~~060~~
061

May 8, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' SUBMISSION OF AFFIDAVIT REGARDING FUEL LOADING FOR UNIT ONE, AND MOTIONS FOR (1) REVISED HEARING SCHEDULE, (2) ADOPTION OF SPECIAL PROCEDURES, AND (3) CLARIFICATION OF ISSUES

I. Introduction

During the conference call on April 18, 1984, the Board clarified that it wished to receive information in affidavit form regarding Applicants' schedule for fuel loading for Comanche Peak Unit 1, together with the basis for the schedule, including any uncertainties and the status of testing activities. Tr. 12,120. Attached in response to the Board's request is the Affidavit of John T. Merritt, Jr., in which Mr. Merritt estimates that Applicants will be ready to load fuel in late September 1984.

The bases for Applicants' schedule for fuel loading were presented yesterday by Applicants to the NRC Staff, including Messrs. Dircks, Stello, Eisenhut, Ippolito and Collins. Following Applicants' presentation, Mr. Eisenhut stated the Staff's conclusion that Applicants' fuel load schedule was workable, and committed to reorient the allocation of Staff

D803

resources to support Applicants' schedule. The meeting was transcribed, and a copy of the transcript will be served on the Board by Mr. Eisenhut as a Board Notification.

II. Supplement to Applicants' Motion for Cut-Off Date on Intimidation

Applicants submit that the Board should utilize the information in this Affidavit for two purposes. First, the Affidavit should be treated as a supplement to Applicants' motion of April 5, 1984, for the Board to adopt a cut-off date (March 31, 1984) "to limit the time period as to which intimidation effects may be alleged for the purpose of trial . . . ." See Board's Memorandum (Clarification of Open Issues) at p. 14 (March 15, 1984). In that Memorandum, the Board explained that "[t]he purpose of such a cut-off is to avoid unduly prejudicing the plant's actual start-up date, whatever that may reasonably be expected to be, so that there will not be a substantial penalty unless there is a substantial reason." Id. The Merritt Affidavit provides the Board with Applicants' position (and supporting bases) that Unit 1 will be ready for fuel loading in late September 1984. This Affidavit constitutes the only "proof as to the completion date" (id.) that has been provided to the Board, and is entitled to conclusive weight in the absence of opposing proof. Further, the Staff's conclusion that Applicants' schedule is workable (and the Staff's commitment to devote the resources necessary to support that schedule) adds further weight to the validity of the schedule.

In these circumstances it is necessary for the Board to take reasonable measures to expedite litigation of all outstanding issues, including intimidation. Accordingly, the Board should grant Applicants' motion to establish March 31, 1984, as the cut-off date for allegations of intimidation to be litigated. 1/ Without such a cut-off date, the scope will never be fixed, the parties will be unable to prepare fully for trial on the issue, and unnecessary and avoidable penalties resulting from needless delay will be incurred by Applicants. 2/

III. Applicants' Motion for Revision of Hearing Schedule

Second, the Board should utilize the information in the Merritt Affidavit as a basis for ruling on Applicants' instant motion, discussed below, for revision of the present hearing schedule. In the conference call of April 18, 1984, the Board Chairman questioned whether the hearing could be concluded before April 1985 in view of the matters yet to be addressed and the present schedule for future hearings (i.e., "two weeks hearing out of every five"). However, the Board

---

1/ 10 C.F.R. §2.718(e); 10 C.F.R. Part 2, Appendix A at V; and Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981).

2/ Applicants have stated in responses filed before the Texas Public Utility Commission and in statements to the Securities and Exchange Commission that Applicants will incur additional costs of at least $22 million per month if licensing of Comanche Peak Unit 1 is delayed beyond the scheduled fuel load of late September 1984. We submit that the Board may take official notice of these facts. See 10 C.F.R. §2.743(i).

also invited motions to expedite the proceeding. Tr. 12,039-12,041. In response to that invitation, Applicants hereby move that the Board revise the hearing schedule to provide for four consecutive weeks of hearing, commencing with hearings on Wednesday, May 30 through Saturday, June 2, then resuming on Monday, June 4 and continuing, Monday through Friday, through June 22. These four weeks of hearings should be followed by two weeks off and then by resumed hearings (starting on July 9) for four consecutive weeks (through August 3).

We recognize that this motion will require the Board to reconsider its "feeling that the hearing schedule we have set of two weeks hearing out of every five is as rigorous as we could possibly hope for CASE to be able to live up to." Tr. 12,041. We submit in this regard that this strikes an unreasonable balance between the competing factors. On the one hand, there are the need for an efficient licensing proceeding, the need to avoid the imposition of penalties on Applicants well in excess of $100 million, 3/ and the requirement on any party to an NRC proceeding "to manipulate its resources, however limited, to meet its obligations." Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 394 (1983). On the other hand,

---

3/ At $22 million per month for each month plant licensing is delayed beyond September 1984, a licensing date in April 1985 will result in unjustified economic penalties on Applicants of between $132 million and $154 million.

there is CASE's expressions of inability to participate fully in order to meet a reasonable schedule.

We respectfully submit that the inability of this intervenor to keep up with an orderly and timely hearing process cannot justify a delay in licensing a plant which stands ready to operate. The Commission itself has addressed the need for licensing boards to avoid prolonging OL licensing proceedings beyond the completion of construction. In its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), the Commission stated that it will seek to avoid the situation where OL proceedings are not concluded prior to completion of construction, consistent with the Commission's commitment to a fair and thorough hearing process. The Commission noted that "[f]airness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in in accordance with applicable law and Commission regulations." Id. at 454. The Commission also noted that "the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations." Id. It is this policy that was referenced by the Appeal Board in Point Beach, supra, 17 NRC at 394.

It is not unusual for NRC licensing boards to conduct lengthy, continuous hearings in order to complete OL proceedings prior to completion of construction. A case in point is Duke Power Company (Catawba Nulcear Station, Units 1 and 2), Docket

Nos. 50-413OL, 50-414OL, in which Judge Kelley convened hearings for over eight consecutive weeks last fall in order to assure that a decision on plant licensing could be rendered prior to completion of construction. Further, the Catawba proceeding was bifurcated with the appointment of a completely new Board to hear one of the principal issues in the case, and that second board is conducting hearings that are expected to take up to four consecutive weeks. This Board should do no less. If the hearing schedule proposed herein is incompatible with the availability of one or more of the present Board members, then Applicants respectfully request that the Chairman of the ASLB Panel address this issue, as appropriate, to permit the proceeding to move forward expeditiously.

IV. Applicants' Motion for Adoption of Special Procedures

If we are to avoid seeing Comanche Peak Unit 1 sitting idle for perhaps seven months, awaiting a licensing decision following completion of construction, the Board must act now to expedite the hearing. However, adoption of the hearing schedule described above will not alone insure efficient, timely decisionmaking in this proceeding. Therefore, Applicants propose the adoption of several procedural measures that also will aid in expediting the licensing decision.

A. Cross-Examination Plans

First, in order to minimize inefficient or unproductive cross-examination, the Board should require the parties to file with the Board plans for cross-examination of witnesses

or panels. Such plans should be filed three days prior to the day on which the witnesses or panels are to be cross-examined. The plans should provide sufficient detail to permit the Board to understand the objectives of the cross-examination, the material facts that are in dispute to which the cross-examination is directed, and the probative value of the evidence sought to be adduced through cross-examination. The Board can use these plans to rule on objections to cross-examination based upon the considerations embodied in Rules 402 and 403 of the Federal Rules of Evidence and to determine whether the cross-examiner is otherwise making constructive use of allocated hearing time. 4/

B. Use of Documents in Cross-Examination

Second, the Board must take action to eliminate the long delays that are experienced during the hearings while documents are found by the cross-examiner, read and studied by witnesses, and debated by the parties. The Board should admonish the parties to use only those documents that are necessary to establish or clarify a material fact that is in dispute and that is designed to adduce evidence of probative value. Documents that will be used on cross-examination (and only those documents) should be served on the parties forty-eight hours in advance of the cross-examination. The parties should avoid serving documents that are not later used, to the

---

4/ The Board also should admonish the parties to be fully organized and prepared to conduct efficient cross-examination such that long delays as the cross-examiner searches for questions or documents can be minimized or avoided.

extent possible. The cross-examiner also should bring five extra copies of the documents to the hearing to avoid delays in providing copies to the reporter, witnesses or the Board. Finally, at the time documents to be used in cross-examination are provided (48 hours before use), the cross-examiner should state the proposition which the document will be used to establish or support. Questioning of the witness at the hearing should proceed directly to the proposition, rather than propounding an entire line of questions to reach the same point.

C. Cross-Examination Limits

In order to reduce the extent of inefficient or unproductive cross-examination, the Board should adopt a maximum time limit of two hours for cross-examination of a witness or panel for each issue addressed by that witness or panel. For example, if a panel presented direct testimony on two issues (e.g., upper lateral restraint analyses and OBE v. SSE damping factors), the cross-examiner could cross-examine for up to two hours on each but could not borrow time from the first issue to cross-examine on the second issue or on any other issue presented by that panel or any other panel. In unusual circumstances the Board could extend the two-hour time limit.

D. Board Cross-Examination of Witnesses

In order to avoid injecting itself too pervasively into the litigation, 5/ the Board generally should refrain from

---

5/ See Applicants' oral motion on this subject at Tr. 12,391-12,405.

interrupting the cross-examiner to conduct Board cross-examination. Rather, the Board should hold its questions until each party has had its opportunity to complete it cross-examination. Further, the Board should refrain where possible from leading the witnesses, given the natural tendency of most witnesses to wish to agree with the judicial officer, despite cautions from the Board to resist that tendency. The best evidence is likely to be adduced if the witnesses state their views and positions in their own words rather than by agreeing with leading questions posed by the Board. These are matters affecting the fundamental nature of adversarial proceedings and the roles of parties to such proceedings vis-a-vis the judicial officer, and thus are properly adopted as general principles governing the conduct of the proceeding. See 10 C.F.R. Part 2, Appendix A, §V.(d)(11).

E. Close of Discovery

In order to assure that hearings may proceed in a timely fashion, the Board should order a final round of discovery on all remaining issues, following which discovery should be closed. The discovery should consist of one round of interrogatories on each open issue, requests for admissions, depositions upon oral examination, and any other method contemplated in 10 C.F.R. §§2.740-2.744. The Board should order that this final round of discovery be completed within thirty days of entry of the Board's order. The Board should find, based upon the results of past discovery in this case, that further

discovery beyond that proposed here may delay the start of the hearing without reducing the scope or length of the hearing. Statement of Policy on Conduct of Licensing Proceedings, supra, 13 NRC at 455.

This should not work any undue hardships on any party because the Board has been instructing the parties to proceed with discovery on the open issues (see Board's Memorandum and Order (Scheduling Matters), at 3 (December 28, 1983)), which have been known to the parties for months. With regard to the testimony and other evidence Applicants will present on the results of Applicants' plan on Walsh/Doyle allegations during the next round of hearings, Applicants intend to provide sufficient detailed information to CASE so that the need for further discovery will be unlikely.

IV. Applicants' Motion for Clarification of Issues

Applicants move the Board to clarify the issues remaining for hearing, as follows. First, Applicants move that the Board proceed to litigation of the intimidation allegations without awaiting the results of the pending investigation by the NRC Office of Investigations. The Staff has been unable to provide the Board with any accurate estimate as to when OI will complete its investigation. In view of the present posture of the case, the appropriate approach for the Board to adopt is to proceed to trial on the allegations and develop our own record, independent of the pending investigation. This would not preclude the use of the results of the OI investigations

that are already complete and documented in investigation reports, assuming of course that the parties are provided the underlying rationale and bases for those reports. Applicants will file shortly a motion seeking these rationale and bases, or in the alternative, seeking the exclusion of the OI reports entirely.

Second, Applicants submit that the Board should reassess the need for litigation of two Staff walkdowns. These matters were scheduled for hearing by the Board, sua sponte, in its Memorandum and Order (Additional Scheduling Order) at 5-6 (January 3, 1984), as a method to assess the implications of the allegations of intimidation. Applicants submit that there is no apparent need for litigation of these walkdowns because there has been no proof yet presented that significant intimidation occurred 6/ and, in any event, there is no indication that there were significant construction deficiencies that resulted from any intimidation that may preclude plant licensing. See Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983).

In these circumstances, Applicants submit that there is no need, on the basis of the present record, for litigation of two Staff walkdowns. However, Applicants would have no objection to litigation of the second Staff walkdown of a plant area (in

---

6/ Applicants are not aware of the substance of the ex parte communication between the Board and OI in October 1983, and thus cannot comment on it. However, it would be fundamentally unfair for the Board to schedule issues for trial, sua sponte, without providing the parties with access to the bases for the Board's decision.

addition to the Fuel Building) to be performed, viz., the Unit 1 cable spreading room. 7/ We believe that this walkdown can be addressed on a reasonable schedule, and would provide the Board with additional proof on the adequacy of the plant, as built.

V. Expedited Responses

In view of the status of the proceeding and the procedural nature of the motions herein, Applicants move the Board to call for expedited, oral responses to these motions. The Board is authorized by 10 C.F.R. §2.711 to do so when compelling reasons, such as those discussed in Parts II and III, supra, are demonstrated. We propose that the Board convene a conference call on Friday, May 18, to receive the oral responses of the parties.

VI. Expedited Board Rulings

Applicants submit that significant policy questions are presented in these motions which may, depending upon the rulings of the Board, require guidance from the Appeal Board or the Commission. See Statement of Policy on Conduct of Licensing Proceedings, supra, 13 NRC 456. We request that the Board expedite its consideration and rulings on these motions so that Applicants may have the option of seeking

---

7/ Litigation of this walkdown would also provide relevant evidence bearing on the Board's concern regarding undocumented removal of cable trays. See Board's Memorandum (Clarification of Open Issues) at 9 (March 15, 1984).

certification for appellate guidance, as appropriate, following this Board's rulings, without unduly impacting the schedule.

Respectfully submitted,

Nicholas S. Reynolds

BISHOP, LIBERMAN, COOK,
PURCELL & REYNOLDS
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 857-9817

Counsel for Applicants

May 8, 1984

DOCUMENT/ PAGE PULLED

ANO. 8405090157

NO. OF PAGES 10

REASON

☐ PAGE ILLEGIBLE

☐ HARD COPY FILED AT. PDR CF

OTHER _____

☐ BETTER COPY REQUESTED ON ___/___/___

☒ PAGE TOO LARGE TO FILM

☒ HARD COPY FILED AT. PDR (CF)

OTHER _____

☐ FILMED ON APERTURE CARD NO 8405090157-01

then 10