



## II. BACKGROUND

A number of concerns relating to the design and design QA for piping and pipe supports were raised by CASE witnesses Messrs. Mark Walsh and Jack Doyle. Following the presentation of evidence by the Staff and Applicants on these concerns, the Board issued a Memorandum and Order stating that it had insufficient information on which to conclude that the design and design QA for piping and pipe supports at CPSES was adequate, and suggesting that the Applicants submit a plan for an independent review for pipe supports. "Memorandum and Order (Quality Assurance for Design)", LBP-83-81, 18 NRC 1410 (1983); "Memorandum and Order (Reconsideration Concerning Quality Assurance for Design)", LBP-84-10, 14 NRC 509 (1984) ("Design QA Order").

In response to the Board's Design QA Order, the Applicants submitted a plan for responding to the Board's questions on piping and pipe support design and design QA. "Applicants' Plan to Respond to Memorandum and Order (Quality Assurance for Design)" (February 3, 1984); "Supplement to Applicants' Plan to Respond to Memorandum and Order (Quality Assurance for Design)" (March 13, 1984) (collectively, "Applicants' Plan"). One aspect of the Applicants' Plan involved the submission of testimony and documentary evidence of tests and analyses addressing 16 technical issues originally raised by Messrs. Walsh and Doyle. Applicants' Plan, pp. 3-7. Applicants subsequently submitted approximately 16 summary disposition motions

motions on piping and pipe support design and design QA <sup>1/</sup> through the spring and summer of 1984. <sup>2/</sup>

Prior to the submission of these summary disposition motions, lengthy hearings were held on the Independent Assessment Program ("IAP") conducted by Cygna Energy Services ("Cygna"). A large portion of these hearings were devoted to technical discussions relating to piping, pipe support and cable tray support designs. After the filing of Applicants' first summary disposition motion, the Board and parties held a telephone conference call on May 24, 1984 to discuss, inter alia, the schedule and the procedures to be followed in responding to the Applicants' summary disposition motions. See Tr. 13797-98. As discussed in Section III.A below, the parties agreed to a procedure to resolve the Applicants'

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<sup>1/</sup> Applicants have referred to 16 summary disposition motions in other pleadings. See, e.g., "Applicants' Current Management Views and Management Plan for Resolution of All Issues" (June 28, 1985), p. 59. However, the Staff points out that the Applicants have also filed a summary disposition motion on AWS and ASME Code provisions on welding for pipe supports (April 5, 1985), as well as a "response" to a Board Order on A-500 steel (April 11, 1984). The subject matters of both of these Applicants filings were alleged by CASE to relate to pipe support design and were raised by Messrs. Walsh and Doyle. Hence, the Staff also regards these Applicants' filings as part of their Plan.

<sup>2/</sup> CASE responded to all of Applicants' summary disposition motions. The Staff responded to Applicants' summary disposition motion on AWS and ASME Code provisions for welding, and their summary disposition on, as well as Applicants' response on A500 steel and was in the process of assessing the remaining motions when the Applicants requested that the Board and Staff suspend their consideration of the summary disposition motions. Letter from Robert Wooldridge to Peter Bloch (March 21, 1984), p. 3, item 9.

summary disposition motions by written filings to the extent possible. <sup>3/</sup>  
On June 29, 1984, the Board issued its "Memorandum and Order (Written Filing Decisions, #1: Some AWS/ASME Issues), LBP-84-25, 19 NRC 1589 ("Written Filings Order"). The Written Filings Order memorialized the parties' agreement (made during a May 24, 1984 telephone conference) to resolve the Applicants' summary disposition motions through the use of written filings whenever possible, and resolved in favor of Applicants one of their summary disposition motions.

Apart from the pipe support design and design QA issues, Applicants had submitted summary disposition motions on protective coatings <sup>4/</sup> and the related matter of the J. J. Lipinsky trip report. <sup>5/</sup> Both CASE and the Staff responded to one of these summary disposition motions.

On September 25, 1985, the Applicants indicated that they were "unequivocally withdraw[ing]" all of their summary disposition motions which have not yet been resolved by the Board. "Applicants' Memorandum in Support of Motion for Modification with Respect to the Board's Memorandum of August 29, 1985 (Proposal for Governance of this Case)", p. 10. On October 2, 1985, the Board issued a "Memorandum and Order

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<sup>3/</sup> The parties' adoption of this procedure would appear to be consistent with the Board's previously-expressed desire that the parties would be able to submit "some of the open issues to this Board on written filings." See Memorandum (Clarification of Open Issues) (March 15, 1984), p. 5.

<sup>4/</sup> The summary disposition motions address near white blast (May 13, 1984), maximum surface roughness (June 26, 1984), and Westinghouse component coatings (September 5, 1984).

<sup>5/</sup> This summary disposition motion is dated September 29, 1984.

(Applicants' Motion for Modification)", LBP-85-\_\_\_, 22 NRC \_\_\_ ("Modification Order"). In its Modification Order, the Board acknowledged Applicants' withdrawal of their summary disposition motions and indicated that it would not act on the Motions. Modification Order, p. 4.

### III. DISCUSSION

#### A. Effect of the Written Filings Procedure "Stipulation"

The Staff does not consider the written filings proceeding "stipulation" <sup>6/</sup> as a bar to the Applicants withdrawal of their summary disposition motions. The genesis of the "written filings proceeding stipulation" may be found in a May 24, 1984 telephone conference among the Board and the parties. The conference call occurred in the period immediately following the filing of the first of Applicants' summary disposition motions on piping and pipe support design and design QA. The Chairman of the Board opened the telephone conference by indicating "the principle with which we are concerned today are the written motions to summary disposition filed by the applicants and whether or not the parties agree that these are addressing matters that should be able to be filed in writing." Tr. 13,797-98. After inquiring as to the Staff's schedule for responding to the summary disposition motions (Tr. 13,798-800), the Chairman asked:

[W]hether, in light of that process [of evaluating and responding to Applicants' summary disposition motions], you think that it would be

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<sup>6/</sup> The Staff notes that the agreement between the parties regarding the procedure to be following was not actually memorialized in a written stipulation.

~~fruitful to look forward to a situation where the Board would attempt to resolve these matters based on the written filing, supplemented, if necessary, by further written filings requested by the Board or by oral argument or, if the Board considers it necessary to resolve the issues fairly, by cross examination of specified witnesses. Would you prefer adopting a procedure at this point which favored the determination on written papers in the discretion of the Board?~~

Tr. 13,800-01 (emphasis added). Counsel for both the Staff and Applicants agreed that such a procedure would be acceptable. Tr. 13,801-02. CASE also agreed that the procedure would be acceptable, stating:

I think that that's a -- pretty much our feeling. I think it would be worth the effort to try to resolve the things on paper, if possible, and at the very least I think it would be worth our while because we could narrow the issues considerably, and at best, we might be able to resolve all of them on paper to the Board's satisfaction.

I think that's certainly a good way to approach it. I don't think at this point, without checking with Mr. Walsh or Doyle, what their schedules would be like as far as meeting. That seems like a reasonable way to proceed if we could, you know, work out some -- with them to be available.

Tr. 13,802-03. The Chairman reiterated the nature of the written filings procedure for CASE, asking:

You understand that what we were requesting is that the parties agree in advance that the Board would attempt to reach decisions based on the written filings and that we would only have additional -- we would only have a hearing or cross examination if the Board determined that that was necessary to make a recent decision. Is that an acceptable standard to you, Mrs. Ellis?

Tr. 13,803 (emphasis added). CASE responded affirmatively. Id.

It is clear, based upon the above-quoted portions of the May 24, 1984 telephone conference transcript, that the Board and parties agreed

to adopt ~~the~~ written filings procedure solely in order to expedite the litigation of the technical issues associated with the Walsh-Doyle piping and pipe support design/design QA concerns. <sup>7/</sup> It was never intended that the Board be limited to the first round of written-filings submitted by the Applicants. Rather, it was contemplated that the written-filings procedure would serve to narrow the issues-in-contention, such that the true technical differences between the positions of the parties would be highlighted. In this manner, the Board could focus its inquiries and assessment, and thereby expedite the progress of the hearing. The Staff's conclusion in this regard is further supported by the Board's Written Filings Order, where the Board explains the written filings procedure and its desirability as follows:

Another unusual aspect of the procedure is that we have adopted--with the permission of the parties--a somewhat more lenient standard for granting summary disposition. Whenever we find ambiguities requiring further clarification, we will ask questions (in writing or on the record), request briefs or otherwise seek to clarify matters fairly. Having done that, we will schedule a hearing (or cross-examination of one or more witnesses) only if we determine that the hearing is necessary for us to make a reasoned decision; we have described this as "adopting a procedure . . . which favored the determination on written papers in the discretion of the Board . . . " Tr. 13,798-13,800-13,801, 13,803.

The purpose of this more lenient standard for summary disposition is to avoid unduly prolonged hearings of technical matters, which generally are better resolved based on an understanding of the

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<sup>7/</sup> As stated in note 3 above, the parties' agreement to adopt the written-filings procedure is consistent with, and in furtherance of, the Board's earlier-expressed desire that the parties attempt to resolve issues in written-filings to the extent possible.

—facts rather than by use of a magical wand to discern truth telling. Our experience in these hearings is that the technical issues require careful study and the comparison of the views of the experts called by the parties. This is an arduous task that is helped by cross-examination only when there is substantial lack of clarity in the written filings or there are important disagreements that require clarification and resolution through the oral interchange provided by a hearing. Cross-examination rarely succeeds in unmasking experts as charlatans and tends to waste time.

Written Filings Order, pp. 2-3 (emphasis added). The Staff does not believe that either the Board or the parties ever intended that the written filings procedure would be anything other than an agreement to litigate the pipe support design and design QA issues in the form of written filings, to the extent possible.

In light of the clear words of the Board and parties regarding the nature of written filings procedure at the time of adopting the procedure as well as the Board's explanation of the purpose for adoption of the procedure in the Written Filings Order, it is Staff's position that the written filings procedure should not act as a bar to the withdrawal of the Applicants' summary disposition motions. <sup>8/</sup>

B. The Scope of the Written Filings Procedure "Stipulation"

As noted above, the Board and parties' discussion leading to the written filings procedure "stipulation" occurred soon after the first

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<sup>8/</sup> The Staff agrees with Applicants that the affidavits which accompany the summary disposition motions being withdrawn may be

group of Applicants' summary disposition motions on piping and pipe support design/design QA were filed. The quoted portions of the telephone conference transcript reveal that the entire focus of the discussion among the Board and parties was limited to the summary disposition motions on piping and pipe support design/design QA, even though at least one protective coating summary disposition motion (on near-white blast) had been filed as of the date of the telephone conference. See Tr. 13,797-806. Second, the Board's order which discussed the agreement of the parties in this matter (the Written Filings Order) refers only to pipe support design/design QA summary disposition motions:

This memorandum and order inaugurates a series of decisions intended to resolve, without further hearings, as many of the design quality assurance and design issues remaining in this case.

Written Filings Order, p. 1 (emphasis added). Finally, the Written Filings Order refers to the May 24, 1984 telephone conference transcript in discussing the parties' assent to the written filings procedure. Written Filings Order, pp. 2-3. This is evidence that the Board intended its Written Filings Order to memorialize the previous agreement of the parties, and not to expand the agreement to cover all summary disposition motions.

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

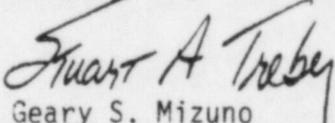
used by CASE for purposes that are consistent with the Commission's Rules of Practice (10 C.F.R. Part 2), such as impeachment. Applicants' Answer to Board Question Regarding Withdrawal of Motions for Summary Disposition (November 1, 1985, p. 7).

These factors, considered together, are strong evidence that the Board and parties understood that the written filings procedure was applicable only to Applicants' (and possibly CASE's) summary disposition motions on pipe support design/design QA. In any case, given the Staff's conclusions in Section IV.A. above that the written filings procedure does not bar the withdrawal of summary disposition motions, the Staff does not regard the matter of scope of the written filings procedure "stipulation" to be crucial to the resolution of the issue of Applicants' ability to withdraw their summary disposition motions.

IV. CONCLUSION

For the reasons set forth above, the Board should find that the written filings procedure agreed to by the parties during the May 24, 1984 telephone conference and memorialized in the Written Filings Order does not affect the Applicants' ability to withdraw all of its summary disposition motions.

Respectfully submitted,

*for*   
Geary S. Mizuno  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 8th day of November, 1985

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF VIEWS ON WITHDRAWAL OF APPLICANTS' SUMMARY DISPOSITION MOTIONS" 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 8th day of November, 1985:

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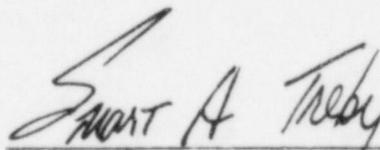
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