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Filed: April 17, 1986.

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 OL 50-446 (Application for an Operating License)

APPLICANTS' RESPONSE TO CASE'S OBJECTIONS TO MOTION FOR ESTABLISHMENT OF A HEARING SCHEDULE

On March 21, 1986, the Applicants filed a motion for the establishment of a schedule for the conduct of resumed proceedings in this matter.[1] That motion was advanced in view of the then-impending (and since

[1] "Motion for Establishment of Schedule" (3/21/86).

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accomplished[2]) availability of the first of the outputs of the Comanche Peak Response Team effort.

CASE has now responded. CASE has used the occasion of the motion for a schedule to attempt a major transmutation of this proceeding into something that it never was and something that the Commission's Rules of Practice do not contemplate it being. The objections that CASE has advanced are not valid, however, and in the absence of any others the motion should be allowed.

Introduction

This is an operating license proceeding in which a QA/QC contention has been raised. That does not mean, however, that it is either required or permissible for CASE to assume the role of construction auditor, required to verify that each and every iota of constructed hardware has been built or designed, as the

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[2]On April 4, 1986, the Applicants served copies of the Results Reports in ISAP's I.a.4, I.b.3, II.b, III.d and VII.b.2 upon CASE, together with a notice of the availability of the working files associated therewith for inspection and copying.

case may be,[3] correctly. Were such the case, operating license proceedings could not begin -- and certainly they could not end -- until after the construction had

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[3]A review of the decided cases shows that some have involved the quality of design (the "correctness" measured against applicable codes and standards, including performance criteria, of the instructions to the builders) and some have involved the quality of construction (the "correctness" of the construction measured against the drawings, specifications and instructions provided by the designers to the builders). This case purportedly involves both, and issues relating to both have in fact been raised in the past.

The admitted contention, however, by its terms, relates only to the quality of construction. The contention reads (in relevant part):

> "The Applicants' failure to adhere to the quality assurance/quality control provisions [of Appendix B] . . . and the construction practices employed . . . have raised substantial questions as to the adequacy of the construction of the facility."

(Emphasis added.) This is not to argue that Appendix B does not apply to design; the Applicants have never so contended. See "Applicants' Motion for Reconsideration of Memorandum and Order (Quality Assurance for Design) (1/17/84) at 5-6. We contend, rather, that Contention 5 was inadequate to cause design QA to become a contested issue in these proceedings. The Board has interpreted the words of Contention 5 differently (Memorandum and Order (Quality Assurance for Design) (12/28/83) at 8) and, of course, the Applicants will abide by the Board's ruling. We do, however, respectfully disagree with it.

been absolutely completed. To our knowledge, no such requirement has ever been recognized or imposed. The reason for this is that the adjudicatory process is not suited for -- and perhaps more compelling even, is not intended by the Commission to function as -- a quality of construction or quality of design auditor. The audit function, rather, belongs to the Staff.

What is fair game for litigation is a properly drawn contention to the effect that the ongoing program is such that there cannot be reasonable assurance that the process will lead to construction free from undetected and uncorrected deficiencies that, if undetected and uncorrected, would render the constructed plant incapable of being operated safely. Such an assessment, which is capable of being made prior to the completion of construction, is the standard applied in such cases.[4]

What is usually relied upon to provide assurance of the adequacy of design or the adequacy of construction

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[4]The authorities are collected and discussed in "Applicants' Memorandum in Response to Board Memorandum (Statistical Inference from CPRT Sampling)" (1/31/86) at 18-23.

is a QA/QC program. Indeed, the design and implementation of such a program is a requirement of the Construction Permit under which the work is done, and failure to design or to implement a conforming QA/QC program might provide a basis for enforcement action by the NRC Staff for what amounts to non-compliance with the Construction Permit. The adequacy of one's QA/QC program is not, however, a per se condition precedent to the issuance of an Operating License. This is demonstrated by the fact (impossible if matters were otherwise) that operating licenses have been authorized in cases where the final conclusions of the licensing adjudication include that either the construction or the design QA/QC program failed. To the contrary, a QA/QC program is, in an operating license proceeding, a means to an end. The end is reasonable assurance that, as constructed, the facility is free of undetected and uncorrected safety-signficant deficiencies that would interfere with its safe operation.[5]

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[5] Op. cit., note 4, supra.

The history of this proceeding is this: the initial quality of construction contention was admitted. To rebut it, the Applicants offered the implementation of their 10 C.F.R., Part 50, Appendix B QA/QC program. CASE then challenged the reliability of that program by challenging a number of areas in which the program had been applied, most notably welding (a construction issue) and pipe supports (a design issue). By the end of 1984 the score was mixed; CASE failed in its welding challenge but had managed to raise genuine doubts about the adequacy of the pipe support designs.

An even more disturbing development, however, was the results of the NRC Staff's Technical Review Team ("TRT") investigation. The TRT's conclusions, as published, raised questions in a number of areas, some related to matters then before the Board and some not. It was at this point that the current management of the lead applicant determined to obtain a fresh assessment of (i) the validity of the TRT conclusions, (ii) the implications of any valid TRT conclusions and of the Board's preliminary or tentative findings regarding piping and pipe support designs, and (iii) its ability to have reasonable assurance that, as designed and

constructed, CPSES is capable of being operated safely. The result of this call for a fresh assessment was a suspension of on-going hearings and the constitution of the Comanche Peak Response Team ("CPRT").

The CPRT charter is spelled out in the CPRT Program Plan. It calls for CPRT to investigate, analyze and reach conclusions about the issues pending before the Board, the issues raised by the TRT findings, and issues raised by other sources. In addition, aspects of the CPRT Program Plan call for CPRT to conduct such re-inspections of hardware and reverification of designs as are necessary to reach reasonable assurance that all safety-signficant deficiencies have been detected. Finally, the Program Plan calls for the definition of corrective action for both the past and the future.

Of necessity, the CPRT program overtakes to some extent the prior litigation. For instance, the program includes a complete reverification and, if necessary, redesign and reanalysis in the pipe support area. This work is being done for the CPSES by an outside engineering firm (Stone & Webster) and will become the analyses or designs of record, and the results will be

overviewed by CPRT. Litigation of the validity of prior designs has thus become moot, for the requisite reasonable assurance will depend upon the adequacy of the Stone & Webster work, not the adequacy of work done previously and since superceded. Likewise, in a case where the construction re-inspections detect matters requiring correction, the requisite reasonable assurance finding will depend upon the adequacy of the re-inspections and the adequacy of the corrective actions defined; it has become irrelevant whether work that has since been repaired was once non-conforming. The CPRT effort, in addition to its usefulness as a management tool by which management can obtain a reliable reading on the quality of construction and design, is the means by which the Applicants intend to prove their case before this Board.[6] Of necessity,

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[6]At one point in its response to the motion for a schedule CASE asserts that it is CASE's prerogative to determine the manner in which the case should proceed, since it is CASE's prerogative to determine how it intends to prove "its case." CASE couldn't be more wrong. In the first instance, CASE has neither

therefore, further litigation should focus on the CPRT efforts and, unless the Board finds them materially deficient, it will end with those efforts.

Given its genesis, the constituents of CPRT vary in their breadth. The Program Plan was initially a response to rather narrow and discrete issues, and the Issue Specific Action Plans responsive to those issues so reflect. Other aspects of the Program Plan are more global. It just so happens that the more discrete action plans, being those commenced the earliest, are those the results of which are available the earliest. Each action plan is self-sufficient for the issue

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prerogative nor power to force the litigation of issues that are or have become legally or factually irrelevant. If in fact Inspection Procedure X was deficient because it missed a critical inspection point, once the CPRT has re-inspected enough of the items in question to determine that the quality of construction of that point is assured, it is pointless to relitigate the adequacy of ancient procedures. (It is, of course, relevant that procedures be corrected to the extent that they will be used in any remaining construction, and CPRT includes a function for the application of prospective corrective actions.) Second, it is for the Applicants and not CASE to determine the means by which the Applicants will demonstrate the existence of the requisite reasonable assurance regarding the adequacy of CPSES construction.

covered, however; should an action plan defer a matter to a later action plan, the deferred matter is effectively no longer a part of the plan's scope. There is nothing more "piecemeal" about this response than there is about the issues to which it responds.

Given the availability of the earliest of the results reports, the Applicants have filed a motion that the Board promulgate a schedule to organize any required litigation on those reports.[7] The schedule proposed by the Applicants has the following premises:

First, there is no longer any function to be served by a separate litigation of and conclusions regarding the programmatic suitability of the Program Plan. Frankly, the Applicants had earlier urged precisely

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[7]The Applicants do not expect litigation to be required in respect of every aspect of every results report. In the first instance, it expects that CASE will review the results report and make a determination whether it has any prospect of challenging the conclusions reached (assuming the conclusions are favorable to Applicants) in litigation; CASE should do this as a matter of its own best interest if not as a matter of public responsibility. Second, the nature of the CPRT Program Plan is that it is bound to be more extensive than Contention 5, either as admitted or as heretofore litigated.

such a litigated "hold point" -- for the obvious purpose of obtaining a pre-implementation approval of the plan by this Board -- but CASE objected and the Board in its discretion determined to withhold any assessment until the results were in. Given the Board's ruling, the program has now been implemented. There is no longer any function to be served in reviewing the plan except insofar as the plan is implicated in given results reports.[8]

Second, while it might be convenient to defer the litigation of any results until all results were in,

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[8]For instance, CASE might choose to challenge the concept of obtaining assurance of adequacy notwithstanding a single found deficiency if an expanded sample fails to find any other deficient examples (despite the wide acceptance of such an analytical tool for any number of military and civilian purposes, including nuclear litigation). Any such contention would be purely hypothetical in the case of an action plan in which no such expansion was required, however; it would also be moot in the case of an action plan in which a deficiency was found and the response was to intitiate a 100% re-inspection without going through the expanded-sample stage. In fact, such an issue would remain hypothetical unless and until a situation arose in which it occurred, and there might never be one. "What if" questions, however useful for a prospective analysis, lose meaning once the results are in.

all other things are not equal. Given that only some of the results reports are not presently available, and that some of the others will take months to become available, not proceeding with such litigation and issue resolution as is presently possible is an unavailable luxury.[9]

CASE objects to the proposed schedule. Stripped of premature arguments about the adequacy of the CPRT Program Plan, its objections are twofold: first, CASE contends that with respect to future action plans and results reports the time durations contained in the proposed schedule might be too short; CASE does not, however, lodge any discernible objection to these time

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[9]This is one of the reasons why the Applicants have determined to make the entirety of the CPRT working files for the published results reports available to CASE immediately, and without the need for the filing and service of and the response to discovery requests. It is virtually a certainty that this process will result in a wider availability to CASE of information than the discovery process would permit, for it is virtually certain that the the working files contain material that would not be discoverable were the Applicants to insist on the formalities.

durations as to the near-term results reports. Second, CASE has resurrected the concept, previously opposed by it and rejected by this Board, of a separate litigation on the prospective CPRT plan; CASE compounds this objection with the further request that the entirety of the litigation be reserved until after the CPRT program has completed those action plans that are not yet finished.

It is in this posture that the matter comes now before this Board.[10]

Argument

I. CASE's Prematurity Argument is Without Basis.

CASE's first argument is that it is premature to schedule litigation on the CPRT results because it wishes first to resume litigation where it left off

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[10]The Staff has also responded to the Applicants' proposed schedule. "NRC Staff Response to Applicants' Motion for Establishment of Schedule" (4/10/86). The Staff, while in agreement with the general sequence of events contained in the Applicants' proposed schedule, has suggested some technical refinements and a slight alteration in time periods. The Applicants' have reviewed the Staff's suggested refinements and regard them to be acceptable. The Applicants' are also willing to accept the modifications proposed by the Staff to the suggested time periods.

earlier. This comes as something of a surprise request, for CASE was previously in the posture of contending that the Board had heard enough to conclude that, without some form of remedial action, the operating license had to be denied. The assertion makes no sense. The function of this Board is to determine, based on the QA/QC program, the CPRT program, some combination thereof, or something else, what the adequacy of construction of CPSES is, not what it assertedly once was, and even less so what doubts there might earlier have been.

CASE purports to bolster its assertion with the additional (and functionally unconnected) assertion that it has been denied in-process discovery of the CPRT work and the Staff's regulatory overview thereof. We prescind from any discussion of discovery of the Staff, a matter controlled in a special form by the Rules of Practice. Because CASE expressly eschews seeking to relitigate the Board's prior rulings on in-process CPRT discovery,[11] we prescind as well from

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[11]At least in its schedule response. "CASE Response to Applicants' Motion for Establishment of

repeating the observation that, to our knowledge, in-process discovery regarding the formulation of an evidentiary presentation has never been allowed (or requested) in a licensing proceeding. There is simply no connection between whether CASE was provided in-process discovery of the action plans the results of which are now available -- and concerning which it now has unfettered "discovery plus" -- and whether the structure of the proposed schedule is appropriate. CASE's assertion comes down to the proposition that it should have discovery first and only then should a schedule be set. We are aware of no precedent for such a distended procedure in this agency (and CASE has cited none).

CASE also refers, in supposed support of the prematurity argument, to this Board's prior tentative conclusions regarding "doubts" about the adequacy of the designs for pipe supports, and a reference to

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Schedule" (4/7/86) at 10 n.5. CASE has, however, sought to raise again the issue of in-process CPRT discovery in its "Motion to Compel" filed April 9, 1986. The Applicants' response to that motion was filed April 15, 1986.

CYGNA. For present purposes this reference is completely unhelpful; the Piping DSAP is not ready for litigation and won't be for some months. More to the point, the manner by which the Applicants intend to prove that piping and pipe support design forms no basis for lack of the requisite reasonable assurance will be through the presentation of the Stone & Webster work (and the CPRT endorsement of the Stone & Webster product) not through CYGNA. CASE cannot dictate how the Applicants offer their proof.[12]

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[12]CASE's speculation that perhaps the Stone & Webster work won't adequately address the "Walsh/Doyle allegations," apart from manifesting an unfamiliarity with the Program Plan, has nothing to do with the schedule question now before the Board. If the Stone & Webster work and the CPRT work should fail to resolve to the Board's satisfaction any heretofore articulated "Walsh/Doyle allegation" -- or anything else properly within the scope of the litigable issues -- CASE should be ecstatic. CASE's argument, however, goes to the merits of an offering not yet made, not to the question of a schedule.

CASE also appends the statement that prior to actual litigation of CPRT results on design "it will be necessary to have Applicants, their consultants, and CYGNA release all the data in their possession related to the extent and causes of the design deficiencies and the breakdown of QA/QC for design." CASE Opposition at 4. Putting aside the "all," we might say "True enough." The pending motion already calls for the disclosure of "all" that is available to the CPRT as

II. CASE's "Practicality" Argument is Invalid.

Under its second section heading CASE offers two unrelated challenges to the pending motion. The first appears to be that the proffered discovery period (60 days) may not be enough and CASE can't tell that until it has had discovery of the documentation. The second is, in essence, that the issues as segregated by this Board, by the TRT and by the CPRT aren't segregatable

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soon as the results are available. As for discovery from CYGNA, CASE has never to our knowledge been under any prohibition from continuing with such discovery and therefore it can frame no argument on a non-existent prohibition. The Applicants neither requested nor obtained from this Board a bar to any CYGNA discovery.

Next CASE draws the following conclusion: "Hearings on that issue [i.e., the extent and causes of design deficiencies and the breakdown of QA/QC for design] must then be completed before addressing the issues presented by Applicants' motion." The assertion is senseless. The issues on which CPRT will provide conclusions are the same issues of "the extent and causes of the design deficiencies and the breakdown of QA/QC for design" (at least insofar as relevant to an operating license), so that the assertion reduces to the claim that we have to have hearings on the adequacy of design before we can schedule hearings on the adequacy of design.

and therefore nothing can be litigated until everything is.

The first objection elicits two responses. Theoretically, it is true that the 60-day period might, in some specific case, prove to be insufficient. However, we assume that the order sought by this motion, like every other interlocutory order, is subject to a motion for modification if in the future specific facts show that modification is needed. Speculation about what might or might not become necessary in the future is neither helpful nor sufficient. We only add that the 60 days provided in the proposed order is consistent with the discovery periods regularly ordered by Licensing Boards for the entirety of cases far more complex than any given handful of CPRT Results Reports.

CASE's second objection is nothing other than an attempted contest on the merits of the sufficiency of the Program Plan. To respond to CASE's example of the Preoperational Testing ISAP (III.d): (i) this bifurcation of issues is the bifucation adopted by TRT for making the issue manageable, and CPRT can hardly be criticised for using the same organizational structure;

(ii) CASE's assertion that one cannot assess separately (a) the adequacy of the Document Control Center ("DCC") to supply correct documents to the startup Test Engineer ("STE") organization and (b) the adequacy of the STE process properly to employ whatever DCC supplied is neither logical nor any basis for adjusting schedules. Finally, CASE's assertion that ISAP III.d assumes the adequacy of the document control process is both inaccurate and irrelevant: the issue presently before the house is how do we schedule the litigation of the results report, not whether its methodology is acceptable.

III. CASE's Resources Argument is No Basis for Deferring Litigation

CASE's final argument is that it does not have the resources to do the job that it believes it is required to do in order to assess the CPRT results. This argument is dressed up with a wholly baseless assertion that the Applicants have the ability to control the timing of the CPRT results reports and will use that power to schedule things in a nefarious and sinister way to take maximum advantage of CASE's thin resources.

The Applicants' first response is that if the Applicants had the power to control the timing of the CPRT results reports, CASE would get its wish for simultaneous litigation because the entire set of reports would be available today. In reality, however, the CPRT results reports are driven by what the Senior Review Team and the Review Team Leaders conclude they must examine and by what they find. The Program Plan makes no provisions for the Applicants exercise control over that process.

The assertion that CASE lacks the resources to do the job it believes it has to do, however, undoubtedly has some validity. For this there a number of reasons, including the fact that CASE believes that it must substitute itself for the NRC Staff as the auditor of the construction of CPSES, and the fact that CASE's concept of litigation in NRC licensing proceedings is that it need have no issues except those that it finds during its audit. Whatever the causes, however, there is no cure. The scheduling of litigation simply cannot be determined or affected by the fact that CASE has desires of doing something for which it isn't equipped.

Conclusion

For the foregoing reasons, the objections of CASE to the pending motion for establishment of a shedule are without validity. The motion should be allowed and a schedule ordered in the form proposed by the Applicants.[13]

Respectfully submitted,

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[13]As modified by the Staff's response; see note 10, supra.

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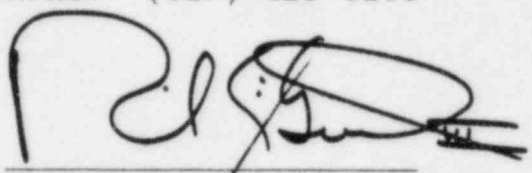
By: 

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Dated: April 17, 1986

CERTIFICATE OF SERVICE

I, Robert K. Gad III, one of the attorneys for the Applicants herein, hereby certify that on April 17, 1986, I made service of the within "Applicants' Response to CASE's Objections to Motion for Establishment of a Hearing Schedule," by mailing copies thereof, postage prepaid, to:

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