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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
TEXAS UTILITIES GENERATING)	Docket Nos. 50-445
COMPANY, <u>et al.</u>)	50-446
)	
(Comanche Peak Steam Electric)	(Application for
Station, Units 1 and 2))	Operating Licenses)

APPLICANTS' MOTION FOR EXPEDITED
RECONSIDERATION OF NEED FOR ANY FURTHER
PROCEEDINGS ON ATCHISON ALLEGATIONS

I. Summary

In this Motion, Applicants request the newly-constituted Licensing Board¹ to reconsider the determination of its predecessor Board that further evidentiary hearings are required regarding the adequacy of the NRC Staff's investigation into the discharge of Mr. Atchison. In short, Applicants submit that the adequacy of that investigation is tangential to the core issues in this case, that the Board can elect to disregard the conclusion of the Staff investigators that Atchison's allegations

¹ On February 24, 1983, Dr. Jordan replaced Dr. Cole as a technical member of the Board, and on April 4, 1983, Chairman Bloch replaced Chairman Miller as the presiding officer. Thus, two of the three members of the Board were not members of the Board or parties to its deliberations when the prior Board stated in its March 4, 1983 Notice that future hearings on the adequacy of the Staff investigation were necessary.

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of wrongful discharge could be neither substantiated nor refuted, and that the Board should proceed to decision without further hearings on this subject.

II. Background

In its Notice of Resumed Evidentiary Hearing (March 4, 1983) the Licensing Board in this proceeding, as previously constituted, explained that it intended to take evidence from certain named Board witnesses

"in order to resolve important factual and credibility issues . . . [and that the Board had] concluded that the circumstances surrounding the investigation and testimony of an NRC investigator that allegations of the wrongful discharge of a QC inspector were not substantiated . . . should 'be fully aired and resolved', regardless of 'whether or not the parties are themselves otherwise interested in pursuing those matters'." (footnote omitted) (March 4, 1983 Notice at 2-3).

In that same Notice, that Board called for the production of the original, signed witness statements developed in the investigation. Perhaps most importantly, that Board added

"It will be necessary for the Board to determine the adequacy of such [I&E] investigations as they relate to the QA/QC program. In that context, an examination of the contemporaneous witness statements as well as the witnesses themselves will help the Board evaluate the quality of such investigations and the validity of their conclusions." (March 4, 1983 Notice at 5).

Also in the Notice, that Board ordered the filing of the transcript of the Department of Labor evidentiary hearing in the Atchison v. Brown & Root proceeding as well as "the material core exhibits" from that proceeding (March 4, 1983 Notice at 7).

Following the Commission's March 31, 1983 Order staying the Licensing Board's Notice of March 4, 1983 and its related Memorandum and Order of March 9, 1983 (Memorializing Conference Call) as they related to the examination of Board witnesses on this topic, the Licensing Board, as previously constituted, cancelled the scheduled hearings. By Order dated April 1, 1983, the Commission clarified its Order of March 30 by stating that several other issues remain to be considered which are not implicated by the Commission's stay. Those issues, which were discussed in Applicant's Motion for Expedited Reconsideration of Commission Order of March 31, 1983, are now scheduled for consideration at a resumed hearing to commence on May 16, 1983. (See "Federal Register Notice" (Evidentiary Hearing May 16-20, 1983), April 12, 1983). The instant Motion for Reconsideration deals with the issues which are subject to the Commission's stay Order of March 30, 1983.

III. Applicants' Position

The history of the dispute between the NRC Staff and the Licensing Board, as previously constituted, over the production of unaltered copies of witness statements is summarized in the Appeal Board's decision (ALAB-714, Feb. 24, 1983, Slip. Op. at pages 3-10) and need not be repeated here.

As is now evident from a close examination of the March 4, 1983 Notice, the Board, as previously constituted, had been determined to inquire into the adequacy of the Staff investigation of the Atchison discharge as it might relate to the QA/QC

program. That matter was not put in issue by Intervenor's Contention 5, which relates to Applicants' QA/QC program. The Board's interest was apparently prompted by the testimony of Intervenor's witnesses Stiner regarding NRC's investigation of his allegations and Atchison regarding NRC's investigation of his discharge. (CASE Ex. 666, e.g., pp. 2-6, 47-53; Tr. 4204-31; CASE Ex. 650, e.g., pp. 40-44 and 67; Tr. 3422-25, 3448-50).

The adequacy of the NRC Staff safety review is not an issue in Commission proceedings, with a few exceptions, viz., uncontested construction permit proceedings (10 C.F.R. §2.104(b)(2)), and unresolved safety questions (Gulf States Utilities Co. (River Bend Station, Units 1&2) ALAB-444, 6 NRC 760 (1977) and Virginia Electric and Power Co. (North Anna Nuclear Power Station, Unit Nos. 1 and 2), ALAB-491, 8 NRC 245 (1978)). In operating license proceedings, the Board resolves the issues raised by the parties (10 C.F.R. §§2.760a and 2.103(c)). There is ample evidence of record other than the Staff investigation on which the Board can base findings regarding the implications, if any, of the Atchison discharge² as tending to sustain

² A careful review of the record leads to the conclusion that, of the Atchison allegations investigated by the Staff, only the discharge allegation led to an ambivalent Staff conclusion. The NRC had investigated two sets of allegations made by Mr. Atchison. As a result of the first investigation, the Staff concluded that of the three allegations made by Mr. Atchison two could not be substantiated and the third, although substantiated, had been the subject of corrective action by Applicants prior to the investigation. NRC Exhibits 123 and 197 at 3-8. With respect to the second investigation, the Staff concluded that the single allegation made in addition to the termination matter could not be substantiated. NRC Exhibits 199 at 3-4; 197 at 3-10.

Intervenor's Contention 5 regarding the Applicants' QA/QC program. The Board need not give weight to the conclusion in the Staff investigation as tending to rebut the allegation of improper discharge (on the theory that Staff could not substantiate the allegations)³; after all, the conclusion of the Staff investigation did not purport to refute that allegation either. And the Board can note what DOL has concluded so far as to whether the discharge was proper. But on the issues before this agency, which have to do with the safety implications, if any, of the Atchison NCR's and any systematic pattern of "whistleblower" discharges or "chilling effect" on employee reporting, there is no evidence that others have been discriminated against. To the contrary, the record reflects that Applicants have maintained an aggressive QA/QC program that encourages its inspectors to find and report non-conforming conditions. Indeed, Atchison himself was instructed to report defects found outside the scope of his assigned tasks. CASE Exhibit 650W.

As recognized indirectly in the Commission's Order of April 1, 1983 (by reference to its Statement of Policy, 46 Fed. Reg. 28534 (May 27, 1981), and as stated by the Appeal Board in its Memorandum and Order of March 1, 1983 (ALAB-716), there is "a

³ The Applicants have provided references to the ample record on this matter in its proposed findings ¶¶204A, 241-262 and, at this juncture, are prepared to modify them in pertinent respects to eliminate any implication that we are asking this Board to make a finding on the propriety, under §210 of the Energy Reorganization Act, of the discharge. Please see Appendix A hereto.

manifest need to avoid unnecessary delays in the completion of this proceeding". When there was a firm schedule for playing out the final chapter in the dispute between the NRC Staff and the Licensing Board, as previously constituted, it appeared that the matter would not become a critical path issue for licensing. That is no longer clear, and Applicants are thus now forced to ask whether this denouement is really necessary.

Applicants have no desire to undercut the review of important policy matters now pending before the Commission. There remains, to be sure, a need for advisory guidance to Licensing Boards generally on the important and potentially recurring issues of policy involved. Those issues include the disclosure vel non of informants' or interviewees' identities. Those issues also include the extent to which Licensing Boards should exercise supervision over, or inquire into, the adequacy of Staff reviews or investigations, a policy question which has become even more acute now that investigatory functions are performed by an office reporting directly to the Commissioners, viz., the Office of Investigations (NRC Press Release No. 82-55, "NRC Forms New Office of Investigations" (April 20, 1982); Memorandum from Nunzio J. Palladino to James Fitzgerald, "Delegation of Authority" (July 16, 1982)). Our purpose, rather, is to ask the newly constituted Licensing Board to consider, free of the unfortunately strained relationship between the previously

constituted Board and the NRC Staff, whether the quality of the NRC Staff investigation into the Atchison discharge is truly a matter for its decision.

It seems to us that the Board should focus only on the issues raised by Intervenor's Contention 5, which relate to Applicants' QA/QC program, not the NRC Staff review. So postured, the Board should proceed as follows. The Board can review the witness interviews already produced by the Staff, inserting the identities already supplied by the Applicant (and confirmed as to three individuals by Staff (Tr. 2573, 2593, 2698) and as to all by Atchison (Tr. 3444-53)). It should review critically the testimony of Messrs. Atchison and Stiner on the alleged lack of followup on some of their allegations, as well as the related record which casts considerable doubt on the knowledgibility and credibility of these Intervenor witnesses.⁴ It should also consider the testimony of Applicants' witnesses and Applicants' exhibits. On the basis of such review, the Board should make its own determination (even if ultimately Atchison's discharge is held by DOL and the courts to have been improper for purposes of Section 210 of the Energy Reorganization Act) as to what, if any, implications for Applicants QA/QC program that discharge had. The Board does not need to ask the proposed Board witnesses questions (those questions already put

⁴ As to Atchison, see Tr. 3270-71, 3340-41, and 3356-57 and App. Ex. 141 at 6-11; as to Stiner, Tr. 4271-88, 4471-77, 4483-84 and 4488-89 and CASE Ex. 666 at 48. The Board may also note that the Department of Labor's ALJ found Atchison to be unreliable (DOL Recommended Decision, at 3-4).

to them by the Staff investigators should suffice - see witness interviews). Indeed many of the named Board witnesses have already testified in this case and were, or could have been, subjected to questioning. Six of the ten individuals (besides Atchison) identified by letter designations in the NRC Staff investigation of Atchison's allegations were presented by Applicants as witnesses to testify with respect to those allegations: Messrs. Chapman, Tolson, Brandt, Purdy, Smith and Boren. See Applicants' Exhibits 122-124 and 141.

To adapt a phrase from Herman Wouk's Caine Mutiny Court Martial, the NRC Staff is not on trial here. Rather, the Applicants seek the licenses and bear the burden of proof. While it is often helpful and desirable for Licensing Boards to be able to rely upon NRC Staff testimony in these proceedings, Staff does not occupy a favored status in these proceedings (as the Appeal Board recently reminded us in this case, ALAB-714, slip op. at 28-29) and the Licensing Board can always decline to rely upon the opinions stated in some of the Staff evidence if there are good reasons for that course.

In short, while Applicants remain convinced that Brown & Root's discharge of Mr. Atchison was entirely proper, we do not ask the Board to make this proceeding into a forum to "second-guess" the DOL. This Board need not, and should not, put itself in the position of potentially competing with (or corroborating) the DOL ALJ or the appellate review process applicable to that recommended decision. The question which this Board must decide

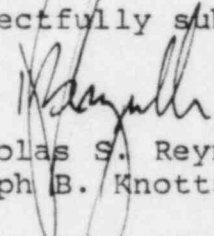
is whether the Atchison discharge and all of the other evidence of record tends to sustain Contention 5. In declining, if it elects that course, to rely on the conclusion or opinions of the Staff's investigation of the discharge allegation (i.e., that the allegations regarding the wrongfulness of the discharge were neither substantiated nor refuted), the Board would be doing nothing more nor less than triers of fact do every day throughout the land. This approach would obviate further inquiries into the Atchison issue.

IV. Conclusion

For the foregoing reasons, Applicants respectfully submit that, especially at this advanced stage of the proceeding, there is no need to assess further the adequacy of this Staff investigation. Nor is there any purpose for the Board to demonstrate to the Staff how to conduct an investigation. There is, as previously stated, ample evidence regarding Applicants' QA/QC program with particular reference to Atchison's NCR's and discharge. There is no evidence that the Atchison discharge was part of a systematic pattern nor is there any evidence that, whether it was right or wrong under Section 210, that it was intended to have, or has had, any effect on employees' reporting of potential construction deficiencies. In short, the Board should rule that it will proceed to decision following completion of the matters now scheduled for hearing beginning on May 16, without holding the proceedings proposed in the March 4 Order and presently stayed.

Because of the fact that this motion relates to matters pending before the Commission and policy questions of interest to both the Appeal Board and the Commission, we are filing copies with those tribunals. Because the pendency of the stayed matters before the Commission creates a cloud of uncertainty over our proposal for completion of the proceeding without hearing the stayed matters, we intend to ask the Commission to complete its review on an expedited basis, or, in the alternative, to announce that it will render advisory guidance on the questions before it, but that in the peculiar circumstances of this case, where identities have been supplied anyway, it has no objection to the Licensing Board following the approach proposed herein if this approach commends itself to the Licensing Board.

Respectfully submitted,



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Counsel for Applicants

April 21, 1983

Appendix A

- A. In paragraph 204A of Applicants' proposed findings (page 113), modify the last two lines (e.g., the two lines immediately preceding ¶205), insert a period after the word "inspector" and strike the remainder of the sentence.
- B. In paragraph 241 of Applicants' proposed findings, page 129, strike the last complete sentence on the page, which begins "On" and ends "stated.". On pages 129-130, strike the carryover sentence which begins "The" and ends "qualified.".
- C. In paragraph 262 of Applicants' proposed findings, strike the third (which begins with "We" and ends with "Inspector).") and fourth (which begins with "We" and ends with "termination.") sentences.

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(Comanche Peak Steam Electric)	(Application for
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Motion For Expedited Reconsideration Of Need For Any Further Proceedings On Atchison Allegations," in the above-captioned matter, were served upon the following persons by hand delivery (*), express delivery (**), or by deposit in the United States mail, first class postage prepaid, this 21st day of April 1983:

- | | |
|--|---|
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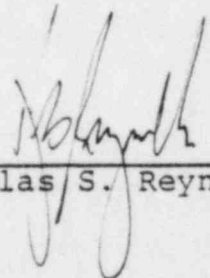
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