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Docket Nos. 50-445
and 50-446

CASE'S MOTION FOR RESCHEDULING
HEARING ON CONTENTION 5

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discovery requests (depending on possible resolution by informal contacts).

Regarding the first point, CASE requested and received over 20,000 pages of material from Applicants over the last 30 days. Both Applicants and Staff, in their responses to CASE's 4/26/82 motion for reconsideration, criticize CASE as not understanding how to do discovery efficiently. CASE makes no claim to expertise. Represented by a lay person, CASE has proceeded as best it could based on learning from scratch.

But recognizing the difficulties for a volunteer intervenor, as compared to other paid and experienced parties, is not new to the Commission. See Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 336 (1980). Prior to CASE successfully arguing for its right to go to the project site to view original records, CASE had to specify what the Applicants should copy and bring to their Dallas offices for CASE review. CASE took a very limited approach to requests for review, asking only for documents which it had enough information about to know it probably wanted. Once CASE received access to the plant site, CASE looked at all possibly relevant documents and took copies of far more than it ever expected to have. Starting April 22, when we first looked at original documents at the plant site, CASE copied for possible use in the hearing more than 20,000 pages.

The second consideration is closely tied to the first. With only thirty days between the end of discovery and the opening of the hearing, CASE has a mammoth task to organize and prepare for orderly use the thousands of pages received in discovery.

The third consideration is the Board's decision that the provisions of 10 C.F.R. Section 2.749(a) would not apply to motions for summary disposition. Specifically, rather than requiring such a motion to be filed forty-five days before the hearing date, as provided in Section 2.749(a), the Board permitted Applicants to file such a motion less than thirty days before the hearing.

The result is that CASE must organize, draft, and produce a response to this

summary disposition motion during twenty one of the less than thirty days remaining between filing of said motion and hearing. CASE has no staff to assign to such a task; CASE's representative will have to take time away from preparing for hearing in order to protect against the possible loss of issues upon which to be heard.

Finally, in conformance with Board directives, CASE has written to the Applicants regarding their refusal to respond to certain CASE interrogatories. Depending on their answer, CASE may also have to file a motion to compel.

CASE is, thus, under an impossible burden in preparing to go to hearing. There are no other intervenors left to share that burden.

Also, CASE urges the Board to consider the importance of the contention to be litigated. Contention 5 involves the adequacy of the QA/QC program during the construction of Comanche Peak, a matter which the Commission said "must receive priority attention". U. S. Nuclear Regulatory Commission Policy and Planning Guidance 1982, NUREG-0885, Issue 1, p. 11.

CASE assumes the NRC staff is going to favor licensing of this nuclear plant. It will be up to CASE to carry the complete burden to argue failures on the part of the Applicants. If CASE is inadequately prepared, the Board will have before it an incomplete record on this most important issue. For example, CASE has already discovered a seven foot crack in the base mat of Containment Building 1 which the NRC knew nothing about (or at least the Applicant did not report the crack to the NRC) and the repair of which CASE is prepared to show was inadequate. It is just such facts which CASE is in the unique position to bring to the attention of the Board. Given adequate time to prepare its presentation, CASE will bring all such matters before the Board in an orderly and productive fashion.

As stated at the beginning of this motion, CASE is filing under 10 C.F.R. 2.711(b). See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454. The NRC staff, however, seems to take a different view of motions regarding scheduling. In their response to CASE's 4/26/82 motion for reconsideration, the staff takes the position that to ask for a delay in a scheduled hearing is the

same as asking for a stay of an initial decision. See "NRC Staff Answer to CASE's Motion for Reconsideration of Board's Order During Conference Call of 4/22/82" (May 7, 1982) at 4-5 citing 10 C.F.R. 2.788(e). (The Board Order cited by the staff on this point does not endorse the staff's view on the applicability of Section 2.788(e) to such a motion.)

The application of Section 2.788(e) to a motion to reschedule submitted to the original scheduling board seems inappropriate. Section 2.788(e) is normally applied when a party is seeking to stay the act of one judicial body while appealing to another. See South Carolina Electric and Gas Co. et al. (Virgil C. Summer Nuclear Station, Unit 1) ALAB-643, 13 NRC 898 (1981); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-385, 5 NRC 621 (1977); and Toledo Edison Co. supra, LBP-77-7, 5 NRC 452 (1977).

Nevertheless, in case the Board agrees with the NRC staff that Section 2.788(e) is applicable to this motion, CASE contends the weighing of the considerations set forth in 2.788(e) favors granting this motion.

The first element is a likelihood CASE will prevail on the merits. This criterion alone demonstrates the difficulty in applying 2.788(e) to an ongoing Board determination of when to hold hearings. CASE is not, at this time, asking the Board to stay the hearing while CASE appeals the scheduling decision to some other body. Were that the situation, the Board would be called upon to consider the likelihood CASE would be successful on appeal.

To apply this test to the request herein is to ask the Board to consider the likelihood CASE would prevail on the merits of Contention 5. Such a determination by the Board would go beyond the considerations which led to admission of the contention and into the merits of the contention prior to hearing any evidence. CASE can tell, and does tell, the Board that there is sufficient evidence to support a finding in favor of CASE on this contention, knowing that such an unsupported

assertion has little weight.

The Applicants' motion for summary disposition argues to the contrary, but CASE does not believe it must now respond to that motion in order to request more time to prepare for hearing. Nor can the Board use the summary disposition motion as a basis for deciding the question of whether CASE will succeed on the merits of Contention 5 since CASE has not had time to respond to the motion.

So on the first element CASE argues that the Board really has no basis for making any determination of CASE's likelihood of succeeding on the merits.

As to the second element, CASE contends that being forced into hearing without adequate time to prepare its case is irreparable harm. The very rights granted to CASE as an intervenor would be destroyed by such a situation. Again, CASE may not have been as efficient or expert in pursuing its rights as other more experienced and well funded parties might have been. But neither has CASE been deliberately non-productive. CASE filed the first interrogatories in this proceeding. CASE worked hard on all segments of the proceeding to date. CASE appeared for all hearings and prehearing conferences. CASE, also, made every effort to perform its duties in a timely fashion. In a backhand way, the Board recognized CASE's diligence by chastizing CASE for filing too many pleadings.

The circumstances surrounding discovery, not CASE's lack of diligence, placed CASE in a position where it cannot be adequately prepared to go to hearing on June 7. Even though CASE's representative has taken a leave of absence from her job to prepare for the hearing, the burden is unsupportable.

In addition, the expenditure of resources by CASE and its representative to participate in this hearing could well foreclose CASE from going through the hearing process on Contention 5 all over again if some later appeal finds CASE's due process rights were violated.

The third element is whether other parties will be harmed. CASE finds no harm

to the other parties if CASE is given more time to prepare. While the Applicants might prefer CASE be unprepared, they are in fact better served, both in terms of public confidence and ultimate reliability of the plant, if they face the strongest possible challenge and meet that challenge.

According to information provided by the utility at the 4/13/82 Caseload Forecast Panel meeting, the utility projects fuel loading for Unit 1 in mid-1983. The delay of the hearing on Contention 5 by sixty days will, therefore, not adversely affect the operating date of the plant, should it get a license. Avoiding such an adverse impact is the goal of the Commission's new policies. See Statement of Policy on Conduct of Licensing Proceedings supra p. 452. Since granting CASE's motion will not violate this policy, there is no harm to the Applicants.

Nor is the NRC staff harmed. In fact, further time might give them a chance to be prepared on questions such as the crack in the base mat. See supra p. 3.

The fourth element is the public interest. CASE has no² doubt that this consideration clearly tips the scales in favor of additional time. CASE is the only party adverse to the Applicants. Whether the Applicants are adequately faced with an adversary proceeding or with a pro forma proceeding depends on how well CASE is able to perform. Any external obstacles to CASE creating the most complete record for decision detracts from the value of the licensing proceeding. Since we are dealing with the licensing of a potentially dangerous energy generating unit with the health and safety of the Dallas-Fort Worth metroplex at risk, any reduction in regulatory comprehensiveness is a reduction in public protection.

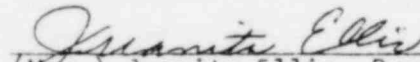
CASE moves for an expedited consideration of this motion. CASES requests a conference call be convened immediately rather than waiting for a ten day response period to expire. The issues are clearly familiar to the Board and the parties from the recent filings. Given the short time remaining prior to the hearing date, CASE needs a prompt resolution of this question in order to pursue alternative relief, should such relief be necessary.

For the above and foregoing reasons, CASE moves this Board to:

(1) Expedite consideration of this motion by the convening of a conference call as quickly as possible, and

(2) Change the schedule for hearings on Contention 5 from June 7, 1982 to August 9, 1982.

Respectfully submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

APPLICATION OF TEXAS UTILITIES
GENERATING COMPANY, ET AL. FOR AN
OPERATING LICENSE FOR COMANCHE
PEAK STEAM ELECTRIC STATION
UNITS #1 AND #2 (CPSES)

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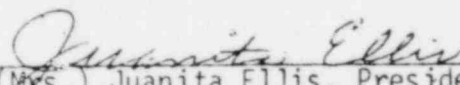
102-24-2107
WETA
Docket Nos. 50-445
and 50-446

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of CASE'S
MOTION FOR RESCHEDULING HEARING ON CONTENTION 5

have been sent to the names listed below this 21st day of May, 1982, by:
Express Mail where indicated by * and First Class Mail elsewhere.

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| * Administrative Judge Marshall E. Miller U. S. Nuclear Regulatory Commission Atomic Safety and Licensing Board Panel Washington, D. C. 20555 | David J. Preister, Esq. Assistant Attorney General Environmental Protection Division P. O. Box 12548, Capitol Station Austin, TX 78711 |
| * Dr. Kenneth A. McCollom, Dean Division of Engineering, Architecture, and Technology Oklahoma State University Stillwater, Oklahoma 74074 | |
| * Dr. Richard Cole, Member Atomic Safety and Licensing Board U. S. Nuclear Regulatory Commission Washington, D. C. 20555 | Atomic Safety and Licensing Board Panel U. S. Nuclear Regulatory Commission Washington, D. C. 20555 |
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CASE (Citizens Association for Sound Energy)