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9/8/87

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'87 SEP 11 A9:50

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	}{	
	}{	
TEXAS UTILITIES ELECTRIC	}{	Docket Nos. 50-445-OL
COMPANY, et al.	}{	and 50-446-OL
(Comanche Peak Steam Electric	}{	
Station, Units 1 and 2)	}{	(Application for an
	}{	Operating License)
In the Matter of	}{	Docket No. 50-445-CPA
	}{	
TEXAS UTILITIES ELECTRIC	}{	(Application for a
COMPANY, et al.	}{	Construction Permit)
(Comanche Peak Steam Electric	}{	
Station, Units 1 and 2)	}{	

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) /1/

CASE supports the August 14, 1987, Motion for Declaratory Order by Brazos Electric Power Cooperative, Inc. (Brazos) (OL and CPA) and the August 14, 1987 Motion for Protective Order by Texas Municipal Power Agency (TMPA) (CPA) /2/.

/1/ A portion of 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. (CASE was granted an extension until 9/15/87 in which to file any motions to compel regarding the rest of the 8/14/87 responses by TMPA, as well as by Brazos, Tex-La, and/or Texas Utilities Electric Company.)

/2/ CASE is filing this response on 9/8/87 with the permission of the Board and Applicants.

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Background

Brazos seeks an Order from this Board declaring that the law firm of Ropes & Gray represent them in the proceedings before the NRC with full recognition, acceptance, and discharge of its fiduciary obligations to Brazos or, in the alternative, that the Board issue a declaratory order permitting Ropes & Gray's withdrawal upon the condition that Brazos be permitted to obtain independent counsel and appear generally in these proceedings to assist Brazos in the discharge of its independent obligations to the NRC without becoming subject to suit by TUEC (8/14/87 Motion for Declaratory Order at 1).

This unusual request arises out of the debate between TUEC and its partners over what information is to be disclosed in the licensing hearings in response to Intervenors' interrogatories and presumably in pursuit of discharging its responsibilities pursuant to other regulations requiring disclosure of information to the Board and parties as well as updating or changing information provided in response to old interrogatories, as set forth in the Introduction and Summary of Brazos' Motion (see 8/14/87 Notice of Special Appearance by General Counsel for Texas Municipal Power Agency, 8/14/87 letter to Board from attorneys for Brazos Electric Power Cooperative, Inc., 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).

Further, it arises in spite of the Board's earlier directive to TUEC preventing its interference with Brazos' fulfilling its independent responsibility to the Board (Texas Utilities Electric Company, et al., Comanche Peak Steam Electric Station, Units 1 and 2, Docket No. 50-445-CPA,

Memorandum and Order (Appointment of Legal Counsel; Clarification of Discovery), ASLB, May 4, 1987, slip op. at 5).

CASE filed discovery requests on June 19, 1987, 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 have now received something of a response from Tex-La attached to its August 31, 1987, Response. (CASE does not accept the responses of Tex-La as full or complete.)

In the August 14, 1987, Responses filed by Texas Utilities Electric Company (TUEC), there was no statement that CASE was not being provided with full and complete answers, nor was there any indication that there were specific documents responsive to the discovery requests whose production was in dispute among the owners, nor was there any request for a protective order by TUEC regarding the information and documents referred to in the minority owners' filings. Based upon TUEC's filing, CASE certainly had the basis for a reasonable belief that TUEC was attempting to provide complete answers. However, CASE then received filings by Brazos, TMPA, and Tex-La which now indicate that there is other material responsive and relevant to our legitimate discovery requests.

As CASE now understands it, it has not yet received the full answers to discovery, updated discovery, or voluntary disclosure because TUEC has threatened to sue the minority owners if they comply with their legal obligations.

In essence, Brazos seeks the protection of a Licensing Board Order clarifying the legal duties and obligations which it is responsible to

discharge. It seeks this order to shield itself from legal retribution by TUEC for disclosing information in the NRC proceedings which may be detrimental to securing an operating license for Comanche Peak.

Since CASE does not have access to the information, it is difficult to hypothesize whether Brazos' fear is well-founded or whether it is simply precautionary /3/. Based on the documents made available with the Motion, however, it is clear that the Board must extend to Brazos the protection and clarification it seeks /4/.

I. Case has standing to be heard on the issues raised by Brazos in its Motion for Declaratory Order

CASE has standing to be heard on Brazos' request. It is CASE's discovery requests that are not being fully answered by all the owners and as a result it is CASE's preparation for these proceedings which will be significantly hindered by not having full access to the findings of the minority owners on the issues in dispute.

/3/ CASE recognizes that multiple ongoing litigations between TUEC and the minority owners of Comanche Peak, as well as Department of Labor cases, surrounding the plant, its cost, management, competence, prudence, the treatment of workers and other aspects of building a nuclear plant under regulatory and legal scrutiny has placed TUEC in an intolerable and legal nightmare. However, this is a nightmare that is a result of deliberate decisions and management actions over the past decade for which TUEC always knew it would ultimately be held accountable.

/4/ The Board has in the past clarified to TUEC its legal responsibilities and mandates as a way of reemphasizing the obligations of all the parties. See, for instance: Board's 4/14/86 Memorandum, Proposed Memorandum and Order (Motion to Compel Production of Checklists); Board's 6/6/86 Memorandum (Definition of "Root Cause"); Board's 9/2/86 Memorandum and Order (Management Issues Under Contention 5; CASE Request of July 2, 1986) at 1 through 3; Board's 5/4/87 Memorandum and Order (Appointment of Legal Counsel; Clarification of Discovery); Board's 6/22/87 Memorandum and Order (Discovery Concerning Cresap Report), at 2 and 3.

Further, it is CASE with the fewest financial and expert technical resources that must rely to a great deal on its analyses of all the facts made available in discovery in order to develop its case and decide on what issues are worth pursuing in hearings and what issues are substantially resolved. As the Board and the parties are well aware, CASE's discovery rights are the key to its ability to do its analyses and develop and present its case in the most efficient manner possible.

Thus CASE has strenuously objected to and opposed any limitations imposed on its discovery rights directly or indirectly by Applicants or the NRC Staff.

Without full and complete access to the information and without the assurance that the information provided is what Applicants represent it is, CASE becomes handicapped not by resources but by semantic deception and word engineering trickery.

From CASE's perspective, the issue before the Board is much simpler than it may appear: it is a discovery dispute; specifically, it is a discovery dispute among TUEC and the minority owners over whether or not CASE will receive full and complete answers to our legitimate discovery requests in accordance with NRC regulations -- information to which CASE is clearly entitled and which is vital to our being able to do our work and fully participate in these proceedings.

Discussion

CASE has a due process right to full discovery. To the extent that any ruling by the Board impinges on CASE's right to such full discovery, CASE

clearly has standing to challenge any such ruling, since our ability to fully participate in these proceedings will be directly affected.

CASE must have access to full discovery, including access to information not necessarily consistent or favorable to TUEC's strategy in order to determine what witnesses to call or what evidence to present at the hearings.

For example, CASE has sought in discovery all documents which are responsive for the interrogatories (see: Consolidated Intervenors' Interrogatories and Request for Production of Documents to Applicant Texas Utilities Electric Company (6/19/87)(CPA); Consolidated Intervenors' Interrogatories and Request for Production of Documents to Applicant Brazos Electric Power Cooperative (6/19/87)(CPA); Consolidated Intervenors' Interrogatories and Request for Production of Documents to Applicant Texas Municipal Power Authority (sic) (6/19/87)(CPA); and Consolidated Intervenors' Interrogatories and Request for Production of Documents to Applicant Tex-La Electric Cooperative of Texas, Inc. (6/19/87)(CPA)). Tex-La identified five responsive documents and provided them to TUEC (August 4, 1987, letter from Foster De Reitzes to William Eggeling, Exhibit C to August 31, 1987 Response of Tex-La Electric Cooperative of Texas Inc. to the Motion of Brazos Electric Power Cooperative, Inc. for Declaratory Order). Tex-La concluded that the documents "may be responsive to certain of the interrogatories and may have safety significance and which Tex-La believes are not currently a matter of public record." (Id.)

TUEC apparently decided that the five documents were not responsive to the interrogatories and in an August 12, 1987, letter sets out its decision. Without any explanation or criteria, TUEC states that "TU Electric has

concluded that they are not properly responsive to any of the interrogatories or the concomitant Requests for Production" (August 12, 1987, letter from William S. Eggeling to Foster De Reitzes, Exhibit D to August 31, 1987 Response of Tex-La Electric Cooperative of Texas Inc. to the Motion of Brazos Electric Power Cooperative, Inc. for Declaratory Order). Of course, TUEC did not provide the five documents nor did they identify the documents and seek a protective order. The documents simply were not disclosed and under a threat of law suit would have remained that way but for attempts by the minority owners to comply with their legal obligations.

The party directly harmed by the non-disclosure is CASE. Although the credibility of the response of the Ropes & Gray law firm may be impugned in this debate, as they have claimed, and the judgement of individual attorneys questioned, those temporal concerns do not rise to supersede the legal rights and responsibilities of the parties /5/.

The Board has the right and the responsibility to order the production of the information at issue. If the Board believes it is necessary, it has the authority to issue protective orders to accommodate real need or fears of one party or all parties /6/.

/5/ At times in this lengthy proceeding, tempers have flared, egos have been damaged, judgements have been questioned and confronted, and individuals personally insulted (i.e., Applicants' then-counsel Nicholas Reynolds made comments about CASE Co-Representative Mrs. Juanita Ellis which were probably libelous). These diversions are unpleasant for all parties; however, as CASE sees it, the debate among the owners is one of law, fact, and money, not personalities or integrity.

/6/ Since the issue of whether or not a protective order is appropriate is premature, CASE reserves its right to argue against a protective order if we believe the information is needed on the public record, which is the process and the practice that has been followed for a long time in these proceedings and is now the law of the case.

II. The Board has a duty to insure that all available facts material and relevant to the issues before the Board are disclosed and considered in reaching a decision as to the licensability of the plant.

Brazos seeks the protection of this Board to do what it is legally bound to do: disclose facts to the parties and the NRC about the safety of the plant.

Brazos has sought by way of protection a declaratory order preventing TUEC from suing it if it discloses information. The need to comply with its legal obligations to this Board and the NRC seems obvious and CASE's rights in this regard are assured by 10 CFR 2.743 **Evidence**, (a) General, which states:

> "Every party to a proceeding shall have the right to present such oral or documentary evidence and rebuttal evidence and conduct such cross-examination as may be required for full and true disclosure of the facts."

Congress intended that full disclosure of all facts would be the basis of assuring that the public health and safety was protected. CASE has a right to present a full record, and it is well established that the Board has the authority and responsibility to assure that there is a full and complete record made available in these proceedings; such authority and responsibility are mandated under provisions which include, but are not limited to, the following:

a. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981), which urges "that the process move[] along at an expeditious pace, consistent with the demands of fairness."

b. 10 CFR 2.718 **Power of presiding officer**, which states, in part:

> "A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order."

c. 10 CFR Part 2, Appendix A, V.(g)(1), which states that the Board has the responsibility and authority to assure a complete record.

Such authority and responsibility include the expectation that if the Board determines, even at the close of the hearing, that "uncertainties arise from lack of sufficient information in the record, it is expected that the board would normally require further evidence to be submitted . . ." 10 CFR Part 2, Appendix A, V.(g)(1). (See also Board's 4/14/86 Memorandum, Proposed Memorandum and Order (Motion to Compel Production of Checklists), at pages 2 and 3.)

This Board has already put Applicants on notice through its actions and through its words that there must be full, complete, and reliable information given in the proceedings and if the Board is not able to rely on the words given and credibility of the factual testimony offered, that the Applicants risk scrutiny as to every word /7/.

/7/ See generally: Board's 12/18/84 Memorandum (Reopening Discovery; Misleading Statement; and the Board's 2/8/84 Memorandum and Order (Reconsideration Concerning Quality Assurance for Design), especially pages 1 through 3. More specifically, the Board stated, in its 11/25/85 Memorandum and Order (Reconsideration of Misrepresentation Memorandum) (excerpted from pages 6 through 8):

> "So we continue to conclude that we were misled. Did it matter in this particular case? Probably not. Although Applicants' entire technique for qualifying U-Bolts is still up in the air, the impact of this error on the technique that was used appears to be marginal.

(Footnote and quotation continued on next page.)

TUEC's current legal team apparently takes pride in the credible reputation of their law firm for diligence and integrity. CASE has previously observed, however, that good lawyers can find legitimate loopholes which enable them a defense of plausible deniability as to the letter of the law while engaging in a course of conduct that runs directly contrary to the spirit of the law.

Technically, TUEC's answers may not be perjury or inaccurate; however, CASE, the Board, and the public have the right to expect that their written word is what it says it is without fearing semantic obfuscation has somehow robbed the English language of clarity.

If the truth and facts as found by the minority owners are not what TUEC previously believed they were and not what they would like them to be, it is understandable. Comanche Peak is a very unique and complex project, with issues which are themselves complex (see statement of NRC's Christopher Grimes during 7/29/87 public meeting, Tr. page 9, Volume I of II). Even with all the facts, it will be difficult for CASE, the NRC, and the Board to reach a judgement on the licensability and potential safety of the plant.

/7/ (continued from preceding page, quoting from 11/25/85 Board Order):

> "Did the statement matter? Yes. Assuredly it did. The only way the Board can trust the Applicants is if their filings communicate clearly and are trustworthy. [Footnote omitted.] That requires care. Otherwise, each word or phrase must be parsed and distrusted. We would be driven to examine closely how we might be misled if we accepted the obvious meaning of the words Applicants used. Unless Applicants' language is careful, precise and trustworthy, we would need to approach their filings with suspicion.
>
> ". . . Clear, careful arguments (and admissions of error when error is pointed out or detected) inspire trust and confidence. In this proceeding, where time means money and carefulness protects lives, we urge Applicants to consider the importance of assuring that we can place trust in their filings. . . "

Even TUEC concedes, although not overtly, that it is impossible to determine if there is reasonable assurance that the plant was designed and built in compliance with regulatory standards (see generally change in scope of CPRT, Rev. 4, passim). However, the arguments support disclosure of all facts sought in discovery and material and relevant to the issues in dispute.

The danger of not disclosing these facts runs contrary to the Commission's directives and case law of the agency. (See In the Matter of Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), Docket 50-454/455, Appeal Board Memorandum and Order ALAB-770, May 7, 1984.)

CASE does not have access to the technical resources of an independent consulting firm. The Board and the Staff have in the past rejected CASE's continual requests for an appointment of an independent third party to oversee the reinspection and rework effort. To date, TUEC has controlled all the participants except, to a certain extent, Cygna, and those engineers and workers who abandoned TUEC's control and brought to the attention of the Intervenors and the NRC Technical Review Team (TRT) under Mr. Noonan's direction evidence that they believed important, material and relevant to the safety of the public vis-a-vis Comanche Peak.

At this point, the minority owners have become, in essence, the closest thing available to being the third-party independent reviewer of the plant's design, construction and management. The insight that their experts have into the issues before the Board and factual evidence that they independently develop is critical to CASE and to the Board at this juncture.

As is obvious from TUEC's latest filing, it is finally getting ready to start the inevitable push for licensing. Presumably it has or is about to

reach conclusions on the extent of the historical quality assurance breakdown and what the likelihood is that all deficiencies have been or will be detected and corrected.

The minority owners have also reviewed this information and at least one, TMPA, has expressed a significant concern that Comanche Peak may never be licensed: "TMPA continues to have concerns that Comanche Peak will ever be licensed and operating." (August 4, 1987, letter to John Beck, TU Electric, and Thomas G. Dignan, Jr., Ropes & Gray, from Ed Wagoner, General Manager, TMPA, attachment to 8/14/87 Notice of Special Appearance of James R. Bailey, General Counsel for TMPA.)

The factual record and subsequent position, although it may be subject to attack on the basis of credibility, is crucial information and one of the closest independent look at the past and present efforts on QA and construction that has ever been done /8/.

Additionally, CASE believes that if the Board does not act now to assure that all the information responsive to CASE's discovery is in fact disclosed, that under the Byron ruling (Supra, at 26 through 29), the record would have to be reopened to consider such evidence, resulting in further delay and confusion of the record.

CASE believes that the Board must now take appropriate steps and consider all these aspects in order to assure a fair and impartial proceeding, to assure that CASE receives all of the discovery information to which we are legitimately entitled, to avoid further prejudice to CASE's due process rights, to avoid unnecessary delay of the proceedings, and to assure

/8/ At this stage, it seems unlikely, although CASE believes it is warranted, that the NRC Staff or the Board would order yet another reinspection program or an overview program of the CPRT work.

a complete and accurate record on which an informed, reasoned decision can be made.

III. The Board must take such appropriate remedial measures as are necessary to ensure that the minority owners comply with their legal obligations.

Brazos has sought a declaratory order of the Board seeking (1) an order declaring that Ropes & Gray continue to represent Brazos in these proceedings with full recognition, acceptance, and discharge of its fiduciary obligations to Brazos directly on licensing matters, or (2) an order requiring Ropes & Gray to request a withdrawal with acceptance thereof when filed, and upon the condition that Brazos be permitted to obtain independent counsel and appear before the NRC and (3) that Brazos and such counsel be free of threats or risk of legal action under the Joint Ownership Agreement.

CASE supports Brazos' request generally and specifically urges the Board to make a determination of this matter that permits Brazos to get separate counsel /9/, and so that the parties can make separate inquiry into

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/9/ CASE reminds the Board that it was at the suggestion of the Board that Cygna Energy Services consult with separate counsel in 1984 (Tr. 9853-9854), which it did and which has worked to provide greater confidence in Cygna's credibility and independence. Additionally, other witnesses or parties have appeared with separate representation, e.g., O. B. Cannon, J. J. Lipinsky, and Everett Mauser.

CASE notes that we support the minority owners' two motions only to the extent we have indicated herein. We reserve the right to object on the grounds of fairness and to ask the Board to make a new balancing assessment were this ever attempted to be extended to the cross-examination of CASE's witnesses, for instance; CASE's Mrs. Ellis is especially concerned that we would not want our witnesses to be subjected to having to run a gauntlet of cross-examination by four Applicants' attorneys. The Board will recall that in the past, it allowed cross-examination of CASE's witnesses -- over CASE's strong objections -- by Cygna (which was a Board witness at the time, but a non-party to these proceedings).

the information which is deemed to be material and relevant by Brazos but not by TUEC /10/.

CASE agrees with Brazos' interpretation of the authority of the Board to grant the relief requested (beginning on page 31 of Brazos' 8/14/87 Motion for Declaratory Order), except for the Board's authority to prevent a law suit or threats of a law suit.

It appears to CASE that the Board lacks the jurisdiction or authority to grant the penultimate injunctive relief. However, it is obvious that any such action based upon the fulfillment of a legal duty would be based on a contract interpretation that would be null and void and violative of public policy.

Additionally, such actions of TUEC to prevent full disclosure would itself be further evidence of management's reluctance to confront all the facts and opinions on this plant and still demonstrate its safety.

Conclusion

CASE is confident that even if the Board denies the requested relief, it can fashion a remedy that will ensure that all the parties' rights are protected and that their responsibilities can be carried out without interference.

/10/ There appear to be at least five documents the relevance of which is in controversy among the owners of Comanche Peak which presently fall into this category, and it is reasonable to assume that there will be others in the future considering TUEC's narrow interpretation of discovery requirements as laid out in the various letters to the minority owners which were attached to their 8/14/87 and 8/31/87 filings.

For the reasons discussed in more detail in the preceding, and so that CASE can be assured of its full discovery rights, CASE supports the 8/14/87 Motion for Declaratory Order by Brazos Electric Power Cooperative, Inc. (OL and CPA) and the 8/14/87 Motion for Protective Order by Texas Municipal Power Agency (CPA).

Respectfully submitted,

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NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
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COMPANY, et al.	}{	and 50-446
(Comanche Peak Steam Electric	}{	
Station, Units 1 and 2)	}{	Docket No. 50-445-CPA

CERTIFICATE OF SERVICE

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

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)

have been sent to the names listed below this 8th day of September, 1987, by: Federal Express where indicated by * and First Class Mail elsewhere.

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