 2 Issues and Proposed Schedule for Docket 2" (July 16, 1985) (Docket 2).

III. DISCUSSION

A. The Issues to be Resolved by the Licensing Board

The fundamental obligation of an Atomic Safety and Licensing Board in an operating license proceeding is to determine, with respect to the issues in controversy in a proceeding, whether a nuclear facility satisfies or will satisfy the applicable Commission regulations. See 10 C.F.R. §§ 2.760a, 50.57(a).

In this proceeding, the only admitted contention remaining in controversy is Contention 5, which alleges:

The Applicants' failure to adhere to the quality assurance/quality control provisions required by

the construction permits for Comanche Peak, Unit 1 and 2, and the requirements of Appendix B of 10 C.F.R. Part 50, and the construction practices employed, specifically in regard to concrete work, mortar blocks, steel, fracture toughness testing, expansion joints, placement of the reactor vessel for Unit 2, welding, inspection and testing, materials used, craft labor qualifications and working conditions (as they may affect QA/QC) and training and organization of QA/QC personnel, have raised substantial questions as to the adequacy of the construction of the facility. As a result, the Commission cannot make the findings required by 10 C.F.R. 50.57(a) necessary for issuance of an operating license for Comanche Peak.

In this proceeding, therefore, the Board must determine whether, based upon record evidence on the issues-in-controversy raised by Contention 5, it can make the relevant findings of 10 C.F.R. § 50.57(a). In reaching this decision, the Board should recognize that perfection in facility construction and in the implementation of a facility's QA/QC program is not required for a favorable § 50.57(a) finding. What is required is "simply a finding of reasonable assurance that, as built, the facility can and will be operated without endangering the public health and safety." Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344-45 (1983); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-77, 18 NRC 1365, 1367-68 and n.6 (1983). The Appeal Board has held that a Licensing Board's inquiry in an operating license proceeding where an applicant's QA program is in issue should focus on two questions: (1) whether "all ascertained construction errors have been cured," and (2) despite the correction of such errors, whether there has been a "breakdown of quality assurance procedures of sufficient

dimensions to raise legitimate doubt as to the overall integrity of the facility and its safety-related structures and components."

Callaway, 18 NRC at 346.

B. The Effect of the CPRT Program on the Issues in this Proceeding

Prior to suspension of hearings of this proceeding, the status of the CPSES proceeding can be briefly described as:

- In Docket 1, with respect to design and design quality assurance ("QA") issues, the Applicants had submitted a number of motions for summary disposition to supplement the record with respect to evidentiary deficiencies identified by the Licensing Board in its December 28, 1983 "Memorandum and Order (Quality Assurance for Design)," LBP-83-81, 18 NRC 1410. Intervenor CASE has responded at least partially to all such motions challenging the information submitted by Applicants. The Staff has responded to only two of these motions. CASE also filed four motions for summary disposition on pipe support design and design QA. Neither Applicants nor the Staff have responded substantively ^{3/} to these CASE summary disposition motions. The Staff, in information submitted to the Board and the parties (but not in evidence ^{4/}) has raised a wide range of

^{3/} Applicants did file an answer to CASE's first summary disposition motion, which opposed CASE's motion on procedural grounds but did not address the technical arguments raised by CASE. Applicants' answer was rejected in the Board's "Memorandum (Challenge to CASE's Summary Disposition Motion)" (November 19, 1984).

^{4/} This information consists primarily of transcripts of technical meetings between the Staff and Applicants. These transcripts were provided to the Board and parties in Board Notifications.

questions concerning the adequacy of Applicants' piping and pipe support designs, design process, and design QA program. With regard to construction adequacy, the parties have submitted substantial evidence on a variety of issues relating to, inter alia, welding, concrete, quality assurance (QA) and quality control (QC). The Board has issued decisions resolving some of these issues-in-controversy. ^{5/} A number of other issues-in-controversy remain to be resolved and the Board has requested Applicants to review previously-resolved issues to determine if they were correctly resolved in light of new information and developments. Memorandum and Order (Case Management Plan) (May 24, 1985). Finally, there are a number of matters on which the Board has requested information, concerning both issues-in-controversy, and matters which may be relevant to admitted issues, but as yet are not themselves admitted issues. ^{6/}

- In Docket 2, CASE presented a number of witnesses who had testified to incidents that CASE characterizes as constituting "harassment" or "intimidation." Applicants offered a number of witnesses in rebuttal, who testified either that the incident did not take place or

^{5/} See, e.g., "Memorandum (Concerning Welding Issues)," LBP-84-54 (December 18, 1984); "Proposed Initial Decision (Concerning Aspects of Construction Quality Control, Emergency Preparedness and Board Questions)," LBP-83-43, 18 NRC 122 (1983); "Memorandum and Order (Emergency Planning, Specific Quality Assurance Issues and Board Issues)," LBP-83-60, 18 NRC 672 (1983); "Memorandum and Order (Reconsideration of Order of September 23, 1983)," LBP-83-69, 18 NRC 1084 (1983).

^{6/} Those matters are listed and discussed infra in Section III.E of the pleading.

that the circumstances were different than those alleged by CASE's witnesses. Although the Staff had distributed to the Board and the parties a preliminary report by its consultant EG&G, ^{7/} and has distributed expurgated versions of a large number of NRC Office of Investigations ("OI") reports and its assessment of the relevance of excised material, ^{8/} the Staff has not presented evidence on intimidation or harassment.

Both of these dockets have a large number of issues that would remain to be litigated. ^{9/} However, as Applicants' Management Plan points out, activities underway outside the confines of the hearing may significantly affect how the fundamental question -- whether upon completion of construction there will be reasonable assurance that the plant can and will be operated without endangering public health and safety -- should most effectively be addressed. Applicants' Management Plan, pp. 2-5, 41-43. Specifically, the Staff's Technical Review Team (TRT) has conducted evaluations of approximately 900 allegations relating to design, construction and quality assurance/quality control deficiencies at CPSES, which are reported in Supplementary Safety Evaluation Reports ("SSERs") 7, 8, 9, 10 and 11. In response, the Applicants have committed to undertake a

^{7/} "Comanche Peak Steam Electric Station Alleged Climate of Intimidation (September 1984)."

^{8/} The Staff's assessment of the relevance of the OI Reports is set forth in an attachment to a April 19, 1985 letter from Staff counsel Gregory Berry to Licensing Board.

^{9/} There are also a number of subject matters which, while not currently issues-in-controversy or 10 C.F.R. § 2.760a sua sponte issues, have been identified by either the Board or one of the parties as having possible relevance and significance to this proceeding. See, infra, at Section III.E.

comprehensive reassessment of plant quality based upon the Staff's TRT findings -- the CPRT Program.

In light of the TRT SSERs and the CPRT Program, Applicants now propose that certain issues not yet resolved by the Board are "moot," and that "the issues should now focus the proceeding upon the adequacy of the CPRT to resolve previously-identified deficiencies, to address programmatic implications, and to thereby provide the Board with the necessary reasonable assurance as to the integrity of the plant." Applicants' Management Plan, p. 28. In Applicants' view:

"The real issue in this proceeding has ... moved beyond the question of what specific QA lapses or construction deficiencies may have existed at Comanche Peak. The issue now is whether Applicants can demonstrate that its QA program, supplemented by the CPRT results, assures that all construction errors found are corrected and confirms the adequacy of the plant..."

Applicants' Management Plan, p. 42 (citation omitted). ^{10/} Rather than attempting to draw inferences of overall plant quality either from disputed evidence concerning a limited number of construction and QA/QC deficiencies, or from disputed evidence regarding alleged instances of intimidation, Applicants propose that the CPRT Program's reverification of construction adequacy for a broad range of design, construction and

^{10/} See also p. 43 of Applicants' Management Plan, which states, "for the purposes of this proceeding the relevant inquiry has moved to the second prong of the Callaway standard: the Board must consider the overall effectiveness of the QA Program and Applicants' remedial efforts, in light of the specific problems and concerns identified."

QA/QC issues and of correction of identified deficiencies, ^{11/} enables the hearing now to focus directly on the quality of the as completed plant.

The Staff substantially agrees with Applicants on the desirability of refocusing the issues in both Dockets 1 and 2 of this proceeding. In light of the large amount of information that became available (although not in evidence) through the Staff review during the past year, as well as Applicants' commitment to implement the CPRT's comprehensive program of reassessment of plant quality, the Staff believes that it is appropriate and preferable at this stage to proceed directly to questions concerning the adequacy of specific CPRT plans to address open issues in Docket 1, rather than to continue, in an adjudicatory context, to plod through disputes regarding:

- whether a specific design or construction concern is, in fact, a deficiency,
- whether that deficiency implies a broader design, construction, or QA deficiency which may affect other safety systems or components,
- whether the specific deficiency been corrected,
- whether there is a broader deficiency which should be corrected on a broad scale,
- what is the proper scope for a corrective action to rectify the identified broad deficiency.

^{11/} It is not completely clear whether the CPRT Program extends to correction of deficiencies or is limited to identification of deficiencies and recommended corrective actions to be decided upon and carried out by other Applicant organizations outside the CPRT Program process. In this pleading the Staff assumes that the CPRT Program encompasses reverification, identification and evaluation of deficiencies, proposed corrective action, and implementation of correction.

Similarly, with respect to Docket 2, the Staff concludes that is preferable to proceed directly to questions concerning the adequacy of CPRT plans to identify and correct as needed any significant generic or programmatic QA/QC deficiency, rather than to continue the tortuous effort to determine in an adjudicatory framework:

- whether, in a particular instance, quality control personnel were as a result of intimidation discouraged from properly carrying out quality activities,
- whether an accumulation of such incidents evidenced a widespread management or supervisory attitude pervasively and adversely affecting construction quality control at Comanche Peak, ^{12/}
- whether such adverse affects can be corrected on a broad scale, and
- what is the proper scope for a corrective action plan to rectify the such adverse effects.

The Staff concludes that the course of action proposed by Applicants' Management Plan should be adopted. The hearing can then proceed directly to the question of whether the CPRT Program is adequate to identify and rectify deficiencies in the areas of concern.

The Staff recognizes that it will be necessary for Applicants' CPRT to address the questions raised above in order to properly implement and achieve the goals of the CPRT. However, adoption of the Applicants' Management Plan will preclude the need to answer most of these questions in the context of a hearing. Instead, the primary questions for hearing will be the adequacy of the scope of, and the corrective actions to be

^{12/} With respect to the factually related but legally separate (not raised as an issue by Contention 5 which deals with construction) issue of management attitude toward safe operation, the Board seems to be properly pursuing, on its own, information about the change in Applicants' management.

implemented in, the CPRT Program. The alternative of rejecting the Applicants' Management Plan, and instead going forward to complete the submission of evidence on the open issues, would be an unnecessary exercise needlessly consuming the Board's and parties' time and resources. If the Applicants' Management Plan were not adopted, and the parties proceeded to litigate to conclusion the issues in Dockets 1 and 2, and CASE prevailed on these issues, the Board at the end of a great deal of time and the expenditure of substantial resources, would be in the same position of attempting to determine the scope and adequacy of a corrective action plan.

To the extent that the CPRT, in fact, satisfies the goals described for it by Applicants, the CPRT corresponds to a program that might be properly required by the Licensing Board in the event that Intervenor CASE prevailed on the issues pending before the Board at the time the hearings were suspended. If Applicants can demonstrate that the CPRT program can and will adequately identify and correct plant deficiencies in the areas of the open issues, it will be unnecessary to actually resolve whether or not deficiencies in fact existed at CPSES, in order to reach the ultimate legal question of whether CPSES as finally constructed satisfies or will satisfy the requirements of applicable Commission regulations.

The Applicants' Management Plan is somewhat unclear on the matter of the use to be made of the existing record with respect to unresolved issues (issues as to which there is no Board determination). See Applicants' Management Plan, p. 46, et seq. At times Applicants suggest that the current record may be used to justify the absence of a CPRT plan on a

particular concern. The Staff disagrees. If Applicants' Management Plan is adopted, resolution of unresolved issues concerning the scope and adequacy of CPRT Program should be based solely on the record to be developed on the CPRT Program, without reliance on the currently existing record, unless, of course, there is a stipulation among the parties.

In conclusion, it is the Staff's position that the litigation in this proceeding should be redirected to focus on the adequacy of the CPRT Program in identifying, properly evaluating and resolving all identified deficiencies or concerns with design, construction, and the QA/QC program. In the Staff's view, it is no longer necessary or desirable, from the standpoint of efficient administration of the proceeding including the expenditure of resources by the parties, to maintain as a separate docket, the current Docket-2. The termination of Docket-2 in these circumstances will not deprive any party of its rights of due process.

C. Appropriateness of Post-Hearing Verification of the CPRT Program by the Staff

As discussed in Section III.A. above, the role of the Licensing Board in an operating license proceeding is, as a general matter, to resolve the admitted issues-in-controversy between the parties. Resolution of safety and environmental matters which are not admitted

issues-in-controversy is the function of the Staff. ^{13/} In the words of the Licensing Board in Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), LBP-84-2, 19 NRC 36, 213 (1984): "The resolution of [matters not at issue in the adjudication], no matter how important, is a Staff function, because we do not oversee the Staff's work." By the same token, however, the Commission has made clear that issues-in-controversy in the hearing process should normally be decided by the Licensing Board:

As a general proposition, issues should be dealt with in the hearings and not left over for later (and possibly more informal) resolution... In some instances, however the unresolved matter is such that the Boards are nevertheless able to make the findings requisite to issuance of the license.⁸ But the mechanism of post-hearing resolution must not be employed to obviate the basic findings prerequisite to an operating license -- including a reasonable assurance that the facility can be operated without endangering the health and safety of the public. 10 CFR 50.57. In short, the post-hearing approach should be employed sparingly and only in clear cases. In doubtful cases, the matter should be resolved in an adversary framework prior to issuance of licenses, reopening hearings if necessary.

⁸ For example, a Board might, after hearings, find an applicant's security plan adequate, except for minor procedural deficiencies. In such a case, the Board could choose to authorize issuance of the license -- with the deficiencies to be subsequently cured under the scrutiny of the Director of Regulation.

^{13/} See Consolidated Edison Co. of New York, Inc. (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 189-90 (1976); New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 279-80 (1978); see also Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 204-208 (1978); Philadelphia Power Co. (Fulton Generating Station, Units 1 and 2), LBP-79-23, 10 NRC 220, 223-24 (1979).

Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951 (1974), citing Wisconsin Electric Power Co. (Point Beach, Unit 2), CLI-73-4, 6 AEC 6 (1973).

Licensing Board and Appeal Board decisions have differed somewhat on the kinds of matters and circumstances where delegation to the Staff is appropriate. ^{14/} Nonetheless, in the cases where the appropriateness of post-hearing confirmation by the Staff is discussed, the apparent standard is whether the results of the confirmatory actions are necessary to the favorable resolution on the record of the issue in controversy (i.e., that reasonable assurance exists), or whether the confirmatory actions were to provide additional assurance and confirmation of the bases on which the issue was resolved by the Licensing Board's decision. For example, in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-729, 17 NRC 814 (1983), the Appeal Board approved the Licensing Board's delegation to the Staff of confirmatory tests on the proper operation of pressurizer heaters, since the Board had already concluded that the pressurizer heaters could be safely operated:

We believe the Licensing Board had essentially fulfilled its responsibility to resolve contested issues.... Stated differently, the Board concluded, albeit without quantification, that any necessary reliability objective had been reached.

The Board required the Staff simply to monitor a test of the connection of the heaters to the DGs. If, as

^{14/} See, e.g., Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 318-19 (1978) (approving Indian Point "minor procedural matters" standard); Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-48, 15 NRC 1549 (1982) (delegation appropriate if "clear corrective actions" exist).

the Licensing Board apparently expected, the test confirms the substantive conclusion regarding the proper operation of the heaters, nothing further needs be done. (emphasis added)

TMI-1, 17 NRC 814, 886-887. In Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-811 (June 27, 1985) the Appeal Board approved of post-hearing verification by the Staff of a design reverification and corrective action program for Unit 2, stating that:

Because of the virtual identity of design of the two units, the record evidence of the scope of PGE's Unit 2 verification program combined with the detailed evidence of the extent and the results of the Unit 1 verification, provides an adequate basis for our findings (albeit predictive ones) with respect to Unit 2.

Diablo Canyon, slip op. at 10. Thus, in Diablo Canyon (unlike the current situation in this proceeding), the adequacy of the reverification program and its implementation, as well as the acceptability of the corrective action and the results of the implementation at Unit 1, had already been favorably resolved by the Board. Because of the foregoing, the Appeal Board held that it was unnecessary to litigate as a discrete issue the results of implementation at Unit 2. Diablo Canyon, slip op. at 14-18.

By contrast, delegation to the Staff of post-hearing confirmatory testing or analyses was specifically disapproved in several cases where the results of the testing were necessary to the Board's decision on the issue-in-controversy. See, e.g., Wisconsin Electric Co. (Point Beach Nuclear Plant, Unit 2), CLI-73-4, 6 AEC 57 (1973) (authorization for 75% power operation on basis of post-hearing Staff review of safety issues involving collapsed fuel rods was improper where the issue was the

subject of contention); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 519-20 (1983); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), LBP-84-2, 19 NRC 36, 209-212, 213-18 (1984) aff'd, ALAB-770, 19 NRC 1163 (1984); Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), ALAB-799, 21 NRC 360 (1985); Washington Public Power Supply System (Hanford No. 2 Nuclear Power Plant), ALAB-113, 6 AEC 251, 252 (1973) (improper for Board in a CP proceeding to delegate to Staff the determination as to whether FWPCA requirements would be met by Applicants); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-298, 2 NRC 730, 736-37 (improper for Board to grant LWA on basis of post-hearing Staff review of unresolved geologic issues); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 318-19 (proper for Board to leave record open for receipt of evidence on execution of REA loan guarantee and ownership participation statement, rather than leaving the matter to Staff for post-hearing resolution, since they were relevant to applicant's financial qualifications, an admitted issue-in-controversy in the proceeding).

The Shoreham, Byron and South Texas cases are particularly instructive for determining when it is appropriate to leave matters for post-hearing confirmation by the Staff. In Shoreham, the Licensing Board resolved in favor of LILCO several issues involving the adequacy of the Shoreham containment despite ongoing confirmatory analyses by LILCO of those issues, since the Board specifically found that, based upon evidence in the record, it could make the requisite reasonable assurance finding. Shoreham, 18 NRC at 519. However, the Board retained juris-

diction of one issue relating to the operation of the RHR discharge mode, because the Staff had not completed its review of the matter, and could not determine whether a design modification would be necessary, or if the issue would be resolved on a generic or plant-specific basis. Shoreham, 18 NRC at 519-520. In Byron, the Licensing Board specifically refused to delegate to the Staff the responsibility for assessing the adequacy of a reinspection program for a contractor whose quality of work was indeterminate. Byron, LBP-84-2, 19 NRC at 212. The Appeal Board specifically upheld the Licensing Board's decision on that point. ALAB-770, 19 NRC at 1175. Moreover, the Appeal Board stated that "the focus of the inquiry should [now] be upon whether, as formulated and executed, the reinspection program now provides the degree of confidence that the Hatfield and Hunter quality assurance inspectors were competent..." 19 NRC at 1178; see also n.62. In Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), ALAB-799, 21 NRC 360 (1985), the Appeal Board stated:

Although no cases are precisely on point, the clear import of our decisions is that remedial efforts are relevant to determining whether applicants should be permitted to obtain or retain licenses. In the Byron case, for example, we concluded that denial of a license requires a finding that "it is not possible for the ascertained quality assurance failings either to be cured or to be overcome to the extent necessary to reach an informed judgment that the facility has been properly constructed."³⁶ Similarly, in the Midland proceeding, we endorsed the licensing board's exploration of both the quality assurance deficiencies that led to institution of the proceeding to suspend the licensee's construction permit and subsequent corrective measures.³⁷ And, quite recently, in the Three Mile Island Restart case, we observed that evaluation of the efficacy of remedial action was a necessary element in determining whether the licensee had demonstrated its ability to operate in a safe and responsible manner in the future.³⁸ In sum, we have required a review of the totality of circumstances in

order to permit a reasonable prediction regarding whether an applicant can and will comply with the safety and environmental standards imposed by statute and the Commission's regulations and procedures.

³⁶ Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1169 (1984).

³⁷ Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-283, 2 NRC 11, 20 (1975).

³⁸ Three Mile Island Restart, ALAB-772, supra, 19 NRC at 1232.

Once the Licensing Board has determined that the record is sufficient to make a reasonable assurance finding, it is settled that any remaining confirmatory matters may be left to the Staff for post-hearing resolution, so long as those matters undertaken by the Staff do not involve any responsibility regarding matters which the Board must, as a fundamental matter, decide, but merely serve to verify the correctness of the Board's conclusion on the issue. See TMI-1, 17 NRC at 887-887; Byron, 19 NRC at 212; 213-18; Shoreham, 18 NRC at 519-21.

In this proceeding, litigation should now proceed in the direction of developing a record as to whether the Board can make the relevant reasonable assurance finding required by 10 C.F.R. § 50.57(a) with respect to the issues-in-controversy raised by Contention 5, based upon evidence regarding the adequacy of the scope of, and corrective actions resulting from, the CPRT Program. If the record develops to the point that the Board can make those findings, the Staff concludes that the Board should then leave to the Staff for post-hearing verification all matters which have

pre-approved action plans and criteria for resolution and do not require the exercise of substantial Staff discretion.

D. Specification of Issues for Litigation

Applicants suggest that the procedure in Diablo Canyon, whereby intervenors in that proceeding were required to submit specific issues regarding the adequacy of applicant's proposed reverification program, ^{15/} be adopted in the CPSES proceeding. ^{16/} Applicants' Management Plan, pp. 43-44.

With a change in focus of the proceeding to address directly whether the CPRT Program will adequately identify, evaluate and rectify facility design and construction deficiencies, it is essential to effective management of the case that disputed issues be recast in terms of this new focus. The Staff agrees with Applicants that CASE should specify those features of the CPRT program which address issues raised in Contention 5, which CASE asserts are inadequate to assure that the plant, as-completed, will satisfy all applicable Commission regulations and the

^{15/} See Diablo Canyon, Order (unpublished) (July 6, 1983).

^{16/} Applicants state that CASE should be required to:

submit a list alleging, with basis and specificity, its specific changes for further proceedings.... Specifically, Intervenor (sic) should either reframe pending issues to challenge the manner in which the CPRT program is claimed to be insufficient to address a specific unresolved deficiency previously in issue, or otherwise assert how that program is insufficient to address the implications of those previously identified deficiencies.

Applicants' Management Plan, pp. 44-45.

applicable FSAR commitments. Of course, CASE may also move to reopen the record with respect to previously-resolved issues on the required showing that new Staff information, new information developed by the CPRT or other new information, warrants reopening. ^{17/} While reframing of contentions would be helpful, the Staff does not believe that it is necessary to go back to disputes about adequacy of "basis and specificity." Fairly straightforward statements, explaining the specific defect alleged in the CPRT Program and why such element of the CPRT Program Plan is inadequate or defective, would be sufficient.

However, such specification should be more than a general denunciation of the CPRT Program. For example, CASE generally asserts that the proposed sampling program is "totally inadequate if the QA/QC program is already determined to be inadequate" and that "a full inspection would be required because there would be no basis to assume (much less accept) that any part of the plant has been properly built". CASE's Response to the Alleged Mootness of Docket 2 Issues and Proposed Schedule for Docket 2 (July 16, 1985), p. 5. CASE's also asserts (id.) that "a finding [that intimidation was a root cause of deficiencies found valid by the staff] would infect every part of the plant and would dictate not a 'random' sample of the plant but a full reinspection of the plant". If, in fact, the alleged intimidation infected every part of the plant, hardware

^{17/} The Staff does not see this as an opportunity for CASE to reargue points or evidence that were previously argued before. Under the Staff's proposal, CASE would only be permitted to show why new information developed or identified since the time of an issue's resolution (such as the TRT findings in the SSERs) draws into question the validity of the Board's previous decision.

deficiencies attributable to the intimidation should be identified in the sampling process if the sampling methodology and the sample itself were properly designed. CASE does not assert any deficiency in the design of the sampling program or the selection of the sample; it just sets forth a general condemnation of sampling, without any technical basis. If CASE intends to dispute any portion of the CPRT Program Plan, such as the sampling methodology, it should explain the specific defect alleged, such that the parties will be able to understand the nature of the issue to be litigated.

E. Issues

The Staff has reviewed Applicants' list of specific issues remaining open in this proceeding. In general, the Staff agrees with Applicants' list but notes that there are a number of matters which were not specifically identified and addressed in Applicants' Plan. The Staff recognizes that this may be attributable to the uncertainty as to what the "issues-in-controversy" are under Contention 5 in this proceeding. There are specific subject matters which were explicitly identified in Contention 5 on which evidence was received in this proceeding but as yet remain unresolved, e.g., the CAT Report, and inadequate disposition of paint repairs. Then there are other matters which cannot be neatly categorized. For example, there are a number of questions which are either explicitly raised or implied by the current evidence. In certain cases, these questions were explicitly raised by the Board, e.g., the technical and programmatic QA concerns which were listed in the Board's October 1, 1984 "Memorandum (Concerns About Start-up Quality Assurance)."

In addition, there are a number of technical concerns which were raised in Docket 2, which remain unresolved. There are other matters pending before the Board which were not originally part of the issues identified and litigated, but which may have some relevance to the litigated issues-in-controversy, e.g., the MAC Report, and the Board's questions on the adequacy of the Applicants' vendor QA program in light of TDI diesel generator deficiencies. June 15, 1984 Telephone Conference Call Transcript. On another footing are matters which constitute part of Applicant's commitment to provide evidence on a subject, e.g., Applicants' commitment to provide testimony of an academic expert on design issues. See "Applicants' Plan to Respond to Memorandum & Order (Quality Assurance for Design)" (February 3, 1984), p. 4.

In sum, there are a number of matters whose status in the proceeding as proper issues-in-controversy or as 10 C.F.R. § 2.760a sua sponte Board issues is unclear or undecided. The matters that are not discussed in Applicants' Management Plan are set forth below, together with a citation where the matter is identified. This list of issues includes Board inquiries, as well as matters pending before the Board but not currently in issue. Applicants' Management Plan does not appear to include these items. In addition, the list below identifies a number of unresolved issues which may be encompassed by a broader category of issues in Applicants' Management Plan. Nonetheless, the Staff includes these matters in the listing below for completeness.

<u>SUBJECT</u>	<u>STATUS AS ISSUES IN HEARING</u>	<u>REFERENCE</u>
1. <u>Welding</u>		
(i) The need for QC holdpoints for repairs of welds	Board Inquiry	October 11, 1984 Order, October 29, Order, January 16, 1985 Order.
(ii) Weld rod control violations by Grinnel Fire Protection Co.	Unresolved Issue	December 18, 1984 Order
(iii) All issues raised in CASE's Motion for Reconsideration of Board's January 16, 1985 Welding Order.	Pending Before Board	
2. <u>Protective Coatings</u>		
(i) Adhesion testing of protective coatings, as set forth in Board Notification 84-015	Board Inquiry	March 15, 1984 Order
(ii) Inadequate disposition of paint repairs	Unresolved Issue	March 15, 1984 Order
3. <u>Pipe Support Design/QA</u>		
(i) Applicants' Response to PID on A-500 Steel	Pending before Board	October 16, 1983 Order
(iii) CASE's four (4) summary disposition motions on pipe support design/QA	Unresolved Issues	
(iv) Discovery on credibility, and material false statement on U-bolts	Pending before Board, but not yet an Issue	December 18, 1984 Order, suspended by February 15, 1985 and March 15, 1985 Orders
(v) Testimony of academic expert	Applicants' commitment	Applicants' Plan, p. 4.
4. <u>CAT Report Findings</u>	Unresolved Issue	October 25, 1983 Order

5. Intimidation

- | | | | |
|-------|--|-------------------------------------|--|
| (ii) | Technical issue on hole in polar crane rail | Unresolved Issue | D.Stiner deposition |
| (iii) | Technical issue on improper welding on doors | Unresolved Issue | D.Stiner deposition |
| (iv) | Technical issue on welding on diesel generator skids -- programmatic QA/QC aspects | Unresolved Issue | D.Stiner deposition |
| (v) | Technical issue on improper testing of electrical components in Safeguards Building | Unresolved Issue | Various intimidation depositions, e.g., Welch, Tolson. |
| (vi) | Technical issue on stainless steel welding done while arc gouging (Stanley Miles) | Unresolved Issue | MiTes deposition, Tr. 50,600 |
| (vii) | Technical issue on hold tags on cable tray supports (Robert Messerly) | Unresolved Issue | Messerly deposition, Tr. 50,600 |
| (ix) | Technical issues regarding timely reporting of Westinghouse inverters | Unresolved Issue | Witness F Testimony |
| (x) | Technical issues involving adequacy of Applicants' start-up testing program, based upon Witness F's conduct, and the adequacy of procedure for testing inverters | Unresolved Issue, and Board Inquiry | October 1, 1984 Order |
| (xi) | Technical issues on XCP-EE8 procedure | Unresolved Issue | Witness F Affidavit |
| (xii) | Technical issues on whether D. Camp approval needed to write-up NCRs | Unresolved Issue | Witness F Testimony |

6. MAC Report

Pending before Board, but not yet an Issue

F. Schedule for Litigation

The Staff finds that Applicants' suggested sequence of events in conducting the litigation is logical and represents a reasonable approach for litigating Docket 1. The Staff also agrees that, in the event that the Board finds that Docket 2 is not moot, a prehearing conference should be held to resolve a number of litigation matters as a prelude to conducting hearings and closing the record in Docket 2.

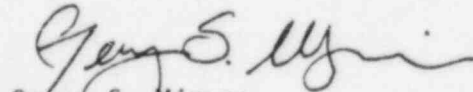
With regard to the proposed time periods and dates for each litigation event, the Staff's view is that the Applicants' proposals may be achievable, but that they represent optimistic assessments of the time necessary to, inter alia, evaluate the adequacy of the CPRT Program, identify issues for litigation, conduct discovery and develop testimony. The Staff also points out that: (1) Applicants' CPRT Program does not appear to respond to SSER 11, which represents the TRT's evaluation of QA/QC concerns, which is the crux of the contention in this proceeding, and (2) Applicants have not yet submitted their QA program for the CPRT Program. See June 28, 1985 Letter from William Counsil to Vincent Noonan, p. 2. Accordingly, the Applicants' proposed dates for responding to the substance of the CPRT Program Plan do not now appear to be achievable.

The Staff suggests that the Board adopt the Applicants' proposed sequencing of litigation events, but that the Board defer setting specific dates for each event in the scheduling sequence at this time.

IV. CONCLUSION

The Board should adopt the Applicants' Management Plan as clarified by the discussion above.

Respectfully submitted,



Geary S. Mizuno
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 2nd day of August, 1985

Of Counsel:

Stuart A. Treby
Assistant Chief Hearing Counsel

Lawrence J. Chandler
Special Litigation Counsel

RELATED CORRESPONDENCE

DOCKETED
USNRC

'85 AUG -5 P3:56

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
50-446

Docket Nos. 50-445/2
50-446/2

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO APPLICANTS' STATEMENT OF CURRENT VIEWS AND PROPOSED CASE MANAGEMENT PLAN" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 2nd day of August, 1985:

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

Dr. Kenneth A. McCollom
Administrative Judge
Dean, Division of Engineering
Architecture and Technology
Oklahoma State University
Stillwater, OK, 74078

Elizabeth B. Johnson
Administrative Judge
Oak Ridge National Laboratory
P.O. Box X, Building 3500
Oak Ridge, TN 37830

Dr. Walter H. Jordan
Administrative Judge
881 W. Outer Drive
Oak Ridge, TN 37830

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

Renea Hicks, Esq.
Assistant Attorney General
Environmental Protection Division
P.O. Box 12548, Capital Station
Austin, TX 78711

Nicholas S. Reynolds, Esq.
William A. Horin, Esq.
Bishop, Liberman, Cook,
Purcell & Reynolds
1200 17th Street, N.W.
Washington, DC 20036

Billie Pirner Garde
Citizens Clinic Director
Government Accountability Project
1901 Que Street, N.W.
Washington, DC 20009

Herbert Grossman, Alternate Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

Robert A. Wooldridge, Esq.
Worsham, Forsythe, Samples
& Wooldridge
2001 Bryan Tower, Suite 2500
Dallas, TX 75201

Mr. James E. Cummins
Resident Inspector/Comanche Peak
Steam Electric Station
c/o U.S. Nuclear Regulatory Commission
P.O. Box 38
Glen Rose, TX 76043

William H. Burchette, Esq.
Mark D. Nozette, Esq.
Heron, Burchette, Ruckert
& Rothwell
Suite 700
1025 Thomas Jefferson Street, N.W.
Washington, DC 20007

Robert D. Martin
U.S. Nuclear Regulatory Commission
611 Ryan Plaza Drive, Suite 1000
Arlington, TX 76011

Anthony Z. Roisman, Esq.
Trial Lawyers for Public Justice
2000 P Street, N.W., Suite 611
Washington, DC 20036

Joseph Gallo, Esq.
Isham, Lincoln & Beale
Suite 8401120 Connecticut Avenue, N.W.
Washington, DC 20036

Mr. W. G. Council
Executive Vice President
Texas Utilities Generating Company
400 North Olive Street, L.B. 81
Dallas, TX 75201

William L. Brown, Esq.
U.S. Nuclear Regulatory Commission
611 Ryan Plaza Drive, Suite 1000
Arlington, TX 76011

Lanny Alan Sinkin
3022 Porter Street, N.W., #304
Washington, DC 20008

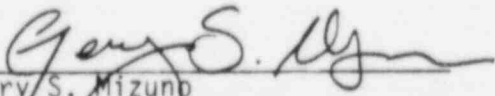
James T. McGaughy
Southern Engineering Co. of Georgia
1800 Peachtree Street, N.W.
Atlanta, GA 30367-8301

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

Atomic Safety and Licensing Appeal
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Robert A. Jablon, Esq.
Spiegel & McDiarmid
1350 New York Avenue, N.W.
Washington, DC 20005-4798


Geary S. Mizuno
Counsel for NRC Staff