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UNITED STATES
NUCLEAR REGULATORY COMMISSION
before the
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	
TEXAS UTILITIES ELECTRIC COMPANY, et.al.,	Docket Nos. 50-445-OL 50-446-OL
	Docket No. 50-445-CPA
(Comanche Peak Steam Electric Station, Units 1 and 2)	

CASE'S RESPONSE TO RECONSIDERATION REQUEST
OF APRIL 5, 1988, BOARD ORDER DENYING CONSOLIDATION

The Citizen's Association for Sound Energy ("CASE" or "Intervenor") herein opposes the April 15, 1988, Motions for Reconsideration of the Atomic Safety and Licensing Board's ("ASLB" or "Board") April 5, 1988, Order denying consolidation of the Construction Permit Amendment proceeding ("CPA") and the Operating License ("OL") proceeding filed by the Nuclear Regulatory Commission's Staff ("NRC" or "Staff") and the Applicants; and, for the reasons stated herein request that the Board deny the reconsideration request.[1/] In the alternative, CASE requests that the Board postpone any ruling on

1/ This brief is filed on May 2, 1988, five days beyond the original due date with the acquiesence of the parties and the permission of the Board.

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reconsideration of the consolidation request at this time, and suggests that an appropriate time to reconsider the request would be upon completion of the discovery phase of the OL and CPA proceedings.

Additionally, after some reflection, CASE opposes Applicants' request for oral argument on this matter and asks the Board to make a ruling on the pleadings. CASE understands that the Board was interested in discussing other matters at the pre-hearing conference. However, as discussed below, CASE simply is not in a position to discuss modification of the current schedule at this time, and seeks a delay of any additional "pre-trial" discussions to modify or streamline the hearing proceedings for at least six weeks.

BACKGROUND

As a result of the strong arguments made by the Applicants and the NRC Staff in opposition to the Board's Order denying consolidation, CASE felt it necessary to summarize the relevant history of the Construction Permit Amendment proceedings. The summary is not intended to be a citation to the record of the case, but rather to put the issue before the Board in procedural perspective.

On August 1, 1985, the construction permit for Unit One of the Comanche Peak Nuclear Power plant expired without any request for an extension being filed by the Applicant-Permittee. On or about January 28, 1986, the NRC discovered the fact that the construction permit had expired and notified officials at Texas Utilities, the Intervenors, and the Board. On January 29, 1986,

TU requested a retroactive extension of the construction permit. Within days the NRC staff approved, retroactively, the permit amendment.

On January 31, 1986, CASE sought a suspension of all work activities at Unit I and started a legal challenge to the retroactive granting of the construction permit and the continuation of the work at the unit. CASE requested a special hearing to be set on the relevant issues. (See, generally, CASE's January 31, 1986, Request for Imposition of Fine, For Suspension of Construction Activities, and for a Hearing of Application to Renew Construction Permit, and the February 11, 1986, Request for Stay of Effectiveness of Construction Permit Extension and Other Relief.)

After a series of challenges to the request, the Commission referred CASE's request for a hearing to the Board for a post-extension hearing. The Licensing Board began proceedings. CASE started discovery. TU and the NRC Staff moved to stay discovery and appealed, to the NRC Appeals Board, the decision of the Board to admit the CPA contention. The Appeals Board certified the question to the Commission. The Commission considered the question and remanded to the Appeals Board the discretion to determine the admissibility of the contention in accordance with its reasoning that:

> We believe that the appropriate balance is struck by holding that if there was a corporate policy to speed construction by violating NRC requirements, and that policy was discarded and repudiated by the permittee, any delays arising from the need to take corrective action would be delays for good cause.

Commission Order, CLI-86-15, September 19, 1986.

Meanshile, CASE's challenge to the legality of the NRC's action in granting the amended permit without granting CASE a prior hearing was considered by a three-member panel of the United States Court of Appeals for the District of Columbia. The Court of Appeals, after oral agreement, did not decide the question of whether the Commission was required to grant CASE's request for a hearing; at least in part, because the NRC had already decided that CASE was entitled to a hearing on the narrow "good cause" question which had the potential, if CASE were to prevail, of leading to an order stopping construction on Unit I. Additionally the Court, in reaching its June 26, 1987, decision, stated:

> Finally, we emphasize that our decision does not constitute approval of TUEC's past construction activities or serve as a prejudgment of any issue in the operating license proceeding. As the NRC concedes, whether TUEC will eventually be allowed to operate the facility is an entirely different question from whether to extend the completion date of the construction permit. (citation omitted)

Slip. Op., at 10.

By this time CASE had amended its contention to incorporate the CPA issues, as defined by the Commission. Recognizing that much of the same information would be relevant and material to prepare for hearings in both the OL and the CPA, CASE filed the similar discovery requests in both proceeding. Applicant's strenuously objected to responding to the similar discovery requests on the bases that the two proceedings were "distinctly different," and discovery was stayed in the CPA proceeding. The

Applicants stated:

> Contrary to CASE's previous assertions, the two dockets are not "companion" proceedings. The issues in the two proceedings are distinctly different, albeit involving the same plant. Whereas some overlap of relevant information is inevitable, in no way can either the scope or nature of the issues be described as identical. Indeed, we believe the Commission has made clear its view that the borders of construction permit extension litigable issues are marked primarily by the consideration that construction permit extension cases and operating license cases are not intended to overlap into the same area. (citing Washington Public Power Supply System (WPPPS Nuclear Project Nos. 1 & 2), CLI 82-29, 16 NRC 1221, 1228-29 (1982).)

Applicant's Response to CASE Request For Production of Documents (June 27, 1986) and Motion for Protective Order, August 1, 1986.

Now, after slightly less than two years, Applicant's have taken the exact opposite position on the similarity of the issues in the two cases. As stated in their Motion for Reconsideration:

> "...it should be noted that there is no serious disagreement that many of the issues in the OL docket are substantially the same as those in the CPA docket."

Motion, at 2.

Notwithstanding the Applicants' assertions regarding the issues in front of the Board, the central argument to both the Staff and the Applicant's Motion for Reconsideration is not similarity of issues, but rather preservation of hearing rights, efficiency, resource allocation, and the Fear of Delay. It is these arguments that CASE addresses below.

I. THE ALLEGED ADVERSE EFFECTS OF NOT COMBINING THE DOCKETS

Neither the Applicants or the NRC Staff raise any new arguments in their reconsideration requests. Both parties devote their briefs to the imagined and potentially disastrous consequences of not combining the operating license proceeding and the construction permit proceeding, which they apparently believe that the Board did not realize when it denied the request for consolidation.

For example, the Applicants state that "the Board failed to consider the serious potential delays and other adverse effects attendant to a schedule calling for consecutive rather than consolidated hearings." (Applicants' Motion, at 1-2). They cite as examples the following imagined horrors which will occur absent consolidation:

> Under the circumstances present here, the resolution of the OL and the CPA issues in two separate hearings will result in procedural confusion and inevitable and unnecessary delay,... (Id, at 4)
>
> ...serious substantive disputes [will erupt] over the extent to which matters that were addressed or should have been addressed in the OL docket can be relitigated in the CPA proceeding. (Id., at 4-5.)
>
> ...attempts to relitigate matters already encompassed within the OL..(Id., at 5.)
>
> ...interpretation of the scope of the single Contention admitted in each separate docket will persist as a source of dispute between the parties. (Id.)
>
> The Board will be continually confronted by objections by all parties in both proceedings as to the scope of the proceedings and the relevancy of evidence. (Id.)
>
> ...separate hearings will strain the resources of all parties and require the repetitive use of witnesses. (Id.)
>
> ... the delays attendant [on two hearings] could be substantial because of the time involved in conducting an

additional round of pre-hearing procedures, resuming a hearing and recalling witnesses, filing proposed findings and conclusions and writing a separate decision. (Id.)

Likewise, the Staff lists four alleged consequences of the Boards' refusal to take affirmative action to consolidate the operating license hearings and the construction permit hearings. See, Staff's Motion, at 2-3. Those consequences are summarized below as:

1. Unnecessary uncertainties concerning the status of a construction permit after it has been determined that an operating license should issue.

2. Evidence taken in a construction permit proceeding which follows an operating license proceeding creates a situation which could result in reopening and relitigation of operating license issues;

3. The OL proceeding is turned into on-the record discovery proceeding for the CPA proceeding; and

4. Substantial delay will accompany the CPA proceeding.

Both the Applicants and the Staff argue that the consequences described above are in violation of the Commission's policy statement on the conduct of licensing proceedings. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981).

Similar arguments by both parties were made to the Commission and the U.S. Court of Appeals prior to the present hearing being established, and were rejected. Similar arguments were made in the first motions to consolidate the proceedings filed in March, 1988. CASE has already addressed the adverse consequences concern in its initial brief, and adopts herein by reference those arguments. However, in response to the

heightened fears of opposing parties CASE makes the following observations on the potential for delay, the likelihood of confusion, and possibility that CASE will get more "due process" than it is entitled to.

First, as to the issue of CASE achieving through the CPA process more than it is entitled to already, CASE asserts that the argument has no merit. CASE has no interest in abusing the CPA proceeding, or to utilize the OL hearing itself as a forum for discovery for the CPA proceeding. CPA discovery is still open and ongoing.

Additionally, CASE already has a substantial body of evidence which is in the record of the OL proceeding, and which the Applicants have never withdrawn or explained that serves to support the first element of the CPA contention that management had an improper purpose in obtaining a delay for completing construction of Unit 1. Further, the evidence is quite clear that many of the managers responsible for the condition of the plant and the improper purpose are still there, and/or TU has not repudiated old practices or policies. In addition, there is substantial new evidence available to CASE from those recently terminated or separated workers who have a window into the current management of the reinspection and corrective action activities that support CASE's contention that TU has not repudiated its past management attitudes toward regulatory

compliance and safety versus cost and scheduling pressures.[2/]

Second, as to the issue of Delay, CASE, which has the most limited resources (both time and money) of all parties has no interest in or motivation for delay. Since at least the early summer of 1984 CASE has been urging that all matters regarding the Comanche Peak plant be heard in as short a time as possible, as soon as possible, once and for all. Since summer of 1984 it has been the Applicants, followed by the Staff, that have repeatedly delayed all the proceedings, hearings, and serious courtroom confrontations over the ultimate issues in this case.

Applicants are now on their third generation of lawyers in this case, the second generation having never brought to hearing any of the dispositive issues. They are on the second major architect/engineer, the second construction contractor, and the fourth major design reinspection and corrective action contractor.

CASE, however, is still doing exactly what it set out to do a decade ago in the operating license hearings, and over two years ago in the construction permit hearing, and has no intention of voluntarily changing its course or its speed to accommodate the unfounded fears of opposing counsel. Particularly where, as here, it is CASE that has the most to lose should its scheduling views be inaccurate.

As the Board noted in its April 5, 1988, Order, it was

2/ See, CASE's April 15, 1988, letter to the Board enclosing two Section 210 complaints against EBASCO, which names, among others the involvement of C. Thomas Brandt.

"explicitly not deciding whether the CPA proceeding may become moot should construction be completed before the time for a hearing arrives." Order, at 2; and, as the Staff noted in its Motion for Reconsideration, the CPA case becomes moot after the OL is granted.

CASE does not want to have the issue become "moot" by default however, and asserts that none of the potential or hypothetical concerns are persuasive enough to combine two distinctly different issues into one docket with the inherent forfeiture of rights that CASE faces in that situation.

CASE wants to create one record in the CPA docket, have one hearing in the CPA docket, write separate proposed conclusions of law and findings of fact, and handle the imminent appeals of the CPA issues separately. To do otherwise would turn the CPA issue into just another OL contention, which it clearly is not. Yet this is precisely the process that Applicants seek to avoid. Motion, at 5.

Finally, as to the concerns over procedural confusion, neither the Applicants nor the Staff offer any basis for their fears that there will be procedural confusion. CASE asserts that there is none, and that this reconsideration motion is yet another attempt to deprive CASE of its substantive procedural rights, and guarantees of adequate time to prepare its case, by "tarring and feathering" the intervenor with the standard intervenor accusations. Such criticism is unfounded,

unappreciated, and unnecessary.[3/] As discussed below CASE supports case management principles in the CPA and the OL docket, and is confident that those issues can be resolved, but opposes doing so by combining the trial and post-trial process for the CPA issue.

It is ironic that CASE now finds itself in the position that the Applicants asserted they were in during the fall of 1985, when they sought directed certification to the Appeals Board in order to protect their substantive and procedural rights from "procedural chaos" and an "incomprehensible record," when and if the case ever went to the Appeals Board.

In fact, Applicant's current position in favor of consolidation is in direct opposition to their previously espoused position in opposition to consolidation of evidence from the technical and harassment and intimidation dockets in the earlier OL proceeding. (See, especially Applicants' November 4, 1985, Petition for Directed Certification of Licensing Board Order of October 31, 1985). Further, in Applicants' November 14, 1985, Memorandum in Response To Appeal Board Order of November 8, 1985, Applicants argued against adoption of a position similar to that they are now advocating regarding the two separate issues in the OL proceeding, stating that no matter how articulated the procedures and rights of the parties in the two dockets were, that the combination of the two proceedings would "...lead to an

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3/ Comments such as "CASE...has had more than ample time to determine the "mistakes" it believes were committed...," and CASE will attempt to relitigate "under the quise" of the CPA issues.

unnecessarily confused and complex trial and appellate record." (Brief, at 3)

Neither the Applicants nor the Staff have raised the spectre of confusion, Delay, or abuse of process so strong that the Board should reverse itself and take away CASE's hard fought right to a separate hearing, separate decision, and separate appellate process on the issues of management motive and repudiation.

II. THE BENEFITS OF CONSOLIDATION

Both the Applicants and the Staff extol the numerous benefits of consolidation, arguing in sum that consolidation will produce efficient proceedings, eliminate discovery and evidentiary disputes, insure that CASE doesn't abuse one proceeding in an attempt to take discovery it is not entitled to or relitigate and reopen issues from the other proceeding once closed, or delay Unit I of Comanche Peak from going into operation.

CASE supports in theory and practice the notion of organized, efficient, and focused hearings. It has been CASE's experience in the OL proceedings that the best way to achieve that type of focus to have a final position from the Applicant as to their affirmative case, to complete discovery into that affirmative case, to thereafter identify issues in dispute, write dispositive motions, and go to trial on those issues that remain in dispute.

In the CPA case the Applicants have not yet taken their affirmative position on the issues in dispute. Thus, it is difficult to engage in substantive discussion on ways to

consolidate the evidence to be relied upon wherever possible.

It has always been CASE's position that much of the evidence on the issue of past practices has already been developed. The Applicants have made no affirmative disclosures or statements other than that publicly available to CASE on which to base a final case development plant, i.e., no management repudiation statement, per se, has been made. No new management team has swept away the ghosts of past practices or patterns of pressure to achieve scheduling and cost constraints, at the price of quality. There is no new era in worker-management communications that is evident to CASE.

CASE anticipates that the CPA proceeding itself will provide the only forum for Applicants to either repudiate or adopt the past practices of TU management or continue to insist that nothing was ever wrong with management in the first place.

On the technical issues there are a number of viable options of the use of evidence gathered in one docket and applied to another docket, both as to the ultimate issue in the case and on the evidence developed in other docket.

CASE supports any meetings, discussions, working sessions, or any other similar undertaking in which the parties attempt to craft a management program for the massive amounts of evidence to be presented. In this proceeding such an undertaking was the backbone of the harassment and intimidation proceedings wherein lawyers representing all parties met over a series of weeks to work out procedures and process for the evidentiary depositions that served as the record support for that docket. Only one

final pre-hearing conference was necessary in that case.

Similar, and even greater case management problems face all counsel in this case. As discussed below, CASE respectfully suggests that the best way to foster the dialogue between the parties on these issues is to deny the motion for reconsideration and require counsel for all parties to meet, talk, and suggest some case management solutions for those problems which are facing each of the parties.

III. CASE AGREES WITH APPLICANTS AND STAFF THAT EFFICIENCY AND EXPEDIENCY ARE IMPORTANT CONSIDERATIONS IN DETERMINING SCHEDULING MATTERS.

CASE agrees with Applicants that, in reality, the CPA proceeding should come first. It should have came in 1985 or 1986. We note that on August 1, 1988, the permit extension now being challenged will itself be up for renewal.

However, given the posture of the case at this stage, and the likelihood that the OL proceedings will themselves focus of the extent of the breakdown at Unit I of the Comanche Peak plant it seems most logical to CASE that the extent of the breakdown be conceded or determined before the effort is expended into proving that this occurred because of some improper purpose, and that the management that fostered the improper purpose has not yet been repudiated.

Like any case of this magnitude there are a number of case management approaches which accomplish the same end. Two of those approaches are now before the Board in this Motion and Opposition for Reconsideration.

If counsel for all parties were required to discuss the management of the case, removed from the oral argument advocacy stage, and propose a variety of alternatives to each other and then to the Board for resolution CASE believes that an accommodation could be reached on many of the concerns raised by Applicants and Staff in these motions.

CASE respectfully proposes that such a discussion would be most beneficial at the completion of discovery in the CPA and OL proceedings since the factual record will be closed and the evidence that all parties intend to rely on at the hearing will be identified.

IV. CASE REQUESTS THAT THE BOARD ISSUE ITS RULING ON THE THE PLEADINGS ON THIS MOTION, AND POSTPONE THE MAY 11, 1988, PRE-HEARING CONFERENCE

CASE does not believe that it is either necessary or desirable at this time to have proposed pre-hearing conference currently, but tentatively scheduled, for May 11, 1988. It is CASE's position there is no need for oral argument on the consolidation issue either, since the Board would in effect be attempting to serve as a mediator or arbitrator between two viewpoints on a matter that is, frankly, not pressing.

Although CASE believes that the presence of the Chairman might be beneficial at some stage of a working session it is our position that May 11 is premature, and oral argument and a ruling will only inevitably lead to further delay as one party or the other attempts to seek interlocutory relieve on this matter.

CASE believes that the Board has sufficient information now before it to rule on the Consolidation Reconsideration motions if

it so desires, and for the reasons stated herein oppose oral argument.4/

As discussed in recent filings CASE is simply not at the point in its hearing preparation to have an in depth discussion on possibly modifying the procedures agreed to in November, which are just now underway on some issues. Further, numerous new documents have been disclosed recently and more are anticipated. CASE's representative is in discussions with Applicants and the NPC Staff on stipulations regarding some portions of issues to be litigated. Finally, CASE is still awaiting the additional reports from CYGNA.

CONCLUSION

CASE opposes the Motions for Reconsideration filed by the NRC Staff and the Applicant and urges the Board to deny the motions outright; in the alternative, CASE requests that the Board postpone ruling on the issue until the completion of discovery in the OL and CPA proceedings.

CASE also opposes a pre-hearing conference at this time, recognizing that the subject of the pre-hearing conference would be scheduling and case management proposals, as well as oral argument on this matter. The basis of CASE's opposition is that there is nothing to reconsider in the opposing parties briefs that was not raised earlier, and that the pre-hearing conference would be costly, time-consuming and would delay CASE's being able

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4/ CASE is concerned with the cost to all parties of a hearing limited to oral argument on consolidation, and suggests that funds would be better spent for a working session.

to continue work which is essential for CASE to reach any point where serious discussions on stipulations, case management and reorganization issues, can be substantively and productively addressed.

Respectfully submitted,

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UNITED STATES OF AMERICA
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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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'88 MAY -6 P4:12

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In the Matter of	)	
	)	
TEXAS UTILITIES ELECTRIC	)	Docket Nos. 50-445-OL
COMPANY, et al.	)	50-446-OL
(Comanche Peak Steam Electric	)	
Station, Units 1 and 2)	)	Docket No. 50-445-CPA

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of CASE'S RESPONSE TO RECONSIDERATION REQUEST OF APRIL 5, 1988, BOARD ORDER DENYING CONSOLIDATION

have been sent to the names listed below this 2nd day of May 1988, by: Federal Express where indicated by * and First Class Mail elsewhere.

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