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04/29/87
N/A
CASE's Response to Apps.'
4/14/87 Mtn to Compel
(Interrogatories Set
1987-4) or Strike Doyle Aff.
N/A

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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-OL
COMPANY, <u>et al.</u>	}}	and 50-446-OL
(Comanche Peak Steam Electric	}}	
Station, Units 1 and 2)	}}	(Application for an
	}}	Operating License)

CASE'S 4/29/87 RESPONSE TO APPLICANTS' 4/14/87
MOTION TO COMPEL (INTERROGATORIES SET 1987-4)
OR, IN THE ALTERNATIVE,
TO STRIKE AFFIDAVIT OF JACK DOYLE

CASE (Citizens Association for Sound Energy), Intervenor herein, hereby files this, its Response to Applicants' 4/14/87 Motion to Compel (Interrogatories Set 1987-4) or, in the Alternative, to Strike Affidavit of Jack Doyle /1/.

Applicants state (Motion at page 3, first paragraph):

"When propounding interrogatories relating to positions taken by CASE in a pleading CASE has filed with the Board . . . the Applicants are only asking follow-up questions as a party is entitled to ask of any statement made by an adversary." (Emphasis added.)

Applicants have again missed the point, which CASE carefully tried to explain in detail in its 3/28/87 Response to Applicants' Interrogatories to Intervenor (Set No. 1987-4) and Motion for Protective Order. As stated therein (top of page 6):

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". . . in CASE's 12/30/86 Partial Response CASE was not contending anything, claiming anything, or taking a final and specific position on anything. When CASE is ready to do so, we will not be shy about so advising Applicants." (Emphasis added.)

We note also that Applicants' comparison between Mr. Doyle's affidavit and the letter from Henry Stiner is hardly comparable. And we point out that the Board has used its discretionary authority on occasion (and over CASE's strong objections) to allow a non-party to utilize privileges normally reserved only to admitted parties (when it allowed Cygna's attorney and expert witness to cross-examine CASE's witnesses during the Cygna hearings).

CASE also takes strong exception to Applicants' statement at page 4, as well as Applicants' insinuations in the quoted portion of 10 CFR 2.708(c) as to CASE's motivations, where Applicants' refer to "CASE's attempt retroactively to disavow Mr. Doyle's affidavit" (emphasis added). To the contrary, CASE made its intent abundantly clear in its 12/30/86 Partial Response, as we quoted specifically on page 2 of our 3/28/87 Response. We made clear from the beginning what our 12/30/86 Partial Response was intended to be, and that was the extent of it.

We further note that it appears to CASE that whether or not to strike documents is at the discretion of the Board, not the Applicants; and the regulations, as quoted by Applicants, state that a document "may be stricken" (emphasis added), not that it must be stricken (as Applicants contend at the bottom of page 5 and on page 6). The deciding factor in this case, based upon all the circumstances and discussions in the various filings, should, CASE believes, be whether or not the Board finds Mr. Doyle's comments helpful; this was the reason his affidavit was submitted in the first place, and if the Board does not find them so, both Mr. Doyle and CASE's representative who typed his affidavit will save ourselves the time, trouble, and effort in the future should

the Board so desire. Certainly we have no intention of voluntarily allowing Applicants to use legalistic maneuverings merely for the purpose of harassment and taking up our time.

Applicants state on page 5:

". . . the Partial Response noted that 'CASE could comment on each and every one of Applicants' statements . . .'" (Emphasis in Applicants' original.)

However, we did not, and we made very clear (CASE's 12/30/86 Partial Response at page 1) that this was not our intention in our filing, and specifically stated what was and was not included in our filing. Applicants chose to ignore this.

Applicants further state at page 5:

". . . the Partial Response . . . further noted that '[t]his pleading is limited to some specific points and comments which CASE witness Jack Doyle . . . believed might be helpful to the Board . . .'" (Emphasis in Applicants' original.)

CASE has made abundantly clear that, at this point in time, we consider Mr. Doyle (and all other experts with which CASE may be working) to be in the category of non-testifying experts (for instance, at page 3, first full paragraph, of CASE's 3/28/87 Response). If the Board will notice, CASE normally titles any affidavits filed by CASE for either Messrs. Doyle or Walsh in this manner, even though we usually have not asked that such affidavits be admitted into evidence. This is the doing of CASE's Dallas non-lawyer representative, and is intended only for purposes of identification; perhaps it is something of a misnomer, since clearly such affidavits are not affidavits as witnesses unless they are admitted into evidence. As is obvious, and as clearly stated in our 3/28/87 Response (page 2, last paragraph), "CASE has not asked that Mr. Doyle's Affidavit be

admitted into evidence, and his Affidavit has not been subjected to the usual requirements for admission into evidence."

With regard to Applicants' statement (page 5) that:

". . . the Partial Response . . . revealed CASE's involvement in the preparation of the affidavit in stating that '[w]e have attempted to include sufficient quotations. . . .from Applicants' pleading to allow the Board to easily follow' the points in that affidavit."

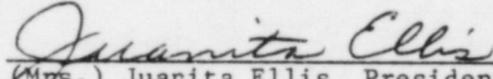
It is no secret that CASE typed Mr. Doyle's Affidavit. Having been cautioned by the Board in a past Board Order that we should be certain to include sufficient information for the Board to be able to easily follow what we were trying to say /2/, CASE has tried to do so ever since and, in this instance, did ascertain from Mr. Doyle the portions of Applicants' 12/1/86 Response to which he was referring and did indeed try to see that those portions were quoted -- for the convenience of the Board and in compliance with past Board directives. We make no apology for "CASE's involvement" and see no need for this or further explanation.

There is another important point which Applicants' pleading has raised, however, which CASE believes should be considered and addressed by the Board, and that is: What exactly is the standing of Applicants' 12/1/86 Response to Board Concerns anyway? What exactly does it really mean? It was not in affidavit form, but was instead signed by Applicants' counsel Mr. Gad, apparently on behalf of Applicants and the attorneys with Ropes and Gray and attorney Mr. Wooldridge of Worsham, Forsythe, Samples & Wooldridge. How much weight has been and should be accorded to that filing? CASE considers it in the category merely of information which may be helpful to the Board -- just as we consider Mr. Doyle's affidavit to be -- nothing more. Applicants state (second paragraph, page 3) "CASE chose to submit its views on the Applicants' pleading";

although this is a misstatement (as discussed previously), why should Applicants' 12/1/86 filing be allowed, yet Mr. Doyle's affidavit be stricken -- and the Board to receive only information which the Applicants believe is helpful to the Board?

CASE has already throughly stated its views regarding this matter. Should the Board believe that Mr. Doyle's affidavit, under the conditions stated by CASE, is not helpful to the Board and/or is not appropriate, CASE asks that the Board so advise and CASE will voluntarily withdraw the affidavit.

Respectfully submitted,



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Co-Representative for CASE

/1/ CASE's response is timely filed today; no extension was needed or sought.

/2/ CASE does not recall the specific Board Order in which this was contained at the moment. However, we believe the Board will recall the instance; if not, CASE will supply further details should the Board so request.

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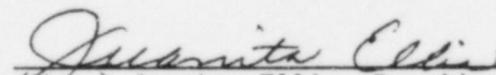
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