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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION DOCKETED
USNRC

Before Administrative Judges:

Peter B. Bloch, Chairman
Dr. Kenneth A. McCollom
Dr. Walter H. Jordan

'86 MAY -5 P3:53

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In the Matter of

TEXAS UTILITIES ELECTRIC COMPANY, et al.
(Comanche Peak Steam Electric Station,
Unit 1)

Docket No. 50-445-CPA

SERVED MAY 6 1986

ASLBP No. 86-528-02-CPA

May 2, 1986

SPECIAL PREHEARING CONFERENCE MEMORANDUM AND ORDER

MEMORANDUM
(CONCERNING PARTIES AND CONTENTIONS)

Petitioners Citizens Association for Sound Energy (CASE) and Meddie Gregory, both having filed petitions on April 7, 1986, seek admission as parties and propose multiple contentions for litigation. This case involves Texas Utilities Electric Company, et al.'s (Applicants') request of January 29, 1986 that their construction permit be extended from August 1, 1985 to August 1, 1988.

A Special Prehearing Conference was held on April 22, 1986, in Dallas.

We conclude that both parties shall be admitted and that each has proposed a contention that shall be admitted.

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I. Standing of Parties

Neither the Staff of the Nuclear Regulatory Commission (Staff) nor the Applicants contest the standing of either intervenor, based in part on proximity to the plant or place of residence. Consequently, we find that there is standing to intervene.¹

II. Standards Governing Admissibility of Contentions

There are two kinds of standards affecting the admissibility of contentions in this proceeding. First, there is a standard of relevance that restricts the admissibility of contentions in proceedings concerning requests to extend the term of construction permits. Second, there are the standards that govern the admissibility of contentions in any Nuclear Regulatory Commission proceeding.

A. Construction Permit Extension Proceeding Limitations

In this case, which involves a request for an extension of a construction permit, we are governed by Texas Utilities Electric Company, et al. (Comanche Peak Steam Electric Station, Unit 1), March 13, 1986, CLI-86-04 (memorandum opinion). In that opinion, the Commission stated that:

the scope of the proceeding is limited to challenges to TUEC's [Applicants'] effort to show "good cause" for the extension.

¹ For this purpose, we approve of the discussion in "NRC Staff's Answer to Petitions for Leave to Intervene Filed by CASE and Meddie Gregory," at 6-11.

Washington Public Power Supply System (WPPSS Nuclear Projects Nos. 1 and 2), CLI-82-29; 16 NRC 1221, 1229 (1982).

Turning then to the page cited by the Commission in the WPPSS decision, we find that this proceeding is limited

to direct challenges to the permit holder's asserted reasons that show "good cause" justification for the delay. [Emphasis added.] . . . [A] permit holder must put forth reasons, founded in fact, that explain why the delay occurred and those reasons must, as a matter of law, be sufficient to sustain a finding of good cause. . . . Moreover, the permit holder cannot misrepresent those reasons upon which it seeks to rely, for, as the Appeal Board in Cook noted, any determination of the sufficiency of a permit holder's reasons for delay "would be influenced by whether they were the sole important reasons for the delay or whether, instead, the delay was in actuality due in significant part to some other cause (which perhaps might have indicated that the applicants have been dilatory in the conduct of the construction work and that this factor was the principal explanation for the need for an extension of the completion deadlines). . . . An intervenor is thus always free to challenge a request for a permit extension by seeking to prove that, on balance, delay was caused by circumstances that do not constitute "good cause."

We also find relevant to our task the following language in CLI-82-29, which occurs on page 1230 of that opinion:

If a permit holder were to construct portions of a facility in violation of NRC regulations, when those violations are detected and corrections ordered or voluntarily undertaken, there is likely to be some delay in the construction caused by the revisions. Nonetheless, such delay, as with delay caused by design changes, must give "good cause" for an extension.

This passage places the following gloss on CLI-82-29: that it is not sufficient to allege that a delay has been caused by violations of applicable regulations. The allegation must show more than a mere violation. In those circumstances, it must allege as well that applicants were dilatory in the conduct of the construction work and that

this factor was the principal explanation for the need for an extension of the completion deadlines.

We learn from Washington Public Power Supply System, et al. (WPPSS Nuclear Project No. 2), ALAB-722, 1983, 17 NRC 546 at 552 that "dilatory" "means the intentional delay of construction without a valid purpose." And from footnote 6 of that case we learn that "the purpose and action taken must be consistent with the Atomic Energy Act and implementing regulations." We further learn, at page 553 of that case, that even if we were to find, based on evidence to be presented to us, that Applicants were dilatory, we would still be required to make a judgment as to whether continued construction should nonetheless be allowed.

B. General Standards Governing Contentions

The admissibility of contentions in this proceeding also is governed by 10 C.F.R. §2.714, which requires petitioner to

file a supplement to his petition to intervene which must include a list of the contentions which petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity.

[Emphasis added.]

This requirement has been further elaborated in two Atomic Safety and Licensing Appeal Board decisions, Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2) 6 AEC 423 (1973) and Houston Lighting and Power Company (Allens Creek Nuclear Generating

Station, Unit 1), ALAB-590, 11 NRC 542 (1980).² These cases limit the power of licensing boards to exclude contentions. Grand Gulf held that a licensing board should not reach the merits of a contention and should not require the introduction of underlying evidence, providing that "the basis for the contention . . . is identified with reasonable specificity." Similarly, Allens Creek found admissible a contention that cited a specific section of the Final Environmental Statement and also cited a government report, Project Independence, as authority for its principal factual assertion. In the course of that opinion, the majority of the appeal board set limits on how deeply a licensing board may go in analyzing the validity for the conclusions of an authority who was cited in support of a contention.³

III. Applicants' Statement of Good Cause

Applicants have claimed that the cause for the delay in construction of the Comanche Peak is as follows:⁴

Physical construction on Comanche Peak Unit 1 was essentially completed in early 1985. However, major efforts to reinspect and reanalyze various structures, systems, and components have been ongoing since the fall of 1984 in order to respond to the questions raised by the NRC Staff's Technical Review Team ("TRT"), by the

² See also Washington Public Power Supply System, et al. (WPPSS Nuclear Project No. 2), ALAB-722, 1983 at 551, footnote 5.

³ See Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 & 2), 14 NRC 175 (1981).

⁴ Comanche Peak Steam Electric Station Docket No. 50-445; Request for Extension of Construction Permit No. CPPR-126, January 29, 1986.

Board and parties in the ASLB operating license proceedings, and raised by other external sources. The TRT was formed by senior NRC Staff management in March of 1984 to consolidate and carry out the various reviews necessary for the Staff to reach its decision regarding plant licensing. Applicants formed the Comanche Peak Response Team and submitted a Program Plan to respond to the TRT's questions, the ASLB issues, and the other external sources issues. That Plan is presently being implemented. It is anticipated that such implementation will not be complete before the second quarter of 1986.

Based upon the foregoing, Applicants submit that the delay which necessitates the construction permit extension was not the result of dilatory action by Applicants; that is, there was no intentional delay of construction without a valid purpose. Matter of Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1189 (1984); Matter of Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 553 (1983). Further, the ultimate good cause finding should "encompass a judgment about why the plant should be completed and is not to rest solely upon a judgment as to the applicants' fault for delay." ALAB-722, 17 NRC at 553.

It scarcely bears mention that Applicants here have not delayed placing Comanche Peak Unit 1 in operation intentionally without valid purpose. The delay has been necessitated by the performance of the reinspections and reanalyses described above. Obviously, Applicants would not delay operation of Comanche Peak Unit 1 any longer than is necessary to demonstrate the safety of the plant to their own satisfaction and that of the NRC.

IV. Intervenors' Admissible Contention

Intervenors have filed a contention that alleges that Applicants have not set forth the principal cause for the delay in completing construction and that also alleges that the delay occurred because of dilatory conduct by Applicants. After considering the legal considerations of relevance, specificity, and adequate basis, we consider that contention, which follows, to be admissible:

CONTENTION #1:⁵

Applicants have not met their burden of proving that the delay in completion of construction was not caused by their own dilatory conduct.

a. Applicants have not given any reason for the existence of the delay. They only assert they need more time to complete a reinspection, redesign, and reconstruction program but they do not disclose the reason why such programs are needed or that the reason for delay was not intentional and without a valid purpose.

b. The real reasons for the delay in construction completion were that:

1. Applicants deliberately refused to take positive action to reform their QA/QC program in the face of consistent criticism, and

2. Applicants have failed to properly design their plant, specifically:

i. Applicants failed to correctly apply fundamental engineering principles,

ii. Applicants failed to properly identify unique designs in their PSAR,

iii. Applicants constructed much of their plant prior to its design having been completed,

iv. Applicants have failed to comply with 10 CFR Part 50, Appendices A and B, including their failure to promptly identify and correct design deficiencies, and deliberately refused to take positive action to correct such deficiencies.

As a basis for this contention, CASE and Meddie Gregory state:

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The admitted contention is a combination of CASE No. 6 and Gregory No. 1. The only substantive change made by the licensing Board is that we consider that part of the contention was in fact a statement of basis. We do not consider the statement of basis to be a part of the contention.

Applicants ignored consistent criticism of their QA/QC program over a period of at least ten years and of their design over a period of at least four years, in the face of warnings by independent auditors, the NRC, and even the Atomic Safety and Licensing Board. As a result of these deliberate actions, Applicants built an unlicensable plant which must now be reinspected, redesigned, and reconstructed in the hope that it can be made licensable. There is no valid purpose given by Applicants for why, in the face of these criticisms, they refused to change their QA/QC implementation or address and correct design deficiencies. Thus Applicants have not established a good cause for the delay.

A. Relevance

Since intervenors have alleged that Applicants were dilatory in not completing their plant within the term of their construction permit, their contention is relevant. Intervenors' interpretation of the facts --whose truth may be tested through discovery and hearing-- is that Applicants did understand the deficiencies in their QA program but that they were dilatory because they deliberately⁶ did not correct those deficiencies in a timely fashion. They state that Applicants have not alleged a valid purpose for that delay.

Petitioners contention is relevant. Their interpretation of Applicants' statement of good cause is that all Applicants have designated as cause is that it is now necessary to take time to correct deficiencies. Petitioners allege, on the other hand, that there is no explanation of the source of the deficiencies. They state that

⁶ We consider "deliberately" and "intentionally" to be equivalent terms in this context.

Applicants deliberately ignored warnings of adverse conditions, that their delay has resulted in the need for the correction efforts now under way, and that Applicants have not provided a good cause for the resulting delay.

B. Board Determination of Adequate Basis

As we just discussed, intervenors allege that Applicants were dilatory in completing construction. The only aspect of the basis for the contention that is at all troubling is whether there is a basis for believing that Applicants intentionally failed to complete construction within the terms of their construction permit.

Applicants are a group of corporations. For a group of corporations to intentionally fail to complete construction, they must have knowledge of what they are doing. As fictional entities, corporations are said to know what they are doing if their agents know what they are doing. In this instance, Applicants must not only have acted intentionally but they also must have had an invalid purpose. Consequently, the petitioners must provide a basis for inquiring further about whether Applicants acted intentionally and whether their purpose was invalid.

As a basis for their contention, petitioners refer to documents well known to the judges on the Board, all of whom also sit on the companion case involving an application for an operating license for Comanche Peak. It is not our job at this stage of this case to scrutinize each of those documents carefully and conduct an analysis of the

extent to which they support in detail CASE's interpretation of the facts.

It is enough for us to know that the cited documents do contain consultants' opinions and the opinions of this Board concerning QA for design. These documents date back to 1975. For the purpose of determining whether to admit this contention, we interpret the facts favorably to petitioners' contention. So, absent proof to the contrary, we assume that Applicants knew of the adverse consultant reports and NRC reports. We also assume that they had access to plant officials and the ability to gather information about the plant's condition. We also are aware that the major remedial step taken by Applicants, formation of the Comanche Peak Review Team, did not occur until 1985.

C. Conclusion

We find that petitioners' allegations of the true cause of the delay in constructing this plant are relevant and have sufficient basis to be admissible; they shall be admitted as a contention. Petitioners appear to be correct in pointing out that Applicants have not alleged the underlying cause of the delay in completing construction nor what valid purpose may explain that delay.

It is not necessary that petitioners' theory of the case be the only interpretation permissible from the documents they cite. It is enough that their theory be a reasonable interpretation, and we find that it is reasonable.

It does not refute petitioner's basis that there is another reasonable interpretation of the same facts, such as the disbelief of the consultants' reports by Applicants. It also is not relevant, at the contention stage, that Applicants may be able to sustain a defense that they disbelieved the consultants they hired because they knew that the consultants were wrong.⁷

Having admitted Contention 1, we now wish to interpret it because it contains design allegations that do not of themselves assert willfulness. These allegations shall be interpreted by the Board to require only that Applicants carry the burden of showing that the conditions either did not occur or that failure to remedy them was not willful.

V. Inadmissible Contentions

Because of our interpretation of the law concerning contentions that are admissible in construction permit extension proceedings, we will not admit CASE's contentions 1 to 5, and 7-9. Similarly, we will not admit Gregory contentions 2-4.⁸ CASE has argued, ably but not persuasively, that it could gain admission of a contention into this proceeding for the purpose of imposing conditions on the Applicant's permit. However, petitioners' proposed conditions do not deal with the

⁷ See, however, Texas Utilities Company Form 8-K Current Report, Securities and Exchange Commission, April 18, 1986.

⁸ See, passim, Permittee's Answer, April 17, 1986.

subject matter of the application: a request for more time. The suggested conditions relate to substantive matters about the correction of deficiencies in the plant. We do not find any authority to consider these conditions independent of the admitted contention, dealing with dilatoriness in addressing known conditions.

VI. Consolidation of Parties

Since the contention in this proceeding was submitted by both CASE and Meddie Gregory, we shall consolidate the parties for hearing. See 10 CFR § 2.714(e).

VII. Discovery Plan

Within 14 days of service of this Memorandum and Order, the intervenors shall file a discovery plan, setting forth the schedule for the filing and answering of interrogatories and follow-up interrogatories, for the taking of depositions and for such other discovery as is anticipated. Other parties may respond as if the discovery plan were a motion.

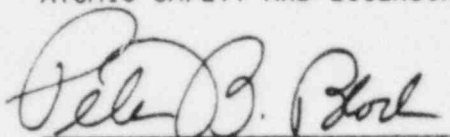
O R D E R

For all the foregoing reasons and based on consideration of the entire record in this matter, it is this 2nd day of May 1986

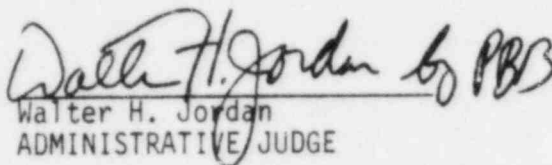
ORDERED:

1. That the petitions to intervene of Citizens Association for Safe Energy (CASE) and of Meddie Gregory are granted.
2. Contention #1, described in the accompanying memorandum, is admitted.
3. CASE and Meddie Gregory are consolidated as a single party and shall be represented by a single person or team of people, with responsibilities carefully delineated so as to avoid the necessity for multiple filings or argument.
4. Pursuant to 10 CFR § 2.714a, this Order may be appealed to the Atomic Safety and Licensing Appeal Board within ten (10) days after service of this order by a party other than the petitioner on the question whether the petition and/or the request for a hearing should have been wholly denied. Any appeal shall be asserted by the filing of a notice of appeal and accompanying supporting brief. Any other party may file a brief in support of or in opposition to an appeal within ten (10) days after service of the appeal.
5. CASE and Meddie Gregory shall file the discovery plan discussed in the accompanying memorandum. Other parties may respond to the plan as if it were a motion. These obligations shall not be stayed by the filing of an appeal.

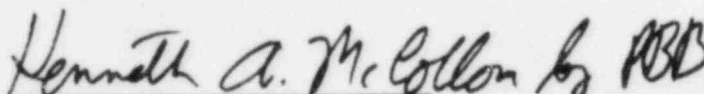
FOR THE
ATOMIC SAFETY AND LICENSING BOARD



Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE



Walter H. Jordan
ADMINISTRATIVE JUDGE



Kenneth A. McCollom
ADMINISTRATIVE JUDGE

Bethesda, Maryland