Filed: October 21, 1985

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICANTS' PETITION FOR DIRECTED CERTIFICATION OF LICENSING BOARD ORDER OF OCTOBER 2, 1985

To the Atomic Safety and Licensing Appeal Board:

Pursuant to 10 CFR § 2.718(i), and for the reasons hereinafter set forth, the applicants hereby petition for directed certification of an order of the Atomic Safety and Licensing Board (ASLB) herein entered on October 2, 1985.

I. STATEMENT OF THE CASE

The above-captioned operating license proceeding was commenced by notice issued on March 9, 1979, 44 Fed. Reg. 15814 (March 15, 1979). There remains to be litigated a single contention limited by its terms to the assertion that

poor QA/QC and construction practices have raised questions as to the "adequacy of construction".[1] Two Boards are engaged in this process. One is the Board which derives its jurisdiction from the original notice of hearing cited above. A second Board has been given jurisdiction over the litigation of so much of the contention as involves "all allegations of intimidation and harassment". 49 Fed. Reg. 13613 (Apr. 5, 1984). The membership of the two boards is identical except for one member (Judge McCollum sits only on the plenary board; Judge Grossman sits only on the "harassment and intimidation" Board).

The record to date in this case leaves little doubt that there is still much to be resolved concerning the licensability of the plant as it now stands. And the applicants, acting under new management, have undertaken a major effort by a group known as the Comanche Peak Response Team (CPRT) to verify the adequacy of construction by reinspection and other approaches. Under date of June 28, 1985, the applicants filed with the Staff and distributed to the parties the plan and charter of CPRT.[2] On that same

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[1] The contention (No. 5) is quoted verbatim infra at p. 9 as part of the discussion as to why the petition should be granted. Also thereat appears an analysis of the breadth and scope of the contention.

[2] Comanche Peak Response Team Program Plan and Issue Specific Action Plans, Revision 2 (June 28, 1985).

date, the applicants filed in the record of the adjudicatory proceeding a seventy-four page document setting forth "Applicants' Current Management Views and Management Plan for Resolution of all Issues" (hereinafter the Views and Plan). The Views and Plan had been filed pursuant to an ASLB memorandum and order of May 24, 1985,[3] directing the filing of a statement of current management views on various matters including the status of the plant and the record, a description of current management, current management's views of past actions of prior management and what amounted to a suggested case management plan for the resolution of outstanding issues. Two responses to the Views and Plan (one in each docket) were filed by CASE and a response was also filed by the Staff which recommended adoption of the case management plan with certain modifications. See NRC Staff Response to Applicants' Statement of Current Views and Proposed Case Management Plan (Aug. 2, 1985).

Thereafter, on August 29, 1985, the ASLB issued in response to the Views and Plan and CASE and Staff responses thereto a memorandum and order entitled "Proposal for

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Further revisions of the plan are contemplated as the result of Staff and Intervenor comments thereon.

[3] The occasion for issuing the order was the prior filing by applicants of a case management plan which the ASLB deemed to have insufficient detail. The applicants treated the directive as being a request by the Licensing Board for information as to matters of interest to it.

Governance of This Case", a copy of which is attached hereto and marked "A". This memorandum, which by its terms "addresses crucial procedural issues" raised by the applicants, rejected the case management plan proposed by the applicants and also rejected the applicants' position that Docket 2 was now moot.

Prescinding from these rulings, the memorandum also contained a number of statements labeled "tentative, preliminary and non-binding conclusions", Exh. A at 4, and "questions that concern us", Exh. A at 6, which applicants deemed to be erroneous as a matter of law or fact and which, if adhered to, would have an extremely deleterious effect upon the future litigation of this matter. In particular, the Boards used language which could be interpreted as expressing the views that (1) if CPPT did not have the requisite "independence" in the view of the ASLB, any testimony by CPRT personnel might be inadmissible, Exh. A at 4; (2) that current management character and competence and past management conduct is an issue admitted for litigation in the proceeding, Exh. A at 4, and (3) that the ASLB had the duty and jurisdiction to investigate the past conduct of this litigation. Exh. A at 5, 6-7. As a result of these and other perceived errors in the August 29, 1985, Memorandum and Order, the applicants filed a motion for

modification[4] together with a memorandum in support thereof,[5] copies of which are attached hereto and marked "B-1" and "B-2" respectively.

The result of this motion was the order of October 2, 1985[6] with respect to which this petition is filed, a copy of which is attached hereto and marked "C". With the exception of so much of the motion as requested a reconsideration of the ruling with respect to the admissibility of CPRT testimony,[7] the motion was denied in its entirety.

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[4] Applicants' Motion for Modification With Respect to the Board's Memorandum of August 29, 1985 (Proposal for Governance of this Case) (Sept. 25, 1985).

[5] Applicants' Memorandum in Support of Motion for Modification With Respect to the Board's Memorandum of August 29, 1985 (Proposal for Governance of This Case) (Sept. 28, 1985).

[6] Memorandum and Order (Applicants' Motion for Modification) (Oct. 2, 1985).

[7] In the August 29, 1985 memorandum the Boards had stated that the CPRT's "lack of independence" might affect the admission of evidence concerning past QA/QC failures and management's responsibility for those failures. Exh. A at 4, ¶ 2. Applicants argued that this was not the law, see Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1091 (1983) and pointed out that The Dallas Morning News of August 30, 1985, purported to quote the Chairman of the ASLBs as stating the law correctly in an interview to the effect that "lack of independence" could affect weight, but not admissibility. Exh. B-2 at 3. The Boards granted this part of the motion as follows:

> "We agree with Texas Utilities Electric Company, et al., (Applicants) that the

In rejecting the remaining parts of the applicants' motion, the Boards premised the result on a number of rulings, all of which applicants submit, are in error. First, the Boards apparently take the position that while there is no contention as to management competence before either of them, they may under the extant single "adequacy of construction" contention gather some evidence as to management competence and at an indeterminate time thereafter decide whether or not to declare such an issue sua sponte. Exh. C at 2-3. Second, the Boards have ruled that they are, unlike an intervenor making late-filed contentions, under no obligation promptly to declare sua sponte issues, but rather can first take evidence on the issues and apparently declare them after the fact. Third, the Boards are ignoring the teachings of the TMI-1 restart case wherein the Commission ruled that the competence of management personnel no longer involved in the project is not a relevant consideration in a proceeding to determine the right of a plant to operate. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-9, 21 NRC 1118, 1137-39 (1985), affirmed, Three Mile Island

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degree of independence of the Comanche Peak Response Team (CPRT) affects the weight of the evidence and not whether it would be received into evidence. See The Dallas Morning News article of August 30, 1985 (p. 16A) cited by Applicants." Exh. C at 1.

Alert v. NRC, ___ F.2d ___ (3d Cir. 1985). Fourth, the Boards are operating on the theory that they have a roving commission to ferret out and presumably punish alleged wrongdoing by the applicants in the prior conduct of this litigation. Exh. C at 3.

II. REASONS FOR GRANTING THE PETITION

The basic standard by which petitions of this nature are judged is well known. Directed certification is granted only when the Licensing Board ruling under attack:

> "either (1) threaten[s] the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by later appeal or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner." Public Service Company of Indiana (Marble Hill Nuclear Generating Station), ALAB-405, 5 NRC 1109, 1192 (1977).

The petition at bar invokes, as do most petitions of this nature, the second of the two Marble Hill criteria. And, in connection therewith the applicants are not unmindful of the admonition of the Appeal Board in the Palo Verde proceeding:

> "In short, the parties to our licensing proceedings might well exercise in the future a greater measure of circumspection insofar as requests for interlocutory appellate review are concerned. Understandably, parties and their counsel are displeased whenever a licensing board enters an interlocutory order that appears to affect their interests adversely and, in their judgment, is plainly wrong to boot. And, no doubt, such an order will be found especially frustrating if its

> consequence is, for example, the litigation of issues that counsel believes should not be tried, the summary dismissal of issues that counsel is convinced are entitled to evidentiary consideration, or the infelicitous scheduling of the hearing on an issue. But, to repeat what we have said on so many prior occasions, in the overwhelming majority of instances the party simply must await the licensing board's initial decision before bringing its complaint to us (assuming that the grievance has not been mooted by intervening developments). The failure to accept this fact of adjudicatory life - judicial as well as administrative - has the unfortunate effect of diverting attention from the progress of the licensing board proceedings where it belongs. Beyond that, insubstantial directed certification requests bring about a waste of our time, as well as the profligate expenditure of the time and resources of the parties themselves." Arizona Public Service Company (Palo Verde Nuclear Generating Station, Units 2 and 3), 18 NRC 380, 384 (1983) (emphases added, footnotes omitted).

Here the difficulty is not that the Board has set matters for litigation that counsel feel should not be litigated or ruled out matters that counsel feel should be in; rather as will appear below, the Board has left the applicants in the position where they do not know what is or is not to be litigated. In addition, the Boards are attempting an "end run" around the regulations and Commission directives governing exercise of the "sua sponte" power and engaging in activities far beyond their jurisdiction as defined in the relevant notices of hearing and regulations.

Only one admitted contention remains to be litigated with respect to Comanche Peak and that is Contention No. 5, which reads as follows:

> "The Applicants' failure to adhere to the quality assurance/quality control provisions required by the construction permits for Comanche Peak, Units 1 and 2, and the requirements of Appendix B of 10 C.F.R. Part 50, and the construction practices employed, specifically in regard to concrete work, mortar blocks, steel, fracture toughness testing, expansion joints, placement of the reactor vessel for Unit 2, welding, inspection and testing, materials used, craft labor qualifications and working conditions (as they may affect QA/QC) and training and organization of QA/QC personnel, have raised substantial questions as to the adequacy of the construction of the facility. As a result, the Commission cannot make the findings required by 10 C.F.R. 50.57(a) necessary for issuance of an operating license for Comanche Peak." (Emphasis added.)

This contention, as framed, deals with adequacy of construction, not the competence and character of management. There can be no question about this. If Contention 5 had been deemed by its proponents, CASE, to encompass management competence and character, CASE would not have deemed it necessary twice to attempt, unsuccessfully, to have accepted for litigation specific contentions with respect to these matters. See CASE Proposed Contention No. 1 in Intervenor's Supplement to Petition for Leave to Intervene and Contentions (May 7, 1979); CASE's Motion to Add a New Contention (Sept. 14,

1982). CASE's actions preclude any assertion that management competence and character is encompassed by Contention No. 5.

CASE's action in trying to assert a new and separate contention is not surprising in light of prior precedent. Unlike a situation which pertains in a construction permit case, when management character and competence may be viewed as encompassed by a contention that the QA/QC of future construction will not be adequate, see Consumer Power Co. (Midland Pland, Units 1 and 2), ALAB-106, 6 AEC 182, 184 (1973), at the operating license stage the two are separate and distinct concepts. "Adequacy of construction" goes to the physical status of the hardware, and inquiries whether, as installed, the hardware is capable of being operated without posing an undue risk to the pulic health and safety. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1345 (1983). Management character and competence, on the ohter hand, is an assessment of the ability and willingness of the people who will be responsible for operating the plant to follow Commission regulations during the life of the operating license. See Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 371 (1985). By their terms and fundamental concept, the two issues are distinct and unrelated.

The Licensing Boards here involved have not stated otherwise and, indeed, appear to acknowledge that Contention No. 5 does not carry with it any contention as to management character or competence, but take the position that such a contention does mean that:

> "the way in which management exercised its responsibility for the construction of Comanche Peak is relevant to the compiling of an adequate record about plant quality." Exh. C at 2.

On this basis it is the Boards' apparent plan to take such evidence and as well monitor applicants' effort "either in the hearing context or outside of it, to address management's responsibility in a careful fashion that reflects their concern for the public safety." Exh. C at 3 (emphasis supplied). Then if the Board decides the evidence or extra-record activities of the applicants do not reflect in the Boards' judgment a sufficient degree of "concern" for past management policies, the Board will then decide that management character and competence is to be an issue sua sponte.

The setting of contentions is not simply an academic exercise in NRC jurisprudence, especially in an operating license proceeding. Discovery is limited to matters relevant to contentions admitted into controversy. 10 CFR § 2.740(b)(1); Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), 12 NRC 317, 322 (1980). Similarly, the admissibility of evidence over

relevant objections is bounded by the contentions admitted. Indeed, one major function of the statement of contentions is to put the applicants on notice as to what must be defended against or opposed. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 1 and 2), ALAB-216, 8 AEC 13, 20 (1974). And yet the Boards herein have decided in the order here under consideration that only after evidence has been taken (and some unspecified extra-record matters examined) will they inform the applicants whether certain matters are or are not contentions in the case. This amounts to the acceptance of contentions conditionally which has been specifically rejected as a proper practice in NRC proceedings, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 466-67 (1982), reversed other grounds, CLI-83-19, 17 NRC 1041 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1188 n.17 (1985).

The above-described problem is further complicated by three other erroneous principles that the Boards are utilizing in the conduct of these proceedings. First, the Boards have ruled that they are under no obligation to act promptly in declaring a sua sponte issue. To begin with there is no logical reason why Licensing Boards, particularly operating license boards, should be afforded the luxury of waiting to declare themselves any more than a

party should be. We are aware of no authority in NRC jurisprudence for the Boards' statement: "we wait", Exh C at 2, and the Boards cite none. Furthermore, such a rule is, we submit, in violation of the spirit, if not the letter, of the Commission directive that Licensing Boards issue separate orders to justify exercise of its sua sponte authority and forward the same to the Office of the General Counsel for "prompt report" to the Commission so that the Commission itself might be satisfied as to whether one of its ongoing proceedings should be expanded. See Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614 (1981); Memo Chilk to Rosenthal, Cotter and Bickwit, Raising Issues Sua Sponte in Adjudicatory Proceedings (June 30, 1981), partial text appears in Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-22, 14 NRC 159, 162-63 (1981).

Second, the order ignores the teachings of the Commission decision in the TMI-1 restart case. CLI-85-9, supra. Therein the Commission made patently clear that the activities of individuals no longer on the project have no relevancy to the issue of whether the plant should operate even where, unlike the situation at bar, there has been admitted a contention as to management character and competence. The Licensing Boards herein have wholly ignored the Commission's admonition that:

> "However, the issue before the Commission is not whether GPU Nuclear has made mistakes, but whether GPU Nuclear as presently constituted and staffed has the necessary integrity to provide reasonable assurance that it will safely operate TMI-1. The Commission finds that it has." 21 NRC at 1139.

Third, the Boards are acting on the basis that they are vested with a roving commission to investigate possible wrongdoing in the prior conduct of this litigation. In the order of August 29, 1985, the Boards articulated certain matters to be addressed as follows:

> "Consideration should be given to whether Applicants incorrectly defended design errors or incomplete design documents before this Board. Exh. A at 5, ¶ 7.
>
> "How CPRT will address managements' responsibility for . . . (b) failure to disclose one or more management studies to CASE pursuant to discovery requests, (c) possible inadequacies in the technical analyses contained in Applicants' filings in this case, including its summary disposition filings, . . . (e) Applicants' conduct with respect to Mr. Lipinski and to Witness F, both of whom appear to have made at least some charges of technical validity . . . (f) the attempt to defend the quality of QA/QC for coatings and for the liner plate (g) the apparent inability to understand and properly evaluate the engineering contentions of Mark Walsh and Jack Doyle, including the apparently erroneous argument that Applicants' engineering practices were standard industry practice . . . ." Exh. A at 6-7.

If the Boards are suggesting that the applicants personnel have engaged in improprieties in the conduct of this litigation its role is to refer its suspicions to the appropriate authority or forum of the Commission. The Office of Investigations (O-I) is the body to investigate wrongdoing of applicants and licensees. In an operating license proceeding with no contention admitted as to character or competence of management, a Licensing Board, a creature of limited jurisdiction restricted to the contested issues committed to it by the notice creating it, e.g., Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976); 10 CFR § 2.760a, has no business engaging in activities that are the proper function of O-I, at least without officially declaring a sua sponte issue and giving the Commission the opportunity to decide for itself whether this is a proper function of one or both of these two Boards.

There can be no doubt that the conduct complained of herein "affect[s] the basic structure of [this] proceeding in a pervasive or unusual manner." As things now stand, the applicants are to try their case, put in the evidence, rest, and then be told what the final list of issues is. This is not simply a lack of due process; it is a lack of any process. No one can litigate the unknown or secret contention. Moreover, as noted earlier the process underway

represents a wholesale avoidance of Licensing Board responsibility and accountability vis-a-vis the Commission with respect to exercise of sua sponte power. It is a fair inference that one major reason that the Commission circumscribed the use of the sua sponte authority was to avoid the delay inherent in litigating additional issues unless the Commission itself was satisfied such activity was appropriate. The procedures being followed by the Licensing Boards herein assure the delay will occur without the Boards ever being accountable to the Commission until after the fact, after the damage is done.

CONCLUSION

The petition should be granted. This Appeal Board should:

1. Instruct the Licensing Boards to cease permitting any consideration of management character or competence unless and until a formal sua sponte declaration has been made with respect thereto by the Board in Docket #1 (the only Board which has jurisdiction over such an issue).
2. Instruct the Licensing Boards that in the event a decision is reached to declare a sua sponte issue, such issue may not include inquires as to the character and competence of individuals no longer

involved in the project nor inquires as to the prior conduct of this litigation;

3. Grant to the applicants such other and further relief as the Appeal Board deems proper in the circumstances.

By their attorneys,

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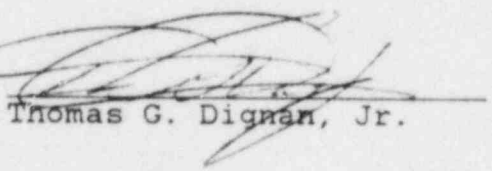
By 
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LBP-85-32

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before Administrative Judges:

Peter B. Bloch, Chairman
Dr. Kenneth A. McCollom
Dr. Walter H. Jordan
Herbert Grossman, Esq.

In the Matter of	Docket Nos. 50-445-OL & OL-2 50-446-OL & OL-2
TEXAS UTILITIES ELECTRIC COMPANY, et al.	
(Comanche Peak Steam Electric Station, Units 1 and 2)	ASLBP No. 79-430-06 OL
	August 29, 1985

MEMORANDUM AND ORDER

MEMORANDUM
(Proposal for Governance of this Case)

This Memorandum addresses crucial procedural issues raised by Texas Utilities Electric Company, et al. (Applicants) in "Applicants' Current Management Views and Management Plan for Resolution of All Issues," (Management Plan) June 28, 1985.[1] It also addresses issues raised by CASE in "CASE's Proposal Regarding Design/Design QA Issues in Response to Applicants' 6/28/85 Current Management Views and Management Plan for Resolution of All Issues" (CASE's Proposal) August 15, 1985.

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1 Citizens' Association for Sound Energy (CASE) responded on July 29, 1985 (Initial Response) and on July 16 (Mootness Response) and the Staff of the Nuclear Regulatory Commission (Staff) responded on August 2, 1985 (Staff Response).

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The Board finds that it would not be proper to adopt the Management Plan as the sole basis for continued litigation of this case. The Plan contemplates complex factual and legal determinations. Focusing the entire proceeding on the adequacy of the Plan, prior to its execution, would abnegate our responsibility to determine the merits of CASE's contention. This would be particularly ironic because CASE raised many of the design and quality assurance issues that are being addressed by the Management Plan.

We have only limited authority to terminate this proceeding when there are analyses to be completed. Termination is appropriate only if the analyses are merely confirmatory of the adequacy of the plant. However, the currently proposed plan is not just a confirmatory analysis.[2] It is necessarily vaguer than Applicants' previous plan, which

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2 Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951 (1974), citing Wisconsin Electric Power Co. (Point Beach, Unit 2), CLI-73-4, 6 AEC 6 (1973)(the mechanism of post-hearing findings is not to be used to provide a reasonable assurance that a facility can be operated without endangering the health and safety of the public); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-729, 17 NRC 814 (1983)(post-hearing procedures may be used for confirmatory issues); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-811 (June 27, 1985)(once a method of evaluation had been used to confirm that one of two virtually identical units had met the standard of a reasonable assurance of safety, it was acceptable to exclude from hearings the use of the same evaluation method to confirm the adequacy of the second unit); see also Staff Response at 915-18. The Board agrees with the Staff's statement at the bottom of p. 18, that we should require evidence of the "adequacy of, the scope of, and corrective actions resulting from, the CPRT Program."

Applicants failed to fulfill. The new Plan is addressed to a wide variety of significant issues that have not been adequately addressed by Applicants.

Although we reject the Plan as the sole basis for litigation, Applicants' commitment to the Plan is substantial and its careful implementation would provide important new information. Hence, it would not be proper to require Applicants to respond to intervenors' pending summary disposition motions before they can complete work on their Plan.

There would be little purpose in addressing a substantial portion of this proceeding to the adequacy of the Plan itself. In a sense, the Plan is Applicants' internal management document for the process by which it plans to demonstrate the adequacy of its plant. On a grand scale, it is like a lawyer's trial preparation plan. Like the lawyer's plan, however, the success of the Plan will depend largely on the skill with which it is implemented. Thus, there is no reason for CASE, at this time, to file contentions about the Plan or about the Comanche Peak Response Team (CPRT) Plan.[3]

Although we will forego any extensive effort to judge the adequacy of the Plan prior to its implementation, we have read it and considered the comments made on it. There are areas of the Plan that concern us.

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[3] We encourage CASE to continue cooperating with the Staff by promptly alleging deficiencies for Staff to consider.

For the purpose of providing guidance to the parties, we have reached the following tentative, preliminary and non-binding conclusions:

1. If the Comanche Peak Response Team Program Plan (CPRT Plan) is revised to address concerns raised in this memorandum and is carefully and appropriately implemented, it may demonstrate both the quality of plant and the extent to which management has fulfilled its responsibility to comply with the FSAR, Commission regulations, and plant quality.

2. The lack of independence of the CPRT from management may seriously affect our willingness to accept the CPRT's findings, particularly with respect to management's responsibilities. Consequently, the lack of independence might affect the admission of evidence concerning past QA/QC failures and management's responsibility for those failures.

3. Applicants will have to demonstrate that the deficiencies identified by the CPRT are adequately resolved.

4. The CPRT must adequately resolve the Staff's Technical Review Team's (TRT's) findings concerning deficiencies in the original QA/QC programs[4] for construction and design. This concern is relevant to whether reinspections by the use of samples are adequate to assure plant safety.

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4 NUREG-0797, SER Supplement No. 11 (May 1985). The TRT found, at p. P-35, that "The pattern of failures by QA and QC personnel to detect and document deficiencies suggests an ineffective B&R and TUGCO inspection system. This pattern . . . challenges the adequacy of the QC inspection program at CPSES on a system-wide basis."

5. The CPRT's resolution of all significant TRT findings that are relevant to Contention 5 may be litigated in this case.

6. We will await the CPRT's consideration of the summary disposition questions raised by Applicants and by CASE, notwithstanding Applicants' request that we no longer consider entering summary disposition in their favor on the basis of these motions.

7. The CPRT should address the extent to which there have been design errors or insufficiently complete design documents at Comanche Peak and it should consider the root cause of these errors. Consideration should be given to whether Applicants incorrectly defended design errors or incomplete design documents before this Board.

8. It would be useful for CYGNA to continue reviewing design issues that it has identified until it reaches independent conclusions about the adequacy with which its concerns have been resolved. CYGNA should maintain its independence from the CPRT, Texas Utilities Electric Company and other site organizations.

9. Applicants must implement an adequate QA/QC program for the CPRT.

10. Applicants cannot be immune from litigating the prior QA/QC program and, at the same time, rely on that program to add confidence to the adequacy of the plant. (See Management Plan at 42.)

11. While in general closed issues need not be relitigated, further investigation by the CPRT, CYGNA or the TRT may cast doubts upon

the validity of our earlier findings. In that event, these closed issues may become eligible for reassessment by the Board.

Some other questions that concern us are:

- o Whether Applicants consistently complied with their FSAR design commitments.

- o Whether the samples are properly structured[5] and whether the populations are defined to include: (a) equipment removed from the plant for design or other reasons, and (b) equipment recently added to the plant or soon-to-be added to the plant.

- o Whether it would be useful or necessary to destructively evaluate components removed from the plant or to use non-destructive evaluation techniques, in addition to visual inspection, to assess welds.[6]

- o How the CPRT will address management's responsibility for: (a) apparent QA/QC management failures with respect to coatings and to the liner plate, (b) failure to disclose one or more management studies to CASE pursuant to discovery requests, (c) possible inadequacies in the technical analyses contained in Applicants' filings in this case, including its summary disposition filings, (d) the implications of the "destructive inspection" and the transfer of workers as they relate to the t-shirt incident, (e) Applicants' conduct with

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5 See "Staff Evaluation of Comanche Peak Response Team Program Plan," Rev. 2 (Evaluation) at 5 (breadth), 6 (basis for selection, sample size), 9 (issues addressed), 10 (exclusion of vendors), 11 (method of establishing populations), 13-14 (criteria for expanding samples).

6 CASE's motion to preserve pipe supports and other components being removed from the plant is denied. CASE has not persuaded us that it has met the standard for issuance of a stay or injunction, and its motion does not appear to be a motion for discovery since it does not announce any intention to collect data about the affected components in the near future. The questions CASE has raised go to the adequacy of the sample being taken by Applicants and to the possible need for destructive evaluation of removed components. These issues go to the credibility of the proof Applicants will present and do not require action by the Board at this time.

respect to Mr. Lipinski and to witness F, both of whom appear to have made at least some charges of technical validity, (f) the handling of Atcheson, Hamilton and Dunham, (g) the handling of other allegations of intimidation of QA/QC and craft personnel, (h) the attempt to defend the quality of QA/QC for coatings and for the liner plate, (i) the apparent inability to understand and properly evaluate the engineering contentions of Mark Walsh and Jack Doyle, including the apparently erroneous argument that Applicants' engineering practices were standard industry practice, and (j) other problems of documentation and workmanship.

- Proper qualification of the QA/QC inspectors used in the CPRT's work.[7]

- The acceptability of CPRT work done before a QA/QC plan was approved or implemented.

- How Applicants or the CPRT will assess the adequacy of repairs made pursuant to its recommendations and how this assessment will be done in a way that makes it reviewable by the Staff and by CASE.

- How the CPRT will discharge its responsibility to find root causes and patterns of deficiencies.

- The suitability of acceptance criteria and the way in which trends will be used to establish corrective action.[8]

- Information concerning the independent design review conducted by a professor.

- Whether generic concerns with QA/QC require additional verification of QA/QC for welding and, if so, the suitability of the inspection attributes being used by the CPRT, particularly with respect to welds covered by paint.

- The acceptability of CYGNA's current role as independent design reviewer.

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7 Evaluation at 11.

8 Evaluation at 13.

o The completeness of the CPRT's list of issues.[9]

Despite these reservations, it is appropriate to defer consideration of issues raised by CASE in its summary disposition motions. If Applicants are successful, then the completed plan will withstand challenges brought by CASE. One form of challenge CASE might bring is a statement that it intends to prove a certain fact about the plant and that, assuming that fact to be true, Applicants plan has not adequately responded to that fact. Another form of challenge is that there are specific reasons (set forth) that Applicants' plan, as implemented, is not adequate to carry their burden of proof to demonstrate the safety of the plant. Still other challenges are possible, which is precisely the state of the world whenever a company prepares its responses to a complex set of allegations. Although this undoubtedly will make things difficult for Applicants, it is nevertheless the only fair way to proceed at this time.

It is difficult to forecast when hearings in this case will be concluded. Much of the difficulty relates to the standard restricting the tasks that may be performed subsequent to the close of hearings. Such subsequent tasks must be merely confirmatory of the adequacy of the plant. Whether or not tasks are confirmatory will, at some future time, become a matter of judgment. Should it be demonstrated that enough work has been done on the CPRT Plan to show its carefulness and

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9 Evaluation at 9; Staff's Response at 21-25.

comprehensiveness and to establish a pattern for a similar portion of work yet to be done, then the remaining tasks could be considered confirmatory.

This ruling may necessitate substantial proceedings that will delay the operation of Comanche Peak. The number of important issues and the length of hearings that may be required is not a source of comfort to this Board. Although apparent "expedition" could have been accomplished by accepting Applicants' plan at this time, regrettably, the easy road for this case is not the proper one. The parties are encouraged to cooperate in the interest of limiting the work that lies before us all.

O R D E R

For all the foregoing reasons and based on consideration of the entire record in this matter, it is this 29th day of August 1985 ORDERED:

Texas Utilities Electric Company, et al.'s request that Docket 2 be declared moot is denied; and its motion that we adopt its Management Plan also is denied. Similarly, Citizen Association for Sound Energy's

Proposal relating to summary disposition motions and to the status of Cygna Energy Services is denied.

THE
ATOMIC SAFETY AND LICENSING BOARDS

Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

Walter H. Jordan
ADMINISTRATIVE JUDGE

Kenneth A. McCollom
ADMINISTRATIVE JUDGE

Herbert Grossman
ADMINISTRATIVE JUDGE

Bethesda, Maryland

Filed: September 25, 1985

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
TEXAS UTILITIES GENERATING COMPANY et al.	)	Docket Nos. 50-445-OL & OL-2 50-446-OL & OL-2
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

APPLICANTS MOTION FOR MODIFICATION WITH RESPECT TO THE BOARDS' MEMORANDUM OF AUGUST 29 1985 (PROPOSAL FOR GOVERNANCE OF THIS CASE)

For the reasons set forth in their Memorandum in Support filed herewith, the Applicants move the Boards to modify their Memorandum of August 29, 1985 (Proposal for Governance of this Case) (the Memo) by:

1. Clarifying the language of the Memo to make clear that any "lack of independence" of CPRT from TUGCO management will have no effect upon the admissibility of testimony by CPRT members or findings documented by CPRT and that no prejudgment has been made as to the weight to be accorded such evidence.

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"B-1"

2. Striking from paragraph 1 on page 4 of the Memo the word "both" in the third line, and everything after the word "plant" in the fourth and fifth lines.

3. Striking paragraph 2 on page 4 of the Memo.

4. Striking from paragraph 6 on page 5 of the Memo the words "Applicants and by" in the second line and the entire last clause of that paragraph.

5. Striking the last sentence of paragraph 7 on page 5 of the Memo.

6. Striking the fourth "question" which appears on pages 6-7 of the Memo commencing "How the CPRT will address managements' responsibility for:"

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Filed: September 25, 1985

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
TEXAS UTILITIES GENERATING COMPANY et al.	)	Docket Nos. 50-445-OL & OL-2 50-446-OL & OL-2
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

APPLICANTS MEMORANDUM IN SUPPORT OF MOTION FOR MODIFICATION WITH RESPECT TO THE BOARDS' MEMORANDUM OF AUGUST 29 1985 (PROPOSAL FOR GOVERNANCE OF THIS CASE)

Introduction

On August 29, 1985 the Boards issued a Memorandum and Order on "Proposal for Governance of this Case" (hereafter "Memo") in which the Boards addressed what were termed "crucial procedural issues", Memo at 1, in this proceeding. Because of the significance of such pronouncements to the future litigation of this matter, because the applicants believe that certain of the declarations contained in the Memo either are, or could be interpreted as, erroneous as a

"B-2"

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matter of law or fact, and because certain statements of the Boards appear to us to evidence a misunderstanding of the role of CPRT, the applicants herein have filed of even date a Motion for Modification (the Motion).

I. Apparent Errors of Law

A. CPRT "Independence"

Paragraph 2 on page 4 of the Memo states:

> "The lack of independence of the CPRT from management may seriously affect our willingness to accept the CPRT's findings, particularly with respect to management's responsibilities. Consequently, the lack of independence might affect the admission of evidence concerning past QA/QC failures and management's responsibility for these failures". (Emphases added)

Prescinding from the question of whether or not CPRT has any role in assigning responsibility for any past problems to management or particular members thereof,[1] the portion of the above quoted language set forth with emphasis may be read as suggesting that testimony from CPRT personnel might be inadmissible as a matter of law by virtue of CPRT's so-called "lack of independence" from TUGCO management. If that is the thrust of the Boards' position, it is respectfully suggested that it is in error. While, after

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[1] See infra § I.B.

hearing a given witness, a Licensing Board of the NRC may conclude that a lack of "independence" affects the weight to be accorded the testimony, such lack of independence does not affect admissibility. Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1091 (1983).

It may well be that the reading which gives rise to applicants' concern is erroneous. An article in The Dallas Morning News on August 30, 1984 (p. 16A) purports to quote the Chairman of the Licensing Board in the main docket as commenting upon the above quoted language in the Memo as follows:

> "'[W]e would just feel more comfortable if they [CPRT] were [independent] 'We're only saying that if they structure it this way, it will affect the weight of the evidence,' Bloch said 'The proof could be stronger if there were more independence - and it's also possible that without independence they could do it so thoroughly and so convincingly that they persuade us anyway.'"

Assuming the Chairman was correctly quoted in the paper, we respectfully suggest that paragraph 1 of the Motion should be granted and that the Memo should be corrected to reflect clearly the views of the Chairman expressed to the press, viz, (1) that lack of independence does not affect admissibility and (2) that no prejudgment has been made as to the weight to be accorded CPRT expert testimony.

B. Past Management Competence or Character

There are numerous statements in the Memo which can be read as assuming that management competence is an admitted issue in this proceeding. It is not. The last remaining contention admitted in this proceeding is Contention No. 5, which, in its entirety, reads as follows:

> "The Applicants' failure to adhere to the quality assurance/quality control provisions required by the construction permits for Comanche Peak, Units 1 and 2, and the requirements of Appendix B of 10 C.F.R. Part 50, and the construction practices employed, specifically in regard to concrete work, mortar blocks, steel, fracture toughness testing, expansion joints, placement of the reactor vessel for Unit 2, welding, inspection and testing, materials used, craft labor qualifications and working conditions (as they may affect QA/QC) and training and organization of QA/QC personnel, have raised substantial questions as to the adequacy of the construction of the facility. As a result, the Commission cannot make the findings required by 10 C.F.R. 50.57(a) necessary for issuance of an operating license for Comanche Peak. (Emphasis added)

The contention as framed deals with adequacy of construction, not the competence and character of management. There can be no question about this. If Contention 5 had been deemed by its proponent, CASE, to encompass management competence and character, CASE would not have deemed it necessary twice to attempt, unsuccessfully, to have accepted for litigation specific

contentions with respect to these matters. See CASE Proposed Contention No. 1 in Intervenor's Supplement to Petition for Leave to Intervene and Contentions (May 7, 1979); CASE's Motion to Add a New Contention (Sept. 14, 1982). CASE's actions preclude any assertion that management competence and character is encompassed by Contention No. 5.

CPRT is charged with the duty of rigorously investigating and resolving all the technical concerns raised by the External Sources enumerated in the Program Plan with respect to CPSES, regardless of whether any given concern is within the ambit of the matters being litigated before the Boards. But CPRT is not assigned any role of placing blame with respect to such concerns on any individuals involved in the past management of this project. While it is possible that some "root cause" findings of CPRT may, by their nature, "point the finger" at certain individuals, this is not a goal, as such, of CPRT. Yet the Memo seems to assume that the trial of this proceeding involves a wholesale investigation of past and/or present management competence and character. For example, in paragraph 1 on page 4 of the Memo reference is made to CPRT delving into "the extent to which management has fulfilled its responsibility to comply with the FSAR, Commission Regulations and plant quality." The already quoted and

discussed paragraph 2 on page 4 apparently assumes a plethora of CPRT findings on management responsibility. On pages 6-7 of the Memo the Board raises the question of "How the CPRT will address management's responsibility for:" a host of past events. None of these matters come within the ambit of contention 5 as framed. And, as will be seen below, the issue of past management competence is, by law, not relevant to the present proceeding.

As noted in a prior pleading, an NRC operating license adjudicatory hearing is not a forum for exploring "past follies" of utilities, real or imagined. This view is confirmed by the Commission's decision in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-9, 21 NRC 1118, 1137-39 (1985), affirmed, Three Mile Island Alert v. NRC, _____ F.2d _____ (3d Cir. 1985). There may well be in the legal universe a forum for discerning and punishing past mistakes of miscreants in nuclear power plant construction, but the operating license proceeding before an ASLB is not one of them.

Prescinding from the legality of exploring past errors of management in any operating license proceeding, in the proceeding such an effort would amount to a misallocation of resources. CPRT is thoroughly "auditable". CPRT Program Plan Rev. 2, § III. J. at pp. 22-24 (June 28, 1985). CPRT is now charged with the duty of providing the requisite

assurance that all construction or design deficiencies that would present a technical bar to licensure have been detected and evaluated. Thus whether management errors were made in the past is now simply irrelevant to the one paramount concern in all NRC licensing proceedings, i.e., whether the plant is in conformity with the regulations which, in turn, means that the plant is licensable. Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1009-10 (1973), affirmed sub nom., Citizens for Safe Power v. NRC, 524 F.2d 1291 (D.C. Cir. 1975).

With respect to management competence to operate the plant: It is now too late for CASE to file and sustain under the provisions of 10 CFR § 2.714 the admission of a late-filed contention on management competence. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468-69 (1982), rev'd. on other grounds in part, CLI-83-19, 17 NRC 1041 (1983).

Similarly there is no basis at this time for this Board to inject any management competence and character issues into this case by exercise of its extraordinary sua sponte authority under 10 CFR § 2.760a in conformity with the procedures delineated in the Commission memorandum of June 2, 1981. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-22, 14 NRC

150, 162-63, reversed as to substance, CLI-81-36, 14 NRC 1111 (1981). With respect to persons no longer involved in CPSES management, as the Commission instructed in CLI-85-9, supra, the character and competence of those individuals are irrelevant to an operating license proceeding. Furthermore, with respect to all management issues, this Board is under the same duty as an intervenor to raise new issues sua sponte in a timely fashion. The time has long since passed for injection of any such issues into this proceeding.

Thus all of the references that could be read as reflecting the Board's intent and jurisdiction to litigate the issue of management competence should be deleted as requested by paragraphs 2, 3 and 6 of the Motion.

II. The Memo Indicates an Assumption By the Board that CPRT is Undertaking Tasks That It is Not

As already noted above, CPRT is not charged with the duty of placing blame on past management personnel for past mistakes. The statements made in the Memo to the effect that CPRT is investigating such matters are, therefore, factually in error. Thus, for this independent reason, paragraphs 2, 3 and 6 of the Motion should be allowed.

In addition CPRT has not been chartered to study and reach conclusions as to how this litigation has been conducted in the past. CPRT contains no legal expertise;

and, in any event, it is the task of the Board to determine on the record before it, if relevant, whether past litigation steps were appropriate. However a number of statements in the Memo seem to assume that such a task is assigned to CPRT viz:

> "Consideration should be given to whether Applicants incorrectly defended design errors or incomplete design documents before this Board." Memo, p. 5, ¶ 7.

> "How CPRT will address managements' responsibility for . . . (b) failure to disclose one or more management studies to CASE pursuant to discovery requests, (c) possible inadequacies in the technical analyses contained in Applicants' filings in this case, including its summary disposition filings, . . . (e) Applicants' conduct with respect to Mr. Lipinski and to Witness F, both of whom appear to have made at least some charges of technical validity . . . (f) the attempt to defend the quality of QA/QC for coatings and for the liner plate (g) the apparent inability to understand and properly evaluate the engineering contentions of Mark Walsh and Jack Doyle, including the apparently erroneous argument that Applicants' engineering practices were standard industry practice . . ." Memo at 6-7.

None of the items listed is on CPRT's agenda. To be sure, in the course of its assigned activities CPRT might, as a matter of course, provide information from which a conclusion could be drawn as to whether a design was erroneous or a design document is complete. On the other hand, economics or expeditiousness may dictate in some cases

substitution of a new design or analysis of record. When this approach is adopted, the original design or analysis will become functionally moot. The foregoing provides additional grounds for the grant of part of the request in paragraph 6 and the basis for the grant of the request in paragraph 5 of the Motion.

III. Miscellaneous Matters.

A. CYGNA

It is not clear to us that the Board's understanding of CYGNA's role vis-a-vis CPRT is correct. This matter will be addressed in detail in response to the Board's Memorandum of September 17, 1985 "(Cygna Review of Revised Designs)" in a subsequent filing.

B. Applicants Summary Disposition Motion

The applicants hereby unequivocally withdraw all of their summary disposition motions on file and as yet not ruled upon. Thus paragraph 4 of the Motion should be granted.

Conclusion

The motion to modify should be granted in its entirety.

Respectfully submitted,

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LBP-85-

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'85 OCT -2 P2:12

Before Administrative Judges:

Peter B. Bloch, Chairman
Dr. Kenneth A. McCollom
Dr. Walter H. Jordan
Herbert Grossman, Esq.

In the Matter of	Docket Nos. 50-445-OL & OL-2 50-446-OL & OL-2
TEXAS UTILITIES ELECTRIC COMPANY, et al.	ASLBP No. 79-430-06 OL
(Comanche Peak Steam Electric Station, Units 1 and 2)	October 2, 1985

MEMORANDUM AND ORDER

MEMORANDUM
(Applicants' Motion for Modification)

Applicants' Motion for Modification, filed September 25, 1985, shall be granted in part.

We agree with Texas Utilities Electric Company, et al., (Applicants) that the degree of independence of the Comanche Peak Response Team (CPRT) affects the weight of the evidence and not whether it would be received into evidence. See The Dallas Morning News article of August 30, 1985 (p. 16A) cited by Applicants.

We find that the remainder of our Memorandum and Order dealing with the way in which management has exercised its responsibility requires neither modification nor correction in response to Applicants' motion. The assessment of plant quality is a complex matter. There are allegations of a pattern of construction and design deficiencies. A determination concerning how management has exercised its responsibility

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for the quality of design and constructior and the adequacy of QA/QC would, at the very least, affect the necessary scope and intensity of review, including sample sizes.

With respect to sua sponte matters, our view of our responsibilities differs from that of Applicants. In particular, the timeliness factors that affect us are different from those affecting intervenors. Intervenors must submit new issues in a timely manner when information relevant to those matters raises their suspicions. It is not, on the other hand, appropriate for a Licensing Board to act on suspicion. We wait. We hear the presented evidence. We declare issues sua sponte when the evidence suggests the necessity for our doing so.

Our unwillingness to act on suspicion is tempered by our awareness that in complex litigation it may be proper to discuss our views, in a preliminary and non-binding manner, in order to assist the parties in anticipating their evidentiary needs. This can avoid the extensive delay that might arise if our views came as a surprise to a party later in the litigation. Hence, we prefer to put the parties on notice of our preliminary views -- providing them with a fair opportunity to assemble and present relevant evidence.

At the present time, the way in which management exercised its responsibility for the construction of Comanche Peak is relevant to the compiling of an adequate record about plant quality. In addition to the present significance of this information, we will consider the implications for the safe operation of the plant of whatever we learn from this relevant evidence.

We expect Applicants, either in the hearing context or outside of it, to address management's responsibility in a careful fashion that reflects their concern for the public safety. We expect to be apprised of any documents that reflect the way in which management exercises this responsibility.

Whether or not Applicants harassed workers or otherwise deviated from Appendix B requirements, as alleged, affects our assessment of the adequacy with which QA/QC observed the quality of the plant. In assessing the significance of QA/QC deficiencies and the remedies that might be appropriate with respect to such deficiencies, we would be concerned were we to conclude that present management has difficulty assessing and learning from management's previous errors. Consequently, should carefulness be missing from Applicants' studies of its own management behavior (or should Applicants fail to develop an adequate understanding of its own behavior), we would consider the implications of that lack of concern.[1]

To the extent that the CPRT does not assess management actions, including actions with respect to this litigation, we are hopeful that the Staff will rise to fill that void. If not, we will need to consider whether to declare a sua sponte issue, considering all the evidence before us as this case is developed.

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[1] Of course, to the extent that the evidence might indicate that Applicants' QA/QC program was adequate, the need for management to
(Footnote Continued)

Since Applicants have withdrawn their summary disposition motions, we will not act on those motions.[2] Typically, when a motion is withdrawn it becomes moot. However, the submission of these summary disposition documents may reflect on management's ability to understand and control the quality of design.[3] The affidavits were submitted for our formal consideration. To the extent that the evidence was incomplete or misleading, we still expect Applicants to fulfill their obligation to correct our record. If necessary, they should explain the reason for the incomplete or misleading affidavits.

(Footnote Continued)
demonstrate an appreciation for its own deficiencies would be diminished.

2 Although Applicants appear to be withdrawing all their summary disposition motions, including those we have already acted on, we do not interpret their motion to apply to withdrawal of motions covered by final decisions of the Board. If we are incorrect in this interpretation, Applicants should notify us promptly, stating why they would have us withdraw decisions that we have already issued.

3 We note that our December 1983 Memorandum and Order, LBP-83-81, 18 NRC 1410 at 1452 concluded, in part, that "[T]he record before us casts doubt on the design quality of Comanche Peak, both because applicant has failed to adopt a system to correct design deficiencies and because our record is devoid of a satisfactory explanation for several design questions raised by intervenors." Nothing subsequently presented to us, up to this time, has detracted from this conclusion.

O R D E R

For all the foregoing reasons and based on consideration of the entire record in this matter, it is this 2nd day of October 1985

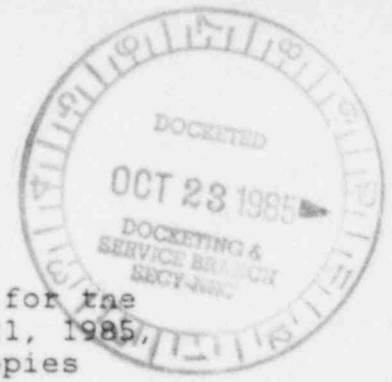
ORDERED:

Applicants' September 25, 1985 Motion for Modification of our order of August 29, 1985, is granted in part--by clarification in the accompanying memorandum of the Board's concern about the independence of the CPRT. In all other respects, the Motion is denied.

FOR THE
ATOMIC SAFETY AND LICENSING BOARD

Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland



CERTIFICATE OF SERVICE

I, Thomas G. Dignan, Jr., one of the attorneys for the Applicants herein, hereby certify that on October 21, 1985, I made service of the within document by mailing copies thereof, postage prepaid, to:

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