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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
TEXAS UTILITIES GENERATING COMPANY, et al.	)	Docket Nos. 50-445 OL
	)	50-446
(Comanche Peak Steam Electric Station, Units 1 & 2)	)	

CASE RESPONSE TO BOARD MEMORANDUM
(STATISTICAL INFERENCES FROM CPRT SAMPLING)

I. Introduction

The Board's Memorandum raises "concerns about the approach to statistical inference apparently being used by the Comanche Peak Response Team (CPRT)." The Board apparently expected that the precise program which applicants would use would be forthcoming shortly. In seeking an extension of the original December 31, 1985, filing date (Applicants' Request for Enlargement of Time . . . (December 16, 1985)) Applicants indicated their need to postpone a response until the CPRT revised program plan had been developed. Similarly CASE is unable to develop its response until it has received and had an opportunity to review the program plan. Although Revision 3 of the Program Plan was received on January 27, 1986, it did not include the revised section on statistical sampling (Appendix D). Thus comments by CASE at this time on the statistical sampling plan of Applicants are not possible. Our comments will be filed in a reasonable time after we have received the revised Appendix D and had an opportunity to evaluate it.

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The other issue raised by the Board in its memorandum relates to the obligation of Applicants to meet the requirements of Appendix B and the need for Applicants to use the provisions of §2.758 if they cannot meet those requirements. At this early date with no indication from Applicants what they intend to do to meet or avoid Appendix B requirements it is difficult for CASE to address the question. We do set forth below certain generic principals which we believe are relevant to the inquiry but reserve the right to expand and modify our position once Applicants intentions are made clear.

II. Discussion

Appendix B is a regulatory requirement of the NRC and neither the Applicants nor the NRC are free to ignore the requirement. Nader v. Nuclear Regulatory Commission, 513 F.2d 1045, 1051 (D.C. Cir., 1975); Vermont Yankee Nuclear Power Corp., ALAB-138, 6 AEC 520, 528 (1973).

Like the basic "reasonable assurance" finding, a finding of compliance with Appendix B does not depend upon a purely objective test. On the other hand, contrary to the implications of the staff filing (NRC comments on Statistical Inference Memorandum, January 30, 1986) the criteria in Appendix B are not so subjective that virtually any level of performance by an applicant can be rationalized into compliance. For instance the requirement for adequate independence of QA/QC from cost and scheduling pressures may not have a simple objective standard for compliance, but it is clear that when production quotas are established for inspectors the standard is violated. Similarly,

in order to meet the requirement to encourage inspectors to find and report deficiencies each applicant may have a different although acceptable program but ignoring widely known incidents which discourage reporting deficiencies and countenancing a management style that is challenging to and suspicious of those who report deficiencies is undeniably a violation of the requirement. Perhaps, like Justice Stewart said of pornography, compliance with Appendix B may be difficult to define but the Board will know it when it sees it.

In the instant case there is overwhelming evidence that in constructing CPSES Applicants did not comply with Appendix B. In addition to evidence that particular requirements of Appendix B were not met there is the objective evidence that the QA/QC program failed to identify substantial deficiencies which it should have found.[1] Thus the threshold issue is how can Applicants qualify for an operating license if they do not meet Appendix B?

Because QA/QC requires an ongoing program to inspect construction activities while they are occurring there is no way, after construction is completed, to conform to Appendix B

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[1] Even if many of the deficiencies were, as Applicants claim, subsequently found to have no safety significance, the fact that the QA/QC program was to have been designed to find all safety-related deficiencies and that the deficiencies were classified as safety-related when they occurred is sufficient indictment of the entire program. Surely Applicants do not claim, or at least have not claimed so far, that they had designed a QA/QC program to ignore deficiencies originally classified as safety-related which would later be able to be shown to be nonsafety-related.

requirements. Unless there is some exception in or exemption from Appendix B, an applicant which fails to meet Appendix B cannot receive an operating license.[2] Commonwealth Edison Company (Byron), ALAB-770, ___ NRC ___, Slip Op., pp. 8-9.

The Staff suggests that the decision in Diablo Canyon (Pacific Gas and Electric (Diablo Canyon), ALAB-763, 19 NRC 571 (1984)) provides an escape hatch. There are at least two critical differences between this case and Diablo Canyon. First, in Diablo Canyon the Commission had specifically authorized a deviation from the regulations by mandating the IDVP be used when the QA/QC program was unreliable. In this case there has been no such Commission approval. The Diablo Canyon opinion and §2.758 establish that deviations from Commission regulations, if available at all, must come from the Commission.

As early as 1973 the Appeal Board made clear in Vermont Yankee Nuclear Power Corp. (Vermont Yankee), ALAB-138, supra, that once the Commission promulgates a regulation it is not for the Staff to modify the regulation. In that case Victor Stello, now acting-EDO, attempted to excuse the utility from fully meeting the ECCS criteria by relying on a low probability

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[2] In some cases this could produce a harsh result because an applicant might be unaware until an operating license hearing that it was not in compliance with Appendix B requirements. That is not the case here. Almost since the inception of construction, Applicants have been warned by auditors, independent consultants, and the NRC that their approach to constructing CPSES was inconsistent with the NRC QA/QC requirements. See, e.g., NRC Trend Analysis (1976) Staff Exhibit 184, p. 1; MAC Report (1978); IE Report #80-25 (1980), Staff Ex. 181; and see generally CASE Motion for Establishment of an Evidentiary Standard . . . (2/4/85), pp. 10-24.

of an accident as a justification for allowing full power operation for a plant which could not prove it meet the ECCS temperature limits above 80% power. The Appeal Board held (Id. at 528):

> Generally, then, an intervenor cannot validly argue on safety grounds that a reactor which meets applicable standards should not be licensed. By the same token, neither the applicant nor the staff should be permitted to challenge applicable regulations, either directly or indirectly. Thus, those parties should not generally be permitted to seek or justify the licensing of a reactor which does not comply with applicable standards. [Footnote omitted.] Nor can they avoid compliance by arguing that, although an applicable regulation is not met, the public health and safety will still be protected. For, once a regulation is adopted, the standards it embodies represent the Commission's definition of what is required to protect the public health and safety.
>
> In short, in order for a facility to be licensed to operate the applicant must establish that the facility complies with all applicable regulations. If the facility does not comply, or if there has been no showing that it does comply, it may not be licensed.

A second reason Diablo Canyon is not controlling here is that it involved design defects, not construction defects. In some cases it may be possible to re-evaluate the design of a plant and by using reliable "as built" drawings conclude that the design failures did not in fact produce unsafe conditions. In such a case the re-evaluation would truly be a re-enactment of the original improper review. In the instant case the failures are in design, QA/QC for construction and documentation. There is no assurance that "as built" drawings reflect "as built" conditions. In addition a plantwide failure of the QA/QC for construction brings into question the adequacy of components that

are no longer accessible and aspects of construction that cannot be checked without taking the component apart. Thus, unless representative portions of the plant are disassembled no sampling program will be able to reliably conclude that the plant was properly built. Only through a 100% (or near 100%) re-inspection of the accessible components of the plant could Applicant have any basis to assert that the rest of the plant could be assumed to be properly built. A sampling program would have to be extremely broad and carefully designed to draw any conclusions about aspects of construction or components. Such a program would probably still inherently fall short of providing reasonable assurance. All indications to date are that Applicants will not propose anything remotely approaching such a thorough sampling program.

Without accepting the correctness of the Diablo Canyon decision it is apparent that it cannot provide an excuse in this case for Applicants' failure to comply with Appendix B. Whether Applicants have another way out of their dilemma, short of re-building the plant in conformity with Appendix B, is not for CASE to speculate. Diablo Canyon is not the way out.

The use of §2.758 will also not save Applicants if, as the Board hypothesizes, Applicants are unable to meet the level of safety required by Appendix B. Section 2.758 requires the party seeking to challenge the regulation to prove that its case is an exception which was ignored when the regulation was written and that application of the rule to the particular case presented would not serve the purpose for which the rule was adopted.

Since the purpose of Appendix B is to achieve a level of assurance that the plant was properly built, we fail to see how Applicants can hope to obtain an exception from its requirements if the substitute plan (CPRT) fails to provide the same level of safety required by Appendix B.

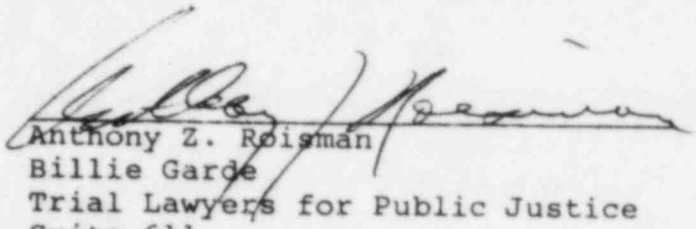
The Staff devotes a significant portion of its filing to the proposition that if Applicants undertake a combination of sampling and other actions that provide the same level of safety as full compliance with Appendix B this could justify the Board in excusing compliance with Appendix B. Then the Staff concludes that it cannot conceive of how Applicants could justify a waiver of Appendix B under §2.758. Staff has it all wrong. First, their assumption that the substitute plan will provide the same level of safety as Appendix B assumes away the premise of the Board's question. Second, the Board does not have the authority to replace the Commission's judgment that Appendix B must be met. No exceptions are provided in that Appendix, even for a substitute that fully meets the goals of Appendix B. Third, Applicant's only hope would be to pursue §2.758 carefully following its stringent limits. In particular Applicants would have to prove that their alternate would provide the same level of safety as Appendix B. We will not speculate on whether that would be successful particularly since we believe it is an extremely remote possiblity that Applicant would file under §2.758. Applicants would have to admit that they had not met Appendix B in order to file under §2.758 and admissions of even lesser transgressions appear to be beyond their capability. We will await their unlikely conversion to candor to present our

views on whether they qualify under §2.758.

CONCLUSION

CASE believes Appendix B is an unavoidable requirement which Applicants cannot meet with a substitute inspection plan; particularly one which fails to achieve the level of safety required by Appendix B. Second, we believe that if an exception to Appendix B is available it must come from the Commission after Applicants seek relief under §2.758 and not from the Staff or the Board. Third, we believe the nature of the breakdowns here in QA/QC for construction, in design and in documentation make any sampling program inherently incapable of providing the same level of safety as compliance with Appendix B. Only a 100% re-inspection program that produced no more than the normally expected number of deficiencies could possibly provide the level of safety which proper compliance with Appendix B was intended to assure. Finally, the inherent ambiguity in the "reasonable assurance" finding does not eliminate all objective tests. We are confident that the Board will know compliance when it sees it. Applicants don't have it here.

Respectfully submitted,



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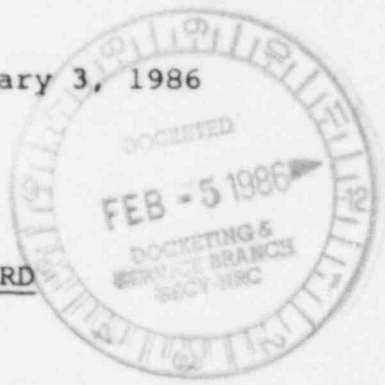
Dated: February 3, 1986

Feburary 3, 1986



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CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of CASE's Response to Board Memorandum (Statistical Inferences From CPRT Sampling) have been sent to the names listed below this 3rd day of February 1986 by: Express mail where indicated by *; Hand-delivery where indicated by **; and First Class Mail unless otherwise indicated.

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