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BEFORE THE
UNITED STATES
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board 86 NOV -7 P12:27

In the Matter of
TEXAS UTILITIES GENERATING COMPANY,
et al.
(Comanche Peak Steam Electric
Station, Unit 1)

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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Dkt. Nos. 50-445-CPA

CONSOLIDATED INTERVENORS' MOTION FOR RECONSIDERATION

By order dated October 30, 1986, this Board denied admission of Consolidated Intervenor's Contention 1. Consolidated Intervenor respectfully request that the Board reconsider the denial. The contention is intended to narrow the issues to be litigated in this proceeding to the single issue raised by TUEC's application for an amendment and decided by the Staff's granting of that amendment. As such, it is an appropriate contention which conforms to the policy of the NRC to avoid raising issues in a licensing proceeding that are beyond the scope of that proceeding.

One critical factor makes this case different from the typical licensing proceeding: the utility has already received the license amendment it sought and the hearing is supposed to decide whether the license amendment should have been granted. TUEC has presented its case and the licensing decision has been made by the Staff. Absent a new application for a construction permit extension, TUEC is bound to the bases, although not the supporting facts, given in its already filed and approved

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application.

Consolidated Intervenor's Amended Contention 1 alleges that in its application TUEC has not claimed that it has a good cause for the delay in construction. This Board has twice acknowledged the validity of that allegation. Memorandum and Order, May 2, 1986, p. 10, and Memorandum and Order, Oct. 30, 1986, p. 7. Consolidated Intervenor's are entitled to have this contention admitted into this proceeding so that it can seek a ruling on the contention and foreclose TUEC from presenting evidence that is intended to prove that its delay in construction was for a good cause. Before TUEC can make such a claim and offer evidence in support of that claim, it must do what it has steadfastly refused to do: it must give its version of why construction at Unit 1 was delayed and allege that the delay was for a good cause. That will provide a claim which Consolidated Intervenor's can contest and, if appropriate, file a contention opposing the claim. Since the Commission in CLI-86-15 has identified two possible theories for obtaining a construction permit extension, the purpose of Contention 1 is to narrow the issues in this proceeding to the only theory claimed by TUEC, i.e., that it has a good cause for the extension.

In its Memorandum and Order this Board rejected Contention 1 (p. 7) because:

1. "it contains assumptions that are more properly the subject of motions than of contentions;"
2. it "suggest[s] that Applicants' failure to allege good cause for past delay should be a barrier to their later deciding to show good cause for past delay;" and

3. it incorrectly assumes "that it is necessary to identify the cause for past delay in order to repudiate the causes of that delay."

We respectfully disagree with the first reason, agree with the second statement, but disagree with conclusion reached from it, and acknowledge in theory the correctness of the third conclusion but suggest an alternative remedy to striking down the entire contention.

As already discussed above, the contention in question is preliminary to a motion for summary disposition on one of the two possible theories TUEC could use to seek to obtain a construction permit extension, i.e., on the theory that it has a good cause for the delay. The fact that the issue can be presented by motion is not in and of itself a reason to forbid the contention. The contention here, as in any case, focusses the intervenor's concern and puts the utility on notice that it cannot offer evidence to support or prevail on a theory that it has not claimed. Without requiring TUEC to make such a claim, Consolidated Intervenors cannot know what to plead as a contention in opposition to TUEC's unarticulated reason for the delay. The proper procedure is for Consolidated Intervenors to contend that the failure of TUEC to make the required allegation is a fatal defect, and once the contention is admitted move for summary disposition. TUEC can only avoid this course by seeking to amend its construction permit extension application or filing a new one, in which it alleges its position.

The Board correctly finds that Consolidated Intervenors'

contention seeks to bar TUEC from later showing that they have good cause for delay, at least until such time as they file an acceptable pleading in which they allege what is that good cause and thus provide Consolidated Intervenors with an opportunity to file contentions in opposition to that allegation. A permittee is as capable as an intervenor of being denied an opportunity to present evidence and make proof if it has not first pled its position. The need to articulate contentions and bases cannot, within the limits of due process of law, be a one-way street. Concededly, in most cases -- maybe all cases but this one -- the applicant fully articulates its contention and bases in its application and there is no need to require more. TUEC, however, has already proven itself to be far different than any other applicant, not the least significant example being its singular and precedent-setting failure to timely seek a renewal of its construction permit. It is manifestly unfair to Consolidated Intervenors to hold, as this Board appears to do here, that an intervenor must be prepared to present an affirmative case on and defend against not only the claims an applicant has made but also the ones it might have made.

The Board finds that in theory a program such as the CPRT could be so complete that it would obviate the need for identifying the cause for the delay. If this is correct, the Board should not reject Contention 1, only a small portion of which claims that the cause for delay must be revealed, but should qualifiedly admit the contention by listing the factors that must exist in the CPRT program to avoid the need to find the cause for the delay. Those factors would have to include at

least 100% reinspection (avoiding the need to use generic implications to broaden areas of reinspection and/or sample sizes) and total independence of the effort including all decisionmakers at every level for program development and implementation, including all rework (avoiding the need to identify which persons caused or allowed the delaying problems to occur). Absent an identification of the factors to be met and the conditional acceptance of the contention, Consolidated Intervenor's are denied the right to pursue a contention based on the mere possibility that TEUC will meet a standard that this Board has not defined.

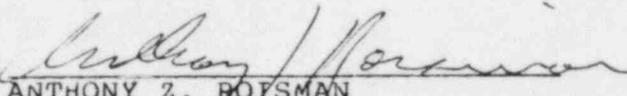
Finally, the contention not only relates to TUEC's failure to plead any good cause for delay but also its failure to provide any bases or evidence to support its claim that there is good cause for the extension. The fact is TUEC was granted the extension of its permit in the face of allegations by CASE that the delay was caused by its own deliberate refusal to obey regulations. The Commission has ruled that in such a case the extension cannot be granted unless the utility discards and repudiates the past policies and replaces the responsible parties. TUEC has never claimed to have done so because it has never identified the failed policies and never identified the responsible parties.¹ On the record, as opposed to in the legal

¹ The existence of the CPRT cannot be the required replacement of persons and discontinuing and repudiating of policies since it is not a program "of record" but is instead the creation of TUEC's lawyers, not of TUEC itself or of its management. Prehearing Conference (November 12, 1985), Tr. pp. 24,238-239. It is a device to rationalize TUEC's past conduct, not to correct it.

pleadings, TUEC should not have had an extension of its permit and the Staff should not have granted it. Consolidated Intervenors should be allowed to plead that in their contention also.

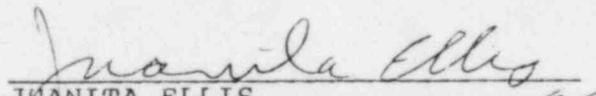
Consolidated Intervenors respectfully request that this Board reconsider that portion of its October 30 Memorandum and Order that denied admission of Amended Contention 1 and allow the contention in the case.

Respectfully submitted,



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Dated: November 4, 1986

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CERTIFICATE OF SERVICE

I hereby certify that copies of CONSOLIDATED INTERVENORS' MOTION FOR RECONSIDERATION were served today, November 4, 1986, by first class mail, or by hand where indicated by an asterisk, and by Federal Express where indicated by two asterisks, upon the following:

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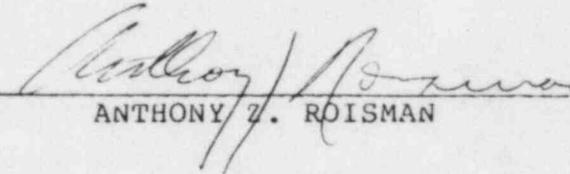
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