11/30/83

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)

Docket Nos. 50-445 and 50-446

CASE'S RESPONSE TO
LICENSING BOARD RE:
POSSIBLE PREJUDICE TO CASE
(DELAY OF HEARINGS ON INTIMIDATION, ETC.)

In CASE's 11/9/83 (1) Partial Answer to Board's 10/25/83 Memorandum (Procedure Concerning Quality Assurance); (2) Motion for Additional Hearings; and (3) Motion for Protective Orders, CASE moved that the Licensing Board order additional hearings on:

(1) Intimidation, harassment, and threatening of QC Inspectors and craftspeople;

(2) Discouragement from doing the job right to begin with;

(3) Concerns raised by CASE witnesses testifying regarding items (1) and (2) and the effect on the quality of work and the safety of the Comanche Peak plant[1];

(4) Open items regarding the Walsh/Doyle Allegations; and

(5) Assessment of Applicability of Board Notification 82-105A to Comanche Peak.

[1] Including hearings on Inspection Report 50-445/83-27 regarding the NRC investigation and inspection of concerns brought forward by Robert L. Messerly. (See page 25, first paragraph, of CASE's 11/9/83 pleading.)

Applicants filed their Answer to CASE's Response to Board Memorandum and CASE's Motion for Hearings on November 21, 1983, and the NRC Staff filed its Answer to CASE's November 9, 1983 Partial Answer to Board's 10/25/83 Memorandum (Procedure Concerning Quality Assurance) on November 25, 1983. On November 25, Licensing Board Chairman Bloch advised CASE that he would like for CASE to respond to one portion of the Staff's Answer (which we had not received at that time but did receive on 11/28/83); specifically he asked that we respond to whether or not prejudice would result to CASE if the Board were to delay hearings for not more than two months (during which time the NRC Office of Investigation would have completed its report).

The Staff's Answer stated (page 3):

> "The Staff also concludes that, although not a necessity under the Board's alternative course of action, it would be acceptable for the Board to hold hearings regarding intimidation of QC inspectors and craftpersons in the protective coating area. However, the Staff urges the Board to defer the scheduling of hearings on intimidation in the protective coatings area until the NRC Staff's and NRC Office of Investigation's reports on this subject matter are issued." (Emphases added.)

It is this portion of the Staff's Answer that we will address. We will not belabor the record by reciting the several Board Memoranda and Orders, telephone conference calls, etc., in which the Board indicated its concern and interest in determining whether or not there is a practice of discouraging the reporting of non-conforming conditions or deficiencies at Comanche Peak; we refer the Board to the following: (1) July 6, 1983, Memorandum and Order (Collateral Estoppel; Atchison Case), especially pages 4 and 5, "As a result, a public hearing also is necessary in order to fulfill public expectations and enhance public confidence in the hearing process"; (2)

July 6, 1983, Memorandum (Response to Commission Order of June 30, 1983), especially pages 1 and 4, "We believe that pursuit of the implications of the Secretary of Labor's decision requires us to inquire further into whether or not there is a practice of discouraging quality assurance reports at the Comanche Peak Steal Electric Station," "The purpose of the State's discovery and trial-preparation activities will be to gather evidence relevant to the Quality Assurance Contention admitted to this proceeding. More specifically, it will interview witnesses in order to present evidence concerning the possible existence of a practice of discouraging the report of non-conforming conditions or deficiencies at Comanche Peak. . . Texas may pursue leads or questions that arise during its discovery process and is not limited to the individuals we have named in order to obatin information." However, when the State of Texas sought discovery of the names of other QC inspectors from Applicants, Applicants refused to provide such names, thus necessitating the July 20, 1983, telephone conference call to "discuss the scope of the discovery rights enjoyed by the State of Texas." (Tr. 8687/23-25.)

During that telephone conference call, it was revealed that the NRC Office of Investigation had filed an amicus curiae brief with the Commission to the effect that it had begun a priority investigation into the matter of discouragement of nonconformance reports, which the State of Texas was also pursuing. (Tr. 8688/23-8689/25.) There was considerable discussion regarding these matters (Tr. 8690/1-8721/12). At one point, Judge Bloch stated ". . . the only things that will be admitted will be relevant. If it is relevant and is directed to the subject matter, then it will be admitted." (Tr. 8702/22-25.) The result of this conference call was that the August hearings which had been

previously scheduled were cancelled, with the understanding that we would be awaiting the investigation report by OI to see how well they pursue the issue, in effect putting on hold any further investigation by the State of Texas (Tr. 8703/18-25, 8704/6-10, 8706/19-20, 8707/5-24, 8709/14-21, 8710/2-14). At one point, Judge Jordan stated (Tr. 8710/17-20), "The evidence that the State of Texas has gotten so far which is positive with respect to the allegations, it seems to me, we will want on the record some time, some time or other." As pointed out by NRC Staff attorney Scinto (Tr. 8714/5-6), regarding the investigations by the NRC, "It relates to the discouragement of reporting of quality control deficiencies."

In response to Judge Bloch's question (Tr. 8714/7-11): ". . . is some staff office or Commission office trying to make an overall assessment of all the evidence of whether or not the evidence indicates that there has been discouragement? Is someone going to attempt to do that?" . . . Mr. Scinto stated "Mr. Chairman, that, I trust, is the issue before the Board in this proceeding." (Tr. 8714-12-13.)

We have already discussed CASE's 8/3/83 pleading under subject of Record Regarding Discouragement from Reporting Nonconforming Conditions at Comanche Peak Nuclear Plant, which the Board treated as a motion to supplement the record and, as such, denied in the Board's 8/15/83 Memorandum and Order (Motion to Supplement and Correct Record) "for lack of ripeness." (CASE's 11/9/83 Answer and Motions, pages 13 and 14.)

Against this background, it appears to CASE that it is entirely inappropriate for the NRC Staff to attempt to confine future hearings on

intimidation to the protective coatings area, as they appear to be attempting to do. Obviously, the Board's initial concerns in this regard did not arise regarding only protective coatings, but rather because of the Department of Labor finding that Charles Atchison had been wrongfully fired for reporting nonconforming conditions.

As CASE understands the Board's concern, it has to do with whether or not there is a pattern of intimidation, etc. (including firings) regarding the reporting of nonconforming conditions at Comanche Peak. It is now, or will be shortly, obvious that there is indeed a pattern of discouragement (including discouragement by firing) from reporting nonconforming conditions in the Protective Coatings QC Department. However, contrary to what the Applicants (and now, apparently, the NRC Staff as well) would have the Board believe, this intimidation and discouragement is not limited to only the Protective Coatings QC Department. It is, CASE believes, pervasive throughout the entire plant. And, ironically enough, it appears that this is also the opinion of Mr. Lipinsky, whose memorandum of August 8, 1983[2] states that he talked not only to QC inspectors in the Protective Coatings Department but in other disciplines as well and that "they all have a low opinion of the quality of of the work put in place, and in effect are keeping quiet until they can find another job." (Lipinsky memorandum, page 4, item B.)

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[2] Attached to CASE's 11/9/83 (1) Partial Answer to Board's 10/25/83 Memorandum (Procedure Concerning Quality Assurance); (2) Motion for Additional Hearings; and (3) Motion for Protective Orders.

The Board is well aware of the contents and attachments to CASE's 11/9/83 Answer and Motions, and these were discussed as well in the 11/16/83 telephone conference call (Tr. 9172/10-9177/10); we will not repeat that discussion here. During that telephone conference call, CASE suggested that hearings be held in December regarding Mr. Dunham's concerns (i.e., with regard to the Protective Coatings matters, including intimidation, harassment, threatening, and discouragement from doing things right to begin with, as well as the quality of work on the Protective Coatings, and any other related matters). (Tr. 9187/2-5.)

When CASE was preparing affidavits for witnesses and potential witnesses regarding whether or not they could and would show the Board specific problems in construction which they believe currently exist at Comanche Peak, we asked them to also address whether they were aware of instances of intimidation, harassment, or threats, as well as instances of employees beir discouraged from doing work right to begin with at Comanche Peak[3]. Although some of our previous witnesses had touched on some such instances in their previous testimony, at the time that testimony was prepared, we were concerned primarily with specific problems in construction and design and had not asked them to address any concerns they had about intimidation, etc. As can be seen from their answers (which we asked them to make as brief as possible), these individuals have much knowledge and much to say about this subject, and they are included in the witnesses whom CASE proposes to have testify in hearings regarding intimidation, etc.

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[3] See affidavits attached to CASE's 11/28/83 Answer to Board's 10/25/83 Memorandum (Procedure Concerning Quality Assurance).

The fact that so many different individuals, from so many different backgrounds and jobs at Comanche Peak, makes it even more obvious that the problems with intimidation, etc., are wide-spread at Comanche Peak and are not limited only to the Protective Coatings QC Department. CASE submits that it is imperative that the Board hear not only from the NRC's Office of Investigations regarding protective coatings but regarding other disciplines as well, with the opportunity for cross-examination and rebuttal testimony from CASE's witnesses.

And we again urge that the Board set up some mechanism for individuals who still work at the plant who have concerns in this regard to contact the Board direct without Applicants or the NRC Staff present (or CASE, for that matter, unless the individuals themselves request otherwise).

Potential Prejudice to CASE

We have discussed with our witnesses and potential witnesses whether or not they have objections to having hearings not in December, but at some time not more than two months from now on the issues of intimidation, harassment, and threats, as well as individuals being discouraged from doing the work right to begin with at Comanche Peak.

From our discussions with them, we do not believe that prejudice to CASE will result, providing the following is taken into consideration.

(1) As stated during the 11/16/83 telephone conference call, one of the reasons for going ahead with hearings in December was to avoid having to follow Applicants' suggestion of having a marathon two to three weeks of non-stop hearings. (Tr. 9187/10-9188/3.) To comply with such a schedule

of hearings would place a severe and unnecessary financial burden on CASE. (We would have to hold hotel rooms for CASE workers and witnesses over the week-ends in order to assure that the rooms would be available when needed during the week; we normally would not have to pay for rooms on week-ends.) CASE's all-volunteer workers have to make arrangements to be off from work, often without pay; it is difficult and in some instances impossible for them to take more than a week off at a time, since the only way some of the individuals who assist CASE can get off work is to make up the time off or prepare necessary reports, etc. in advance of hearings, etc. The same would apply for those of CASE's witnesses who are working; it would be difficult and in some instances impossible for them to take off more than one week at a time. These are problems not shared by the NRC Staff witnesses nor the utility witnesses. An additional consideration is that such a schedule would place a severe and unnecessary burden on CASE's representatives physically. CASE does not have the personnel available that either the NRC Staff or the Applicants do. Each week of hearings which we have attended have left us totally exhausted. It would be difficult and in some instances impossible for CASE's representatives to stand up to marathon hearings such as suggested by Applicants' attorney. The burden imposed upon CASE in this regard would be far greater than that imposes on any of the other parties'. And a final consideration in this regard is that most CASE workers, and some witnesses, cannot be away from home for extended periods of time due to the fact that they have small children or pets at home. While it may be possible to have neighbors or relatives care for the children or pets, it would be impossible to have someone else care for them for an extended period of time.

For these reasons, CASE requests that hearings be scheduled so that there are no more than two weeks of hearings at a time, four days a week (as suggested in the 11/16/83 conference call, Tr. 9187/18-20), and further that there be at least two weeks between hearings.

In this instance, prejudice to CASE could result, but it need not with judicious handling by the Licensing Board, on which we believe we can rely and in which we are trusting.

(2) CASE's witnesses should have the opportunity to rebut any report (should it be necessary) by the NRC's Office of Investigations, and by the NRC Region IV office regarding their assessment of the significance of the concerns raised by our witnesses (including potential witnesses who have not yet testified). This would include, for example, the inspection report (with brief investigation report attached to the back) of Robert Messerly's allegations. (See discussion at pages 24-25 of CASE's 11/9/83 Answer and Motions; also Affidavit of Robert Messerly, page 4, attached to CASE's 11/28/83 Answer to Board's 10/25/83 Memorandum (Procedure Concerning Quality Assurance).) CASE's rights would be severely prejudiced should the Board decide to accept either the investigation report by OI or the inspection report by Region IV without CASE's witnesses having the opportunity to rebut such reports. CASE would hope that the Board would see to it that CASE is afforded that opportunity in accordance with 10 CFR 2.743(a).

In this instance also, prejudice to CASE could result, but it need not, and can be avoided by the Licensing Board's handling.

(3) CASE's witnesses (including potential witnesses who have not yet testified) should be supplied with copies of any statements, affidavits,

depositions, tape recordings, etc. provided by them to the NRC investigators or inspectors. Further, these should be provided at once, upon request of the witness, so that the witness and CASE can properly prepare for hearings. (For example, Lester Smith requests in his affidavit[4] that "the Licensing Board have my deposition made part of my testimony in these proceedings." He goes on to state that the investigators refused to give him a copy until the investigation was over, that he had not asked to remain confidential and does not now want to remain confidential, that he had never had an opportunity to even read it over and be sure it's correct, and that he would like to have it right now. I don't see any use in having to repeat everything over and over again when I've already stated everything under oath." (Emphasis in the original.))

CASE requests the assistance of the Licensing Board in obtaining these items. In this instance also, prejudice to CASE could result if our witnesses are not provided with such items right away in order for us to properly prepare for hearings, but it need not with the Board's assistance.

(4) We do not foresee that there will be any problem with any of our witnesses getting off from work. However, should some of those who are not presently working secure employment by the time hearings come up, their employers might not willingly let them off from work, and it might be necessary for CASE to subpoena them to avoid their losing their jobs. Further, although we do not presently anticipate the need for a subpoena for any

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[4] Attached to CASE's 11/28/83 Answer to Board's 10/25/83 Memorandum (Procedure Concerning Quality Assurance) -- page 2 of affidavit.

of our witnesses who are currently employed, should be there a problem in their getting off from work, it might also be necessary for CASE to subpoena them to avoid their losing their jobs. Were hearings to be held right away, we do not believe there would be a problem along these lines, but the Board should be aware of the possibilities of future problems.

Here again, prejudice could result to CASE, but it need not with the Board's assistance if necessary.

(5) CASE indicated in its 11/9/83 Partial Answer and Motions (pages 9 through 11) that we wanted to have the Board call Mr. Lipinsky as a Board witness, under a protective order; or that the Board grant a protective order until CASE could contact Mr. Lipinsky to ascertain whether or not he would be willing to voluntarily testify as a CASE witness. We have done this, and although he has not yet given us his final reply, it appears from our conversations with him to date that he might prefer to testify as a Board witness. We will advise the Board as soon as possible regarding his response. We indicated in our 11/9/83 pleading that in the alternative, we would ask the Board for a subpoena for him to testify.

Should the Applicants have Mr. Lipinsky testify as a witness for the Applicants, with prefiled direct testimony, CASE's rights could be prejudiced should we be limited to cross-examination only on his prefiled direct testimony. In the event Mr. Lipinsky testifies as a witness for the Applicants, CASE should be allowed to ask him leading questions (which are relevant and material to the issues, of course) which perhaps would go beyond his prefiled direct testimony.

CASE believes that Mr. Lipinsky should be called as a witness,

one way or another, and that CASE should be afforded the opportunity to cross-examine him to the extent necessary to arrive at all pertinent and material facts and to assure a complete record.

This is another example of an instance where prejudice could result to CASE, but it need not with the Board's assistance if necessary.

To summarize, as indicated in the preceding, there are several instances where CASE's rights could be prejudiced, but they need not be with the Board's assistance in seeing that they are not.

Respectfully submitted,

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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 11/30/83 Response to Licensing Board re: Possible Prejudice to CASE (Delay of Hearings on Intimidation, etc.)

have been sent to the names listed below this 30th day of November, 1983, by: Express Mail where indicated by * and First Class Mail elsewhere.

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