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October 15, 1985

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
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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 OL

NRC STAFF RESPONSE TO CASE'S MOTION FOR
RECONSIDERATION AND/OR PROTECTIVE ORDER

I. Introduction

On September 30, 1985 the NRC Staff received "CASE's Motion for Reconsideration of Board's 8/29/85 Memorandum and Order (Proposal for Governance of this Case and/or Motion for Protective Order) (September 25, 1985) ("CASE's Motion)". CASE's Motion contains multiple requests, some of which are in the alternative, mostly regarding Applicants' and CASE's summary disposition motions on pipe support design and design quality assurance ("QA"), and the representations made by Applicants in their "Applicants' Plan to Respond to Memorandum and Order (Quality Assurance for Design)" (February 3, 1984) and "Supplement to Applicants' Plan to Respond to Memorandum and Order (Quality Assurance for Design)" (March 13, 1984) (collectively, "Applicants' Plan"). CASE also asks that the Board "confirm CASE's right to discovery" on pipe supports and components which are removed or modified (CASE's Motion, pp. 19-20, 26), and asks the Board to reconsider its decision on "CASE's Motion for Immediate Board Order for Applicants to Preserve Evidence" (August 14,

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1985) (CASE's Motion, pp. 19-22, 26). The NRC Staff herein responds to CASE's Motion. ^{1/}

II. BACKGROUND

On April 26, 1985, Applicants filed a "Proposed Case Management Plan" which outlined a proposed procedure and schedule for defining the scope of issues requiring resolution in the two CPSES dockets. The Board subsequently directed the Applicants to file a "further elaboration" of the Applicants' Proposed Case Management Plan, listing five matters that Applicants' filing should address. "Memorandum and Order (Case Management Plan)" (May 24, 1985). On June 28, 1985, Applicants responded to the Board's request by filing "Applicants' Current Management Views and Management Plan for Resolution of All Issues" ("Applicants' Management Plan"). Following the submission of responsive briefs by the Staff and Intervenor Case, the Board issued its "Memorandum and Order (Proposal for Governance of this Case)" (August 29, 1985) ("Board's Governance Order").

Thereafter, on September 25, 1985 Applicants filed a "Motion for Modification with Respect to the Board's Memorandum of August 29, 1985 (Proposal for Governance of this CASE)" ("Applicants' Motion"), together with the "Applicants' Memorandum in Support of Motion for Modification with Respect to the Board's Memorandum of August 29, 1985 (Proposal for

^{1/} The Staff does not intend to respond to CASE's request that the Board "confirm" CASE's right to discovery on modified or removed components at CPSES (CASE's Motion, pp. 19-20, 26), since this request concerns discovery between CASE and Applicants.

Governance of this CASE)" ("Applicants' Memorandum"). Applicants' Motion requested the Board to modify the Board's Governance Order with respect to six matters. Applicants' Memorandum stated that Applicants "unequivocally withdraw" their summary disposition motions which have not yet been resolved by the Board. Applicants' Memorandum, p. 10. CASE filed its Motion simultaneously with Applicants' Motion.

On October 2, 1985, the Board issued a "Memorandum and Order (Applicants' Motion for Modification)" ("Board's Modification Order"). The Board acknowledged Applicants' withdrawal of their summary disposition motions, and indicated it would not act on the motions. Board's Modification Order, p. 4. However, the Board noted that with their withdrawal, the record is still incomplete on addressing the Board's concerns on design and design QA which were discussed in the Board's "Memorandum and Order (Quality Assurance for Design)", LBP-83-81, 18 NRC 1410 (1983). Board's Modification Order, p. 4, and note 3. In a separate "Notice", the Board indicated that nothing in the Board's Modification Order should be interpreted to deny CASE's Motion, and that responses to that motion were in order.

III. Discussion

A. Summary Disposition Motions on Pipe Support Design and Design QA

CASE's multiple requests for Board action revolve largely around Applicants' and CASE's summary disposition motions addressing the adequacy of Applicants' pipe support designs and design QA for CPSES. As mentioned above, Applicants have withdrawn their summary disposition

motions which have not been acted upon by the Board. ^{2/} The Board has acknowledged the Applicants' withdrawal of those motions, and indicated that it will not act on those motions. ^{3/} Board's Modification Order, p. 4. Because of these actions, it is no longer necessary for the Board to act upon CASE's requests concerning Applicants' summary disposition motions. Thus, the Board should deny CASE's requests that the Board: (1) find that Applicants are in default in answering CASE's responses to Applicants' summary disposition motions, and that there are "inadequate or erroneous" designs at CPSES (CASE's Motion, pp. 22, 25, request 10); (2) "clarify" that Applicants' summary disposition motions do not address all of the Walsh/Doyle allegations identified in CASE's August 22, 1983

^{2/} One of Applicants' summary disposition motions on pipe support design ("Applicants' Motion for Summary Disposition of Certain CASE Allegations Regarding AWS and ASME Code Provisions Related to Welding Issues; Request for Expedited Response" (April 6, 1984)) has been resolved by the Board in Applicants' favor. "Memorandum and Order (Written-Filing Decisions, #1: Some AWS/ASME Issues)" LBP-84-25, 19 NRC 1589 (1984). The Staff trusts that Applicants will be reviewing the representations made in this summary disposition motion together with the corrective actions which are currently being implemented by the CPRT, and that they will notify the Board and parties if there is any new information which may bear upon the correctness of the Board's decision on this matter. See Petition for Emergency and Remedial Relief, CLI-78-6, 7 NRC 400, 418 (1978), Tennessee Valley Authority (Browns Ferry Nuclear Power Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387 (1982); Consumers Power Co. (Midland Plant, Units 1 and), ALAB-691, 16 NRC 897, 910 (1982); see also Board's Modification Order, p. 4.

^{3/} The Staff knows of no legal theory barring the withdrawal of evidence by the party originally offering it into evidence, and is aware of at least one proceeding where a party voluntarily withdrew evidence it offered without any further Board comment. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445 (1983), at Finding F-5 (unpublished in NRC Reports).

Proposed Findings of Fact and Conclusions of Law (CASE's Motion, pp. 22-23, request 1); (3) "confirm" that the Board will rule upon Applicants' summary disposition motions, and decide whether, "based upon the record at the time of the motions filed, a license would not have been issued" (CASE's Motion, p. 24, requests 5 and 6); (4) find that Applicants cannot "change" their affidavits submitted in support of their summary disposition motions (CASE's Motion, p. 24, request 7); (5) rule against Applicants' summary disposition motions (CASE's Motion, p. 24, request 8); and (6) permit CASE to undertake discovery on Applicants' answer to CASE's response regarding Applicants' summary disposition motions (CASE's Motion, p. 25, request 12). No purpose would be served by the Board and parties continuing to pursue these summary disposition motions, which have been withdrawn from the proceeding and have no evidentiary standing. Moreover, the Board has recognized that the CPRT has the potential to refocus the issues in this proceeding. Board's Governance Order, pp. 3, 4-8. If the Applicants are able to successfully show that the CPRT and related corrective actions comprehensively address and resolve all identified and potential deficiencies, evidence intended to establish the actual nature of potential deficiencies becomes largely irrelevant. Thus, the Staff does not support any further efforts at this time at litigating currently-identified issues under the existing theory of the case.

While CASE suggests that it has been prejudiced by Applicants' failure to respond to CASE's responses regarding Applicants' summary disposition motions and CASE's own summary disposition motions (see, e.g., pp. 4-8, 10-12), the Staff disagrees. CASE essentially questions

whether Applicants can continue to have the opportunity to present new evidence, rely upon new legal theories until the Board rules in Applicants' favor. ^{4/} The answer to that question is in the affirmative, ^{5/} as the Applicants have argued. See Applicants' Management Plan, pp. 29-35. It is perhaps unfair from a procedural standpoint that an intervenor such as CASE may be required to repeatedly "make its case" against an applicant and that an applicant will be afforded numerous opportunities to correct any deficiencies at the plant and offer evidence on those corrective action at a hearing. However, where an applicant has

^{4/} CASE also appears to contend that the Board's decision in its "Order (Granting Summary Disposition of Contentions 2 and 7)" (March 5, 1982) ("CFUR Contention Order") stands for the proposition that Applicants may not request postponement of action on their summary disposition motions. See CASE's Motion, pp. 5-8. The Staff points out that with Applicants' withdrawal of their summary disposition motions, this CASE argument is essentially irrelevant. In any event, the Staff disagrees with CASE's understanding of the CFUR Contention Order. At the time of the CFUR Contention Order, CFUR had withdrawn from the proceeding, as well as all of its contentions, including Contentions 2 and 7. CFUR Contention Order, p. 2. However, prior to CFUR's notice of withdrawal, Applicants had filed a motion for summary disposition on Contentions 2 and 7. The Staff submitted an answer supporting the Applicants' motion. CFUR never filed an answer challenging the substantive or legal arguments presented by Applicants and the Staff. Id. Thus, at that time the Board was faced with contentions without a sponsoring intervenor, as well as uncontroverted evidence showing that the contentions were unsubstantiated. It was in that procedural posture that the Board granted summary disposition of CFUR Contentions 2 and 7. Accordingly, the Staff regards the CFUR Contention Order to be inapposite and without relevance to the issue raised by CASE in its Motion.

^{5/} An exception is where the Licensing Board finds that an applicant is incapable or unwilling to demonstrate, either factually or as a matter of law, that the nuclear power plant is properly designed and constructed, and can be operated without endangering the health and safety of the public. Cf. Commonwealth Edison Company (Bryon Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1169 (1984).

committed to instituting corrective actions to address identified and potential deficiencies, as have the Applicants in this proceeding, and there is a likelihood of substantial information on the corrective actions being generated and offered into evidence, as Applicants have offered in their Management Plan, it would not be "logical or proper to close down a multi-billion-dollar nuclear plant because of a deficiency of proof." "Memorandum and Order (Reconsideration Concerning Quality Assurance for Design)" LBP-84-10, 19 NRC 509, 530 (1984); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1168-70 (1984). If Applicants are able to demonstrate that deficiencies at CPSES have been addressed and corrected and there is assurance that the plant can be operated safely, there simply is no logical reason for not granting an operating license. See Atomic Energy Act of 1955, Section 185, 42 U.S.C. § 2235. In sum, the Staff finds that CASE is not prejudiced by the Applicants' actions.

The Board should deny CASE's requests (CASE's Motion, pp. 22, 25, requests 10 and 11) that the Board find that Applicants have defaulted in answering CASE's First, Second, Third and Fourth Summary Disposition Motions. The Board has suspended all litigation on currently-pending issues. See January 30, 1985 Letter from Robert Wooldridge to Peter Bloch; March 21, 1985 Letter from Robert Wooldridge to Peter Bloch, item 9. Therefore, Applicants are not in default of any obligation to respond to CASE's responses or summary dispositions motions.

The Staff acknowledges CASE's observation (CASE's Motion, pp. 18, 25, request 14) that Applicants' 1985 request for a suspension of hearings and litigation in this proceeding has contributed to a delay in

the proceeding. However, the Staff does not see the need or legal basis for a ruling by the Board to this effect. The Board has also stated several times, in various contexts, that CASE will not be prejudiced by Applicants' requests for suspensions or deferrals. See, e.g., "Memorandum and Order (Case Management Plan)" (May 24 1985); "Memorandum (Reopening Discovery; Misleading Statement)" (December 18, 1984). For these reasons, the Board should deny CASE's request that the Board find that the "delay caused by Applicants' failure to fulfill their 1984 Plan" is attributable to Applicants.

CASE's request that the Board find that Applicants have "defaulted" on their 1984 Plan (CASE's Motion, p. 9, request 9) should also be denied. Applicants' CPRT is presently considering the pipe support design and design QA concerns that were to be addressed by Applicants' Plan (CPRT Program Plan, Revision 2 (June 28, 1985), Appendix B; Appendix C, Item IX), and Applicants intend to offer into evidence the CPRT's evaluation and conclusions on these issues. Applicants' Management Plan, pp. 59-60. In light of these representations by Applicants, as well as their withdrawal of their summary disposition motions on these issues, it is a fair conclusion (although not explicitly stated by Applicants) that Applicants have withdrawn their 1984 Plan. However, it would be inaccurate for the Board to characterize the Applicants' action in this matter as a "default."

Finally, the Board should deny CASE's request that the Board find that the CPRT Plan does not address all of the piping and pipe support design and design QA issues identified by Messrs. Walsh and Doyle. It is premature for the Board to make such a finding, when the CPRT Program

Plan is not yet in evidence, and the detailed information regarding the actual scope of issues to be assessed by the CPRT has yet to be fully developed. Moreover, CASE's assertion in this regard is without any basis -- CASE does not indicate what issues identified by Messrs. Walsh and Doyle will not be addressed by the CPRT. Indeed, such a showing probably would be impossible at this time, since it is the Staff's understanding that the CPRT has not yet completed compiling a comprehensive list of piping and pipe support design and design QA issues which it intends to review. ^{6/} In sum, there is no basis for a Board finding at this stage in the proceeding that the CPRT will not be addressing all currently-identified Walsh/Doyle issues.

B. Preservation of Evidence

CASE asks the Board to reconsider its decision ^{7/} denying CASE's earlier request for a Board order directing Applicants not to remove or modify pipe supports or other plant components, ^{8/} by granting an "amended request" by CASE for a Board order directing Applicants to "retain in retrievable condition, in some retrievable-location, with fully retrievable documentation," all removed pipe and cable tray

^{6/} The Staff expresses its hope that CASE will continue to participate in the CPRT process by transmitting its comments on the CPRT Program Plan to the Staff in a timely manner, consistent with the past practice of CASE. See, e.g., Board Notification 85-975 (August 16, 1985) and the Board's Governance Order, p. 3, n.3.

^{7/} Board's Governance Order, p. 6, n.4.

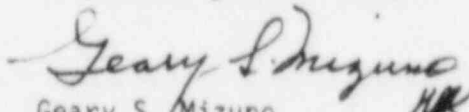
^{8/} "CASE's Motion for Immediate Board Order for Applicants to Preserve Evidence" (August 14, 1985).

supports. CASE's Motion, pp. 20-21, 26. The Staff opposes this request. Contrary to CASE's representation, its "amended" request does not differ in substance from its original request for preservation of evidence, and CASE presents no new arguments explaining why the Board's decision on this matter is incorrect. The Staff submits that the points raised by the Staff in opposition to CASE's original motion ^{9/} are just as compelling in counseling the denial of CASE's latest request. Accordingly, the Board should deny CASE's Motion for reconsideration of this matter.

IV. Conclusion

For the reasons set forth above, the Board should deny CASE's Motion.

Respectfully submitted,


Geary S. Mizuno
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 15th day of October, 1985

^{9/} "NRC Staff Response to CASE's Motion for Board Order Directing Applicants to Preserve Evidence, and CASE's Offer of Proof in Support of this Motion" (August 27, 1985), pp. 3-7.

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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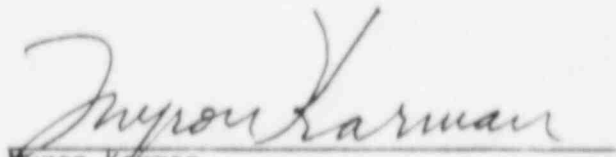
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