June 1, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CASE'S PROPOSED SCHEDULE AND PROCEDURES FOR RESOLUTION OF HARASSMENT AND INTIMIDATION ISSUES

The following proposal for the conduct and scheduling of the hearings on harassment and intimidation is submitted at the request of the Atomic Safety and Licensing Board ("Board"). CASE's proposal, if accepted, would (1) most effectively utilize the valuable time available for the development of a complete and accurate record on this issue; (2) insure that the oral hearing was devoid of extended, repetitive or meaningless cross-examination of numerous witnesses; and (3) realistically provide for the "human factor" in this issue which differentiates allegations of harassment and intimidation and its effects from specific technical or engineering allegations and their resolutions.

BACKGROUND:

Pending before this Board are a series of motions by Applicant regarding the scheduling, scope, cut-off date, and some discovery matters on the issue of harassment and intimidation. During a conference call on May 24, 1984, the Board established a schedule for CASE's counsel to respond to these matters. This is the first of three pleadings which will address (1) scheduling and procedural matters; (2) the use of confidential information; and (3) the proposed scope of the harassment and intimidation issue. The second and third pleadings will be filed June 5 and June 12, respectively. (CASE, Applicant and Staff are also actively engaged in discovery on this matter through both document requests and interrogatories.)

This Motion specifically addresses the following from Applicant's May 8, 1984 Submission of Affidavit Regarding Fuel Loading for Unit One and other motions: Item III -- Applicant's Motion For Revision of Hearing Schedule, pp. 3-6; and Item IV -- Applicant's Motion for Adoption of Special Procedures regarding A - "Cross-Examination Plans," B - "Use of Documents In Cross-Examination," and E - "Close of Discovery."[1] It also addresses Applicant's May 18, 1984 Proposed Schedule for Litigation of Remaining Issues and Filing of Proposed Findings.

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[1] It does not address Item C -- "Cross-Examination Limits" as a result of the comment made by Applicant's counsel during the May 24, 1984 conference call, supra, that such time limits would not be necessary since CASE now has counsel, or D -- "Board Cross-Examination of Witnesses" because that is most appropriately addressed by the Board. CASE has no objection to the Board asking any questions at any time in this proceeding but does favor as much advance notice as possible from the Board.

PROPOSAL:

CASE submits that the record on the harassment and intimidation issue can be substantially developed through an expansion of the use of depositions, including cross-examination during depositions, in lieu of the oral hearings. Further, that for reasons set forth in this motion the proposed schedule and procedures will enable the Board to have all of the relevant facts and arguments before it soon after the conclusion of the discovery and deposition phase. The oral hearings will be limited to only those matters which, for reasons of excusable neglect (i.e., newly discovered information) were excluded from the depositions the parties wish to present, or for purposes of establishing credibility, or for those witnesses or matters which the Board indicates it wants to pursue.

If the procedures and schedule are adopted and implemented all parties should know all of the facts regarding each witness and all relative incidents at the conclusion of the taking of depositions.[2] The parties would then file proposed findings of fact, which would include as exhibits the relevant portions of depositions and those documents which support each party's case. The proposed findings would also indicate what matters remained to be proven or disproven at oral hearing, and how each party was prepared to demonstrate that.

CASE believes that the time for surprise is over. Our proposal is consistent with the admonishments of the Board to the

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[2] The success of this procedure, as well as the ability of the parties to adhere to the proposal schedule, is obviously dependent upon the full cooperation of the parties through exchange of document discovery and interrogatories.

parties to resolve as many of the issues as practicable through a settlement or briefing process.[3] Finally, CASE's proposal and schedule is consistent with the desires of all of the parties to avoid this phase of the hearing becoming an evidentiary circus.[4]

CASE proposes a three-step process, as follows:

Step One: Completion of Discovery (Documents and Interrogatories)

All parties, including the Staff, would expeditiously exchange all relevant documentation and answer all outstanding interrogatories not later than June 15, 1984.[5] Specifically, as was informally discussed between the parties at the May 30, 1984 meeting (supra), CASE will proceed in the following manner. On Friday, June 1 the Applicant will be provided -- by telephone --

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3 Most recently, during a conference call on May 24, 1984, the parties agreed to resolve the remaining issues on design questions through a briefing process, as opposed to the hearing process. The Board stated its agreement with this process.

4 The Staff, Applicant and CASE met on May 30, 1984 to discuss scheduling and procedural matters. The parties did not reach any agreement. Throughout this motion CASE will identify the objections of the Applicant as expressed to us and CASE's response to those objections.

5 Current outstanding discovery requests are Applicant's Eighth Set of Interrogatories and Requests for Production of Documents, 4/9/84, and Questions 1-13 of Applicant's Ninth Set of Interrogatories to CASE and Requests to Produce, 4/16/84. Also outstanding on this issue are CASE's Seventeenth and Eighteenth Sets of Interrogatories, dated March 12, 1984 and March 14, 1984, respectively, and several questions from CASE's Nineteenth Set, dated March 14, 1984, and Twentieth Set, dated March 15, 1984.

As a result of current discovery exchanges we request the Board to hold CASE's Motion to Compel in abeyance. Such a hearing will be requested if informal exchange fails. CASE also expects the Staff to participate in discovery, either formally or informally, and is pursuing this with the Staff.

with a list of all persons known to CASE's counsel at this time who have knowledge of harassment and intimidation who might be called as witnesses, and a list of all specific classes of documents it requests to be searched or provided for documentary evidence responsive to CASE's interrogatories on this issue. CASE will also informally notify the Staff of the scope of discovery it requests of the Staff telephonically on June 1. That request will subsequently be submitted in writing on June 4. On June 5 CASE will file its initial response to Applicant's discovery requests and interrogatories, and supplement that as soon as is possible.

In order to move from the document and interrogatory stage of discovery into the taking of depositions of any witnesses, full discovery must have occurred. Any inadequate or incomplete responses will, of course, delay the proposed schedule by an equal amount of time spent waiting for or disputing relevant material.[6]

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[6] If the Applicant persists in engaging in the type of "cat and mouse" discovery game it has to date it will be impossible for CASE to proceed on any reasonable schedule. For example, on Thursday May 31, 1984 Mrs. Ellis, President of CASE, was informed that an August 19, 1983 report entitled "Cover Up and Intimidation by TUGCO, Dallas Quality Assurance" and some related documents were being provided to CASE in response to their discovery request. This was the day after an informal meeting between the parties at which counsel represented that a one-inch stack of documents provided to CASE May 25, 1984 was all Applicant believed was relevant to the requests articulated in Interrogatories 17 and 18 regarding information Applicant has on harassment and intimidation at Comanche Peak. Nothing could be more relevant to this issue, or more specifically identified as responsive. Continued failure to produce such relevant material (under the guise of a question of relevancy) guarantees this hearing will become protracted, exceedingly expensive, and unnecessarily adversarial.

Step Two: Witnesses and the Deposition Process

Not later than June 15 the Applicant will be provided with an updated list of those persons CASE may call as witnesses on this matter. (A preliminary list of all persons known to CASE who may have information relevant to harassment and intimidation will be provided to the Applicant on Monday, June 4, 1984.) CASE proposes that commencing on June 26, 1984, running four days a week (Tuesday-Friday, excluding the week of July 4), and continuing until the completion of the deposition process[7] the parties would engage in open depositions of proposed witnesses in the following order: Applicant's witnesses, Staff witnesses, CASE witnesses.

These depositions will contain both direct and cross-examination, as appropriate, and incorporate the documentary evidence available to the parties regarding each witness.[8]

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7 Counsel for CASE has a prior and unavoidable business commitment for the week of July 23. Should depositions continue that long, the week of July 23 would not be available.

8 When CASE broached the essence of this proposal during the informal scheduling meeting, supra, the Applicant indicated his objection based on his desire to immediately begin taking the depositions of anyone available. We attempted to explain, and reiterate here why that is inappropriate in these circumstances.

First, our witnesses are all lay presons who have virtually no previous experience with the litigation process. Each witness must have the benefit of meeting and working with CASE's counsel, and equally CASE's counsel must have the opportunity of hearing first-hand the information and experiences of each witness prior to the exposure of the witness to the deposition process. This will be particularly true under the proposed procedures in which witnesses will face cross-examination by Applicant and questioning by the Staff. With the very real possibility that CASE will be providing between forty and fifty witnesses the preparation time for the bulk of these witnesses is an enormous

task.

Before that task can begin however it will be necessary for CASE to have all of the documents of the Staff and the Applicant about what these witnesses have said, or has been said or decided about them. The Applicant also legitimately needs for CASE to produce all relevant documentation that it has, and that search is in process; finally, CASE's counsel must himself become familiar with the voluminous amount of material in this case on this issue prior to the beginning of the critical deposition phase. Thus CASE proposes the depositions begin as soon as possible, but that it properly begin with Applicant's witnesses who can be deposed during the day while CASE simultaneously prepares CASE witnesses during the hours not filled with the actual taking of depositions.

Second, since CASE is proposing a procedure which in effect makes the deposition the equivalent of a hearing, it is appropriate that Applicant proceed first. Harassment and intimidation is an accepted contention in this proceeding, the burden of proof on this matter, as in technical matters, is on the Applicant.

Because the ultimate burden of persuasion rests with Applicant and with the NRC Staff to the extent the Staff supports the Applicant's position, it is accepted practice that these parties proceed first. Philadelphia Electric Company, et al. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-566, 10 NRC 527, 529 (1979).

Finally, because Applicant's witnesses could be excluded from the hearing room at the request of CASE under the provisions of Rule 615 of the Federal Rules of Civil Procedure, having their depositions first essentially achieves the same objective. Rule 615 provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is known by a party to be essential to the presentation of his cause.

The purpose for invoking the rule, as explained in 6 Wigmore § 1837-1838 and cited in the Notes of Advisory Committee on Proposed Rules is to exclude or sequester witnesses "as a means of discouraging and exposing fabrication, inaccuracy and collusion." Such a request was accepted on a Motion For Reconsideration of Intervenor Palmetto Alliance in the Catawba

Step Three: Pre-hearing Filings

Two weeks after the completion of the deposition process each party will file, simultaneously, the following documents: (1) Proposed findings of fact in which the parties will present their respective affirmative cases, including all exhibits and portions of depositions relied upon and also identifying any gaps in the record which the parties propose to fill in the subsequent hearing process and how they will attempt to do that; (2) Motions for summary judgment; (3) All exhibits (documentary) which the parties intend to rely upon or use in any way during the hearing;[9] (4) Pre-filed testimony for any relevant matters which develop subsequent to the deposition process or that was not covered by either party for excusable neglect. (CASE invites the Board to instruct all parties to adhere to the expanded use of deposition as a substitute for the hearing process, and upon indication that any party fails to do so, require an explanation and then decide upon the validity of that explanation before allowing the party to proceed with witnesses or cross-examination

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proceeding where the Quality Assurance manager was sequestered, and prevented from having either direct or transferred knowledge of the testimony of certain Quality Control inspectors who testified about harassment and intimidation and its effects on the Catawba construction site. Order of the Board on Palmetto's Motion for Reconsideration, 13 October 1983, Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2).

9 CASE proposes that the parties stipulate that all documents produced in discovery are deemed to be genuine unless a specific objection is filed as to a particular document and that the parties provide only enough copies for the court reporter, Board members and other parties.

during the hearing); (5) Cross-examination plans for all witnesses and all matters which any party intends to probe during the hearing itself with respect to those witnesses whose depositions have been taken.

One week after the submittal of the above-listed items the parties would file cross-examination plans for any new matters or other witnesses proffered by another party, as well as any objections to opposing parties' witness list on the grounds of the offered testimony being repetitive of that offered in discovery.

One week after the supplemental cross-examination plans and submission of the completed witness list the Board would rule on the witnesses and the scope of their testimony and summary judgment motions.

Finally, the parties would have one final preparation week after the ruling of the Board on witnesses and matters to be presented in hearing.

Five weeks after the close of the deposition period the hearing into the issue of harassment and intimidation would commence and continue (4 day weeks, Tuesday-Friday) until completion.

ARGUMENT

CASE believes that there are numerous advantages to the adoption of these procedures, first and foremost it is efficient, second it is more likely to produce a better record, and third it is consistent with the desires of the Applicant and the Staff to complete the hearing process fully utilizing all the time available.

This is a proceeding in which numerous witnesses will be giving their perception, understanding, or explanation of a series of incidents which are collectively being referred to by the parties and Board in this case as harassment and intimidation.[10]

By its nature this hearing is going to be quite different from the hearings on specific technical issues or the questions of design engineering or construction practices and procedures usually litigated in front of the Board. Most significantly there will be conflicting testimony regarding objective facts and conflicting judgments regarding the implication of those facts where the judgments are based more on human experience than technical experience.[11] It is also, by definition, a "people" issue in which the Board must have available to it a substantial amount of information regarding the experiences of numerous workers and the explanation of those experiences by Applicant. The Board certainly can choose to hear each and every witness tell their story, and each party could decide to put on direct testimony of each and every witness. However, CASE believes that this is unnecessary and that the expanded use of depositions in this case is a logical alternative to a lengthy protracted

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10 The definition of harassment and intimidation and the scope of that matter as it relates to the implementation of a 10 CFR 50 Appendix B and the ultimate reasonable assurance that Comanche Peak can operate without endangering the public health and safety will be decided in the near future by the Board, after a briefing on the subject by the parties.

11 These differences are apparently reflected in part in the different board used for this issue -- one additional lawyer, one less technical expert.

evidentiary hearing.[12]

CASE submits that efficiency will be increased because a deposition does not require attendance of the Board, eliminates argument over the form of questions and admissibility,[13] increases the available information to parties and the Board before the hearing and provides a mechanism for obtaining oral testimony on this subject that is be superior to the hearing itself.

CASE believes that this is an issue which should first be tried among the parties, organized by the parties, and then brought to the Board in its entirety in the form of proposed findings of fact. The proposal of CASE is that the depositions substitute for cross-examination -- leaving for the hearing only those matters of witness credibility or valid new relevant information not available during discovery, those contested facts which the parties concur should be developed through the open hearing, and any testimony the Board specifically requests be heard live.

It will also reduce the amount of pure verbiage placed into the record, and narrow the amount of information the Board will

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12 One objection raised by the Applicant during the informal meeting was that the scope of the cross-examination during depositions could not be limited as it could be during the oral hearing process. CASE believes that this concern would be allayed by two significant factors. First, when the Board issues its definition of harassment and intimidation the scope of both direct and cross-examination will be materially clarified. Second, if the situation arises the Board can always be called by any party to rule on an objection or a question of relevancy (CASE would encourage the Board to encourage the parties to let more, instead of less, information in the deposition record).

13 Such objections can be raised at the time the deposition is offered into evidence.

be required to review. It is axiomatic that this type of proceeding will also reduce substantially the resource intensive hearing days which are the most expensive for all parties, and insure that the amount of time spent in hearing will be as valuable as possible.

Further, CASE submits that such proceedings would produce a more accurate record. We believe that "amateur" witnesses on this matter are less likely to be inhibited and therefore to be more forthcoming in the atmosphere surrounding the taking of a deposition than in the more formal hearing.

The deposition process is a less complicated one, with a far less inhibiting setting than the hearing process. CASE's witnesses will by and large not be professionals, but instead will be a composite of construction, quality control, and administrative employees who have had experiences at Comanche Peak which evidence CASE's contention. CASE wants the Board to hear their stories, but it does not believe it is necessary or desirable to h e three or four dozen witnesses personally address the Board in order for the Board to assess the reality of the situation or the results.[14] Clearly, where questions of credibility are at issue any party, or the Board, could and should request live testimony. We do not believe that will be the case for the majority of our witnesses.

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[14] Should the Applicant and/or Staff insist on having their witnesses appear at the hearing and should the Board agree to that, CASE, of course, reserves the right to similarly bring all its witnesses to the hearing as well. What we are proposing is that in the interest of efficiency all parties agree to use the deposition in lieu of the hearings procedure.

Finally, on the issue of timeliness, it is CASE's proposal that every reasonably available day be used in a logical, intelligent order to bring about resolution of the harassment and intimidation issue. First completing document discovery, then proceeding with the deposition of witnesses, and then fully utilizing both the documents and depositions to increase the quality and reduce the length of actual hearing days.

Should Applicant's resistance to CASE's proposal prevail, the scenario for resolution of this issue would be substantially different. Applicant would first notice CASE's witnesses for deposition, and CASE would then resist those notices until completion of full document discovery and an opportunity for counsel to review the documents and prepare each witness. The production of CASE's witnesses would undoubtably be complicated by the short notice and resultant scheduling problems including many expensive flights to and from Fort Worth. In addition to the confusion that will surround the process is the reality that all the witnesses of all the parties are going to be deposed before the hearing regardless of what procedures are followed. The process of depositions will take just as long -- if not longer -- and the hearing will, as is traditionally the case, be a rerun of the deposition process, with sufficient modification to avoid objections thus virtually doubling the total amount of time spent up to the completion of the hearing. Add to that the post-hearing time for proposed findings of fact and conclusions of law, and the subsequent review time for the Board and it is apparent that resolution of this phase of the hearing will not be

completed until late fall and probably not until early winter.[15]

The schedule we have proposed will accomplish more in less time but it is an optimistic and difficult one for us to meet. We have proposed it because we believe that it will be advantageous with limited resources.[16] Were we forced to use a substantially more resource intensive and expensive process as desired by Applicant (i.e. taking depositions of CASE's witnesses at a prematurely early date and on a "catch as catch can" basis) our ability to meet that kind of tight time schedule would be substantially destroyed.

Thus what we offer is a fair bargain that is ultimately beneficial to the interests of all parties and the Board. We

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15 CASE is legitimately concerned that the results of a positive presentation by CASE will result in a second hearing being requested by Applicant or scheduled by the Board, and desires to avoid the possibility of relitigating issues it has prevailed on. The process suggested here should eliminate that danger by making the first hearing the only hearing on harassment and intimidation except for subsequent hearings on the yet to be completed analyses by and any other similar reviews. See Byron, infra.

16 The proposal offered by CASE incorporates the very real resource restraints faced by Intervenor and Intervenor's counsel. There is one volunteer lawyer and one volunteer law clerk handling this matter, both lawyer and law clerk have full-time responsibilities to other cases which they have agreed to place "on hold", to the extent that is possible. The organized approach of CASE to incorporate the deposition of Applicant's well-prepared and well-counselled witnesses first, and at the same time -- in the evenings and on weekends -- preparing CASE's witnesses would allow a concentrated use of time commencing at the onset of the taking of depositions. Applicant's proposal, to proceed without organization, will require numerous trips between Washington, D.C. and the Dallas area, and disjointed efforts of witness preparation. Although CASE recognizes that funding assistance for intervenors is not possible, the lack of funding should be taken into consideration in decisions such as this so as not to bias Intervenor.

believe our proposal is entirely consistent with the legitimate interests of timely and effective hearings. However, CASE wishes the record to be clear about our position on the concerns of timeliness. We reject categorically the notion that the issue of whether Comanche Peak should be allowed to operate can be compromised by a demand for early resolution to meet a mythical schedule.[17]

We believe it is Applicant's own failure to ensure that Comanche Peak was designed and constructed in accordance with the requirements of 10 C.F.R. 50 Appendix B which has resulted in the length of these hearings to date. (See, e.g., the Board's 12/29/84 Memorandum and Order (Regarding Quality Assurance in Design) in which the Board has already demonstrated its commitment to requiring a full hearing on the issues before it, including the incoporation of the results of the inspection or investigation currently underway by the various branches of the Staff and/or its consultants. The Atomic Safety and Licensing Appeals Board ("Appeals Board") has recently and significantly confirmed the obvious need to leave the hearing record open until undeniably relevant investigations, such as the ongoing OI investigations in this case, have been completed.[18] To do less is

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17 We believe "judicial notice" should be taken of the fact that from "time immemorial" Applicants have been more efficient at constructing artificially premature start-up dates than they have been at constructing nuclear power plants. We urge the Board to not be victimized by Applicant's overly optimistic fuel load date.

18 In Byron the Licensing Board issued its initial decision without waiting for relevant ongoing inspections by the Staff and Applicant into the area of dispute to be completed. The Appeals Board noted in footnote 62 "In sum, it seems to us that the

to rely on the Staff's resolution of matters in litigation, which is not acceptable.[19]

Thus our view on the issue of timeliness is not to finish the hearing by some arbitrary date, but rather to utilize all of the time available as efficiently and effectively as possible.

CONCLUSION

CASE submits that our proposal for the expanded use of depositions and the adoption of the proposed procedures will result in an expedited, efficient hearing process, with minimum post-hearing time, and maximum utilization of the time and resources of all parties and the Board and will simultaneously increase the quality of the record on the issue of harassment and intimidation and its effects on the Comanche Peak site.

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public interest would be ill-served were final judgment to be passed on the operating license application without a full evidentiary consideration of the reinspection program and its results." This situation is parallel to the issue of harassment and intimidation, and the numerous ongoing investigations and inspections into this matter by the Staff (and Applicant). Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, ___ NRC ___, Slip Opinion at 27-28 (May 7, 1984).

19 A Licensing Board may not delegate its obligation to decide issues to the Staff. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2); P.S. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 318 (1978).

For the above reasons, CASE requests the Board adopt the proceedings outlined on pages three to five of this Motion.

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Dated: June 1, 1984

June 1, 1984

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of CASE's Proposed Schedule And Procedures For Resolution Of Harassment And Intimidation Issues has been sent to the names listed below this 1st day of June, 1984, by: Express mail where indicated by *; Hand-delivery where indicated by **; and First Class Mail unless otherwise indicated.

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