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RELATED CORRESPONDENCE

BEFORE THE
UNITED STATES
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board '86 AUG -4 A10:59

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of	)	
	)	
TEXAS UTILITIES GENERATING COMPANY, et al.	)	Dkt. Nos. 50-445-OL
	)	50-446-OL
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	
	)	

CASE RESPONSE TO APPLICANTS' MOTION FOR PROTECTIVE ORDER OF JULY 16, 1986, AND MOTION TO COMPEL

Pursuant to 10 CFR §2.740(f), CASE moves this Board to issue an order compelling Applicants to answer CASE's Interrogatories and Requests for Documents of July 2, 1986.

Applicants object to CASE's interrogatories on the grounds that they are not relevant to the issues in the Operating License proceeding, and that they duplicate requests made in the Construction Permit proceeding. Applicants accuse CASE of trying to use the operating license proceeding to obtain information they do not need for that proceeding but will use in the construction permit proceeding, where discovery has been stayed. But all the information requested by CASE is fully relevant to the operating license proceeding, although it is relevant to the construction permit proceeding as well. The two proceedings revolve around separate issues, but the basic facts underlying these issues are similar.

In the operating license proceeding the issues concern the Applicants' failure to adhere to quality assurance/quality control provisions, with the result that the plant has not been

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constructed safely nor in conformance with the requirements of 10 CFR Part 50, Appendix B. The main issue in the construction permit proceeding is whether good cause exists for the delay in completing construction of Unit 1 of the plant. CASE alleges that the delay was caused by Applicants' deliberate decision to ignore safety requirements and short circuit the quality assurance/quality control program , thus resulting in deficiencies in Unit 1 which Applicants were unsuccessful in covering up or explaining away and which they now must correct before the plant can be considered complete. Thus the issue in the CPA proceeding, while distinct from the OL proceeding, arises out of a subset of the facts relevant in the OL proceeding, and discovery is bound to overlap between the two cases.

Applicants have contended, in a different forum, that the issues in the CPA proceeding are identical to issues being raised in the OL proceeding. They have repeatedly argued that Intervenors CASE should not even get a hearing on the construction permit extension because "[the principal contention in the operating license proceeding] comprehends essentially the same allegations as those that CASE has presented . . . on review of the construction permit extension." TUEC Brief of June 24, 1986, before the U.S. Court of Appeals for the D.C. Circuit, pp. 7, 55. See also TUEC Memorandum of Points and Authorities in Opposition to Stay of April 7, 1986, before the Court of Appeals, at 3-5. Applicants would deny CASE the right to intervene in the construction permit proceeding on the grounds that the issues involved are already being litigated in the operating license

proceeding, and simultaneously deny discovery in the operating license proceeding on the grounds that "the issues in the extension proceeding are not coincident, and indeed differ significantly, with [sic] those in this proceeding." Applicants' Response at 6, n. 6. This duplicitous pleading should not be countenanced.

Applicants also argue that it is inappropriate for CASE to instruct them to answer these questions "in light of the interpretations clarifications and guidance expressed in the Board's Memorandum and Order of June 27, 1986" in the CPA proceeding (Instruction 6 of CASE's Interrogatories). Applicants' Motion at 3. Applicants claim that this instruction is inconsistent with licensing board authority. They do not explain exactly how it is inconsistent. In the case they cite, Pacific Gas & Electric Company (Stanislaus Nuclear Project, Unit No. 1), ALAB-400; 5 NRC 1175 (1977), the Appeal Board held that a licensing board appointed only to rule on petitions to intervene did not have jurisdiction to rule on the merits of a case. Applicants imply that CASE is trying to make an order issued in the construction permit proceeding binding on the Applicants in the operating licensing proceeding. But CASE is not alleging that the Board's order to comply with their discovery requests in the CPA proceeding is binding in the OL proceeding. They merely require that the answers in the present case be made "in light of the interpretations, clarifications, and guidance" of the order. Surely Applicants cannot seriously contend that the same Board, faced with the same questions in a different proceeding, will interpret the questions differently. In other words, the

questions asked should be understood to have the meaning that the Board gave them in its June 27 order. The purpose of this instruction was to prevent relitigating the same arguments concerning the meaning of the questions that were fought out and resolved in the construction permit proceeding. To rehash these disputes is a waste of time, especially since the same Board is sitting in both cases.

Applicants, however, are determined to go through the process once again. In particular, they raise the same objections concerning the undue burden of answering Interrogatories 3-6 that they brought up in their objections to the construction permit discovery. They have now added an affidavit alleging that it would take seven man-years [sic], and require the efforts of 30-40 people to answer these questions. Affidavit of Ed Powell, July 16, 1986, at 2. The affidavit does not explain how this figure was derived, and thus adds nothing to the argument. Such a self-serving statement cannot simply be taken at face value. Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 334 (1980). As discussed below, Interrogatories 3-6 are as important to CASE's contentions in this proceeding as they are to the construction permit extension, in which the Board decided that Applicants must answer these questions even though it will be time consuming to do so. Memorandum and Order of June 27, 1986 (Dkt. No. 50-445-CPA), at 2. CASE requests a similar ruling here. Moreover, it is the scope of the project and its problems that result in

extensive responses to discovery. Even if the work involved is as great as Mr. Powell alleges, it is small compared to a project that has taken twelve years, $6 billion, and tens of thousands of person-years to construct improperly. According to Applicants' theory, the more a utility misconstructs a nuclear plant, the less they have to reveal about it.

Applicants' Objections to Specific Questions

Interrogatory 1: Applicants allege that the documents on which they intend to rely to show that they had a "good cause" for the delay in completing Unit 1 are not relevant to the issues in the operating license proceeding. These documents are relevant because CASE believes that the delay was caused, inter alia, by the deliberate harassment and intimidation and discouragement of Comanche Peak workers who tried to implement the quality control program, and by the resulting breakdown in quality control. Applicants have repeatedly tried to say that the delay was caused by the need to correct problems at the plant rather than by the factors that created these problems. If they can ever be forced to answer the question in a straightforward manner, however, they will have to come up with some sort of explanation as to how quality control and quality assurance broke down, or give other reasons for the plant's problems. This explanation is likely to reveal considerable information about their treatment of workers, and also to be relevant to the credibility of Comanche Peak management.

Interrogatory 2: Applicants provided (on their second try) what was supposed to be a complete list responding to this

question as of July 5, 1986, the day after these interrogatories were filed. If that is the complete answer to the question, then we assume Applicants' objection is really a statement that the CPA answers should be incorporated by reference. We have no problem with that response.

However, Applicants argue that material sought is not relevant to any issues in the OL proceeding. The relevance of the requested documents to the issues in the operating license proceeding should be obvious, since their subject matter is "the plant's construction, procedures, compliance with industry or agency standards, or management style or competence." Applicants claim that discovery has been narrowly limited in the OL proceeding. Applicants' Response, p. 5. They concede, however, that harassment and intimidation as well as credibility and the CPRT are still open. These issues alone would be sufficient grounds for the requested discovery, but in reality many other areas also remain open, as discussed in the Board's Memorandum of March 15, 1984 (Clarification of Open Issues). Applicants ignore this document, which among other things shows that harassment and intimidation include the general practice of discouraging the reporting of nonconforming conditions. Id. at 13. A more recent order shows that the overall pattern of "construction and design deficiencies" and of "how management has exercised its responsibility for the quality of design and construction" are also open issues. Memorandum and Order of October 2, 1985 (Applicants' Motion for Modification) at 1-2. The information requested in Interrogatory 2 is essential to get a clear picture of these broad patterns of management practices and plant

quality.

Applicants also claim that they should not have to provide the answer to this question because in February 1984 they agreed with CASE that neither side would have to supplement certain previous requests. The present request is not a renewal of those earlier requets, nor a request to supplement them, but a separate and distinct request, although some of the information may already have been provided. No agreement was ever made not to request more documents. If Applicants claim that because they were not required to provide particular items as part of the process of supplementing earlier requests, they should never have to produce those items, their claim goes far beyond the scope of any agreement that CASE ever made.

Applicants' attempt to bind CASE on the basis of verbal agreements made in February 1984 is, at best, outrageous in the light of their own conduct since February 1984. For instance, Applicants never kept their side of the supplementation agreement. Part of those agreements was that Applicants would provide supplemental answers to designated Interrogatories, which were never supplemented. Most significantly, in Applicants' response of May 11, 1984, to Interrogatory 16 of CASE's 20th Set of Interrogatories, they claimed that they had already provided all the information requested. Interrogatory 16 included a request that Appicants identify all documents on which each of their witnesses intended to rely in the hearings held between February and May of 1984. At the hearings, however, it was clear that Applicants were using documents that had not been provided.

See the Board's ruling during the March 23, 1984, hearing, Tr. 11964/21-11965/13. See also the letter of March 15, 1984, from Juanita Ellis to Judge Bloch, Dr. Walter Jordan, and Dr. Kenneth A. McCollom concerning Applicants' history of noncooperation in the area of discovery. In addition, Applicants breached their agreement with CASE that they would submit to summary judgment on key issues in the case. Applicants' unilateral withdrawal from the summary judgment agreement caused tremendous losses to CASE in both time and money.

CASE also believes that any agreements not to require supplementation were, in effect, nullified when Applicants acknowledged that a major reinspection, redesign, and rework effort was required at the plant. The net effect of that process is that the record is reopened as to all matters that may lead to relevant information about issues or contentions in the proceeding.

Applicants also bemoan the fact that some of the materials requested have already been produced. To the extent that this is true, it actually makes their task much easier, and all they need to do is to identify which previous responses answer which portions of the pending questions. Applicants imply that they are being harassed by requests to produce documents twice, but in reality the Request for Documents section of the Interrogatories asks only that they identify with particularity any materials already produced, and explain when and in which docket they were produced. If some of the requested documents have been identified in the search described on page 6 of Applicants' Response, but not yet produced, Applicants should tell

intervenors which ones they are and then produce them. If they produce them now, they will not have to do so again later. There is no reason why this process should be burdensome.

Interrogatories 3-5: These questions relate to the issue of harassment and intimidation, which, as discussed above, includes the question of whether Comanche Peak management discouraged the reporting of nonconforming conditions. They also relate to the issue of "how management has exercised its responsibility for the quality of design and construction and the adequacy of QA/QC" discussed by the Board in its Memorandum and Order of October 2, 1985. Intervenors need to know when and how problems were reported, as well as what response was taken, in order to find out how long management took to deal with problems, whether at times it refused to deal with them, and how these events relate to other events such as personnel actions taken with regard to people who reported problems.

Interrogatories 3-5 are not overbroad, as Applicants allege on page 9 of their Response, because CASE is not looking merely for information about specific problems with the plant, but instead is concerned with the overall patterns of management practices as discussed above. Information concerning TRT findings that are not in themselves "significant" may nonetheless reveal essential aspects of these overall patterns. See the Board's discussion of discovery concerning the intimidation of QC inspectors in its Memorandum of March 5, 1984, at 13.

Applicants also argue once again that the requested information will be provided under provisions currently in place

for producing information about CPRT activities. The Board already stated that it was "not persuaded that the CPRT plans to look at this information concerning the dates that Applicants first learned of TRT deficiencies." Memorandum and Order of June 27, 1986 (Dkt. No. 50-445-CPA) at 2. Information pertaining to the CPRT is no substitute for the information requested here, nor should the conditions established for the conduct of CPRT discovery apply.[1]

Interrogatory 6: Applicants reiterate the argument that they made on this question in the construction permit extension that CASE could tell by looking at documents available to them when and to what extent Applicants integrated earlier findings into their consideration of later findings. As CASE pointed out in responding to this argument at that time, this question concerns the subjective thinking of the Applicants, and only they can answer it. See Consolidated Intervenors' June 26, 1986, Response to Applicants' Motion for Protective Order of June 17, 1986, and Motion to Compel at 6-7. The Board established a

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[1] The premise of the so-called CPRT conditions is that the CPRT process should not be disrupted by having to produce documents being generated by the CPRT and that all documents will be produced in the central file when each Results Report is complete. First, interrogatories 3-5 ask for document identification. Even the CPRT conditions do not preclude document identification. Second, many, if not most, of the documents sought pre-date the CPRT or are not generated by the CPRT process. Third, contrary to the representation regarding the CPRT, that process involves very little examination of prior documents (see Board Order of June 27, 1986, supra). Finally, our experience to date is that the Results Reports files are incomplete (i.e., do not include all documents examined or produced as part of the review) and are not located in a single file where they can be accessed quickly by CASE. See attached Affadivit of Adam Palmer.

procedure for answering this question in its Order of June 27 and apparently rejected Applicants' spurious objection.

Interrogatory 7: As discussed above, CASE alleges that the delay in construction resulted from TUEC management's deliberate attempts to sabotage the quality control/quality assurance process. Applicants' response to this question will either shed light on the management procedures and decision making involved, or it will show some explanation as to why so many problems remain unresolved at the plant even though it is allegedly almost complete. Applicants will probably use any such alternative explanation as a defense against allegations concerning management practices, and CASE will need to respond appropriately. Thus this question, like all the others, is highly relevant to CASE's case.

Request for Documents: Applicants have not objected to the request for documents referring or relating to documents identified in the Interrogatories. Assuming that the Board agrees as to the relevance of the Interrogatories to CASE's case, Applicants have waived any other right to object to production of all such documents.

Respectfully submitted,

ANTHONY Z. ROISMAN

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

Counsel for CASE

Law Student

Ann Hunter
Antioch Law School

Dated: July 31, 1986

BEFORE THE
UNITED STATES
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
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TEXAS UTILITIES GENERATING COMPANY, et al.	)	Dkt. Nos. 50-445-OL 50-446-OL
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

AFFIDAVIT OF ADAM PALMER

City of Washington)
) ss:
District of Columbia)

My name is Adam Palmer. I am a legal intern with Trial Lawyers for Public Justice.

In my experience in reviewing ISAPs, I have come to the conclusion that all the necessary materials needed to analyse the TRT concerns were not included in the discovery material presented to me.

For instance, on my recent trip to Dallas, Texas, to review the two latest ISAPs that have been released, I was presented with two folders that contained materials used by the CPRT during their investigation. However, the materials contained in these folders were very limited, and only contained documents that supported the CPRT analysis. These ISAP files did not contain any deficiency papers of any type and in some instances these files lacked necessary documents needed for a proper and complete analysis of the problems identified by the TRT. For example, ISAP I.A.3, which deals with butt splicing, had no supporting

documentation in the Procedure, Testing, and Inspection working file index.

All the supporting documents that relate to the specific ISAPs released are not contained in one central main file.

For instance, after leaving Dallas, I went to the Comanche Peak site to review deficiency papers. The deficiency papers I asked to review were spread out all over the plant site. The reports were located in a main vault, an IRV vault, the operations building, and several other various trailers set up around the site. Because these reports were spread all around the site, I could not maximize my time and review the maximum amount of reports possible. I either had to wait for the reports to be brought back and forth to me, or I had to leave one area and drive to another.

This affidavit is true and accurate to the best of my knowledge.

ADAM PALMER

Subscribed and sworn to before
me this 31st day of July 1986

Notary Public

My Commission Expires August 31, 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.	)	Docket Nos. 50-445-OL and 50-446-OL
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of CASE's RESPONSE TO APPLICANTS' MOTION FOR PROTECTIVE ORDER OF JULY 16, 1986, AND MOTION TO COMPEL and AFFIDAVIT OF ADAM PALMER have been sent to the persons listed below this 31st day of July 1986 by: Express mail where indicated by *; Hand-delivery where indicated by **; and First Class Mail unless otherwise indicated.

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

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

Dr. Walter H. Jordan
881 W. Outer Drive
Oak Ridge, Tennessee 37830

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

Ellen Ginsberg, Esq.
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Robert A. Wooldridge, Esquire
Worsham, Forsythe, Sampels
& Wooldridge
2001 Bryan Tower, Suite 3200
Dallas, Texas 75201

Nicholas Reynolds, Esquire
Bishop, Liberman, Cook,
Purcell & Reynolds
1200 17th Street, N.W.
Washington, D.C. 20036

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

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

Renea Hicks, Esquire
Assistant Attorney General
Environmental Protection Division
Supreme Court Building
Austin, Texas 78711

Mrs. Juanita Ellis
President, CASE
1426 S. Polk
Dallas, Texas 75224

Mr. W.G. Counsil
Executive Vice President
Texas Utilities Generating Co.
Skyway Tower, 25th Floor
400 N. Olive Street
Dallas, Texas 75201

Mr. Roy P. Lessy, Jr.
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

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

Anthony Z. Roisman /bp
ANTHONY Z. ROISMAN