

666

RELATED CORRESPONDENCE

BEFORE THE
UNITED STATES
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, Unit 1)

)
)
) Dkt. Nos. 50-445-CPA
)
)
)

PHASE I DISCOVERY:
CASE AND MEDDIE GREGORY'S
THIRD REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to the regulations of the Commission and the Order of June 6, 1986, CASE and Meddie Gregory hereby request that Applicants Texas Utilities Electric Company, et al., provide the following documents. "Documents" means any written, printed, recorded, typed, or other graphic or photographic matter of any kind or nature, and all mechanical or electrical sound recordings or a transcript thereof, any other sound reproductions, however produced or reproduced, and all copies of documents, by whatever means made, now or formerly in the possession, custody, or control of any of the Applicants, their agents or employees, or known by any of them to exist, including but not limited to studies, reports, minutes of meetings, memoranda (including but not limited to memoranda of meetings and phone conversations), letters, rules, pamphlets, calendars, flyers, books, booklets, cards, and brochures.

8606230307 860618
PDR ADOCK 05000445
G PDR

D583

1. All documents in the possession of any of the owners of Comanche Peak Steam Electric Station that were generated in the course of the "monitoring program . . . undertaken by Tex-La in connection with Comanche Peak," including but not limited to all assessments, independent assessments, evaluations, interim reports, notes of meetings, and raw data generated. See "Permits/Licenses: The Minority Owners' Responsibilities - The Function of Legal Counsel," presented by William H. Burchette, General Counsel, Tex-La Electric Cooperative of Texas, Inc., before the NRECA Committee on Joint Ownership Meeting, May 20-21, 1986, p. 5, hereafter "Burchette Speech" (copy attached).

Please include all documents (1) between the persons conducting the assessments, monitoring, and evaluation and the persons requesting such assessment, monitoring, and evaluation; (2) between the persons requesting such assessment, monitoring, and evaluation and other persons within Tex-La; and (3) between any person employed by, representing, or providing contracting or consulting services to Texas Utilities Electric Company or any of its parents, subsidiaries, or predecessors in interest and any person at Tex-La with respect to such assessment, monitoring, or evaluation.

2. To the extent any monitoring, independent assessment, or evaluations were conducted by other minority owners of Comanche Peak at any time, all the documents as identified in Request #1, above, generated by these independent assessments, monitoring, or evaluations.

3. All documents and all other information which provided the basis for the statement by Applicants in their Current

Management Views and Case Management Plan (6/28/85), at 7, that

TUGCO management is not satisfied with the status of the plant and would not proceed to operate it, even if authority were to be granted, until all of the outstanding concerns have been addressed, their safety significance determined, generic implications and collective significance considered, and necessary corrective actions have been completed.

4. With respect to each document identified on Attachment 1 to Texas Utilities Electric Company, et al., Response to Interrogatories and Requests for Documents dated June 16, 1986, a copy of all documents that (1) evaluate the findings and/or recommendations in those documents, (2) propose actions to be taken in response to the findings and/or recommendation, and (3) direct implementation of any actions in response to the findings and/or recommendations.

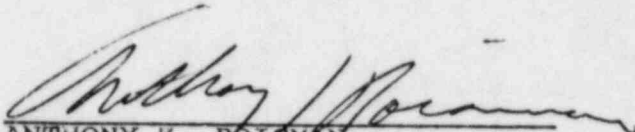
5. All documents upon which TUEC relied to support the following statements contained in its January 29, 1986, letter and request for extension of construction permit:

Applicants submit that good cause exists for the construction permit extension[.] [p. 1]

Applicants submit that the delay which necessitates the construction permit extension was not the result of dilatory action by Applicants[.] [p. 2]

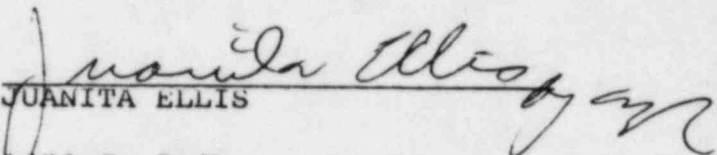
[T]here was no intentional delay of construction without a valid purpose. [p. 2]

6. All documents that assess the status of the plant and that were presented at all of the periodic meetings of the Owners Committee and all minutes or other notes recording what transpired at those meetings where assessments were presented. See Burchette Speech, supra, p. 5.


ANTHONY Z. ROISMAN

Trial Lawyers for Public Justice
2000 P Street, NW, #611
Washington, D.C. 20036
(202) 463-8600

Counsel for Meddie Gregory


JUANITA ELLIS

1426 S. Polk
Dallas, TX 75224
(214) 946-9446

Representative for CASE

Dated: June 18, 1986

PERMITS/LICENSES: THE MINORITY
OWNERS' RESPONSIBILITIES - THE FUNCTION OF
LEGAL COUNSEL

Presented by:

William H. Burchette, Partner
Heron, Burchette, Ruckert & Rothwell
Washington, D.C.

Committee on Joint Ownership Meeting
Ramada Renaissance Hotel
Washington, D.C.
May 20 - 21, 1986

NRECA
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036

My purpose here today is to discuss the legal responsibilities of a minority owner participant in a power project, and particularly the role to be played by the minority owner's legal counsel in ensuring that these responsibilities are properly fulfilled.

While in past years I have dealt with various minority owners involved in power projects jointly with other utilities, my most recent experience in this area has been as general counsel of Tex-La Electric Cooperative of Texas, Inc. As has already been explained, in the early 1980's Tex-La became a minority owner of the Comanche Peak Nuclear Project, in Texas. Since then, the project has experienced extensive delays, price escalations, and significant difficulties in obtaining an operating license from the Nuclear Regulatory Commission. The majority owner and manager of the project is Texas Utilities, an investor-owned utility.

In assessing the minority owner's responsibilities, one is well advised first to focus on the legal standard which will govern the minority owner's conduct. As is true or essentially all utility management actions, the minority participant's conduct will be judged by the standard of prudence: whether the action it took can be viewed as reasonable, given the circumstances and facts known to it at

the time. An important consideration in assessing prudence is to determine how the actions compare with those of other companies in the industry facing similar circumstances.

The prudency standard might be applied to a minority owner in a variety of circumstances. Most likely, however, it will be applied when the minority owner seeks to recover from its rate payers the full cost of its minority participation. Particularly where the project involved is plagued by problems and is far over budget, the state utility commission will want to determine whether the minority owner's expenditures were incurred prudently.

It is worth noting that the minority owner's responsibilities, and how its prudency will be judged, are not necessarily identical to the standards governing the majority owner and manager of the project. This difference was dealt with recently by the Federal Energy Regulatory Commission, in a proceeding involving New England Power Company, which was a minority owner in the Pilgrim II nuclear project. That project ultimately was cancelled by the majority owner. At the time the issue of the minority owner's prudence arose before FERC, the Massachusetts Public Utilities Department already had determined, based on the prudency standard, that the majority owner should have cancelled the project approximately one year

sooner than it did, and that any expenses it incurred in that intervening year were imprudent. The question before FERC concerned the minority owner's share of those same expenditures. What FERC concluded was that the imprudence of the majority owner could not automatically be imputed to the minority owner. Rather, the minority owner's actions in continuing to make contributions in the year prior to cancellation had to be assessed independently, based on what the minority owner knew at the time, what it should have known, whether it had reason to believe that the project's problems could be overcome, and other such considerations. In the end, FERC concluded that the minority owner, given the circumstances and facts known to it at the time, had been reasonable in continuing to pay for the project even after the project had encountered difficulties.

I now will review some of the actions a prudent minority owner might take to ensure that it properly fulfills its legal responsibilities. Many of these steps were taken by Tex-La in connection with Comanche Peak. The role of the minority owner's legal counsel is to help make the minority owner fully aware of its duties, and, at every step along the way, to advise the minority owner regarding the prudent course of conduct.

The very first question the minority owner faces, of course, is the decision of whether to participate in the power project in question. The prudence of that decision necessarily must reflect what is known about the project at the time the decision is made. Invariably, any time a minority owner elects to become a minority owner, it will do so because the project looks promising at the time, and appears to fulfill the minority owner's needs. Unfortunately, those assessments, however prudent when they are made, sometimes prove wrong.

Attempting to negotiate the best possible terms in a joint ownership agreement is of course essential. In most cases, the majority owner will retain to itself the full management discretion and authority regarding the construction and licensing of the project. Most majority owners will not readily agree to share control with the minority owner. Nevertheless, the minority owner should make certain that the agreement gives it the right to receive all information and progress reports it needs to properly monitor the status of the project as it is being built and licensed. Other key terms of the joint ownership agreement include those involving the potential default of the minority owner, and the majority owner's responsibilities in the event that the project is delayed, costs too much more, or encounters other difficulties. The exact standard governing the majority

owner's construction and licensing effort is particularly crucial. Quite commonly the majority owner will expressly commit to constructing the project in accordance with so-called "prudent utility practice." This requires it to manage the project's construction and licensing in a competent manner, based on the prevailing industry standard of performance.

Assuming, as is likely, that the minority owner has no direct say in how project construction and licensing are being handled, it should make certain that it knows at all times how those tasks are progressing. It must be sure to obtain from the majority owner all essential information regarding the project's status. As soon as the minority owner begins participation in a project, it is imperative that it initiate a monitoring program comparable to that undertaken by Tex-La in connection with Comanche Peak. This program has enabled Tex-La to make its own independent assessment of the status of the project. Often this assessment has been considerably more pessimistic than the assessment the majority owner announced publicly or conveyed to the minority owners at the periodic meetings of the Owners Committee. Unfortunately, the pessimistic assessments from the monitoring program in the long run have proven to be accurate. In this regard, it is particularly important not simply to rely on information fed to you by the majority owner. They necessarily will be reluctant

to admit that problems exist. Thus, any information they provide should be carefully scrutinized and questioned by experts retained by the minority owner and having the appropriate type of expertise, depending on the kind of project involved. It is important that these be outside experts, not on the minority owner's regular staff, so that they can evaluate the data with an appropriate degree of independence and objectivity. If at all possible, the monitoring program also should include, on a regular basis, direct interviews with key management people from the majority owner.

Whenever the minority disagrees with how the project is being managed, it should raise questions with the majority owner, and alert the majority owner to its concerns. It is important, however, if under the joint ownership agreement the majority owner has retained sole management responsibility, that the minority owner not actually seek to participate in the majority owner's management decisions. If it does so, it runs the risk that it ultimately will share the responsibility for any management imprudence which occurred. This could severely undercut the minority owner's ability to recover its share of the project costs in its rates, or to obtain a recovery in a

possible lawsuit against the majority owner based on mismanagement. Therefore, the minority owner should monitor, raise questions, and express its concerns, but it should not tell the minority owner what to do.

The minority owner's legal counsel necessarily will be involved also in interpreting the joint ownership agreement for the minority owner and advising the minority owner of its rights. One question which almost inevitably will arise if a project is in trouble, and which arose in the case of Comanche Peak, is the question of whether the minority owner should continue to make payments to the majority owner for its share of the project. Comanche Peak now is years behind schedule, and the majority owner appears unable to date to satisfy the Nuclear Regulatory Commission that an operating license should be issued. It is uncertain whether a license ever will be issued. Tex-La believes that the majority owner has acted imprudently in its management of construction and licensing, and, no doubt, the majority owner will be unable to recover all its project costs in its rate base. Nevertheless, the question of whether the minority owner should continue paying the majority owner is quite complex, and involves numerous factors. Although the majority owner may have been imprudent, the minority owner might reasonably expect the project ultimately to be completed and licensed, and therefore may want

to avoid the risks inherent in stopping its payments. In particular, the Comanche Peak Joint Ownership Agreement imposes severe penalties on any minority owner who defaults, and, until either a court or a commission has held the majority owner imprudent, the minority owner is proceeding at some risk in taking action based only on its own opinion that imprudence has occurred. The minority owner's ability to continue funding the ever increasing costs of the project also will affect the decision. All these considerations must be balanced in determining whether to continue to pay for a troubled project, and in deciding precisely when to discontinue payments.

Counsel for the minority owner will have to advise his client also on what legal rights it may have to be made whole by the majority owner for any imprudent management by the majority owner. This necessarily will involve an assessment of all of the complex factors and considerations that normally affect a decision on whether or not to initiate litigation.

I will close by describing one particular incident of rather obvious imprudence by the majority owner of Comanche Peak, and some of the consequences that Texas Utilities now faces as a result. In late January, 1986, the NRC discovered that Texas Utilities' construction permit for Unit 1 of Comanche Peak had expired in early August, 1985 -- almost six

months earlier. Never before had an applicant for a nuclear project license allowed its construction permit to lapse. The NRC advised the Company of the expiration, and the Company immediately ceased all construction activities on the project. The Company then promptly filed an application for an extension of the expired permit, and, within two weeks, the NRC staff reinstated the license and construction was resumed. However, the consequences of the Company's oversight in failing to renew its permit in a timely fashion are still continuing. Had it sought the extension before the permit expired in August, 1985, a grant of the extension by the NRC would have been almost routine. The NRC's extension of the permit some six months after expiration, however, now is open to legal challenge by an intervenor in the NRC proceeding, which has appealed the decision to the United States Court of Appeals for the District of Columbia Circuit. In addition, the question of whether "good cause" exists for granting the extension, as required by law, still is to be the subject of a hearing before the Atomic Safety and Licensing Board established by the NRC to hear this case. Either of these proceedings could bring about the cancellation of the construction permit, which inevitably would spell the end of the project.

As to Tex-La's actions, over a year ago, through its monitoring program, it raised a question with the majority owner as to whether the system it was using for keeping track of its licenses and permits was adequate. Obviously, it was not. Since the license has expired, Tex-La has further inquired of the Company regarding the procedures it intends to institute to ensure that no other licenses or permits will expire.

At this stage, it is unclear when Comanche Peak will be licensed, and, indeed, whether it ever will be licensed. Tex-La continues to closely monitor the proceedings at the NRC, and is doing everything it can to make sure that its minority ownership interest is being managed in a prudent manner.

UNITED STATES
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
)
TEXAS UTILITIES GENERATING COMPANY,) Dkt. Nos. 50-445-CPA
 et al.)
)
(Comanche Peak Steam Electric)
 Station, Units 1 and 2)

CERTIFICATE OF SERVICE

I hereby certify that copies of PHASE I DISCOVERY: CASE AND
MEDDIE GREGORY'S THIRD REQUEST FOR PRODUCTION OF DOCUMENTS were
served today, June 18, 1986, by first class mail, or by hand where
indicated by an asterisk, upon the following:

Administrative Judge Peter Bloch*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Walter H. Jordan
881 West Outer Drive
Oak Ridge, TN 37830

Dr. Kenneth A. McCollom
1107 West Knapp
Stillwater, OK 74075

Elizabeth B. Johnson
Oak Ridge National Laboratory
P.O. Box X, Building 3500
Oak Ridge, TN 37830

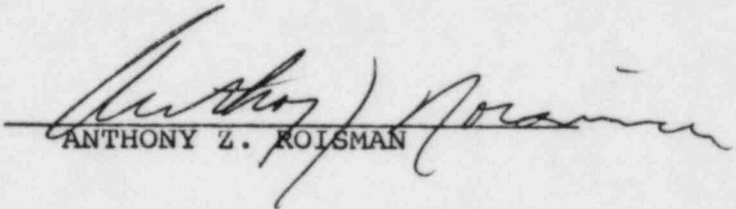
Nicholas Reynolds, Esq.*
Bishop, Liberman, Cook,
Purcell & Reynolds
1200 17th Street, NW
Washington, D.C. 20036

Docketing & Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Geary S. Mizuno, Esq.*
Office of Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Thomas G. Dignan, Jr.*
c/o Ropes & Gray
1001 22nd St., NW, #700
Washington, D.C. 20037

Thomas G. Dignan, Jr.
Ropes & Gray
225 Franklin Street
Boston, MA 02110


ANTHONY Z. ROISMAN