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November 1, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-445 and 50-446
TEXAS UTILITIES ELECTRIC COMPANY, ET AL	)	
	)	(Application for Operating Licenses)
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

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APPLICANTS' ANSWER TO BOARD QUESTION REGARDING WITHDRAWAL OF MOTIONS FOR SUMMARY DISPOSITION

I. Introduction

On October 16, 1985, the Licensing Board contacted the parties to request their positions on a question concerning Applicants' withdrawal of the motions for summary disposition. Specifically, the Board inquired, as follows:

> Does the 'written filings' stipulation affect the right of the Applicants to withdraw the summary disposition motions?

The Board requested that the parties respond to this question by October 30, 1985. Applicants set forth their response below.

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II. DISCUSSION

A. Background

1. The "stipulation"

The "stipulation" to which the Board refers is an oral agreement among the parties (later documented in a Board Memorandum and Order) to a procedure for handling Applicants' summary disposition motions. That procedure was envisioned to entail, inter alia, possible Board inquiry (either through further written filings or "on the record") to clarify the parties' positions. The purpose of the procedure was to limit the need for hearings to issues as to which the Board felt it could not reach a "reasoned decision," thereby avoiding "unduly prolonged hearings of technical matters, . . . " (See Memorandum and Order (Written-Filing Decisions, #1: Some AWS/ASME Issues), June 29, 1984, at 2-3; see also Conference Call of May 24, 1984, Tr. 13,798-13,803.)

2. Applicants' withdrawal of motions

Applicants withdrew their motions for summary disposition in their "Motion for Modification With Respect to the Board's Memorandum of August 29, 1985 (Proposal for Governance of this Case)", dated September 25, 1985, at 10. The Board accepted that withdrawal, determining in the October 2, 1985, Memorandum and Order (Applicants' Motion for Modification), at 4, that it would not act on those motions per se, although reiterating its previous request that Applicants submit corrections to those

motions.[1] However, upon consideration of CASE's September 25, 1985, motion for reconsideration of the Board's August 29, 1985, Memorandum and Order, the Board posed the above question.

3. CASE motion for reconsideration

The aspect of CASE's September 25, 1985, motion for reconsideration that apparently gave rise to the present inquiry is CASE's assertion that it is "entitled to a ruling on the summary disposition motions (both Applicants' and CASE's) based on the conditions at the plant...at the time each Motion was filed" (Motion at 14 (emphasis in original)). As a separate assertion, CASE argued that Applicants should not be allowed to "change their sworn affidavits...without prejudice" because the Board and parties had agreed those affidavits were to be "evidentiary affidavits." CASE seeks to preserve the affidavits for "use as evidence in future Findings of Fact." (Motion at 15.)

Because Applicants' had not withdrawn their motions for summary disposition at the time CASE filed its motion (Applicants withdrew the motions in their motion of the same date), CASE's arguments do not go directly to the question posed by the Board. Applicants rely on their prior answer to CASE's motion as setting forth their position with respect to the specific arguments

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1/ Those corrections were requested in the context of another Board decision. Applicants intend to submit those corrections.

raised by CASE. The discussion herein goes to the Board's particular question, as set out above.

B. Response to Board Question

1. Effect of agreement on withdrawal of motions

As noted previously, the agreement at issue is that memorialized in the June 29, 1984, Memorandum and Order (Written Filings). It was a procedural agreement, reflecting a desire on the part of all parties to resolve outstanding issues efficiently. The agreement did not substantively affect the status of the motions for summary disposition as motions or the role of the Board in ruling on those motions. That agreement simply set out, in advance, a process comparable to that already contemplated by the rules governing disposition of summary disposition motions after consideration of the motions and responsive pleadings.

In particular, the Rules of Practice contemplate that the Board may take such measures as are "appropriate" in considering motions for summary disposition if a ruling cannot be made on the pleadings, including a continuance to obtain additional affidavits. 10 C.F.R. §2.749(c). Further, the Federal Rules governing summary judgment (Fed.R.Civ.P. 56),[2] are mirrored by the Rules of Practice generally with respect to tribunal

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2/ The Federal Rules are analogous to the Rules of Practice and may be looked to for guidance in construing 10 C.F.R. §2.749. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 756 n. 46 (1977).

involvement (compare Fed.R.Civ.P 56(f) with 10 C.F.R §2.749(c)). The Federal Rules also provide expressly for inquiry by the tribunal, including through a hearing on the motion, to determine what material facts exist without substantial controversy and which are in good faith controverted (Fed.R.Civ.P. 56(d)), and for supplementation of affidavits or further affidavits (Fed.R.Civ.P. 56(e)). These procedures correspond to those agreed to by the parties in this proceeding.

Clearly, the parties' agreement did not place Applicants' motions in some unique posture. Rather, that agreement simply foresaw prior to Board consideration of those motions a process that is likely to have evolved over the course of such consideration, with or without the agreement. Indeed, Applicants did not object to this process, proposed by the Board, in that it was consistent with the Rules of Practice and appeared to have a reasonable promise of facilitating the efficient resolution of outstanding issues. Applicants certainly never agreed, or had reason to suspect, that the process could serve to infringe on their rights with respect to the motions or the presentation of their case. There was certainly never any stipulation that Applicants would be precluded from withdrawing their motions and/or from proceeding to a hearing to resolve the issues if the process did not work. (See Tr. 13,798-13,803, Attachment.) In short, the subject agreement does not affect Applicants' rights with respect to their motions, including the right to withdraw a motion and proceed to trial on the issues involved.

Finally, the Board should recognize that CASE's position that the Board must proceed to decision on the motions is simply an attempt by CASE to have it both ways. CASE has argued throughout this proceeding, and most vociferously in responding to the motions for summary disposition, that Applicants must conduct a comprehensive review of the piping and support systems to address the cumulative effect of the outstanding issues in that area. Applicants have commissioned Stone & Webster to perform such analyses. Yet, CASE would have the Board proceed to a decision on material that Applicants have effectively acknowledged does not address all questions that must be resolved before licensing.[3] The ongoing CPRT efforts cannot be ignored, and Applicants cannot be denied the right to rely on those efforts to meet their burden.[4] No basis exists to unnecessarily burden the Board and

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3/ The outstanding questions to which we refer include more than the various matters raised by CASE with respect to pipe support designs at issue before the Board. There are questions which were raised by Cygna, TRT and CPRT, questions that relate both to matters before the Board and matters to be resolved before the Staff, that in Applicants' view are best resolved by the comprehensive CPRT program. In short, superseding events rendered resolution of the issues addressed in the motions, in isolation, inefficient and impractical. (See "Applicants' Current Management Views and Management Plan for Resolution of All Issues," June 28, 1985, at 59-60.) It is for this reason Applicants withdrew their motions.

4/ See Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1169-70 (1984) (holding that applicants could use evidence of various remedial programs to meet their burden of proof on specific quality assurance issues); see also Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-763, 19 NRC 571, 576 (1984) (holding that verification efforts may "substitute for, and supplement" the QA program in order to provide the Board with reasonable assurance that the plant can operate safely).

parties with resolving withdrawn motions that, even if disposed of, would not negate the need for a decision on the comprehensive program Applicants have undertaken.[5]

2. Effect of Agreement on Affidavits Supporting Motions for Summary Disposition

Apart from the status of the motions per se is the question of the status of the affidavits supporting those motions. It is not apparent what particular use CASE might envision for those affidavits. CASE only states that it would have the Board rule that Applicants' motions were available for "use as evidence in future Findings of Fact." It would be premature for Applicants, or the Board, to speculate as to the specific uses CASE may wish to make of the affidavits. However, to be clear, Applicants recognize that withdrawing the motions does not preclude CASE from seeking to use the accompanying affidavits for purposes that are consistent with the Rules of Practice, including the rules governing receipt of evidence into the record. Indeed, Applicants have already acknowledged that one such use may be for impeachment purposes (see Applicants' October 15, 1985, "Answer to CASE's Motion for Reconsideration," at 9).

5/ In that the Staff filed an answer to only one of Applicants' motions, and the Board previously expressed its desire to have the Staff's positions before ruling (Tr. 13,977 (August 22, 1984 conference call)), ruling on those motions in their present posture would not even be consistent with the procedure the Board envisioned for disposing of the motions.

III. CONCLUSION

For the foregoing reasons, Applicants respond in the negative to the Board's question as to whether the written filings agreement affects the right of Applicants' to withdraw their motions for summary disposition.

Respectfully submitted,

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November 1, 1985

UNITED STATES OF AMERICA
NUCLEAR RECULATORY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING BOARD

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

4th Floor
4350 East West Highway
Bethesday, Maryland

Thursday, May 24, 1984

Hearing in the above-entitled matter convened at 3:10 p.m.

BEFORE:

JUDGE PETER BLOCH, ESQ
Chairman, Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C.

JUDGE WALTER JORDAN
Member, Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C.

are the written motions to summary disposition filed by the applicants and whether or not the parties agree that these are addressing matters that should be able to be filed in writing.

We can discuss in detail as we go on what that would mean. Also of importance is applicants' motion for these option of special procedures filed on May 8th, 1984, which have been responded to in part by cases motion for enlargement of time filed on May 21, 1984.

There are a variety of scheduling matters that the Board would like to clarify, including the staff schedule to the extent that's possible, and the applicants' schedule for filing the remaining items related to its plan.

I think with that brief introduction, the order of those things doesn't seem to me to be that important, but I think it probably would be helpful if the staff could clarify, if it would, when it feels it is going to be able to respond to the various pending matters.

MR. TREBY: By pending matters, are you talking about the motions for summary disposition or something beyond that?

JUDGE BLOCH: That's a good start.

MR. TREBY: With regard to the motions for

summary disposition, it is our belief that in the first instance at least a response in pleading -- would be appropriate. We believe that --

JUDGE BLOCH: I'm asking about a schedule. Can you do it within the time schedule provided in the rules?

MR. TREBY: No, I don't believe so. We have reviewed those motions. We've had our technical people review them and we believe that we have a number of matters for clarification that we'd like to ask the applicants about.

I would like to point out that when the applicants filed their plan initially on February 3rd, they indicated as part of that plan that they proposed to meet with Messrs. Walsh and Dole during the latter stages of implementation of the plan to discuss the results of those efforts.

And then in later pleading their discussions amongst the parties and with the Board, that would include the staff. We have not had any of those meetings. In reviewing the various documents, we find that we have a number of questions with regard to some of the data and some of the methodology.

We think that if we could have a meeting in the very near future -- we would prefer either the end

of next week or the beginning of the following week -- that we would probably be able to answer these motions for summary disposition shortly thereafter, perhaps within the time allotted by the regulations which would be June 11th on most of the ones we've received.

But I suspect that we might need a short period of time to go after it. It all really depends on the information that we would gather at these meetings.

JUDGE BLOCH: Since the meetings would be designed to try to narrow issues and focus the motion to some extent --

MR. TREBY: These would be technical meetings and exchange of technical information between the people which would be designed to do that, you know, to the extent that the technical people could agree on what has been proposed and said -- things and we all agree, that wouldm of course, narrow that matter and we'd be able to dispose of it.

JUDGE BLOCH: I appreciate that and the Board will be pleased either to have you do that alone or with our participation, as you know. What I was going to ask you is whether in light of that process, you think that it would be fruitful to look forward to a situation where the Board would attempt to resolve these matters based on the written filing, supplemented, if

necessary, by further written filings requested by the Board or by oral argument or, if the Board considers it necessary to resolve the issues fairly, by croxx examination of specified witnesses.

Would you prefer adopting a procedure at this point which favored the determination on written papers in the discretion of the Board?

MR. TREBY: Yes, we would favor that -- that approach after we have this meeting and filed our written paper.

JUDGE BLOCH: I understand. You're not waiving any rights to take the time necessary to make a clear and careful technically correct response. I hope that's what we'll get because that's the only way the Board's going to be able to make a clear decision on summary disposition anyway.

Mr. Reynolds, would you like to comment on the schedule of staff as suggested and on the Board's comments on a principal commitment to determinations on written filings?

MR. REYNOLDS: Once you have Mr. Treby to clarify whether the staff indeed was suggesting that these matters could go off on the pleadings and you received an answer in the affirmative, that satisfied my concerns that the staff hadn't made up its mind one way

or the other on that question. I think that a meeting in the next week is appropriate.

I would suggest that it be next week and not the following week because that would impair any hearing schedule that the Board might rule on today. So yes, we would agree that a meeting with the staff next week sometime is appropriate to respond to staff questions.

JUDGE BLOCH: Now, when you said with the staff, the staff suggestion was with staff and CASE. Is that okay?

MR. REYNOLDS: I didn't mind -- I didn't mean to exclude CASE.

JUDGE BLOCH: Mrs. Ellis, would you like to comment?

MRS. ELLIS: I think that that's a -- pretty much our feeling. I think it would be worth the effort to try to resolve the things on paper, if possible, and at the very least I think it would be worth our while because we could narrow the issues considerably, and at best, we might be able to resolve all of them on paper to the Board's satisfaction.

I think that's certainly a good way to approach it. I don't know at this point, without checking with Mr. Walsh or Doyle, what their schedules would be like as far as a meeting. That seems like a reasonable way

to proceed if we could, you know, work out some -- with them to be available.

JUDGE BLOCH: It would be best if they could be available in person, but if not, I would hope things could be done so that they can have a meaningful conference by telephone.

MRS. ELLIS: Right, uh-huh.

JUDGE BLOCH: I think it is important that we try to proceed expeditiously and try to get it going next week. You understand that what we were requesting is that the parties agree in advance that the Board would attempt to reach decisions based on the written filings and that we would only have additional -- we would only have a hearing or cross examination if the Board determined that that was necessary to make a recent decision. Is that an acceptable standard to you, Mrs. Ellis?

MRS. ELLIS: Yes, I think so.

JUDGE BLOCH: It's my understanding that all of the parties are agreeable to that basic method of going forward. We, therefore, don't know at this time that any of the issues that are now pending before us will need to go to hearing, and therefore have nothing at this point to schedule for hearing.

We're hopeful that the parties will meet, narrow things and will give us the record to decide

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	)	Docket Nos. 50-445 and
TEXAS UTILITIES ELECTRIC COMPANY, ET AL.	)	50-446
	)	
	)	(Application for
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	Operating Licenses)
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer to Board Question Regarding Withdrawal of Motions for Summary Disposition" in the above-captioned matter were served upon the following persons by express mail (*), or deposit in the United States mail, postage prepaid, on this 1st day of November, 1985 or will be served by hand delivery (**) on the 4th day of November 1985.

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