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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

before the

ATOMIC SAFETY AND LICENSING BOARD

_____)	
In the Matter of)	Docket Nos. 50-445-OL
TEXAS UTILITIES GENERATING)	50-446-OL
COMPANY et al.)	
(Comanche Peak Steam Electric)	(Application for an
Station, Units 1 and 2)	Operating License)
_____)	

APPLICANTS' OBJECTION TO
ASLB MEMORANDUM AND ORDER
(CPRT Interrogatories Set 12)

Pursuant to 10 C.F.R § 2.752, the Applicants respectfully object to the Board's "Memorandum and Order (CPRT Interrogatories Set 12)" in the respects and for the reasons hereinafter set forth.

Interrogatory No. 7(a)

Interrogatory No. 7 contained two subparts. Subpart (a) by its terms and context called for an unqualified "yes" or "no." Subpart (b) required, in the event of a "yes" answer to subpart (a), the answer¹ to a question judged by the Applicants to be unanswerable because its premise made no sense.

¹"[I]n precise detail" CASE CPRT Interrogatories - Set 12, Interrogatory 7(b).

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The Applicants answered subpart (a) "Yes." The Applicants then answered subpart (b) to the best of their ability, given the imperfections in the question.

In its Motion to Compel, CASE sought no relief in respect of subpart (a) of Interrogatory No. 7.

CASE did complain about the response to subpart (b), but only on the ground that the answer assertedly lacked the requisite "precise detail."² This objection could only relate to subpart (b) of Interrogatory No. 7 given the wording of the interrogatories, and CASE made clear its complaint was addressed to subpart (b): "As further clarification, our concern in 7.b is:"³

In its *Memorandum and Order* the Board pronounced the Applicants' answer to subpart (a) inadequate:

"We find that Applicants did not adequate respond[] to the initial question, particularly with respect to the population that is being sampled."

Memorandum and Order at 6 (emphasis added). The Board then appears to propound several new and additional questions to the Applicants:

"Is the sample solely of work that was completed prior to the commencement of the CPRT? Prior to the Techni-

²"Applicants have not responded in the precise detail which case is seeking." *CASE's Motion to Compel Applicants to Provide Complete Answers to CASE's 9/18/86 CPRT Discovery -- 12 Sampling*, filed 1/21/87, at 27.

³*Id.* (emphasis added). Note that CASE urged in its *Motion to Compel* not that subpart (b) were answered, but that the Applicants be ordered to answer questions different from the question it had propounded. This is a misuse of the discovery process not legitimated by repetition.

cal Review Teams' (TRT's) work? Does it include or exclude repairs made in response to the TRT or CPRT findings?"

Id. Finally, the Board ordered the Applicants to answer the additional questions propounded by CASE in its *Motion to Compel*.⁴

The Applicants respectfully submit that by this Order the Board has committed three different errors:

First, the Board has "allowed" a motion to compel that was not filed. CASE made no objection to the response to subpart (a). Thus, the Applicants were never put on notice that the adequacy of that response was being considered by the Board, nor, of course, were the Applicants afforded an opportunity to respond to any objection or concerns regarding the propriety or sufficiency of their answer to that subpart.

Second, the Board has sanctioned CASE's abusive use of the motion to compel as a device for propounding questions in addition to and different from the interrogatories with which the Applicants were served (and long after the time for propounding these interrogatories had elapsed). It is axiomatic that the motion to compel lies only in the case of non-responsive answers.⁵ It necessarily follows that the

⁴"We also refer Applicants to the clarification provided by CASE in its motion to compel and we ask that Applicants respond fully." *Id.*

⁵10 C.F.R. § 2.740(f)(1): "If a . . . party upon whom a request for . . . answers to interrogatories is served fails to respond or objects to the request, . . . the party

extent of the power to adjudicate motions to compel is limited to ordering answers to questions "in accordance with the request."⁶ The motion to compel is not properly used as a vehicle for propounding interrogatories borne of afterthought, and CASE may not properly be permitted to achieve that purpose and result.

Third and most troubling of all, in ordering the Applicants to answer questions propounded by the Board rather than by CASE, the Board's *Memorandum and Order* makes it appear that the Board has adjudged this aspect of the *Motion to Compel* based not on the responsiveness of answers to questions as framed, but on the basis of the Board's judgments about what information should be made available in order to assess the adequacy of the response to Contention 5 on which the Applicants are presently working. Prescinding from the total lack of nexus between such judgments and the literal tenor of the prior interrogatories, in so doing the Board's *Memorandum and Order* has the effect of creating the impression that it is monitoring and substantively reviewing the exchange of discovery with a view to formulating judgments about the resolution of Contention 5 and the adequacy of the Applicants' proof in opposition to that contention. Matters exchanged in discovery are not

submitting the request may move the presiding officer . . . for an order compelling a response . . . *in accordance with the request.*" (Emphasis added.)

⁶ *Id.*

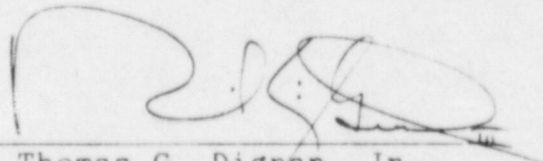
evidence -- and their substance is therefore not before the tribunal -- until the evidentiary hearing is convened and then unless and until a given discovery response has been offered and received into evidence. *E.g.*, 8 Wright & Miller, *Federal Practice and Procedure* 38, § 2007. The fact of the matter is that we are not now in hearing and the Applicants have not yet offered their proof.

For the foregoing reasons, the Applicants object to the order compelling further responses to Interrogatory No. 7.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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