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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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NRC

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)	
)	
TEXAS UTILITIES ELECTRIC)	Docket Nos. 50-445-CPA
COMPANY, <u>et al.</u>)	
)	
(Comanche Peak Steam Electric)	
Station, Unit 1))	

NRC STAFF COMMENTS ON CLI-86-15

Geary S. Mizuno
Counsel for NRC Staff

September 30, 1986

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I. INTRODUCTION

On September 19, 1986 the Commission issued a Memorandum and Order, CLI-86-15 in this proceeding. CLI-86-15 provides the Commission's answer to the question certified to it by the Atomic Safety and Licensing Appeal Board regarding the admissibility of CASE/Meddie Gregory Contention 1.

On September 22, 1986, the Appeal Board issued an order inviting the parties to file briefs with the Appeal Board commenting on CLI-86-15. In this filing the Staff presents its position on the effect of CLI-86-15 on this proceeding.

II. BACKGROUND

On May 2, 1986, the Licensing Board issued an order admitting CASE and Meddie Gregory as Consolidated Intervenors in this proceeding, and admitting a single consolidated contention. See "Special Prehearing

Conference Memorandum and Order." The consolidated contention of CASE and Meddie Gregory asserts:

Applicants have not met their burden of proving that the delay in completion of construction was not caused by their own dilatory conduct.

- a. Applicants have not given any reason for the existence of the delay. They only assert they need more time for a reinspection, redesign, and reconstruction program but they do not disclose the reason why such programs are needed or that the reason for delay was not intentional and without a valid purpose.
- b. The real reasons for the delay in construction completion were that:
 1. Applicants deliberately refused to take positive action to reform their QA/QC program in the face of consistent criticism, and
 2. Applicants have failed to properly design their plant, specifically:
 - i. Applicants failed to correctly apply fundamental engineering principles,
 - ii. Applicants failed to properly identify unique designs in their PSAR,
 - iii. Applicants constructed much of their plant prior to its design having been completed,
 - iv. Applicants have failed to comply with 10 CFR Part 50, Appendices A and B, including their failure to promptly identify and correct design deficiencies, and deliberately refused to take positive action to correct such deficiencies.

Both the Applicants and the Staff appealed from the Licensing Board's decision. After the filing of briefs and oral argument, the Appeal Board

certified the following question to the Commission, pursuant to 10 C.F.R.

§ 2.718(i):

Is the admitted CASE/Meddie Gregory contention . . . foreclosed as a matter of law by Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1 & 2), CLI-82-29, 16 NRC 1221, 1230-31 (1982)?

Memorandum and Order (July 2, 1986) slip op. at 11.

III. DISCUSSION

The Commission's decision in CLI-86-15 must result in the reversal of the Licensing Board's decision admitting the consolidated contention of CASE and Meddie Gregory. According to the Commission, permittees may demonstrate good cause for a construction permit (CP) extension in two ways. On one hand, a permittee may establish good cause for the extension by showing that there was good cause for the past delay in plant completion, citing the Commission's earlier decision in Public Service Company of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975 (1984) (Seabrook). CLI-86-15, slip op. at 5.

Alternatively, under the Commission's previous holding in WPPSS, a permittee may show good cause by demonstrating that there is at present good cause to allow more time for plant completion. CLI-86-15, slip op. at 5-6. The Commission indicated that its decision in WPPSS was intended to encourage permittees to "conduct vigorous internal investigations and remedial safety actions by not penalizing them for any completion delay caused thereby." CLI-86-15, slip op. at 6, citing WPPSS, 16 NRC at 1230-31. However, in CLI-86-15 the Commission expanded upon the rationale of WPPSS to hold that the determination of

present good cause for a CP extension does not depend upon whether the violations requiring correction were innocent, as opposed to negligent or intentional. CLI-86-15, slip op. at 6.

Thus, the Commission stated:

[I]f a utility were to adopt a corporate policy to construct a plant in willful violation of NRC requirements, but were then to reverse that policy, remove the wrongdoers, and embark on a new effort to construct a safe plant . . . we could find that the new policy constitutes "good cause" for an extension. We will not penalize a current management for the mistakes of its predecessors in this regard.

Id., citing Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 296-306 (1985), Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1135-40 (1985).

The Commission then proceeded to apply these principles to the situation in this proceeding. The Commission concluded that if Applicants' request for a CP extension was predicated upon present good cause due to the institution of a corrective action program (a supposition which the Commission apparently feels is supported by the representations in the Applicants' request, see CLI-86-15, slip op. at 7, n.3), then the CASE/Meddie Gregory consolidated contention is barred by WPPSS because it focuses only upon the Applicants' past conduct. Id., at 7. As the Commission stated, a "contention worded like this one and directed only at past conduct would not be sufficient, even if true, to defeat the extension." Id.

On the other hand, the Commission declined to apply the Seabrook analysis to the circumstances of this proceeding. The Commission noted

that an unthinking application of the Seabrook holding would result in a situation where a finding that construction delays arose from a deliberate corporate policy to construct the plant in violation of NRC requirements would "virtually never defeat a CP extension". This is because such a policy could not be characterized as "dilatatory", since it is likely that the policy was intended to speed, rather than delay, construction. CLI-86-15, slip op. at 7-8. Moreover, the Commission pointed out that the Seabrook analysis would result in dismissal of contentions "even if the deliberate corporate policy to construct in violation were an ongoing one, for even an ongoing policy would have the valid business purpose to speed construction and not be 'dilatatory'". Id. at 8. Accordingly, the Commission declined to apply the Seabrook framework to this proceeding. The Commission instead decided to follow the analysis of WPPSS, which balanced the need to deter wrongdoing against the desire of the Commission not to penalize current management for the mistakes of its predecessors. Accordingly, the Commission held:

[I]f there was a corporate policy to speed construction by violating NRC requirements, and that policy was discarded and repudiated by the permittee, any delays arising from the need to take corrective action would be delays for good cause.

Id. at 8-9. Thus, the Commission indicated that a contention worded like that of CASE's and Meddie Gregory's consolidated contention, "would not be sufficient, even if true, to defeat the [CP] extension. Id.

It is the Staff's position that the Commission answered the question certified to it by the Appeal Board in the affirmative, holding that WPPSS precludes admission of the admitted CASE/Meddie Gregory consolidated

contention as a matter of law, because the contention is predicated on the past conduct of the Applicants. See CLI-86-15, slip op. at 6-7. It is also the Staff's view that the Commission went further to decide that the WPPSS, rather than the Seabrook analysis should be employed to determine whether or not good cause exists for a CP extension in proceeding such as these, where it is alleged that the permittee's policy was to violate NRC requirements. Thus, good cause would be found where the policy of violating NRC requirements is discarded and repudiated by the permittee - for example, where the permittee were to "remove the wrongdoers and embark on a new effort to construct a safe plant in full compliance with NRC requirements." See CLI-86-15 at 6. It has not been disputed that Applicants have brought in new management officials, and have instituted a reinspection, reevaluation and corrective action program for both Units 1 and 2 of the CPSES facility. Cf. CLI-86-15 at p.7, n.3. The Staff submits that under these circumstances, the Commission was correct in concluding that the CASE/Meddie Gregory consolidated contention, being directed only at past conduct, is not admissible in this proceeding. Id. at 9.

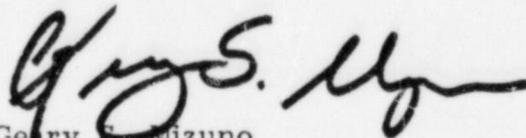
In light of the Commission's holdings, the Staff submits that the Appeal Board should reverse the Licensing Board's decision admitting the consolidated contention. The consolidated contention was the sole contention admitted by the Licensing Board, and its rejection deprives the Consolidated Intervenors of any further grounds for intervention. See Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424 (1973). Dismissal of the

petitions for intervention and termination of the proceeding by the Appeal Board is appropriate under these circumstances.

IV. CONCLUSION

The Appeal Board should reverse the Licensing Board's decision admitting the consolidated contention, dismiss the intervention petitions of Consolidated Intervenors CASE and Meddie Gregory, and terminate the proceeding.

Respectfully submitted,



Gerry S. Mizuno
Counsel to NRC Staff

Dated at Bethesda, Maryland
this 30th day of September, 1986

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF COMMENTS ON CLI-86-15" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or as indicated by (*) through deposit in the Nuclear Regulatory Commission's internal mail system, or (**) hand delivery, this 30th day of September, 1986:

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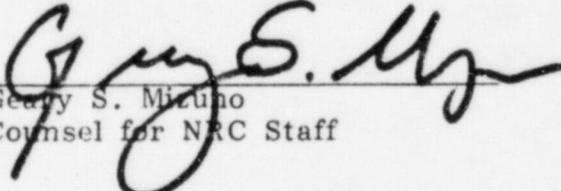
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