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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of	}{	Docket Nos. 50-445-OL
	}{	and 50-446-OL
TEXAS UTILITIES ELECTRIC	}{	(Application for an
COMPANY, et al.	}{	Operating License)
	}{	
(Comanche Peak Steam Electric	}{	and
Station, Units 1 and 2)	}{	
	}{	Docket No. 50-445-CPA
	}{	(Application for a
	}{	Construction Permit)

CASE'S ANSWER TO APPLICANTS' 3/8/88
MOTION TO CONSOLIDATE PROCEEDINGS

On March 8, 1988, Applicants filed a Motion to Consolidate Proceedings, in which they requested that the Atomic Safety and Licensing Board ("Board") consolidate the proceedings on Applicants' application for an operating license ("OL") for the Comanche Peak Steam Electric Station ("CPSES"), Docket Nos. 50-445-OL and 50-446-OL, with the construction permit amendment ("CPA") proceedings, Docket No. 50-445-CPA. CASE (Citizens Association for Sound Energy), Intervernor herein, opposes this Motion /1/.

DISCUSSION

I. Applicants' view of the issues is in error.

Applicants assert on page 5 of their Motion that "There can be little, if any, disagreement that the matters at issue in the CPA docket and those

/1/ CASE requested and was granted by the Board Chairman an extension until today to file this Answer; neither Applicants nor NRC Staff had any objections to the extension. CASE, in a March 29, 1988, telephone conference call among Applicants, NRC Staff, and CASE, attempted unsuccessfully to arrive at a stipulation regarding consolidation.

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at issue in the OL docket are substantially the same." /2/. CASE disagrees. The key issue in the CPA and the OL proceedings is significantly different.

CASE's accepted amended Contention 2 in the CPA states /3/:

> Amended Contention 2. The delay of construction of Unit 1 was caused by Applicants' intentional conduct, which had no valid purpose and was the result of corporate policies which have not been discarded or repudiated by Applicants. (Emphases added.)

CASE's Contention 5 as accepted in the OL states /4/:

> Contention 5. The applicants' failure to adhere to the quality assurance/quality control provisions required by the construction permits for Comanche Peak, Units 1 and 2, and the requirements of Appendix B of 10 CFR Part 50, and the construction practices employed, specifically in regard to concrete work, mortar blocks, steel, fracture toughness testing, expansion joints, placement of the

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/2/ This statement is a rather remarkable contradiction of Applicants' previous position on the inclusion of management issues in the OL proceeding.

/3/ Board's October 30, 1986, Memorandum and Order (CPA) (Motion to Admit New Contentions or for Reconsideration), at 7.

/4/ Board's Order Subsequent to the Prehearing Conference of April 30, 1980 (June 16, 1980), at 11.

In addition, In the Board's 10/31/80 Rulings on Objections to Board's Order of June 16, 1980 and on Miscellaneous Motions, at page 5, item (b), the Board construed Contention 5 to cover the Inspection and Enforcement Reports identified by then-Intervenor ACORN in its 8/29/80 Offer of Proof.

Further, the Board has interpreted Contention 5 to apply to quality assurance for design of Comanche Peak and also has permitted CASE to raise questions concerning particular design deficiencies alleged not to have been caught by the design control program. (See Tr. 714; see also Board's 12/28/83 Memorandum and Order (Quality Assurance for Design), especially top of page 8, first paragraph of page 2, top of page 21, and bottom of page 70 continued top of page 71.) The matter of design/design QA as an issue in the OL has also been discussed in considerable detail in past filings, including CASE's 11/4/85 (Main Docket) Answer to Applicants' 10/21/85 Petition for Directed Certification of Licensing Board Order of October 2, 1985.

> 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 CFR 50.57(a) necessary for issuance of an operating license for Comanche Peak.

In accepting CASE's Amended Contention 2 in the CPA, the Board stated specifically, in part (Board's October 30, 1986, Memorandum and Order (CPA) (Motion to Admit New Contentions or for Reconsideration), at 10):

> Although the Board believes that issues similar to those raised in this case are also pending in the operating license case, the issues do not appear to be identical. In particular, litigation within the operating license case would not result in terminating the construction license and therefore would not be a substitute for Intervenors' right to intervene to contest the extension of that license.
>
> Furthermore, the Board's view about the issues properly in the operating license case is not shared by Applicants. It is Applicants' view in the operating license case that it is not proper, under the admitted contention, to consider the extent to which management practices have resulted in quality assurance/quality control breakdowns. The basis for applicants' argument is their belief that they can correct all plant deficiencies without assessing management blame and that correction of the physical problems is all they need do to counter the allegations of Contention 5.
>
> Because that is Applicants' view, which could be sustained on appeal, the procedural context for raising these management issues is substantially different in the two cases.

In essence, the CPA issue goes to <u>why</u> the construction of CPSES went awry and whether similiar problems could occur in the future, while the OL proceeding goes to <u>what</u> happened and whether the problems have been resolved such that the Board can find reasonable assurance about the safety of the plant.

The Applicants have consistently taken the position that management practices are not at issue in the OL proceeding. They have gone so far as to take the matter up with the Appeal Board in an interlocutory appeal (see Applicants' 10/21/85 Petition for Directed Certification of Licensing Board Order of October 2, 1985). In their Motion for consolidation, Applicants, through new counsel, argue that since they were not getting anywhere with their exclusion arguments in front of the Board, consolidation would "clarify the issues to be litigated" and "largely eliminate unnecessary disputes over the scope of the two contentions or the relevancy of evidence" (Motion, at 9).

Applicants' suggestion that consolidation "clarifies the issues" is neither logical nor persuasive, and CASE vigorously opposes the notion that consolidation would clarify the object of each separate proceeding. However, as discussed below, consolidation of the proceedings in a manner that preserves the true issues and provides for a reasonable and efficient method of managing the evidence would produce a substantial benefit to the parties and the Board.

As outlined below, CASE believes that a two-step hearing process, with the concession inherent in the Applicants' Motion that all evidence is relevant in both dockets, will accomplish Applicants' purpose and preserve CASE's right to have a separate finding on management motives and whether or not Applicants' management has repudiated past practices.

A. The Applicants' view of the OL issues is in error.

The issues in front of the Board in the OL proceeding and as described in Contention 5 were clarified by Board Orders and at the November 2 and 3,

1987, prehearing conference and specified in the Board's 11/18/87 Memorandum and Order (Litigation Schedule), which states, in part (pages 1, 2, and 3):

> The purpose of this memorandum is to establish a litigation schedule governing discovery and the resolution of issues in this case. [Footnote omitted.]
>
> The schedule is organized around the Collective Significance Report and the Project Status Reports, documents being prepared by . . . (Applicants). These documents are being produced as part of Applicants' efforts to demonstrate the safety of their plant without regard to the overall effectiveness of their historical QA/QC program. Hence, in evaluating these documents, we will assume that the historical QA/QC programs for design and for construction have broken down. We will, therefore, require careful proof whenever portions of the QA/QC program are relied on to assure the safety of the plant.
>
> . . . it may be harder to demonstrate the adequacy of finished construction than it is to demonstrate the adequacy of finished design. In particular, it may be difficult to show that the plant has received at least the level of scrutiny that could have been provided by a quality assurance program that initially complied with Appendix B.
>
> Nevertheless, despite the difficulty, Applicants have chosen to meet this standard and should relevant matters be contested before us, we will scrutinize the proof carefully and determine whether Applicants have met their burden of proof. . .
>
> (Emphasis added.)

The Applicants concede in their filing that OL issues focus on the adequacy of the QA/QC program as "developed and implemented by Applicants at CPSES, including the adequacy of the historical QA/QC program." (Motion at 7.) (CASE notes, however, that Applicants have not accepted the Board's assumption that the historical QA/QC programs for design and for construction have broken down.) Applicants concede that the adequacy of the reinspection and corrective action program is at issue in the OL. They also apparently concede that some aspects of management are destined to be heard

in the OL. However, Applicants continue to take the position that design issues are not raised by Contention 5 and will not be properly explored in the OL proceeding. Id. at 8, Footnote 7.

For example, although Applicants state in the middle of page 8 that ". . . Applicants have taken the position that the only significant difference between Contention 5 in the OL docket and Contention 2 in the CPA docket is the issue of past management oversight of CPSES", on the same page they take the position (Footnote 7, page 8) that design is not an issue, and state: "Applicants, of course, do not agree that design issues are raised by Contention 5. That contention, by its terms, questions only the construction of CPSES." As stated by the Board in its 12/28/83 Memorandum and Order (Quality Assurance for Design), top of page 8:

> This contention [No. 5] is very broadly worded and has been broadly interpreted by the Board /9/. We have interpreted it to apply to quality assurance for design of Comanche Peak and also have permitted CASE to raise questions concerning particular design deficiencies alleged not to have been caught by the design control program.
>
> /9/ Tr. 714.

Applicants have argued long and hard that design issues are not within the scope of Contention 5 in the OL; their statement in the middle of page 8 notwithstanding, they continue this argument in Footnote 7 on page 8.

Applicants' Motion indicates that they are trying to simplify the OL and exclude the parts of the case they do not want to hear.

B. The CPA unquestionably contains design per se and design QA issues.

Although CASE has continued to make its arguments regarding design in the OL proceedings, apparently the Board has recognized and CASE anticipates

that the Applicants will appeal any finding adverse to Applicants on design issues, in part on the basis that those issues were not properly within the scope of the OL.

However, there can be absolutely no doubt that design issues per se as well as design QA issues are included in CASE's admitted amended Contention 2 in the CPA and will be a major part of CASE's proof of our Contention. Both design issues per se and design QA issues were specifically included in the bases for amended Contention 2 /5/. If there were ever any doubt that design issues and design QA issues were included in the OL (and CASE does not believe any such doubt ever had any validity), there surely should exist no shred of doubt even in Applicants' mind that they are duly accepted issues in the CPA.

C. If the proceedings are consolidated, both design per se and design QA should be recognized as admitted issues in the consolidated proceedings.

Should the Board decide to consolidate the two proceedings, Applicants should also be forced, once and for all, to admit what they have tried to deny for years but which has now been validated by Applicants' own reinspection program: that both design per se and design QA are admitted issues in both the proceedings (and certainly in any consolidated proceeding).

As discussed below, although CASE has no objection to an efficient proceeding, we will not and cannot agree to any process which would force us

/5/ See Consolidated Intervenors' 9/30/86 Amended Contentions 1 and 2, pages 2 through 5.

to give up the forum in which there is no doubt that design per se and design QA both are included. The design and design QA problems which Applicants have tried to deny for years have now been validated by Applicants' own reinspection program. This will be an important part of our proof, which even Applicants cannot deny in the CPA.

II. CASE and Applicants agree that the hearing should avoid duplication of evidence whenever possible.

The key premise of Applicants' Motion to consolidate is that "much of the same evidence would be presented to the Board in both proceedings." (Motion at 10.) Applicants state that the evidence would be the same because of the substantial similarity of issues. CASE agrees that much of the foundational evidence in both proceedings would be the same, but not because of the similarity of issues.

CASE agrees with Applicants that the categories of information described on pages 10 and 11 are applicable to both cases; however, the treatment of the information will be far different in both proceedings and the information to be relied upon as proof in the CPA goes to the categories identified by Applicants.

CASE intends in the CPA proceedings to put on either direct or circumstantial evidence of management motive. Thus, the CPA inquiry will revolve on management's explanation for the lapses in quality and management decisions made throughout the design and construction process. For example, the question of why certain managers have been allowed to continue in positions of authority in the face of clear evidence as to their propensity toward minimizing procedural requirements, violating regulations, and

creating an atmosphere of intimidation detrimental to quality will be answered in the CPA docket. Another example is the question of why management ignored the warnings of the MAC Report recommendations. Yet another issue is the question of why certain choices were made regarding design and design criteria.

Since the object of the OL proceedings is to establish what the mistakes were, the extent and depth and breadth of the mistakes and whether they have been satisfactorily corrected, it follows that an inquiry into motive and repudiation only makes sense where the mistakes have been identified and recognized by admission or Board findings. One must first recognize and know what mistakes have been made before one can get to the issue of why the mistakes occurred. If the Board concludes that no mistakes were made, there is nothing for CASE to prove regarding the reasons for such mistakes. In addition, before one can establish motive, it is necessary to establish whether or not patterns exist, which can only be identified by looking at the cumulative effects rather than bits and pieces.

As the Board recognized in its Order when it stated that Applicants could attempt to prove that they had repudiated their past practices through the circumstantial evidence of a successfully implemented reinspection program, CASE also is entitled to put on the circumstantial evidence that cumulative management mistakes demonstrate the points that CASE seeks to make. Such use of circumstantial evidence that analyzes the inherent fallacy in a self-serving defense is an accepted and traditional method of proving motive. CASE reasonably anticipates that Applicants' witnesses will testify that they had no improper purpose and that at worst they were guilty of ignorance.

CASE always intended to demonstrate through the OL hearings that management decisions led to design and construction problems but could have sustained our case by demonstrating incompetency and naivity. However, in the CPA, CASE must demonstrate that intentional management actions were taken to knowingly achieve an improper purpose and also establish that management has not repudiated its past practices. This is far beyond the burden CASE carries in the OL. CASE is entitled to demonstrate that ignorance, in the face of repeated continual warnings and evidence of failed programs, loses its innocence. Such pattern and practice evidence will not be available to CASE until the completion of the OL proceedings.

III. Proposal.

CASE proposes that the Board keep the issues separate and allow evidence from one docket to be used in the other docket wherever possible. In the alternative, should the Board decide to consolidate the dockets, CASE requests that the Board's Order of Consolidation deal separately with the issues, discovery, and hearing schedules. As described above, CASE asserts that the issues in both proceedings have been clarified and specified in accordance with NRC procedures in the language of the Contentions and through Board Orders. No further clarification of the issues is necessary.

As to discovery, CASE vigorously opposes the imposition of yet another discovery requirement on top of the already-demanding if not impossible schedule of discovery and trial preparation CASE is now operating under. CASE again reminds the Board of its often-repeated promise that CASE would not be damaged by having to wait until late in the process to receive and attempt to digest the materials generated by Applicants' efforts of over three years. Although Applicants have provided informal discovery, CASE

still faces a mammoth job, and we most strenuously would object to any additional burdens /6/. CASE also urges that discovery on all CPA issues be open until the close of all discovery in the OL proceeding and not be limited by area of interest.

As to hearing schedules, CASE suggests that following the conclusion of the submission of all evidence in the OL proceeding, the Board hold a prehearing conference to set for hearing the CPA docket, at which time CASE would designate the evidence upon which it intends to rely in the CPA proceedings and specify those witnesses whom CASE intends to call. Applicants and NRC Staff would do likewise. CASE commits that wherever possible we will rely upon already-submitted and accepted evidence applicable to both dockets and strive for as little duplication of evidence as possible. For example, CASE will not attempt to again put on the harassment and intimidation evidence from 1984 which has already been admitted in the OL. And, for example, although CASE will undoubtedly call TU Electric President, Mr. Spence, to testify in the CPA proceedings, we would not ask him again about the reasons he did not remove Brown & Root in the early 1980's, since he has already testified on his explanation on that matter.

CASE envisions the CPA proceeding as a relatively narrow and focused hearing going beyond information contained in the OL to determine the motive for management decisions.

/6/ Should the Board decide adversely to CASE on this point, it certainly would be essential to make special arrangements for the piping and pipe supports, since the NRC Staff has already issued its SSER 14. CASE certainly would consider it most unfair and a severe violation of CASE's due process rights otherwise.

CASE believes that the CPA issues must be presented and briefed separately, while liberal and organized use of the evidenciary OL record and preplanning by all parties will shorten the time required in the CPA hearing and limit it to new evidence that establishes motive and whether or not management has repudiated its past practices.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of

CASE'S ANSWER TO APPLICANTS' 3/8/88 MOTION TO CONSOLIDATE PROCEEDINGS

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