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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' MOTION TO OBTAIN ACCESS TO INFORMATION REGARDING INVESTIGATIONS AT COMANCHE PEAK OR FOR ALTERNATIVE RELIEF

I. Introduction

Applicants in the captioned proceeding hereby move to be granted access to information provided to the Licensing Board regarding investigations now being conducted by the Office of Investigations ("OI") into allegations of "intimidation" at Comanche Peak. To date Applicants have received only redacted versions of some of the OI investigation reports. In many instances the redactions are such that the statements Applicants have received are unintelligible. Applicants, of course, have no way to test the validity of redacted statements without complete statements. In addition, Applicants have not been privy to any in camera ex parte briefings of the Board by NRC Staff, including the briefing of the Board by OI in October, 1983.

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Applicants seek access to this information to enable them to litigate allegations before the Licensing Board regarding the issue of intimidation. In the event that Applicants are denied access to this information, Applicants move that the Licensing Board not allow into evidence and not rely in any respect on this information.

II. Standards Governing Access to Information Regarding OI Investigations

The Commission has promulgated a Statement of Policy providing its views as to the procedures licensing boards should follow when an investigation and adjudicatory proceeding involving the same matter are underway concurrently.[1] The procedures include in camera ex parte briefings of licensing boards by the NRC Staff as to the investigation.[2]

This Policy Statement is a guidance document which does not have the force of law.[3] Therefore, it does not constitute a legal basis for permitting the NRC Staff to brief a licensing board, on an in camera ex parte basis, as to on-going investigations bearing on issues before it. Moreover, the courts have often articulated the dangers

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1 "Investigation and Adjudicatory Proceedings; Statement of Policy," 48 Fed Reg. 36358 (1983) ("Statement of Policy").

2 Id. at 36359.

3 Pacific Gas & Electric Co. v. Federal Power Commission, 506 F.2d 33, 38 (D.C. Cir. 1974).

associated with such ex parte communications.[4] Perhaps because of these dangers, the Commission's Policy Statement provides that if a licensing board concludes that one or more parties may be prejudiced should information concerning the investigation not be disclosed to them, then disclosure is appropriate under certain conditions.[5]

The Statement of Policy does not address what constitutes prejudice to a party arising from failure to disclose information regarding an investigation. Therefore, it is necessary to examine other Commission guidance, decisions of NRC tribunals, and fundamental aspects of administrative due process in order to evaluate the likelihood of prejudice here.

First, delay may occasion significant prejudice. The Commission has emphasized the importance of completing operating license proceedings in a timely manner. It has long recognized that where possible, actions should be taken to avoid needless delay of plant operation:

> If these proceedings are not concluded prior to the completion of construction, the cost of such delay could reach billions of dollars. The Commission will seek to avoid or reduce such delays whenever measures are available that do not compromise

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4 E.g., National Small Shipments Traffic Conference, Inc., v. I.C.C. 590 F.2d 345, 350-51 (D.C. Cir. 1978).

5 Id. at 36359.

> the Commission's fundamental commitment to a fair and thorough hearing process.[6]

Implicit in this commitment is the recognition that additional costs applicants (and ratepayers) incur as a result of unnecessary delays in the hearing process are prejudicial to their interests.

It follows that an applicant is prejudiced when issues are revealed late in a proceeding and the applicant defending against them must decide between not invoking its discovery rights and prolonging the hearing by seeking discovery.[7] Where an applicant is required to defend against a claim, it is entitled in advance of the hearing to ascertain through discovery the underlying basis for the claim. Its rights to discovery should not be circumscribed by events beyond its control, such as the timing of release of OI investigative reports. Where such reports are prepared, and are relevant to a contention at an upcoming hearing, they should be made available to all parties in a timely manner. If an applicant is permitted to learn only at the eleventh hour the content of an

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6 Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981).

7 Cf. South Carolina Electric & Gas (Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 888-889 (1981) (licensing board abused its discretion by admitting late-filed contentions based in part on its finding that discovery on contentions was not needed and, therefore, would not delay proceedings).

investigative report concerning its facility, such applicant is prejudiced.[8] To the extent that the Applicants seek discovery needed to respond to issues based on the report, the likelihood increases that the hearing will not be completed prior to the completion of construction.[9]

Second, denial of access to information presented to the Licensing Board by OI regarding issues pending before that tribunal constitutes a denial of administrative due process where the information is relied on by the Board. An applicant would be unable to respond to that information in order to test its reliability or truthfulness and is prejudiced thereby:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact-finding, the evidence used to prove the Government's case must be

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8 Cf. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 470 n. 17 (1982), rev'd on other grounds, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

9 In a related matter, Chairman Palladino recently expressed his deep concern over "delay occasioned by allegations coming at a time close to a licensing decision and prospective startup of a new facility." See Remarks by Nunzio Palladino, Chairman, U. S. Nuclear Regulatory Commission, given at Colloquia held at the Sandia and Los Alamos Laboratories, December 12 and 13, 1983. Reprinted in NUREG/BR-0032, News Release, Vol. 4, No. 2 at 4.

> disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in types of cases where administrative and regulatory actions were under scrutiny. . . .[10]

At bottom, in camera ex parte exchanges of information between the NRC Staff and a Licensing Board are inconsistent with fundamental notions of fairness implicit in due process and with the ideal of reasoned, public decisionmaking on the merits which undergird all of our administrative law.[11]

> The parties must generally be allowed an opportunity to know the claims of the opposing party, . . . to present evidence to support their contentions, . . . and to cross-examine witnesses for the other side . . . . Thus, it is not proper to admit ex

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10 Green v. McElroy, 360 U.S. 474, 495-96 (1959) (citations and footnotes omitted).

11 Home Box Office, Inc. v. FCC, 567 F.2d 9, 56 (D.C. Cir. 1977).

> parte evidence, given by a witness not under oath and not subject to cross-examination by the opposing party. . . .[12]

III. Application of Standards

In this proceeding an in camera ex parte briefing took place on October 17, 1983.[13] In addition, on March 13, 1984 and on April 3, 1984, the NRC Staff provided to the Board complete copies of OI Reports 4-83-001 and 4-83-013 as well as OI Report 484-006.[14] Applicants were provided with only redacted versions of the OI Reports and were not given any substantive information regarding the in camera ex parte briefing.

While Applicants consented to the October, 1983, in camera ex parte briefing, Applicants did not consent to the ex parte filing of complete OI reports with the Board. In any event, in consenting to the oral ex parte contact, Applicants did not waive their rights to a fair hearing at which decisions would be rendered solely on the basis of competent record evidence. Applicants basis for consenting to the oral briefing was two-fold. First,

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12 Hornsby v. Atken, 362 F.2d 605, 608 (5th Cir. 1964).

13 Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445 and 50-446, Transcript of October 17, 1983, Hearings ("Oct. 17 Tr.") at 8848.

14 March 4, 1984, and April 3, 1984, letters from Stuart A. Treby, Assistant Chief Hearing Counsel, to Chairman Peter B. Bloch, et al.

because it was then impossible to determine for purposes of establishing a hearing schedule when the OI investigation would be completed, Applicants believed that an in camera ex parte presentation by those conducting the investigation would be a useful mechanism through which the Board could decide whether and, if so, to what extent the schedule for its deliberation should be influenced by the investigation. Second, Applicants were concerned that a Protective Order might not prevent the release of information revealed to certain representatives of the parties who would be present if the briefing was not ex parte.[15]

Applicants expect to commence loading fuel in late September, 1984.[16] As a result, it is necessary for the hearing process to move forward efficiently and for the Licensing Board to decide all remaining outstanding issues. While the Licensing Board initially was inclined to defer hearings on claims of intimidation until the

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15 Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445 and 50-446, Transcript of September 7, 1983, Telephone Conference ("Sept. 7 Tr.") at 8727-28, 8749.

16 See 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, May 8, 1984 ("Applicants' Motion"), at 1 and attached Affidavit of John T. Merritt, Jr.

completion of an investigation by OI into such claims,[17] it is now evident that these investigations will not be completed until the fall of 1984.[18]

Applicants' Motion requested that the Board proceed to litigation of the intimidation allegations without awaiting the results of the pending investigation by OI.[19] Accordingly, Applicants are now preparing to litigate allegations involving intimidation. If Applicants are wholly denied access to information presently before the Board on this matter, they will be prejudiced because the ultimate decision of that tribunal could be based on information not subject to cross-examination or other challenge by Applicants. As discussed above, this would be contrary to administrative due process.[20] Similarly, Applicants will be prejudiced if they are denied adequate

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17 Board's Memorandum and Order (Scheduling Matters) December 28, 1983, at 4.

18 March 21, 1984, letter from Ben B. Hayes, Director, Office of Investigations, to Chairman Peter B. Bloch, et al.

19 Applicants' Motion at 10.

20 See notes 10-12, supra, and accompanying text. The Board has already relied on the in camera ex parte Staff briefing when evaluating the possible seriousness of the intimidation allegations. Board's Memorandum and Order (Additional Scheduling Order), January 4, 1984, at 5.

time in which to prepare a response to information submitted on an in camera ex parte basis to the Board regarding intimidation.

At bottom, Applicants cannot be deprived of information, yet have that same information play some part in the decision making process. Either Applicants should be granted access to all information before the Board submitted by the Staff with respect to allegations regarding intimidation or such information should not be before the Board.

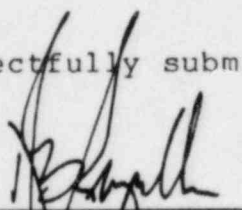
Applicants recognize the legitimate confidentiality requirements of OI. OI's confidentiality agreements, however, clearly recognize that the time may well come when the information gleaned from confidential sources either must be revealed or cannot be utilized at trial. There are two processes at work here -- an investigative process and a hearing process. Confidentiality is appropriate in the investigative process because of the need to encourage parties to provide information and because of the need not to unnecessarily publicly implicate individuals who are targets of investigations which do not reveal an impropriety. However, when a matter under investigation is adjudicated in a hearing context, the Licensing Board must decide issues on the basis of information properly presented and tested before

the Board on the basis of equal access to all parties. OI has utilized confidentiality in its investigation. Now, however, if the allegations that were investigated are to be litigated, the confidentiality of the sources and information simply can no longer be preserved.

IV. Conclusion

Accordingly, the Licensing Board should grant Applicants access to all information previously provided to the Board concerning the investigations by OI into claims of intimidation at Comanche Peak, including non-redacted versions of OI investigative reports. If such access is not granted in a timely manner (within two weeks from the date of this motion), Applicants request in the alternative that the Board rule that it will not allow into evidence and will not rely on this information because it is not equally available to all parties to the proceeding.

Respectfully submitted,



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May 10, 1984

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Motion to Obtain Access to Information Regarding Investigations at Comanche Peak or for Alternative Relief" in the above-captioned matters were served upon the following persons by overnight delivery (*), or deposit in the United States mail, first class, postage prepaid, this 10th day of May, 1984, or by hand delivery (**) on the 11th day of May, 1984.

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