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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'87 SEP 18 P2:22

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DEPT. OF ENERGY
DOCKETING SERVICE
BRANCH

In the Matter of	}}	
	}}	
TEXAS UTILITIES ELECTRIC	}}	Docket Nos. 50-445-CPA
COMPANY, <u>et al.</u>	}}	
(Comanche Peak Steam Electric	}}	(Application for a
Station, Units 1 and 2)	}}	Construction Permit)

CASE'S MOTION TO COMPEL APPLICANTS
TO SUPPLY COMPLETE ANSWERS TO CONSOLIDATED INTERVENORS'
INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS
TO APPLICANTS (6/19/87) /1/

On June 19, 1987, Consolidated Intervenors filed discovery requests to each of the four owners of Comanche Peak which constitute "Applicants" in these proceedings. We received responses dated August 14, 1987, from Texas Utilities Electric Company, Brazos Electric, and Texas Municipal Power Agency, and received something of a response (which CASE does not accept as being full or complete) from Tex-La attached to the August 31, 1987, Response of Tex-La Electric Cooperative of Texas Inc. to the Motion of Brazos Electric Power Cooperative, Inc. for Declaratory Order.

/1/ See: Consolidated Intervenors' Interrogatories and Request for Production of Documents to Applicant Brazos Electric Power Cooperative (6/19/87); Consolidated Intervenors' Interrogatories and Request for Production of Documents to Applicant Texas Municipal Power Authority (sic) (6/19/87); Consolidated Intervenors' Interrogatories and Request for Production of Documents to Applicant Texas Utilities Electric Company (6/19/87); and Consolidated Intervenors' Interrogatories and Request for Production of Documents to Applicant Tex-La Electric Cooperative of Texas, Inc. (6/19/87).

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CASE now finds it necessary to file this motion to compel pursuant to 10 CFR 2.740(f) /2/. Applicants have failed to respond, or provided incomplete and sometimes evasive responses, to many of the interrogatories. Prior to filing their responses, Applicants made no attempt to contact CASE to clarify any of these interrogatories that they may have found objectionable, and have not provided any specific basis for the blanket objections which were utilized in some of the responses.

CASE finds itself in the unusual situation of having to file motions to compel against each of the four Applicants: Texas Utilities Electric Company (TUEC) (the primary owner); Brazos Electric; Texas Municipal Power Agency (TMPA); and Tex-La Electric. However, it is not certain at this time how the Board will rule regarding the minority owners' requests for the Board to assist them in assuring that they can fulfill all of their obligations in these proceedings without being sued by Texas Utilities (see: Brazos's 8/14/87 Motion for Declaratory Order; 8/14/87 Response of Texas Municipal Power Agency to "Consolidated Intervenors' Interrogatories and Request for Production of Documents to Applicant Texas Municipal Power Authority(sic) (6/19/87)" and Motion for Protective Order; 8/31/87 Response of Tex-La Electric Cooperative of Texas Inc. to the Motion of Brazos Electric Power Cooperative, Inc. for Declaratory Order; and other related filings). CASE is filing this Motion to Compel as though each of the minority owners were obligated to respond (which CASE believes to be correct).

/2/ This motion is being filed today in accordance with the Board Chairman's ruling during an 8/31/87 telephone conference call with the parties.

Should the Board rule that Texas Utilities is responsible for supplying all responses, CASE requests that the Board treat all of the Motions to Compel filed against the minority owners as Motions to Compel against Texas Utilities, and that Texas Utilities be ordered to respond fully and completely on behalf of each of the minority owners. CASE notes, however, that should the Board rule that Texas Utilities is responsible for supplying all responses, it appears that it would still be necessary for the Board to take additional steps (such as the minority owners' supplying CASE with certain documents under a protective order as has been ordered before; see Board's 11/28/86 Memorandum and Order (Discovery of Tex-La Documents), upheld by ALAB-870, Appeal Board's 8/27/87 Memorandum and Order). Further, CASE believes that it would be necessary in such an event for the Board to ensure that Texas Utilities supply all information and documents which each of the minority owners believe are responsive to CASE's discovery requests. This is especially crucial to the preparation of our case in light of TUEC's historically narrow and severely limited interpretation of CASE's admitted contention and our right to discovery, of NRC regulations, of the Board's Orders and guidance, as well as its refusal to comply with the Instructions stated in our discovery requests.

Regardless of the specific ruling which the Board makes, however, it is clear that CASE is entitled to the information requested, one way or another (as discussed herein and in the 9/8/87 CASE's Answer to 8/14/87 Motion for Declaratory Order by Brazos Electric Power Cooperative, Inc. (OL and CPA) and CASE's Answer to 8/14/87 Motion for Protective Order by Texas Municipal Power Agency (CPA)). Equally clear is that all Applicants have responsibilities which must be fulfilled. The Board, in its 5/4/87

Memorandum and Order (Appointment of Legal Counsel; Clarification of Discovery) stated (pages 4 and 5):

"We find that minority members are responsible for assuring the completeness of our factual record and the adequacy of factual responses to discovery. We agree with Staff (with a few wording changes of our own) that Applicants must either transmit to the Board the differing views of minority Applicants concerning factual matters or must permit, without threat of legal action, minority applicants to bring factual information to the parties and the Licensing Board.

"In this respect, we find that Texas Utilities Electric Company has an obligation that goes beyond its representations to us. Minority owners have independent responsibilities to this Board. Texas Utilities must not interfere with them in any way in fulfilling those responsibilities." (Footnotes omitted.)

RELEVANT LAW AND REGULATIONS REGARDING DISCOVERY

The basic requirements under NRC regulations for responding to discovery requests are well known to all parties in this proceeding. For the record and because in the past three of the four Applicants have not been active participants in these proceedings, CASE points out some of the specific basic discovery principles on which we rely:

The Nuclear Regulatory Commission (NRC) Rules of Practice provide discovery of:

". . . any matter, not privileged, which is relevant to the subject matter in the proceeding, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." 10 CFR 2.740(B)(1).

In general, the discovery rules follow the Federal Rules of Civil Procedure (FRCP). However, the Federal Rules and court decision interpreting those rules are not authoritative, but instead provide

guidelines and/or guidance for the interpretation of the NRC discovery rules. Allied-General Nuclear Services, et al., (Barnwell Fuel Receiving and Storing Station), LBP-77-13, 5 NRC 489 (1977); Detroit Edison Co., et al., (Enrico Fermi Atomic Power Plant, Unit 2) LBP-78-37, 8 NRC 575, 581 (1978).

As with the Federal Rules, discovery is liberally granted and construed to enable the parties to determine facts and refine issues, and prepare adequately for more expeditious hearings. Texas Utilities Generating Company, (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241-243 (1981), Pacific Gas and Electric Company, (Stanislaus Nuclear Power Project, Unit 1) LBP-78-20, 7 NRC 1038, 1040 (1978); see, Illinois Power Company, (Clinton Power Station, Unit 1) LBP-81-61, 14 NRC 1735, 1742 (1981). Discovery in litigation before the courts, as well as in NRC licensing proceedings, is intended to insure that "the parties have access to all relevant, unprivileged information prior to the hearing." (Boston Edison Company, (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 582 (1975)).

The scope of discovery permitted under the rules is very broad. It is well-settled that a party has the right to find out what the other parties know with respect to a particular contention, viz., the positions of adversary parties and the information available to those parties to support their position. Pennsylvania Power & Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), ASLB Memoranda and Orders, January 4, 1980, slip op. at p. 6 and August 27, 1979, slip op. at pp. 5-6. Discovery inquiries are limited only by the requirements that they be reasonably relevant to a sensible investigation, Pilgrim, LBP-75-30, supra at 582, and the information sought is reasonably calculated to lead to the

discovery of admissible evidence, 10 CFR 2.740(b)(1). The test is one of general relevance, and unless it is clear that the evidence sought can have no possible bearing on the issues the test will be satisfied. Commonwealth Edison Co., (Zion Station Units 1 and 2), ALAB-185, 7 AEC 240 (1974); see also Allied-General, supra. at 489.

The Appeal Board in Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), 12 NRC 317 (1980) discussed the conduct of discovery in NRC proceedings. That decision confirms and reinforces the preceding.

Many of the arguments and objections advanced by Applicants in this proceeding have been based on subject matter relevance. Previous Boards have determined that subject matter relevance is determined by an analysis of the issue involved. PG&E, supra., at 1040.

For those interrogatories that are not adequately answered on the basis of subject matter relevance, CASE has submitted a brief argument in support of its position that the sought-after information is relevant and within the scope of permissible discovery. This is sufficient because the burden of establishing relevancy of its propounded interrogatories is slight. However, Applicants' burden of establishing the basis for any requested protective order is great. 10 CFR 2.740(c) provides that in order to obtain a protective order, the requesting party must demonstrate that:

- (1) The information in question is of a type customarily held in confidence by its originator;
- (2) There is a rational basis for having customarily held it in confidence;
- (3) It has, in fact, been kept in confidence; and

(4) It is not found in public sources.

Kansas Gas and Electric Company, (Wolf Creek Nuclear Generating Station, Unit 1) ALAB-327, 3 NRC 408 (1976).

In some instances, Applicants have sought, without explanation, a protective order on all of the information not provided in response to various interrogatories. There is no attempt by Applicants to meet the test.

A party to an NRC licensing proceeding is not excused from making timely responses to discovery requests because of a lack of complete knowledge or because the party has only partial knowledge of the answer. See Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 583 n. 10 (1975). That party must answer discovery requests to the best of its ability, and if the party claims a lack of sufficient information to provide any response at the time answers are due, the party should answer by providing the information when available. Id. Answers must be responsive and complete to the extent information is now available. See Pilgrim, supra 1 NRC at 583 n. 10, 586; see also 10 CFR 2.740(f).

With respect to objections to discovery requests, the burden of persuasion is on the objecting party to show that the interrogatory should not be answered. Pilgrim, LBP-75-30, supra at 583. General objections are not sufficient. Id. Indeed, answers to discovery requests are important to a party's ability to prepare its case for trial. Claims that responses would be unduly burdensome, time-consuming and expensive are merely general, unsupported assertions, and thus are insufficient to sustain the burden of persuasion. Pilgrim, supra, 1 NRC at 583.

See also NRC Rules of Practice, 10 CFR 2.740b(b) and 2.741(d). These regulations require that a party must timely respond or state its objections with respect to each interrogatory or request to produce.

We also note that additional background regarding NRC regulations governing discovery was contained in CASE's 10/15/86 Motion to Compel regarding Applicants' 9/26/86 Answers to CASE CPRT Program Plan Interrogatories, Set 1 and 2, and CASE's 11/28/86 Motion to Compel Answers to Sets 3-7. We will not repeat it here.

MOTIONS TO COMPEL

Throughout each of the three minority owners' filings /3/, there is a common theme, concern, and request to the Board. This was discussed in some detail in CASE's 9/8/87 Answer to 8/14/87 Motion for Declaratory Order by Brazos Electric Power Cooperative, Inc. (OL and CPA) and CASE's Answer to 8/14/87 Motion for Protective Order by Texas Municipal Power Agency (CPA); we will not repeat those arguments here, but incorporate them herein by reference. There appear to be at least five documents which the minority owners should now provide to CASE in response to our discovery requests (certainly the relevance test has been passed according to the minority owners themselves). CASE considers these (and any other similar documents

/3/ 8/14/87 Objections and Responses of Brazos Electric Power Cooperative, Inc. to Consolidated Intervenor's Interrogatories and Request for Production of Documents (6/19/87), 8/14/87 Response of Texas Municipal Power Agency to "Consolidated Intervenor's Interrogatories and Request for Production of Documents to Applicant Texas Municipal Power Authority(sic) (6/19/87)" and Motion for Protective Order, and 8/31/87 Response of Tex-La Electric Cooperative of Texas Inc. to the Motion of Brazos Electric Power Cooperative, Inc. for Declaratory Order.

now or in the future) to be absolutely essential to the preparation of our case and to preserve CASE's due process rights. We move that the Board order them supplied immediately.

In addition, CASE files the following Motions to Compel:

Motion to Compel Brazos:

In several instances throughout the Responses from Brazos, statements such as (or very similar to) the following are made:

1. "Brazos objects to this interrogatory, as it pertains solely to employees of TU Electric, and should properly be directed to TU Electric."

This applies to Interrogatory No. 4, which states:

"4. Identify each of the person(s) who are or were at supervisory level or above at the plant for any Applicant, contractor, subcontractor, or consultant after February 1985 who is/are listed in the answer to interrogatory 3 above, and list all positions held by such persons(s), by whom he/she was employed, and the dates of such employment since February 1985."

Brazos stated that it "objects to this interrogatory, as it pertains solely to employees of TU Electric, and should properly be directed to TU Electric." However, in its response to Interrogatory 3 referenced in Interrogatory 4, Brazos stated, in part (page 9):

". . . Brazos is conducting discovery in the state court litigation in order to determine more fully when, how, and by whom the policies underlying these actions were formulated and implemented, and expects to supplement this answer as information becomes available."

If Brazos had given the same answer to Interrogatory 4 as it did to Interrogatory 3, that would have been an acceptable answer to CASE. Or if Brazos had answered that it does not know the answer to Interrogatory 4, that too would have been a different matter. However, neither of those was its response. As required by NRC regulations, Brazos must answer (if such

answer is known by Brazos) to the best of its ability at this time and supplement its response if new information becomes available which indicates its answer is no longer accurate and complete. (See discussion at page 7 preceding.) CASE moves that the Board order Brazos to answer.

2. "As TU Electric is solely responsible for construction and licensing of Comanche Peak, the interrogatory does not and cannot refer to Brazos's actions. Brazos has no information on the subject of this interrogatory that is not in the possession of TU Electric, which is obliged under the Joint Ownership Agreement to respond fully and completely, on Brazos's behalf, subject to any and all proper objections which it may assert."

This applies to Interrogatory Nos. 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32. These interrogatories request information of which Brazos is aware. The fact that TU Electric is aware of such information does not necessarily ensure (as is obvious from the 8/14/87 filings of Brazos and TMPA, and the 8/31/87 filing of Tex-La which are now before the Board) that CASE will ever be aware of it. CASE does not expect Brazos (or any of the minority owners, for that matter) to repeat everything which has already been told to CASE by TUEC. However, as required by NRC regulations, Brazos must answer (if such answer is known by Brazos) to the best of its ability at this time and supplement its response if new information becomes available which indicates its answer is no longer accurate and complete. (See discussion at page 7 preceding.) CASE moves that the Board order Brazos to answer each of the interrogatories in question.

3. "Insofar as this interrogatory refers to criticisms directed to TU Electric, TU Electric is obliged under the Joint Ownership Agreement to respond fully and completely, on Brazos's behalf, subject to any and all proper objections which it may assert.

"Brazos objects to this interrogatory insofar as it may request criticisms which have been communicated directly to Brazos, as distinguished from criticisms relayed to Brazos by TU Electric.

All such criticisms, with the exception of those generated in connection with litigation initiated by TU Electric against Brazos on May 29, 1986, have been provided to TU Electric, which has sole power to take appropriate actions thereupon. Criticisms contained in reports prepared for Brazos or its counsel in connection with said litigation are privileged and will not be provided absent the entry of an appropriate protective order. Brazos intends to comply fully with all disclosure obligations imposed on it as a permittee and license applicant."

This applies to Interrogatory No. 7. See CASE's comments regarding items 1, 2, and 4 above and following. CASE moves that the Board order Brazos to answer each of the interrogatories in question.

4. "Since the initiation of litigation against Brazos by TU Electric, Brazos, through its counsel, has employed experts to evaluate TU Electric's performance of its duties to Brazos. Privileged materials generated in the course of preparation for this litigation include criticisms of Comanche Peak QA/QC programs. Brazos objects on grounds of privilege to interrogatories or document requests with respect to these matters absent the entry of an appropriate protective order."

This applies to Interrogatory Nos. 7, 8, 10, 11, 15, 16, 17, 21, 22, 23, and regarding documents (page 30 of Brazos's Responses). CASE needs the information requested in order to do our work. It is not clear exactly what documents would be involved were Brazos to answer. CASE has no listing by which to even know what the documents might be, much less how vital they might be to our case. Depending upon the Board's ruling regarding the status and responsibilities of the minority owners in these proceedings, as well as a better understanding of what materials are involved, CASE may well be willing to agree to a protective order similar to that which has been ordered previously.

CASE believes that Brazos's above-referenced responses are deficient and we move that the Board compel Brazos to supply complete answers.

understanding of what materials are involved, CASE might well be willing to agree to a protective order similar to that which has been ordered previously.

CASE believes that Brazos's above-referenced responses are deficient and we move that the Board compel Brazos to supply complete answers.

Motion to Compel TMPA:

TMPA "objects to each and every Interrogatory" and "to the Request for Production" on the grounds that they are unduly burdensome and oppressive, and that responsive information would not be in TMPA's possession but in TUEC's possession, and further that the interrogatories "inquire into matters which are protected from disclosure by attorney-client privilege or consultant/attorney work product." These interrogatories request information of which TMPA is aware. The fact that TU Electric is aware of such information does not necessarily ensure (as is obvious from the 8/14/87 filings of Brazos and TMPA, and the 8/31/87 filing of Tex-La which are now before the Board) that CASE will ever be aware of such information. CASE does not expect TMPA (or any of the minority owners, for that matter) to repeat everything which has already been provided to CASE by TUEC in the operating license proceedings or the construction permit proceedings. However, as required by NRC regulations, TMPA must answer (if such answer is known by TMPA) to the best of its ability at this time and supplement its response if new information becomes available which indicates its answer is no longer accurate and complete. TMPA's objections on the grounds of undue burdensomeness and oppressiveness fall far short of the requirements of NRC regulations, especially in light of CASE's clarification above of what we do

not expect. (See also discussion at page 7 preceding.) With regard to the claim of attorney-client privilege or consultant/attorney work product, TMPA has not attempted to specify why the information CASE seeks should not be provided (if necessary under a protective order). CASE has no listing of any documents involved, and it is not clear exactly what answers or documents would be involved were TMPA to answer. Depending upon the Board's ruling regarding the status and responsibilities of the minority owners in these proceedings, as well as a better understanding of what materials are involved, CASE might well be willing to agree to a protective order similar to that which has been ordered previously (although the only protective order requested by TMPA is against TU Electric's suing TMPA). CASE moves that the Board order TMPA to answer each of the interrogatories in question.

Motion to Compel Tex-La:

CASE notes first that those responses which were provided by Tex-La (attached to Exhibit C to the 8/31/87 Response of Tex-La Electric Cooperative of Texas Inc. to the Motion of Brazos Electric Power Cooperative, Inc. for Declaratory Order) were not sworn notarized responses which meet NRC requirements of 10 CFR 2.740b(b). CASE would accept at face value Tex-La's properly prepared responses and its representation that, other than the five documents specifically referenced and already addressed on pages 8 and 9 herein, they currently have no information which has not already been made public record; we are assuming, however, that Tex-La means in the record of the operating license proceedings or the construction permit proceedings, since CASE is not a party to the lawsuit between the four owners of Comanche Peak. (If CASE is reading Tex-La's response incorrectly in this regard, we would expect and request that Tex-La so

inform us and that we would then ask the Board to be allowed to file a Motion to Compel.) It also appears from Tex-La's responses that the state of Tex-La's knowledge will change following its extensive discovery effort in the pending lawsuit between the four Comanche Peak owners, in which case we would certainly expect Tex-La to comply with NRC regulations regarding supplementing their responses (see discussion at pages 4 through 8 herein). Depending upon the Board's ruling regarding the status and responsibilities of the minority owners in these proceedings, as well as a better understanding of what materials are involved, CASE might well be willing to agree to a protective order similar to that which has been ordered previously (although Tex-La has not yet specifically requested any protective order).

Motion to Compel TUEC:

CASE will not, with one exception, file a Motion to Compel TUEC to supply more complete answers to these specific interrogatories (although we may well have some additional and/or follow-up interrogatories, especially after we have reviewed some of the documents listed in TUEC's responses).

The one exception is Question No. 19, which states:

"List every warning of which you are aware by the Atomic Safety and Licensing Board of the existence of policies or practices at Unit 1 which were not in compliance with NRC requirements or accepted practice."

TUEC declined to provide any answer, and objected to this Interrogatory "on the grounds that to the extent that if any such 'warnings' were ever issued (a proposition with which Applicants do not agree) they would be matters of public record and Intervenors are as capable of identifying them as are Applicants. The interrogatory is therefore overbroad, unduly

burdensome and not reasonably calculated to lead to the discovery of admissible evidence." To the contrary, CASE believes this interrogatory would definitely lead to the discovery of admissible evidence (evidence which Applicants would undoubtedly like to keep out of the record of these proceedings, to be sure), because it goes to the very heart of one of the major parts of CASE's contention -- that Applicants have not discarded or repudiated the corporate policies which led to the delay in construction of Unit 1. The sworn answer to this interrogatory will provide CASE with important evidence, not directly available from any other source, as to whether or not Applicants have even recognized the Board's warnings (much less heeded them) and as to whether or not they have discarded or repudiated such corporate policies. An important piece of information to be obtained from Applicants' answer to this particular question is not whether CASE recognizes the Board's warnings, but whether Applicants do and what (if anything) they have done about those warnings. Although the warnings may have been many (and CASE believes they have), this does not mean that the interrogatory is overbroad or unduly burdensome. CASE moves that the Board order Applicants to provide full and complete answers to this important interrogatory.

At the end of Applicants' Answers, as they generally have in recent answers to CASE's interrogatories, Applicants included the following:

"Motion for Protective Order

"To the extent required by the Commission's Rules of Practice, the Applicants move for the entry of a protective order in accordance with the foregoing objections and responses which are subject thereto."

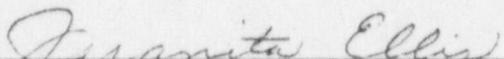
Clearly Applicants' move for a protective order is so deficient that the Board should deny it. The burden of persuasion is on the objecting

party to show that the interrogatory should not be answered. General objections are not sufficient. Further, 10 CFR 2.740b(b) and 2.741(d) require that a party must timely respond or state its objections with respect to each interrogatory or request to produce. See also further discussion at pages 6 and 7 of this pleading. CASE moves that the Board deny TUEC's Motion for Protective Order.

In Conclusion:

For all of the foregoing reasons, CASE moves that the Board order Applicants to provide complete and specific answers to the Interrogatories specified in the preceding. CASE also moves that the Board deny Applicants' Motion for Protective Order.

Respectfully submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE SECRETARY
DOCKET NUMBER
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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of
CASE's Motion to Compel Applicants to Supply Complete Answers to Consolidated
Intervenors' Interrogatories and Request for Production of Documents to
Applicants (6/19/87)

have been sent to the names listed below this 15th day of September, 1987,
by: Federal Express where indicated by * and First Class Mail elsewhere.

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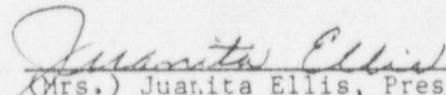
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