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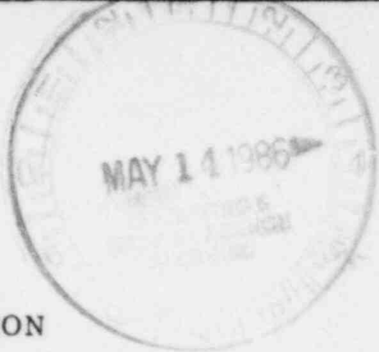

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
TEXAS UTILITIES ELECTRIC COMPANY, *et al.*	)	Docket No. 50-445-CPA
	)	
	)	
(Comanche Peak Steam Electric Station, Unit 1)	)	
	)	

NRC STAFF'S NOTICE OF APPEAL FROM ATOMIC SAFETY AND LICENSING BOARD MEMORANDUM AND ORDER CONCERNING PARTIES AND CONTENTIONS AND SUPPORTING BRIEF

Lawrence J. Chandler
Special Litigation Assistant

Geary S. Mizuno
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May 12, 1986

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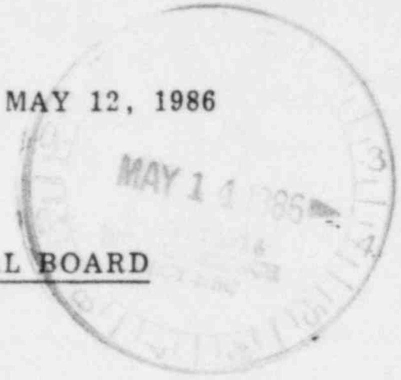
MAY 12, 1986



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NRC STAFF'S NOTICE OF APPEAL FROM ATOMIC SAFETY AND LICENSING BOARD MEMORANDUM AND ORDER CONCERNING PARTIES AND CONTENTIONS AND SUPPORTING BRIEF

Pursuant to 10 C.F.R. § 2.714a, notice is hereby given that the NRC Staff takes an appeal from the Memorandum and Order of the Atomic Safety and Licensing Board issued on May 2, 1986 concerning the admission of parties and contentions in the Comanche Peak Unit 1 construction permit amendment proceeding.

I. INTRODUCTION

On May 2, 1986, the Atomic Safety and Licensing Board (Board) designated to rule on petitions for leave to intervene and to conduct any necessary hearing in connection with the Staff's Order extending the construction permit for Comanche Peak Unit 1, issued a Special Prehearing Conference Memorandum and Order concerning the admission of parties and contentions. Therein, the Board found that petitioners CASE and Meddie Gregory have standing to intervene in this proceeding. In addition, the Board admitted, as a single contention and in a somewhat

modified form, CASE Contention 6 and the virtually identical Gregory Contention 1.

For reasons discussed below, the NRC Staff believes that the Board erred by admitting the foregoing contention. Accordingly, the Staff urges that its Order be reversed and the proceeding terminated.

II. BACKGROUND

On February 10, 1986, the Staff issued an Order extending the construction completion date of Construction Permit No. CPPR-126 for Comanche Peak Unit 1, to August 1, 1988. 51 F.R. 5622. This action was taken following the Staff's review of a request filed by the Applicants on January 29, 1986.

In connection with that action, CASE, on January 31, 1986 and February 11, 1986, had previously filed with the Commission, requests for, among other things, a hearing. By Memorandum and Order dated March 13, 1986, CLI-86-04, the Commission referred CASE's request for hearing to an Atomic Safety and Licensing Board for disposition.

Thereafter, on April 7, 1986, CASE and Meddie Gregory filed petitions for leave to intervene and proposed contentions. Responses to the petitions were filed by the Applicants and Staff on April 17 and 18, 1986, respectively. Neither Applicants nor the Staff opposed the petitions on grounds of standing but both contended that the petitions should be denied for failure to present at least one admissible contention as required by 10 C.F.R. § 2.714.

A Special Prehearing Conference to consider the petitions was held on April 22, 1986 at which time each of the participants was afforded an

opportunity to present further argument in support of its position on both standing and the contentions. On May 2, 1986, the Board issued its Special Prehearing Conference Memorandum and Order (Order) concerning parties and contentions from which this appeal is taken.

III. ISSUES ON APPEAL

The two issues on which an appeal is taken by the Staff are:

> Issue A
>
> Whether the Licensing Board erred in relying on information regarding design and construction deficiencies developed in a related operating license proceeding to cure deficiencies in the basis set forth by a petitioner in support of a contention sought to be raised in a construction permit extension proceeding.
>
> Issue B
>
> Whether, in light of the petitioner's statement that it does not seek a denial of the permit extension but rather seeks to have certain conditions imposed on the permit extension, together with the Licensing Board's determination that it lacked authority to impose such conditions, a hearing is warranted.

IV. ARGUMENT

A. Petitioners Have Failed To Set Forth With Reasonable Specificity A Basis For Supporting Their Contention That Applicants' Conduct Was Dilatory

In accordance with 10 C.F.R. § 2.714(b), a petitioner for leave to intervene is obligated to file "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." Failing to file at least one contention meeting this requirement, a petitioner will not be admitted as a party. Id.

In the context of a construction permit extension proceeding, the contention and its stated basis must go to the showing of "good cause" that must underly an extension request. See, Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1 and 2), CLI-82-29, 16 NRC 1221 (1982). To challenge an assertion of "good cause", a contention must seek to demonstrate that the applicant was both responsible for the delay in completing construction of the facility and that it was "dilatory". Id. "Dilatory" delay has been defined as an intentional delay without a valid purpose. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 552 (1983).

Thus, in order to satisfy the contention requirement in the context of a construction permit extension proceeding, a petitioner must advance a contention which presents a reasonably specific basis for the assertion that the applicant's conduct was intentional and without a valid purpose. A vague reference to information that might tend to show violations of the Commission's regulations or of the construction permit which require remedial action would not be adequate. Such reference must be coupled with a basis for suggesting that delays in identifying and correcting deficiencies was caused by the purposeful conduct of the applicant without a valid purpose; it is not, for example, sufficient to simply assert that the applicant was, even as a result of mismanagement, indifferent to factors which might have caused delay. Id.

The cases interpreting the foregoing "basis" requirement are legion. Suffice it to say that the requirement to set forth the basis for a contention with specificity does not entail the consideration of the merits of the issue in terms of possible evidence that the parties may subse-

quently introduce in support of or in opposition to that contention if admitted.' Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980). Indeed, it is conceded that, as a general proposition, at the contention pleading stage, the threshold for admissibility is relatively low. On the other hand, in cases not involving a mandatory hearing, such as the instant proceeding, a board "'should take the utmost care to satisfy itself fully that there is a least one contention advanced in the petition which, on its face, raises an issue clearly open to adjudication in the proceeding.'" Cincinnati Gas & Electric Company, et al. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 12 (1976; emphasis supplied); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 191-192 (1973). But irrespective of the magnitude of the threshold, it is beyond question that overcoming it is the burden of the petitioner. [1/] See, Duke Power Company, et al.

1/ As observed by the Appeal Board in the context of an appeal from a Licensing Board's ruling on the admission of contentions in Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 592 n.6, "The NRC's adjudicatory boards should not have to conduct or complete a party's research for it." In two recent opinions, the Commission itself again emphasized that it is the party and not the adjudicatory tribunal that must demonstrate the entitlement to a hearing. In Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), CLI-86-1, ___ NRC ___ (January 30, 1986), the Commission held that "it is not the duty of the adjudicatory boards to search for evidence that might fill the gaps in the moving party's submissions." (Slip op. at 6). This was affirmed in Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-07, ___ NRC ___ (April 18, 1986). Although each of these decisions was rendered in the context of motions to reopen records, they nonetheless provide useful guidance on the obligation of the parties relative to litigation of issues in NRC proceedings.

(Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982). It is in this respect that the Board's Order is flawed and must be reversed.

The Contention at issue, CASE Contention 6 and Gregory Contention 1, as admitted by the Board, states as follows:

> 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 indentify and correct design deficiencies, and deliberately refused to take positive action to correct such deficiencies.

Order at 7.

In modifying the contention phrased by petitioners, the Board severed the following language which, in its view, constitutes the basis for (but not 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 now must 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 good cause for the delay.

Order at 8.

The foregoing language is devoid of any specific reference to documentation or other basis to support an assertion that activities conducted by the Applicants were defective in terms of compliance with either 10 C.F.R. Part 50, Appendix B or the construction permit. That documentation which shows deficiencies in the design and construction of the facility exists is not at issue here; it simply was not explicitly pleaded by petitioners in support of the admission of this contention before the Board. Likewise, the transcript of the Special Prehearing Conference held in this matter on April 22, 1986 does not reveal any specific reference to a basis; only vague references to CASE's January 31, 1986 filing before the Commission, to the Board's memorandum of December 1983 and to other unstated documentation can be found. The Board explained its decision to admit the contention despite the failure of

petitioners to identify with specificity those documents, reports or other information upon which they were relying as follows:

> 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.

Order, at 9. It is apparent that the Board's conclusion is based on the fortuitous coincidence of the membership of the two Boards in the construction permit amendment and operating license proceedings. The Board does not imply that such conclusion would be reached by another Board not similarly constituted, based solely on the record of this proceeding to date. To countenance rulings based solely on the serendipitous coincidence of board membership would undercut any semblance of administrative regularity and eliminate the burden of complying with the Commission's regulations which, in this instance, is on petitioners.

More significantly, it is not the lack of specific information in the intervention petition that is its fatal defect. Rather, it is the lack of a direct nexus between such information and petitioners' assertion of Applicants' willful conduct to delay completion of the facility that precludes petitioner's statement as an acceptable basis for admission of the proposed contention in this proceeding. Nowhere in its Order does the Board explain in what way the contention as put forward by petitioners contains a basis, set forth with reasonable specificity, from which one might even reasonably infer that the causes of the delay (the need "to reinspect and reanalyze various structures, systems, and components", Order at 5) are attributable to the intentional conduct of the Applicants without a valid purpose. On the contrary, the Board has

injected its own subjective inference of the record thus far developed in the separate operating license proceeding to substitute for the failure of the petitioners. It thus states:

> 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. . r 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 are also aware that the major remedial step taken by Applicants, formation of the Comanche Peak Review Team, did not occur until 1985.

Order at 9-10.

At most, it appears that the Board's Order can be read to find a basis for claiming that the Applicants, with knowledge of deficiencies in the design and construction of the plant, might not have acted as swiftly as one might have wished to assure that such deficiencies were identified and remedied. [2/] Thus, not only has the Board apparently done petitioners' research, see Limerick, supra, it has, without explanation, made the quantum leap from unidentified documentation of deficiencies in design and construction to a conclusion that such deficiencies provide a basis for

---

2/ Applicants' prior efforts were aimed principally at showing that identified deficiencies did not exist as opposed to its more ambitious current effort which is directed at a far broader examination of the facility to ascertain, on a plant-wide basis, whether design and construction deficiencies exist, and, if so, to remedy them.

alleging that they may have resulted from the intentional conduct of Applicants without a valid purpose. The Board's finding that the Applicants' knowledge of deficiencies and the subsequent submission of a corrective action program constitutes a basis for a reasonable inference of dilatory conduct, while ignoring the intervening measures taken by the Applicants, is simply unjustified. 3/

3/ In fact, the Board's ruling on the admission of the contention at issue appears to be at odds with the Commission's holding in WPPSS, CLI-82-29, supra, in which the Commission concluded that:

> Likewise inadmissible, although for a somewhat different reason, is CSP's first contention relating to WNP-2, by which it asserts that delays were due to WPPSS violations of NRC regulations. It might be argued that this contention should be admitted because it seeks to establish that a reason other than those given by the permit holder is a principal cause of delay and that such a reason does not constitute "good cause"; upon closer examination, however, we believe that the admission of such a contention in a construction permit extension proceeding on that basis would be contrary to the overall intent of the Atomic Energy Act and the Commission's regulations. 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. To consider it otherwise could discourage permit holders from disclosing and correcting improper construction for fear that corrections would cause delays that would result in a refusal to extend a construction permit, a result obviously inconsistent with the Commission's efforts to ensure the protection of the public health and safety. This contention thus is not litigable.

16 NRC at 1230-1231.

The Staff discerns no meaningful distinction in substance between the contention presented in WPPSS, see, 16 NRC at 1225, and the contention here admitted by the Board.

B. <u>Absent An Appropriate Remedy, No Hearing Is Warranted</u>

Petitioners have stated that they are "not asking that the extension be denied. C.A.S.E. (sic) is asking that the extension be granted only if certain conditions are met." Special Prehearing Conference, Tr. 7. Yet the Board, in its Order, has ruled that:

> 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 Applicants' permit. However, petitioners' proposed conditions do not deal with the 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.

Order at 11-12.

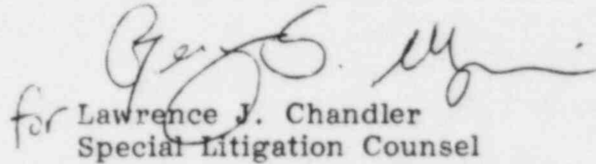
Having rejected CASE's argument that a condition of the type sought could be imposed by this Board as a consequence of the ensuing hearing, there appears to be no remedy being sought by petitioners which can be effected and, thus, no hearing is warranted.

V. CONCLUSION

Based on the foregoing, it is evident that the petitioners failed to put forward a contention set forth with a reasonably specific basis as required by 10 C.F.R. § 2.714(b), and that their petitions for leave to intervene should have been denied. By admitting CASE Contention 6/ Gregory Contention 1, the Board erred. The Board further erred by failing to deny a hearing and terminate the proceeding in circumstances in which the remedy sought by petitioners has been properly rejected by the

Board as being beyond its authority. For these reasons, the Special Prehearing Conference Memorandum and Order should be reversed and the proceeding terminated.

Respectfully submitted,



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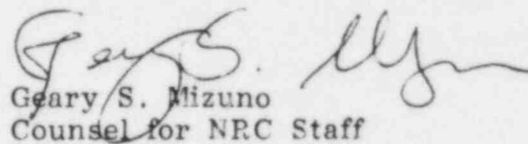

Geary S. Mizuno
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of May, 1986

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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TEXAS UTILITIES ELECTRIC COMPANY, et al.	)	Docket Nos. 50-445-CPA
	)	
(Comanche Peak Steam Electric Station, Unit 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S NOTICE OF APPEAL FROM ATOMIC SAFETY AND LICENSING BOARD MEMORANDUM AND ORDER CONCERNING PARTIES AND CONTENTIONS AND SUPPORTING BRIEF" in the above- captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 12th day of May, 1986:

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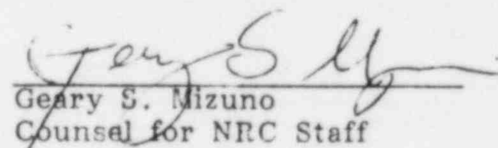

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