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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Thomas S. Moore
Howard A. Wilber

August 27, 1987
(ALAB-870)

In the Matter of	
TEXAS UTILITIES ELECTRIC COMPANY, ET AL.	Docket No. 50-445-OL 50-446-OL
(Comanche Peak Steam Electric Station, Units 1 and 2)	

R.K. Gad III, William S. Eggeling, John P. Dennis and Deborah A. Steenland, Boston, Massachusetts, for the applicant Texas Utilities Electric Company.

William H. Burchette, Foster De Reitzes and Michael N. McCarty, Washington, D.C., for the applicant Tex-La Electric Cooperative of Texas, Inc.

Anthony Z. Roisman, Washington, D.C., for the intervenor Citizens Association for Sound Energy.

Geary S. Mizuno for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

A. On November 28, 1986, the Licensing Board in this operating license proceeding issued a discovery order in response to the motion of the intervenor, Citizens Association for Sound Energy (CASE), to compel the production of certain documents from Tex-La Electric Cooperative of Texas, Inc. (Tex-La) -- one of the co-applicants and minority owners of the Comanche Peak nuclear facility. Before the Licensing Board, Tex-La

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asserted that the documents were covered by the work product privilege because they were prepared by Tex-La's engineering consultants in anticipation of state court litigation against the majority owner and lead applicant of the project, Texas Utilities Electric Company (TU). The Licensing Board found that the documents in issue were discoverable and that the asserted privilege was inapplicable with respect to CASE's document request. It indicated, however, that Tex-La could shield the information from TU and any legal counsel representing TU in litigation against Tex-La. The Board then instructed CASE to draft and to execute a protective agreement which, "[i]f Tex-La approves . . . shall constitute an Order of this Board."[1]

Thereafter, CASE and Tex-La reached an accord on the terms of a protective agreement which they executed and submitted to the Licensing Board in the form of a protective order. The Chairman of the Board approved the order on March 12, 1987. In essence, the order provides that Tex-La turn over the requested documents to certain employees or representatives of CASE and, upon request, to the NRC staff and licensing counsel for TU. But the order prohibits any recipient of the protected documents from disclosing the

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[1] Memorandum and Order (November 28, 1986) at 4.

material to any principal of TU or any counsel representing TU in litigation against Tex-La.[2]

On June 19, 1987, TU filed a petition for directed certification of the Licensing Board's March 12 protective order.[3] In its petition, TU asserts that the protective order violates its right to due process, contravenes settled discovery principles and prevents the NRC staff from fulfilling its licensing responsibilities. After obtaining extensions of time in which to respond, Tex-La, CASE and the staff all urge that we deny the petition.

B. Our cases make clear that we will exercise our discretionary authority to direct certification of an interlocutory order of a licensing board "only where the ruling below either (1) threaten[s] the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, [can]not be alleviated by a later appeal or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner."[4] We also have

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[2] Protective Order (March 12, 1987) at 2-3.

[3] See 10 C.F.R. § 2.718(i); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482-83 (1975).

[4] Public Service Co. of Indiana (Marble Hill Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977) (footnotes omitted). Accord Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC

(Footnote Continued)

repeatedly pointed out that "discovery rulings of licensing boards are not promising candidates for the exercise of our discretionary authority to review interlocutory orders."[5] This Licensing Board order is no exception. In spite of the overblown rhetoric in TU's petition, the March 12, 1987 discovery order neither threatens TU with imminent and serious irremediable harm nor pervasively affects the very foundation of the operating license proceeding. Indeed, stated most charitably, TU's petition is so devoid of merit that it gives credence to Tex-La's assertion that TU seeks to use this licensing proceeding to advance its interests in

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(Footnote Continued)
129, 134 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-839, 24 NRC 45, 49-50 (1986); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 473 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-805, 21 NRC 596, 599 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1582 (1984); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-762, 19 NRC 565, 568 (1984); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 (1983).

[5] Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-608, 12 NRC 168, 170 (1980). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-780, 20 NRC 378, 381 (1984); Long Island Lighting Co. (Jamesport Nuclear Power Station Units 1 and 2), ALAB-318, 3 NRC 186, 187 (1976).

the pending state court litigation with the minority owners.[6]

In the text of its petition, TU first asserts that the protective order prohibits it access to allegedly relevant discovery material and therefore denies TU its due process right to know what it must establish in order to succeed in the operating license proceeding.[7] TU follows its constitutional argument with a footnote asserting that the provision of the protective order allowing TU's licensing counsel access to the Tex-La documents "is simply unworkable, and its attempted implementation would contravene the essential premises of the system of representative advocacy employed before the NRC (as well as in Anglo-American jurisprudence in general)."[8] As is evident from the structure of its argument, TU is well aware that its claim of constitutional error contains an inaccurate factual predicate. The Licensing Board's protective order does not deprive TU of any discovery material because it specifically permits TU's licensing

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[6] See Response of Applicant Tex-La Electric Cooperative of Texas, Inc. (July 22, 1987) at 15-16.

[7] Applicant Texas Utilities Electric Company's Petition for Directed Certification of Licensing Board Order of March 12, 1987 (June 19, 1987) at 5-6 [hereinafter TU Petition].

[8] Id. at 6 n.5.

counsel access to the Tex-La documents. Thus, even assuming we were to accept TU's highly questionable claim of a due process right to the Tex-La documents at this stage of the proceeding, such a right is not infringed here.

TU's other claim is similarly without merit. Merely asserting, without more, that the Licensing Board's limitation is unworkable does not advance TU's position any more than its amorphous claims of violations of the norms of Anglo-American jurisprudence. From all that appears in its petition, TU's licensing counsel has yet even to request the documents in question. In any event, counsel certainly has not demonstrated how the Board's order is impractical or explained what specific prejudicial material in the Tex-La documents must be revealed to the principals of TU. Nor is it likely licensing counsel can do this because any possible prejudice to TU does not arise until CASE seeks to use the documents in question against TU at the licensing hearing. Only at that time could licensing counsel be disadvantaged by not being able to disclose the contents of the documents to appropriate employees of TU. But any such claim is entirely premature because there is no indication such documents will ever be used at trial and the protective order precludes the introduction of such materials at the

hearing without a further order of the Board.[9] Thus, TU's argument establishes neither that the Licensing Board's order threatens it with immediate and irreparable harm nor that the order pervasively alters the basic structure of the proceeding.

The same is true of TU's remaining two arguments. TU claims that "there is no provision in the Rules of Practice which would permit discovery by some parties and not others of information such as CASE claims may exist in the Tex-La documents."[10] TU then concludes that "[i]t is thus presumptively impermissible to enforce a work product privilege against only one of the parties."[11] Contrary to TU's assertion, however, the Commission's discovery regulations expressly provide that the Licensing Board

> may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . ; (2) that the discovery may be had only on specified terms and conditions . . . ; (4) that certain matters not be inquired into . . . ; (5) that discovery be conducted with no one present except persons designated by the presiding officer . . . .[12]

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[9] See Protective Order (March 12, 1987) at 4.

[10] TU Petition at 8.

[11] Id. at 8-9.

[12] 10 C.F.R. § 2.740(c).

Here, the Licensing Board's protective order limiting access of the Tex-La documents to TU's licensing counsel is well within the broad reach of these provisions. Indeed, in analogous circumstances, we have sanctioned similar limiting provisions.[13]

TU also claims that the "most egregious" fault of the Licensing Board's order is that it prevents the staff from fulfilling the staff's licensing responsibilities.[14] According to TU, if the Tex-La documents reveal instances where TU has failed to comply with licensing commitments or agency regulations, the staff is precluded by the protective order from disclosing the deficiencies to the appropriate TU officials so they may be corrected.[15] TU's objection is once again premature for the staff has indicated neither that the Tex-La documents reveal any such deficiencies nor that the staff is permanently precluded by the order from fulfilling its responsibilities. Rather, in its opposition to TU's petition for directed certification, the staff states that "the Protective Order does not pose any immediate and substantial threat to the Staff's ability to

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[13] See, e.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant Units 1 and 2), ALAB-592, 11 NRC 744, 757 (1980).

[14] TU Petition at 11-12.

[15] Id. at 12.

conduct its regulatory and licensing activities."[16] In any event, as hardly should need be mentioned, TU has no standing to complain on behalf of the staff. TU's petition is, therefore, denied for failing to meet either of the two standards for the grant of directed certification.

Finally, the petition is subject to denial on yet another ground. Although the Rules of Practice do not specify any time limit for motions requesting the exercise of our discretionary authority under 10 C.F.R. § 2.718(i) to direct certification of an interlocutory ruling, we have indicated that parties should act with dispatch in seeking such relief.[17] That suggestion is in accord with the analogous referral provision of 10 C.F.R. § 2.730(f) specifying that referrals of interlocutory rulings by the licensing boards must be made "promptly." Even though the Commission's regulations generally prohibit interlocutory appeals,[18] each exception to that proscription, such as that for referrals, requires that the interlocutory appeals be taken expeditiously in order to prevent undue delay and to

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[16] NRC Staff Response to Texas Utilities Electric Company's Petition for Directed Certification (July 27, 1987) at 12.

[17] See Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 373 n.2 (1983).

[18] See 10 C.F.R. § 2.730(f); Shoreham, 25 NRC at 134.

avoid diverting attention from the progress of the licensing hearing.[19] Thus, like a referral, a petition requesting the invocation of our discretionary directed certification authority must also be filed promptly after the interlocutory ruling at issue is handed down. To hold otherwise would sanction the possibility of needless delay in licensing proceedings in contravention of the Commission's policy "that the process move[] along at an expeditious pace, consistent with the demands of fairness."[20] It also would create the unnecessary incongruity in the Rules of Practice of requiring licensing boards to act immediately in requesting our review of interlocutory rulings while not imposing a similar requirement on the parties themselves.[21]

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[19] See 10 C.F.R. §§ 2.730(f), 2.714(a); Palo Verde, 18 NRC at 384.

[20] Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981).

[21] Indeed, the standards we apply in determining whether to exercise our discretion in directing certification of an interlocutory ruling presuppose a timely request by a party for relief. Thus, the ruling must, inter alia, threaten the adversely affected party with immediate harm that cannot await the regular appeal route for correction. Alternatively, the ruling must affect the basic structure of the proceeding. This standard implies that the error is so fundamental and disruptive that it must be corrected by prompt interlocutory review to ensure that the proceeding can be efficiently completed.

The limits of what constitutes a prompt request for relief depend upon the circumstances of each case. But here, no matter where the reasonable outer line is drawn, TU's petition falls far beyond that boundary. The Licensing Board's order was issued March 12, 1987; yet TU's petition was not filed until June 19 -- over three months later. Moreover, TU had been aware of the substance of the protective order since November 28, 1986, when the Licensing Board issued its initial order in response to CASE's motion to compel the production of the Tex-La documents. TU's only mention of the extreme tardiness of its filing, however, is buried in a footnote on page 16 of its 18 page petition where it states that "[u]pon the entry of the Board's unprecedented Order, TU Electric attempted to determine whether it could somehow be accepted as tolerable if nonetheless erroneous. The hopeful evaluation of that possibility took some time."[22] Contrary to TU's evident belief, it is not free to take over three months in determining whether the Licensing Board's order is "tolerable," after already having had over three additional months notice of the substance of the order, if it expects to persuade us to invoke our discretionary directed certification authority. Rather, it must act promptly in

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[22] TU Petition at 16 n.16.

seeking such interlocutory relief. Thus, TU's lack of diligence in filing its request also compels the denial of its petition.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board