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RELATED CORRESPONDENCE

Filed: April 15, 1986

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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.)
)
(Comanche Peak Steam Electric)
Station, Units 1 and 2))
_____)

Docket Nos. 50-445
50-446

OK

(Application for an
Operating License)

APPLICANTS' OPPOSITION TO CASE'S
MOTION TO COMPEL
(CPRT Checklists)

Introduction

This is the third time CASE has raised the issue of in-process discovery of CPRT materials.

On September 4, 1985, CASE filed a request for the production of documents. Amongst the documents requested were the in-process workpapers of the group of experts whom the Applicants have retained to assess and render an opinion to management and counsel about

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the state of construction and design at Comanche Peak, including a number of specific issues relating thereto that have been made the subject of pending litigation in this proceeding. The Applicants objected to this request on two grounds, one legal (to the effect that under the Commission's Rules of Practice the Board has no authority to order such production in the absence of a finding of "compelling circumstances," see Fed. R. Civ. P. 26(b)(4)(B)) and one practical (to the effects that in process discovery of the CPRT process would work an interference with that process and that causing such interference is not necessary to the litigation of any issue before this Board, inasmuch as the same discovery could be had, with greater efficiency, once each discrete CPRT task had been completed). The Board declined to order the production sought by CASE.

Subsequently, CASE filed a Motion to Compel on January 10, 1986. That motion again sought in-process production of CPRT workpapers. The Applicants filed an opposition on January 27, 1986, and the Board declined to grant CASE the relief sought. Memorandum and Order of February 4, 1986.

Now, some four months after the pre-hearing conference and two months since the Board's prior order, CASE wishes to revisit this same question. CASE offers nothing new, but rather resurrects two assertions. The first is that whatever further disruption might be effected by having to make a production for CASE should be disregarded because there is already disruption caused by the Staff's continuing inspection and audit activities at the CPSES site, which include audits and inspections of CPRT. The second argument is that CASE has a "critical need" for the documentation, not for the purpose of preparing for litigation of any issue before this Board, but for the purpose of formulating extra-record comments to the NRC Staff (on an issue on which, in fact, the Staff has not invited comments). This third attempt at in-process¹ CPRT discovery should fare no better than its predecessors.

¹At the risk of repetition, we point out that this present issue involves the timing of the production of checklists, not their production vel non. The Applicants have previously stated that the CPRT Working Files for each ISAP will be offered to CASE for inspection and copying as the ISAP's Results Report is published. The CPRT Program Plan (section III(J), page 12 of 45 (Rev. 3)) provides specifically that Working Files are required to contain "[c]opies of procedures or checklists utilized in the performance of inspections."

ARGUMENT

I. Because the Documents Constitute Discovery Relating to Non-Testifying Experts, this Board Cannot Grant the Motion

The CPRT consists of experts. The experts are currently engaged in preparatory work designed to lead to the formation of expert opinions. The matters on which they are working are matters that arose in this litigation, and the experts may be (but have not yet been) designated as expert witnesses by the Applicants for the purpose of constituting a portion of the Applicants' case on those issues. For the reasons set forth previously,² discovery of non-testifying experts is barred except upon a showing and finding of "exceptional circumstances." The pending motion, which does not even address this well-known legal impediment to the relief it seeks, makes no attempt to demonstrate "exceptional circumstances," and for this reason the motion must be and should be denied.

²See Tr. 24228-40 (11/12/85); "Applicants' Opposition to 'Motion to Compel Responses to CASE's November 15, 1985, Interrogatories'" (1/27/86) at 8-13.

II. Unavoidable Disruption Attributable to Staff Audits and Inspections Does not Warrant the Sanction of Additional, Avoidable Disruption

CASE argues that Staff activities involving the auditing and inspection of CPRT activities, and the constituent review by the Staff of at least some of the documents (or prior versions thereof) that CASE seeks production of, somehow vitiates any concern about further disruption. This argument is without basis. The NRC Staff has statutory and regulatory duties that CASE does not have, and the Staff has statutory and regulatory powers of inspection that probably deny the Applicants the power to foreclose Staff inspection of in-process CPRT activities. See 10 C.F.R. § 50.70. Assuming that in the process the Staff has caused some disruption of CPRT, it simply makes no sense to assert that therefore it doesn't matter if CASE were to cause some more.³

³Note that CASE is not asserting that the Staff requested and received copies of things, and therefore a copy of the copies should be made for CASE; any document that was supplied to the Staff is available to CASE from the Staff (and has, insofar as we are aware, already been provided to it by the Staff). What CASE

There is, we must note, one limited area in which the production of a current set of checklists would not present the threat of incremental disruption. As they undertook to this Board to do,⁴ the Applicants have entertained, and have in good faith endeavored to respond to, informal requests for information and documents made by CASE. As a part of this effort, the Applicants arranged for a complete set of the current checklists being used for the implementation of ISAP VII.c to be made and set aside for CASE's inspection. CASE was advised that this set was available for its inspection subject to the same three conditions under which prior informal discovery had been made and to which CASE had previously agreed. The conditions were

is saying is that, if the Staff was allowed to come down and look through the working files, then the files should be made available to CASE, too. The proposition is a non sequitur. The occurrence of one disruption, probably unavoidable and in any event justified by a public policy permitting unfettered Staff inspections, does not justify -- and certainly does not negate the existence of -- additional disruption that will serve no purpose.

⁴Tr. 24258 (11/12/85).

designed only to ensure that, by attempting to compromise where feasible, the Applicants would not be prejudiced by attempts to argue waiver or by follow-up requests.⁵ This time, however, CASE declined to accept the conditions and it therefore rejected the offer of these checklists informally. One presumes that the motion that followed is de facto an attempt to invoke the Board's arbitration of an offer of compromise.

⁵The three conditions were: "First, that our providing informal in-process CPRT discovery will not be used to support any attempt at reconsideration, modification, or other adjustment of the Licensing Board's ruling on that subject of November 12, 1985; second, that we are not in a position to keep these documents current, in the event of any revisions or modifications; and third, that CASE will engage in no 'follow-up' discovery on CPRT documents."

At the same time, CASE was informed that (on the assumption of CASE's continued acquiescence in the conditions) the Applicants were willing to undertake an effort to accumulate a similar set of checklists with respect to the Design Adequacy Program. In both cases, the Applicants were attempting in good faith to provide CASE with the bulk (if not the entirety) of the materials it was seeking and to do so in a fashion that would not require either surrendering or prejudicing its legal position and its legal rights. By its rejection of the conditions and the filing of the present motion, CASE is insisting on exactly such surrender and prejudice.

As a consequence of its efforts to accommodate CASE, the disruption attendant the production of a set of VII.c checklists has already been voluntarily incurred. Nonetheless, the Applicants urge the Board to deny the motion, for to permit CASE to bootstrap an attempt at coercive discovery, previously rejected, upon the Applicants' subsequent attempts to compromise will impose a heavy disincentive upon any further attempts at compromise and informal discovery. Given, therefore, the counterproductive precedent that would be set, given that, as is set forth in the following sections CASE has no need for the documents at this juncture, and given that at least the bulk of the documents have in fact been offered to CASE as soon as it is willing to agree to some rather reasonable conditions, the Board should deny the pending motion.

III. CASE's Assertion of a Need for the Documents
Does not Refer to a Litigation Need

CASE claims that it needs the documents, i.e., that without the documents it cannot do something that it wishes to do. However, the thing that it wishes to do is not either the preparation of testimony for proffer into evidence in these proceedings or the review of the

bases for testimony that the Applicants have or will offer into evidence in these proceedings in order to permit cross-examination. Discovery via the devices provided for in 10 C.F.R., Part 2 is legitimate only for the purpose of accomplishing one of these two goals.

What CASE says it "needs" the documents for, rather, is to provide information to the Staff with respect to the preparation by the Staff of an SSER concerning the sufficiency of the CPRT Program Plan.⁶ There are two difficulties with CASE's assertion of need. First, the Rules of Practice afford an intervenor no discovery rights so that the intervenor may have input into the preparation by the Staff of SSERs. To the contrary, what the Rules of Practice contemplate is that the Staff formulates its opinion,

⁶Specifically, CASE claims a "current need to do work on evaluating and analyzing the Comanche Peak Response Team (CPRT) program plan CASE has a critical need for the checklists because we are unable to complete our review and analysis of the CPRT program plan and [to] provide the NRC with comments on the acceptability of the plan without them." CASE Motion to Compel at 2, 3 (emphasis added).

that the opinion is offered into evidence, and that then any person who disagrees with it may have the opportunity to attempt to prove that the Staff is wrong. Nor does it change matters that in this case the Staff may have invited CASE to provide any input into the Staff formulation of opinions that CASE might have; the Rules of Practice do not provide for discovery in order to permit a party to take a pre-publication position on what should be contained in a Staff Audit Report or SER. A request to a licensing board for discovery for such a purpose is beyond the authority of the Board to grant. Since that is precisely what CASE has asked for, the motion must be and should be denied.

Second, even as CASE has stated the proposition, its "critical need" is non-existent. The assigned basis for the need is to provide input to the forthcoming Staff SSER. The Staff proposes to issue an SSER on the sufficiency of the CPRT plans. That SSER will not depend upon anything that the Staff has determined during its audit of CPRT implementation (including checklists), and CASE has not been asked for its views on CPRT implementation (including

checklists). In a letter dated March 28, 1986, the Staff advised CASE that:

"[a]lthough we appreciate the significance of the checklists, we are unable to agree with your position that, without the checklists, meaningful comments cannot be provided. As you no doubt recognize, the Program Plan itself presents the overall approach and methodology to be followed by the CPRT in performing its functions. The various appendices describe, in a significant amount of detail, the CPRT plans for the design adequacy program, quality of construction and QA/QC adequacy program, the issue-specific actions, the sampling approach, the method for tracking and evaluating discrepancies, planned interfaces, the quality assurance program, and the procedure for implementation of corrective action. The staff's SSER on the Program Plan is intended to present the staff's evaluation of the adequacy of the Program Plan's overall approach and methodology. It is not intended to address whether this approach and methodology has been implemented by the CPRT. The checklists that CASE refers to were developed in accordance with procedures and criteria set forth in the Program Plan; the staff's evaluation in this SSER is to be limited only to whether it is acceptable from a conceptual standpoint to develop checklists using such proposed procedures and criteria. The adequacy of the checklists themselves, and whether they were developed in accordance with the Program Plan's commitments, is a matter of implementation, and will not be evaluated in the upcoming SSER."⁷

⁷Letter of Vincent S. Noonan, Director, PWR Project Directorate #5, Division of PWR Licensing-A to Billie Firner Garde dated March 28, 1986.

CASE's asserted "critical need" being therefore non-existent, the motion is without basis and should be denied.

Conclusion

For each of the foregoing reasons, the "Motion to Compel" must be and should be denied.

Respectfully submitted,

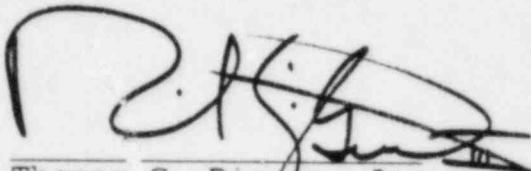
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Dated: April 15, 1986.

CERTIFICATE OF SERVICE

I, Robert K. Gad III, one of the attorneys for the Applicants herein, hereby certify that on April 15, 1986, I made service of the within "Applicants' Opposition to CASE's Motion to Compel (CPRT Checklists)," by mailing copies thereof, postage prepaid, to:

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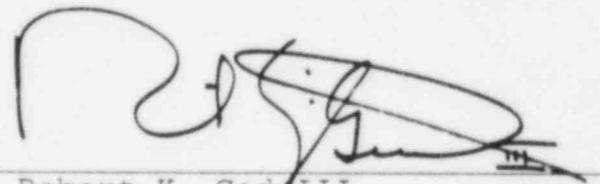
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