

UNITED STATES  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC  
'87 SEP 10 P3:38

OFFICE OF THE  
DOCKETING & SERVICE  
BRANCH

In the Matter of:

TEXAS UTILITIES GENERATING  
COMPANY, et.al.,

Docket 50-445-CPA

(Comanche Peak Steam Electric  
Station, Units 1 and 2)

INTERVENORS' RESPONSE TO APPLICANT TEXAS UTILITIES  
ELECTRIC COMPANY'S MOTION TO QUASH DISCOVERY REQUEST

Intervenor and Meddie Gregory and CASE ("Joint Intervenors") herein files this Opposition to Permittees' (Texas Utilities Electric Company or TUEC) July 13, 1987, Motion for Reconsideration of the June 22, 1987, MEMORANDUM AND ORDER (Discovery Concerning CRESAP Report). For the reasons set forth in this motion, Joint Intervenors assert that the materials sought by CASE, and not yet produced by TUEC, are material and relevant to the issues before the Board, are not privileged and therefore must be produced.

BACKGROUND

On December 30, 1986, Intervenor Meddie Gregory filed Interrogatories and Request for Documents (Set 5) seeking, inter alia, information about a retrospective audit conducted at the Comanche Peak site. On February 3, 1987, TUEC answered the interrogatories in part, and sought a protective order from the Board regarding those interrogatories that it believed were

privileged and/or outside the jurisdiction of the NRC. (See, Permittees' Response [And Motion for a Protective Order] To Intervenor Meddie Gregory Requests for Production (Set 5), February 3, 1987). In February, 1987, TUEC supplemented its Response to Set 5, providing some information about the audit being performed by Cresap, McCormick, and Paget, but declining to produce either the audit itself or any of the factual data that supported the audit conclusions. TUEC cited a variety of grounds for their refusal to disclose the information, but centered on the attorney's work product privilege as the basis for the need for a protective order. On March 24, 1987, TUEC filed a Response to the Joint Intervenor's Opposition to the Motions for a Protective Order. Joint Intervenor's replied to the Opposition on April 20, 1987.

On June 22, 1987, the Board issued its MEMORANDUM AND ORDER (Discovery Concerning Cresap Report). The Board Order granted the protective order in part, disallowing some of the materials being sought by Joint Intervenor's, but required the production of a certain class of materials identified by the Board as:  
... all information and all admissions relative to Appendix B requirements and determinations and supplied to CRESAP.  
(footnote omitted)

Notwithstanding the six-month dispute over the production of the audit materials TUEC filed a Motion for Reconsideration (hereinafter "Motion") on July 13, 1987, and sought a Stay of the Board's Order.

In its Motion TUEC submits that the Board's June 22, 1987, Order should either be vacated as being contrary to controlling

law or at least substantially modified and clarified. (Motion, at 3.) The Board responded, in part, to TUEC's request during a July 20, 1987, telephone conference to discuss the Stay request. In that conference the Board clarified, and therefore modified to some degree, the earlier order. (See, July 20, 1987, Transcript of Telephone Conference Call, Pages 24,892, 24,895-898.)

According to TUEC:

The Order thereby requires TU Electric to reveal two distinct types of privileged material. First, ..., it requires TU Electric to reveal which "historical documents Cresap believed relevant to its retrospective prudence audit efforts....Second, by requiring TU Electric to supply written or oral "factual statements obtained from present or former project employees by Cresap personnel" the Board would require disclosure of precisely the type of matter archetypically protected by work product privilege: statements made or elicited by a party or his agent in anticipation of litigation. (footnotes and citations omitted) (Brief, at 5-6).

On July 20, 1987, the parties participated in a telephone conference on the discussion of the stay. The Board issued a stay until it decides the merits of TUEC's reconsideration motion. TUEC also agreed to identify further the documents contained in or surrounding the CRESAP audit materials that would be responsive to the Board Order. TUEC provided that information in two letters of July 28, 1987, to the Board and parties, respectively. Since the issuance of the Stay of the Board's Order no further pleadings have been filed on the subject of this dispute by any party. Joint Intervenors, who oppose TUEC's Reconsideration Request, sought and received an extension of time to enable Meddie Gregory's counsel to reply to the Motion for Reconsideration.



It is with deep sadness that in the interim Intervenor Meddie Gregory, after a noble struggle with cancer, died. However, her interests in the issues before this Board remain alive and of concern to her many friends and fellow workers and heirs as well as to co-intervenor CASE. (The legal status of Ms. Gregory's contentions in this proceeding will be addressed in a separate filing.)

#### ISSUES IN DISPUTE

The sole issue now before the Board is whether or not the materials identified as "Category II documents", in the July 28, 1987, letter from William Eggeling to the ASLB Judges are going to be produced under the Board's June 22, 1987 Order.

(The Category I documents, for which TUEC originally claimed a privilege that went to the selection process of historical materials, have been made available to the Joint Intervenor for their inspection and review pursuant to a July 28, 1987, letter to Mr. Roisman, Ms. Garde, Mr. Chandler, and Mrs. Ellis) (CASE does not agree with the "inspection only" terms of the production set forth in the July 28, 1987, letter. However, for the purposes of this filing CASE acknowledges that the materials have been made available. If Joint Intervenor decide to challenge the reasonableness of TUEC's production it will do so separately.)

TUEC continues to maintain that these materials are protected under the "work product" or the "non-testifying expert" doctrines, and that the Board erred when it concluded that the asserted privilege could be overridden on the facts before it.

(Motion, at 6.)

The basic law applicable to the disagreement between the Board and TUEC is spelled out in the Board's June 22, 1987, Order, at 2. As the Board states, and as the parties agree, the rule is that, where a privilege has been claimed a Board can override that privilege and order disclosure only "upon a showing that the party seeking discovery has substantial need for the materials in the preparation of his case and that he is unable without due hardship to obtain the substantial equivalent of the materials by other means." 10 CFR 2.740(b)(2).

The parties already briefed those issues of law in the spring of 1987. No new legal arguments have been advanced by TUEC in its Motion for Reconsideration.

The Board, in reaching its decision, looked to the purposes behind the privileges and the discovery rules. Order, at 2. The Applicants do not contest that the Board has misstated the purposes behind the privileges or misapplied the balancing test. What TUEC grieves is the merits of the Board's decision after a balancing of the considerations involved between TUEC's right to the privilege and the Joint Intervenor's right to discovery.

TUEC's reconsideration request apparently stems out of the belief that in order to make such a showing Joint Intervenor must first endure the "undue hardship," and suffer the harm resulting from not having the materials which it substantially needs, before the exception can apply.

A. Joint Intervenor has a Substantial Need For the Information Contained in the Category Two Documents.

As a preliminary matter Joint Intervenorors have gone through the Topic Categories identified by TUEC in the July 28, 1987, letter and hereby eliminates those topics, and the documents contained in those topics, that it does not have a "substantial need" for in order to prepare its case for the Construction Permit Hearing. The documents we continue to seek are identified below, by number in the letter:

- (3). Administration and Management of the Cresap Retrospective Audit.
- (6). CPSES Personnel and Organizational Structure.
- (7). CPSES Purchasing, Procurement and Vendor/Supplier Contract Management.
- (8). CPSES Project Budget, Cost Control and Scheduling.
- (9). CPSES QA/QC.
- (10). CPSES Procedures.
- (12). Consultants and Consultant Reports for CPSES.
- (13). CPSES and TMI-1.
- (14). CPSES Permits, Licenses, Hearings, Contentions, Legal Counsel, NRC, ASLB, and Intervenorors.
- (15). CPSES Licensing, Regulatory Changes, and Commitment Tracking.
- (16). CPSES Construction and Construction Management,



Brown & Root.

(17). CPSES Engineering, Engineering Management,  
Gibbs & Hill.

(18). CPSES Project Management, Management Decisions,  
and TU Senior Management Involvement.

(19). CPSES Startup and System Turnovers.

In order for Joint Intervenors to prove their contention in this proceeding they must be able to persuade the Board that Applicants favored schedule over safety to the intentional disregard of Commission regulations. Proving intent on this matter is going to involve exacting proof from the historical decision-making process at the plant regarding decisions on the expenditure of resources, the hiring, firing, and management of personnel, the compliance with industry standards and regulatory codes, the warnings and observations of personnel in management positions, and/or the beliefs of personnel in management positions that certain decisions were or were not in compliance with Commission regulations.

Although Joint Intervenors can, and regularly do, sift through the mass of paper available regarding individual decisions on specific deficiencies or identified problem areas, they are not limited to that process. Discovery provides an opportunity to find all relevant information and information

which could lead to relevant information, not privileged, which is material to the case. The raw deficiency paper and other materials are not the same information contained in the Cresap information which the Board has ordered produced. Joint Intervenor seek WHY certain things happened, and WHY certain decisions were made, and WHY certain events occurred, not just what occurred and how it is now being resolved.

These "cause" documents are the heart of the case. They are, as in a discrimination case, the documents that most closely resemble the "legitimate business reasons" management advances for taking a particular action against an individual employee. Without availability to the information there is no way for the employee to test the credibility of the position offered by management. Instead, the employee would be left to defend without any tools his raw assertions, suspicions, and beliefs for what the real reason for his reprisal was.

The Joint Intervenor's contention is based on a premise that the factual record available indicates that there was an intentional course of conduct undertaken. TUEC claims that there was no such intentional course of conduct undertaken, that mistakes happen, that people make errors in judgment, that design errors and construction flaws attend every project, and that no deliberate management decisions were made which would lead to a decision that could deny them a construction permit.

Assuming that neither party's position is made out of whole cloth, there seems little logical basis in privilege to claiming that factual information relevant to Appendix B requirements and



cause determinations would be protected from disclosure simply because an attorney is somewhat involved in the management decision to commission the audit, and to review the findings.

Additionally, the factual statements obtained from present or former project employees by Cresap personnel relevant to Appendix B requirements and cause determinations and supplied to Cresap are also obviously the exact type of factual information that discovery rules generally, and the NRC specifically, has required to be produced notwithstanding the claim of privilege.

TUEC asserts that Joint Intervenors have made no showing of a substantial need for the material it seeks. However, nowhere in TUEC's Motion for Reconsideration does TUEC support its argument, and indeed CASE made such a showing in its original briefs on this subject which the Board weighed in reaching its decision. TUEC seems to concede what is obvious to the Board, the Staff, and the Joint Intervenors: in order to complete discovery and decide if there is legitimate proof to put into evidence in support of its contenttion it must have access to informtaion about the basis for managment decisions. It has a substantial and realistic need for the information.

For example, Topic Category 9 "CPSES QA/QC" includes: ...discussions, listings and summarizations regarding corporate policies, QA/QC interface with other organizations and with senior management, audit program, inspection reports, SDAR's, and reportable items.

This information is exactly the type of factual information which will evidence the correctness or incorrectness of Joint Intervenors' contentions that management made a decision to take

certain risks regarding compliance with federal law, or whether decisions were made that evidence a legitimate misunderstanding of the law, or an absolute intent to follow the letter and the spirit of the law. Likewise, in topic Group 17 "CPSES Engineering, Engineering Management, Gibbs and Hill" which includes:

These include listings, tabulation and explanations of Gibbs and Hill contract terms, scope of work, costs, cost control, cost changes, invoices to TU, engineering effort and products, manpower levels, project management of CPSES effort, interface with TU personnel concerning project management, vendor selection, management of G&H by TU. Also includes summarizations, and explanations of TU management of various engineering functions, transfer of TU engineering to the site, summary of scope of work for discipline engineering groups and building management task teams, and descriptions of CPSES design control and design changes.

In the OL docket there is sworn testimony of workers that the building management program didn't work as it was envisioned to work, and that the real purpose behind the building management task teams were to push the plant "on-line" in the spring and summer of 1984 regardless of the specific Appendix B requirements for the documentation of each deficiency on controlled documents, and the Appendix B requirement of the independence of Quality Control Inspectors from construction management. (See, generally the testimony and documents regarding the "T-Shirt incident," from OL-2, in September-October 1984). Additionally, there is testimony that the "paper flow groups" were established for the express purpose of "getting the plant on line regardless of the federal laws surrounding the Appendix B Document Control requirements.

Topic Category 18, "CPSES Project Management, Management

Decisions, and TU Senior Management Involvement" includes apparently only summarizations and histories of management meetings, etc., and "early project construction decisions."

As stated above, TUEC did not articulate any argument that Joint Intervenors had a substantial need for the factual information as described in footnote ten. To the extent that there was ever any doubt about that need it has been eliminated by description in the July 28, 1987, letter.

B. Joint Intervenors cannot obtain the substantial equivalent of the materials by other means.

The key argument raised by TUEC in opposition to the Board's Order is that the Joint Intervenors have not demonstrated that they have not exhausted their avenues of getting the information by any other means. In this case the information that the Board has made available is, in fact, unavailable to the Joint Intervenors by any other means.

There are two classes of information made available by the Board Order, not yet produced, and still the subject of dispute. First, is the factual information discussed above, and second, is the "admissions" or statements that "could be construed unfavorably to any of Applicants' positions in this litigation..." (Order, at 6). These admissions, of course, would be offered by the Joint Intervenors or the Staff and stem from the statements of TUEC and its officials.

The factual statements obtained from present or former project employees by Cresap personnel are not available to CASE for the very reason that the Board articulates in its footnote



11. This information contained in the statements is now and forever "unavailable" to Joint Intervenors because it is the factual presentation and explanation that was given to a fact finder (Cresap) that is sought. Although Joint Intervenors could attempt to take the depositions of the Cresap auditors or the individuals that they interviewed, and could attempt to restructure the interviews, it is an impossible task.

Further, Joint Intervenors do not believe that the "work product" privilege is really appropriate in the first place as to this information because the Cresap auditors were not looking to prepare a document solely for the purpose of the attorney in anticipation of litigation, but were always aware that they may be called to provide expert testimony at public hearings in support of its findings. (Work Specification for the audit.) As professional auditors Cresap is well aware they will be asked to identify the basis of their conclusions and be prepared to make that material available.

As the Court held In Re Arthur Treacher's Franchise Litigation, 92 FRD 429 (ED Pa, 1981):

The defendants must remember, however, that they have the burden of establishing the existence of the privilege both with regard to the substance and the subject matter of the communications. Questions concerning the interchanging of views among the franchisees, for example, are not privileged if not made in the presence of their attorneys and for the purpose of seeking legal advice, etc. (citations omitted) Similarly, discussions of a purely financial or business nature are not privileged, again assuming these discussions were not entered into for the purpose of eliciting the attorney's advice as to the legal overtones of the various business strategies possibly discussed. (citations omitted)

Further, work product privilege does not absolve TUEC of

its duty to report information to the NRC which evidence violations of Appendix B criteria or commitment : management decisions reagrding these matters. Although Cresap auditors may not recognize a deficiency or reportable matters there is no doubt that the other members of the management Review Committee would recognize those matters.

As Joint Intervenors' original brief articulated, the information is not properly designated under work-product privilege in the first place. However, CASE did not file a request for reconsideration on the decision because it is satisfied at this juncture with the production of the materials ordered produced. Should it find, through discovery, that other materials are necessary, it will take such actions at that time to seek them.

## II. The June 22, 1987, Board Order Must Be Enforced.

If nothing is more crystal clear from this eight month battle it is that TUEC does not want the Joint Intervenors to have this information for use in this proceeding. The variety of reasons articulated by TUEC have been presented ad nauseum and the Board has ruled, weighing the interests and the privileges according to the rights of the parties and the importance of the information.

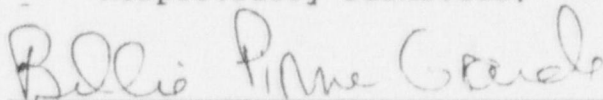
Cresap is a professional in its field. It has developed an expertise in conducting audits at nuclear plants and looking for answers to difficult questions. (For the benefit of the Board I have included a Cresap audit scope package from the Midland Plant.) The Board has ruled that the Joint Intervenors do not

get access to the Audit results, but they should have access to the factual information provided by non-lawyers (not working in a capacity of a paralegal or investigator) to other non-lawyers (who were working at the behest of TUEC and at the suggestion of counsel) for the purpose of providing a report to TUEC and possibly public testimony. These are not the trappings that surround either the attorney client privilege or the "work product privilege" and cannot be bent to fit that shape.

#### CONCLUSION

For all the reasons stated herein Joint Intervenors urge that the Board deny TUEC's Motion for reconsideration, lift the stay and require immediate production of the documents identified in the Board's June 22, 1987, Order and as further clarified by the July 20, 1987, conference call and this filing.

Respectfully submitted,



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Date: September 9, 1987



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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE SECRETARY  
DOCKETING & SERVICE  
BRANCH

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	}}	
	}}	Docket No. 50-445-CPA
TEXAS UTILITIES ELECTRIC	}}	
COMPANY, <u>et al.</u>	}}	(Application for a
(Comanche Peak Steam Electric	}}	Construction Permit)
Station, Units 1 and 2)	}}	

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of

Joint Intervenors' Response to Applicants' 7/13/87 Motion for  
Reconsideration of the Board's Order of 6/22/87.

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