May 3, 1982

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 and 50-446
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	(Application for Operating Licenses)

APPLICANTS' RESPONSE TO CASE'S MOTION FOR RECONSIDERATION OF BOARD'S ORDER DURING CONFERENCE CALL OF APRIL 22, 1982

Pursuant to 10 C.F.R. § 2.730(c), Texas Utilities Generating Company, et al. ("Applicants") hereby respond to CASE's April 26, 1982 "Motion for Reconsideration of Board's Order During Conference Call of April 22, 1982." Applicants submit that CASE's Motion is wholly without merit and constitutes simply another unwarranted and inappropriate attack on the integrity of the Applicants, the NRC Staff and the Board. Applicants have been hesitant in the past to respond specifically to such accusations of CASE simply because to do so would distinguish those allegations. However, the instant pleading by CASE has gone too far, and compels a response by Applicants and the Staff, and action by the Board.

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CASE charges the Applicants with "deliberately obstructing discovery" and the Staff with "withholding" of documents. CASE Motion at 2, 5. These charges by CASE are unfair at best and dishonest at worst. Giving CASE the benefit of the doubt because its President and chief spokesperson is a lay person, Applicants assume that CASE simply fails to comprehend the legal process and the implications of its allegations. A less charitable interpretation would be that CASE, recognizing that it will not pevail on the merits, has determined to drag this proceeding down with procedural tricks and charges of unfair treatment by the Board. In any event, the Board should seize control of the situation now before this proceeding degenerates into the type of name-calling and ad hominum attacks that plague the South Texas proceeding, where even the licensing board was not immune. Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-672, 15 NRC ___ (April 21, 1982).

Accordingly, for the reasons set forth below, Applicants urge the Board to (1) deny CASE's Motion, (2) strike the remainder of CASE's pleading containing accusations against the Applicants, the Staff and the Board and (3) admonish CASE to refrain from personal innuendos and false charges against the parties and the Board.

I. BACKGROUND

On April 22, 1982, the Board placed a conference call to all parties in this proceeding to provide an opportunity for oral argument on a CASE motion dated April 20, 1982 seeking additional time for discovery on Contention 5. In that motion, CASE sought "at least" an additional 60 days for discovery on Contention 5. Discovery was scheduled to close on May 3, 1982, with the last date for filing discovery requests set for April 22, 1982. The hearing on Contention 5 was (and remains) scheduled to commence June 7, 1982. See the Board's Revised Schedule, dated March 25, 1982.

During the conference call, both the NRC Staff and Applicants opposed CASE's motion. The Applicants and NRC Staff argued that CASE had not demonstrated good cause for further extensions of discovery on Contention 5. 1/ The Board ordered,

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1/ The Board originally established March 29, 1982 as the cut-off date for discovery on Contention 5. See Order Cancelling Scheduled Evidentiary Session, dated February 9, 1982. This date was chosen at the request of CASE in a telephone conference with the Board on February 3, 1982. On March 25, 1982, the Board extended discovery on Contention 5 until May 3, 1982, and established June 7, 1982 as the date for commencement of the hearing. See Revised Schedule, supra. This extension in effect granted a March 1, 1982 motion by CASE for an extension of discovery which had previously been denied by the Board. See the Board's March 8, 1982 Order.

however, that discovery on Contention 5 be extended an additional two weeks, until May 17, 1982. An Order (Amending Revised Schedule) was issued on April 23, 1982 setting forth the Board's decision during the conference call. It is that decision and Order which CASE would have the Board reconsider.

II. APPLICANTS' RESPONSE TO CASE'S MOTION

CASE bases its motion for reconsideration on allegations that the conduct of Applicants, the NRC Staff and the Board has been improper. Applicants below address each allegation against Applicants.

A. Applicants' Have Properly and Timely Responded to All CASE Discovery Requests

CASE's first allegation is that "Applicants' are deliberately obstructing discovery in an attempt to exploit the Board's dedication to holding a hearing on June 7, 1982." CASE Motion at 2. In support of this statement, CASE contends Applicants have withheld important documents ("forcing CASE to turn to the Board to obtain discovery of original documents") and have "severly and unnecessarily" limited CASE's discovery of original documents by allegedly limiting discovery to three people at a time, requiring that all such persons be CASE members and allowing discovery of documents only during normal business hours. None of CASE's accusations is meritorious.

In the first instance, the record reflects that Applicants have responded to each and every discovery request in a timely fashion. It also reflects that when Applicants disputed the relevance of discovery requests, they filed appropriate motions with the Board in a timely fashion and in several instances responded to discovery requests that were of questionable revelance to Contention 5, even for the purposes of discovery. The record also reflects that Applicants were responsive to all discovery requests which were not disputed as to relevance or otherwise.

It is unclear to what CASE is referring when it alleges Applicants have withheld important documents. CASE argues that copies of documents provided to CASE were not "true and correct copies," and apparently translates this into a withholding of documents. In this regard, CASE cited instances where it appeared to CASE that originals of certain logs had been "whited-out" or typed versions of those logs did not agree with handwritten versions previously supplied to CASE. If this is the thrust of CASE's instant motion, the Board has aleady dealt with this matter as a basis for extending discovery when it held the April 22, 1982 conference call. See CASE's April 20, 1982, Motion at 8-10.

In any event, as Applicants explained in their Answers to CASE's Ninth Set of Interrogatories, Response to Interrogatory 15, "logs" are not "records" pursuant to 10 C.F.R. Part 50, Appendix B and are not retained as such. They are retained simply for tracking purposes. Also, as Applicants explained, handwritten versions are simply an interim step before a log is typed. Thus, variations between the handwritten and typed versions simply occur when more concise descriptions are made for the typed version. Finally, these logs may occasionally be corrected when dates are found to be inaccurate or descriptions not concise as compared to whatever official "record" document the particular log summarizes and tracks. Further, CASE did not seek to see originals of requested documents until March 1, 1982, and Applicants have produced originals since April 8, following Board disposition of Applicants' request for a protective order. Accordingly, CASE's concern with seeing original documents is not only unfounded, but presents no justification for further extension of discovery.

CASE's instant complaints concerning arrangements for discovery of documents at the site have already been before the Board, see CASE's April 20, 1982 Motion for Additional Time, and considered in making the decision during the April 22, 1982 conference call to further extend discovery. Thus, this is no new information that warrants the Board to reconsider its decision.

Further, Applicants have never placed a limitation of three persons for reviewing documents at the site. CASE has apparently misunderstood a limitation of three persons for a personal site tour as also applying to visits at the site to review documents. While space is very limited at the site, Applicants have offered to work out CASE's concern in this regard. 2/ Applicants have maintained and continue to maintain that only CASE members and representatives, as parties to this proceeding, may enter the site to review documents. 3/ This is wholly proper in that only those persons

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2/ Applicants conveyed to CASE in a phone conference on April 27, 1982 that they would try to work out any requests by CASE for additional persons to inspect documents, to the extent space limitations allowed.

3/ CASE has been represented in discovery at the site by Mrs. Juanita Ellis, its President, and by Mr. Jerry Ellis and Mr. Lanny Sinkin, both members of CASE.

are subject to the rights and obligations imposed on parties to this proceeding. As for discovery during business hours, Applicants note that under the Federal Rules, documents are required to be produced during reasonable business hours and that Saturdays and Sundays are considered beyond reasonable business hours. Miller v. International Paper Co., 408 F.2d 283, 292-93 (5th Cir. 1969); Harris v. Sunset Oil Co., 2 F.R.D. 93 (W.D. Wash. 1941). Thus, each of CASE's allegations that Applicants have obstructed discovery is without merit and provides no support for a further extension of discovery or the other relief sought.

B. Applicants' Promptly Provided Clarification to Its Responses to CASE's Ninth Set of Interrogatories

As an additional reason for requesting a further extension of discovery (and to delay the hearing) on Contention 5, CASE complains that Applicants were not responsive to its Ninth Set of Interrogatories. The record reflects the contrary. Out of 164 discovery requests in that set, CASE considers only seven to be "not responsive." See CASE's letter to Applicants' counsel dated April 26, 1982. Apparently CASE considers that Applicants' answers to the remaining 157 discovery requests were responsive.

Further, CASE contacted Applicants' Counsel on April 26, 1982, evidently after it had sent its letter and the instant motion, to inform counsel that it had questions on those few responses. CASE did not indicate at the time that it was filing the instant motion. Applicants Counsel informed CASE that Applicants would telephone CASE the next day with clarifications. Applicants provided the requested clarifications as promised and CASE indicated that Applicants' responses, as clarified, were acceptable. See Applicants' letter to CASE of April 28, 1982. On this matter CASE has again resorted to the typewriter before contacting Applicants, contrary to the Board's directive to the parties to consult with each other before seeking Board intervention. Accordingly, in that Applicants satisfied CASE's requests promptly, this matter provides no support for the instant motion.

C. Applicants' Properly Supplemented Their Responses to CASE's Discovery Requests

CASE also charges that Applicants "deliberately withheld" a document produced by letter dated April 19, 1982 as a Supplement to Applicants' response to CASE's First Set of Interrogatories. CASE Motion at 3-4. At the time Applicants

responded to CASE's First Set of Interrogatories, the document did not exist, and Applicants advised CASE as to the material then in existence. The instant document was prepared in June 1981 and apparently was overlooked by Applicants' system for updating discovery responses as new information becomes available. When it was determined that the report was within the scope of CASE's First Set, the document was made available to CASE immediately.

In any event, the document does not raise any serious issues with regard to the subject with which it is concerned, viz., the QA Records Management System. Further, even though this document may be outside the scope of Contention 5, it was produced in accordance with the Board's directives to interpret the scope of Contention 5 very broadly for discovery purposes. In any event, production of the document gave rise to no new or substantive issues, and CASE will have had several weeks in which to pursue discovery on the report if it desires. Accordingly, this matter also fails to provide support for CASE's motion.

III. CASE'S FAILURE TO PURSUE DISCOVERY DILIGENTLY DURING THE PROCEEDING DOES NOT JUSTIFY FURTHER EXTENSIONS

CASE's failure to pursue discovery diligently and prudently throughout this proceeding is the root cause of CASE's present position. Such failure should not be permitted to justify further extensions of the discovery deadline and postponement of the June 7 hearing.

When the Board granted party status to all three intervenors in its Order dated June 16, 1980, there was no consolidation of the parties and each party was free to pursue discovery on each and every admitted contention, including Contention 5. The Board urged the parties at that time to pursue discovery with "reasonable promptness." CASE filed its First Set of Interrogatories on July 7, 1980 and its Second and Third Set of Interrogatories five months later, on December 1 and 4, 1980, respectively. Contention 5 was a subject of discovery in all three sets. This open season on discovery continued for approximately six months until the Board issued its Memorandum and Order on

December 31, 1980, consolidating the intervenors on some issues, including Contention 5.

The lead intervenor for Contention 5 was designated in that order to be ACORN. ACORN continued in the role as lead intervenor on Contention 5 until it withdrew from the proceeding in June 1981. There is absolutely no indication in the record to suggest that CASE made any effort to coordinate discovery with ACORN during that period, as it was free to do. CASE could have simply prepared discovery requests for or in coordination with ACORN, but it elected not to do so. Rather, CASE apparently simply sat back and allowed ACORN to determine the proper priority and necessity for discovery on Contention 5.

Upon ACORN's withdrawal in June 1981, the Board then designated CFUR as lead party on Contention 5. See Memorandum and Order of July 24, 1981. Again, there is no indication in the record that CASE made any effort to coordinate discovery on Contention 5 with CFUR, as it was free to do.

Of course, CASE was free any time after December, 1980 to file a motion for reconsideration of the Board's consolidation order and thereby seek separate party status on Contention 5. If CASE felt so deprived by the Board's consolidation order, then it certainly should have timely

sought reconsideration. 4/ Not until a November 7, 1981 motion was filed did CASE seek such reconsideration.

At the hearing in December 1981, the Board ruled in response to CASE's November 7, 1981 motion that the consolidation of the parties would cease and that both CASE and CFUR could pursue Contention 5 for all purpo. s, including discovery. 5/ From that date onward, CASE was free to engage in any discovery it desired on Contention 5. However, it took CASE one full month to initiate discovery (January 4, 1982), even though there were no significant post-hearing filings or other burdens placed on the parties which might have otherwise occupied CASE's time.

Since January 6, 1982, CASE has engaged in extensive discovery on Contention 5. There have been disputes between CASE and the Applicants and NRC Staff on discovery matters,

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4/ On July 28, 1981 CASE filed a Motion for Board Clarification of Wording of Contention 5. Therein, CASE expressed its displeasure with the Board's consolidation ruling but did not seek any relief on that point.

5/ The Board noted at that time that "there should have been more communication" between CASE and the other intervenors designated as lead party-intervenors on Contention 5. December 1, 1981 Transcript at 103.

and the parties have sought the guidance of the Board to resolve those disputes. In all cases, the disputes were pursued by Applicants (and the Staff) with professionalism and integrity and in accordance with the NRC Rules of Practice. Further, Applicants have scrupulously adhered to the time limits prescribed in NRC Regulations for responding to discovery, and have been neither dilatory nor obstructionist in their conduct of discovery.

The current dilemma in which CASE apparently finds itself is due primarily to two factors. First, for well over one year CASE failed to pursue discovery diligently when it could have, either on its own or through another lead party-intervenor, and failed to seek reconsideration of the Board's consolidation order when it desired to engage in discovery itself but was required to do so through another lead party-intervenor. After all, nearly two years have elapsed since CASE was granted intervenor status in this proceeding. During that time, CASE was able unilaterally to pursue discovery on Contention 5 for approximately one year and was able to work through another lead party intervenor in engaging in discovery for approximately one year. However, CASE only engaged in limited discovery in 1980, and delayed until January 6, 1982 to initiate discovery on

Contention 5 in earnest. The entire year between that early discovery and the current phase was totally wasted by CASE when in all likelihood it could have at least coordinated discovery efforts with the lead party-intervenor and fully explored the issues during that time.

Second, CASE has caused its dilemma by the method in which it has conducted its discovery. Rather than commence discovery with broad inquiries on broad issues, and thereafter narrowing and scoping the issues (working from the bottom of the pyramid to the top), CASE continues to seek discovery on the broadest range imaginable. For example, in response to CASE's First Set of Interrogatories filed on July 7, 1980, Applicants produced copies of Deficiency and Disposition Report ("DDR") logs, Non-Conformance Report ("NCR") logs, and Corrective Action Request ("CAR") logs. From these logs, and supplements to those logs, CASE should have been able to identify the CARs, DDRs and NCRs which at least dealt with areas in which CASE had a concern and then request those particular CARs, DDRs or NCRs.

Instead, CASE waited until two days before the then-scheduled April 22, 1982 cut-off for discovery (20 months after CASE first had available to it the applicable logs) to

pursue this tack with another set (Tenth) of interrogatories in which CASE requests "each and every" DDR and CAR, and all NCRs not produced in response to CASE's Ninth Set of Interrogatories which was filed only two weeks before the Tenth Set. This latest request involves over 6000 documents. In sum, CASE has brought its last minute rush upon itself through its election to pursue discovery from the top of the pyramid to the bottom. CASE should not be afforded additional time for discovery in these circumstances. 6/

IV. CONCLUSION

For the foregoing reasons, Applicants urge the Board to deny CASE's motion for yet another extension of the time for discovery and in effect postponement of the hearing. Applicants also urge the Board to strike the balance of

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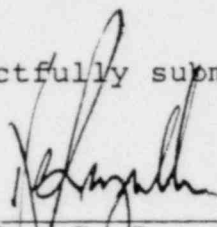
6/ In this regard, Applicants have offered on several occasions to meet with CASE to discuss identification and narrowing of issues and to discuss discovery matters that could assist in narrowing the issues. CASE has not accepted Applicants' offers on the grounds that it needed to see more documents before it could narrow the issues.

CASE's pleading containing inflammatory accusations against the Applicants, the Staff and the Board, and to admonish CASE to refrain from the use of personal innuendos and false charges against the parties and the Board.

Respectfully submitted,



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(Comanche Peak Steam Electric Station, Units 1 and 2)	)	(Application for Operating License)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Responses to CASE's Motion For Reconsideration of Board's Order During Conference Call of April 22, 1982," in the above-captioned matter were served upon the following persons by overnight delivery (*) or by deposit in the United States mail, first class postage prepaid this 3rd day of May, 1982:

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