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5/13/85

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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CASE'S ANSWER TO APPLICANTS' 4/26/85
PROPOSED CASE MANAGEMENT PLAN
(IN MAIN DOCKET, 50-445 AND 50-446)

On 4/26/85, Applicants filed their Proposed Case Management Plan, for both dockets (50-445-2 and 50-446-2, the Intimidation and Harassment Docket, and 50-445 and 50-446, the Main Docket). CASE's response is in two parts: one for Docket -2, which was to be mailed by 5/9/85; and one for Docket -1 or the Main Docket, which was to be put into the mail by today, 5/13/85 /1/.

Considering the recent background of these proceedings, CASE is frankly somewhat amazed at Applicants' timing. As the Board is aware, hearings have been on hold since January at the request of Applicants. CASE has been exceedingly patient (in both dockets). In the Main Docket, for instance, we have not pushed for answers to duly authorized discovery requests filed long ago, we have not pushed for answers to CASE's Motions for Summary

/1/ Applicants' pleading was sent by First Class Mail, and CASE (in the Main Docket) received it on 4/30/85. CASE sought an extension in which to file its response in the Main Docket, from Friday, 5/10/85, to Monday, 5/13/85; Applicants' Mr. Wooldridge and NRC Staff's Mr. Treby had no objections, and Judge Bloch asked that CASE memorialize approval for this extension in this pleading.

It should be noted that throughout this pleading, unless specifically indicated otherwise, when CASE is referred to, it should be construed to be CASE in the Main Docket.

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Disposition (the first of which was filed over seven months ago, on 10/6/84), we have not pushed for answers from Applicants to CASE's responses to Applicants' seventeen Motions for Summary Disposition or for the Staff's initial answers to Applicants' Motions, etc. We have followed what has transpired since CASE's 2/4/85 Motion for an Evidentiary Standard was filed (in Docket -2) and have taken note of the Board's 3/12/85 Memorandum (CASE Motion for Evidentiary Standard). We are aware of the Board's reluctance to rush Applicants or NRC Staff. And we have been waiting patiently for the Applicants to get their act together and decide how they propose to proceed and to deal with the numerous design and construction problems which have been identified at Comanche Peak.

However, Applicants' 4/26/85 Proposed Plan falls far short of the type of response which we had expected from Applicants. The timing itself is very questionable, and it is difficult for CASE to understand why Applicants believed on 4/22/85 that the timing suggested by Mr. Roisman (for a face-to-face scheduling conference no later than the end of April) was premature, but on 4/26/85 -- just four days later -- believed it was time to file Applicants' Proposed Plan /2/. It appears to CASE that if Mr. Roisman's suggestions were premature, Applicants' Proposed Plan must also be premature. In addition, Applicants have filed their Proposed Case Management Plan without ever having filed Applicants' proposed plan for dealing with the numerous design and construction problems at Comanche Peak.

/2/ See CASE's 4/16/85 and 4/17/85 letters to the Board in Docket -2, Applicants' 4/22/85 response, and NRC Staff's 4/26/85 response.

We also note in passing that nothing in the copy we received of Applicants' pleading (including the Certificate of Service) was signed, which means that technically Applicants' filing was not a valid pleading.

CASE cannot adequately and fully respond to any plan proposed by Applicants until such time as Applicants have made the necessary responses and pleadings discussed above; however, we will address some portions of Applicants' Proposed Case Management Plan which we can answer at this time.

DISCUSSION

There are several very telling statements in Applicants' pleading which give an indication of what Applicants' latest strategy will be, and to which we call the Board's attention. On pages 1 and 2, Applicants make the following statements:

> ". . . there is, we presume, no desire on anyone's part to expend time, effort or expense conducting further adjudicatory proceedings with respect to issues which have been mooted by the passage of time or intervening events" (emphasis added).
>
> "Of perhaps more importance at this juncture, a number of intervening events have occurred since January 1, 1985 that, we believe, have great significance in any analysis of the future management of this proceeding. These include numerous changes in the management of the lead applicant, issuance of reports by various Staff teams and groups with respect to numerous subjects and, following numerous meetings with the Staff, CASE, Cygna, the NRC Contention 5 Panel and the Applicants, the undertaking by various independent experts employed by the Applicants of extensive projects designed to determine the existence, clarify the extent, and assess the safety significance, if any, of deviations from design or specifications in the construction of the plant, and defining any corrective action deemed necessary. /1/ We refer in particular to the ongoing efforts of the Comanche Peak Response Team ("CPRT") to deal with the questions raised and concerns expressed by the Staff's Technical Review Team (TRT) as well as design adequacy issues raised by Messrs. Walsh and Doyle, Cygna and NRC technical experts and consultants.
>
> "The effect of these intenvening changes, studies, and undertaking has been, or will be, effectively to render unnecessary (or at least have an effect upon) further consideration of a number of admitted issues. . . " (Emphases added.)
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> "/1/ Applicants have already directed the modification, replacement or removal of over 100 pipe supports. See Letter Beck to Noonan, April 15, 1985."

It appears that Applicants' latest underlying strategy will be to attempt to convince the Board that the Board's consideration should start from right now -- but without Applicants getting a report card from the Board on what has gone before. It appears that Applicants would like to take credit for making "numerous changes in the management of the lead applicant" -- while at the same time they do not want to admit that there was any need for such changes (because Applicants also don't want to admit that there are any problems). Further, Applicants have not yet responded to CASE's discovery requests regarding such changes /3/.

Similarly, Applicants have not yet responded to CASE's request for the resumes, qualifications, etc. of Applicants' new consultants, and the scope of what they will be doing, contracts and/or guidelines regarding their work, etc. (which we have repeatedly requested informally /4/). Further,

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/3/ Applicants are just beginning to respond to CASE's 3/4/85 5th Set of Interrogatories to Applicants and Requests to Produce re: Credibility (regarding tests and sampling). It is difficult at this point to be certain which questions Applicants will answer adequately, since Applicants have not yet responded at all to many of them. CASE has already informed Applicants' Mr. Horin that we will be filing a Motion to Compel regarding certain questions but that we do not want to have to file piecemeal without having all the necessary information. We therefore plan to file when we have sufficient answers to know what we really still need; Applicants had no objection to this procedure.

As discussed in the off-the-record informal telephone conference call on 5/7/85 with the Board and parties, we will also be filing an informal letter to the Staff in the next few days detailing some of the specific interrogatories and requests to produce in CASE's 1st through 4th Sets which we believe Applicants should answer now, which we think the Staff may not be looking into.

/4/ See transcripts of meetings: 2/7/85 NRC Contention 5 Panel/CASE/Applicants meeting, afternoon Tr. page 136, line 18, through page 137, line 13; 2/27/85 NRC Walsh/Doyle Allegation Panel (or Design/Design QA Panel)/Applicants meeting, Tr. page 173, line 22, through page 174, line 10; and 3/23/85 NRC Walsh/Doyle Allegation Panel/CASE meeting, Tr. page 189, line 25, through page 190, line 9. See also Applicants' informal response, 3/23/85 meeting Tr. page 229, line 12, through page 230, line 20.

Applicants have objected to answering CASE's discovery requests regarding tests and samples which their "independent" experts and consultants will be doing /5/.

These items obviously come under the category of information which is absolutely essential and regarding which CASE has every right to discovery (if nothing else, as new and significant information). The Board Chairman has assured CASE (in both Dockets) that our waiting to receive answers to discovery requests will not be allowed to work to CASE's disadvantage later and that we will be given sufficient time for discovery and digesting information before having to go to hearings. Applicants' footdragging and delaying tactics in providing such basic information which CASE very obviously will want and need can therefore only work to Applicants' disadvantage later, when they will want to speed up the licensing process.

Particularly noticeable by their absence in Applicants' Proposed Plan is any mention of CASE's Motions for Summary Disposition or Applicants' responses to CASE's answers to Applicants' Motions for Summary Disposition. Applicants would undoubtedly like to forget all about the agreed-upon Plan of Applicants' own choosing which was to have decided the adequacy (or inadequacy) of the design of the whole plant. Applicants would apparently like for the Board to make its decision based upon Applicants' proposals and promises of what they will do in the future -- not upon evidence now in the record or soon to be in the record. This would amount to yet another plan by Applicants to deal with the design/design QA issues -- but without

/5/ See Applicants' 4/25/85 First Partial Response to CASE's Fifth Set of Interrogatories and Requests to Produce "Re: Credibility," pages 23 through 26, Questions 37 through 39. See also Footnote 3 on page 4 preceding.

Applicants' having to admit that their own chosen plan (which was agreed upon by the parties and the Board) has failed to prove that the plant was designed properly (and that, in fact, the evidence will prove conclusively that the reverse is true). It would also be very similar to the approach Applicants sought to pursue in the Intimidation hearings -- where Mr. Lipinsky was asked to accept Mr. Brandt's statements at face value, without question, as though they were fact. Applicants' ploy is understandable, since they are in worse trouble now regarding design/design QA issues than they were at the time of the Board's 12/28/83 Memorandum and Order (Quality Assurance for Design); then there was a deficiency of proof -- now there is proof of deficiencies. That proof is now available, and the Board must allow CASE the opportunity to get it into the record, through discovery and (where necessary) through hearings.

CASE also believes that, as part of their new strategy, Applicants are attempting to have their CPRT (or other allegedly "independent" organizations employed by Applicants) take over as much as Applicants can get by with of what Cygna is supposed to be reviewing, thereby hoping to lessen the adverse impact of Cygna's changes of position /6/.

It appears that Applicants want to use the "passage of time" brought about by Applicants themselves to argue that certain issues are now moot. CASE does not at this time recollect any such issues. However, we do recall that the parties have already gone through the process suggested in

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/6/ See: 2/7/85 meeting Tr. page 26, line 17, through page 28, line 21, and page 84, line 15, through page 85, line 17; 2/27/85 meeting Tr. page 170, line 21, through 172, line 11; and 4/26/85 Cygna/NRC management Tr. _____ (CASE does not yet have a copy of this transcript; however, it is our understanding from CASE's representative at that meeting in Washington that there were further indications of this during that meeting).

Applicants' item 2.a. (page 4 of Applicants' 4/26/85 pleading); it resulted in the Board's 3/15/84 Memorandum (Clarification of Open Issues). If Applicants believe that consideration of any of the open items set forth in that Memorandum has been rendered unnecessary or moot, or that the "intervening changes, studies, and undertakings" have had a substantive effect on those items, Applicants should address each such item and state precisely when, in what manner, and by what means it has been changed. That burden should be upon Applicants, not the NRC Staff or CASE. Neither CASE nor the NRC Staff should have to respond to Applicants' filing in this regard unless the Board believes Applicants have made sufficient showing that the Board might consider granting Applicants' request; in that event (and only then), CASE and the Staff should be given the opportunity to respond to Applicants' filing. Otherwise, each open item set forth in the Board's 3/15/84 Memorandum should still be considered open, absent proof by Applicants to the contrary. And CASE should have full discovery rights to any new information on which Applicants rely to attempt to prove that each such issue is closed. The Board should not allow Applicants to deliberately delay the proceedings, then to turn such delay to their own advantage while at the same time attempting to shift the burden of proof to CASE or the NRC Staff and by placing an additional unnecessary and unfair burden on CASE and the NRC Staff, or by allowing Applicants to file Motions for Summary Disposition prematurely without sufficient discovery or time for CASE to properly and fairly address those Motions.

In addition, since Applicants are now attempting to take credit for "numerous changes in the management of the lead applicant," they should also address precisely what effect each of those changes have on each of the items in the Board's 3/15/84 Memorandum which was closed out based upon the

affidavit of any of the individuals who have been changed to other positions or who are no longer employed by Applicants or its agents (for whatever reason).

The "intervening events [which] have occurred since January 1, 1985" and the "extensive projects" undertaken by "various independent experts employed by the Applicants" are still in large part unknown quantities at this point in time. Just a few examples, for instance: The 4/23/85 letter from Applicants to Mr. Vince Noonan (Subject: Comanche Peak Response Team (CPRT) - Program Plan (Draft Sections) and Issue Specific Action Plans, concerning TRT letters of 9/18/84, 11/29/84, and 1/8/85, and SSER 7, 8, and 9), and the 4/24/85 letter from Applicants to Mr. Noonan (Subject: Comprehensive Action List (CAL) of yet-to-be completed work items (action items) for the licensing of CPSES Unit 1) /7/ were incomplete and did not contain many of the specific plan sections referenced. It was not until the 2/26/85 meeting between Applicants' Comanche Peak Response Team (CPRT) and the NRC's Walsh/Doyle allegation panel (or design/design QA issues panel) that Applicants announced that the CPRT would be looking at the design/design QA issues in depth. A meeting which had been scheduled in Bethesda on May 8, at which Applicants were to tell the NRC Staff what Applicants' plans are for dealing with the design/design QA issues, has been postponed because the Staff is trying to complete work on its QA/QC SSER; it is CASE's understanding that the meeting will be rescheduled in Texas, probably not before the last part of May. A meeting has been scheduled at

/7/ Applicants did not send CASE a copy of either of these documents direct (we first learned of them from local reporters, to whom Applicants had given copies); we received copies from the NRC Staff on 5/3/85. CASE has requested that Mr. Wooldridge assure that we are sent copies of all such documents at the same time Applicants send them to the Staff; he has agreed to do so.

Cygna's offices in San Francisco for May 21, 22, 23, and (if necessary) 24; this is to be a Staff briefing by Cygna so that the Staff can understand the depth and breadth of Cygna's Phase 4 efforts. Obviously, this is the type of information which CASE also needs to be able to adequately respond to any plan proposed by Applicants, including discovery where needed /8/. CASE has

/8/ We note that Applicants' statements regarding "numerous meetings" might be misunderstood as indicating that CASE has been included in such meetings as a full participant. This is not what has transpired for the most part; in most instances, CASE has been afforded only an opportunity to say a few words at the end of meetings. Exceptions to this are the 2/7/85 meeting of CASE and Applicants with the NRC Contention 5 Panel, and the 3/23/85 meeting of CASE and the NRC Walsh/Doyle Allegation Team (or Design/Design QA team).

CASE has been receiving copies of transcripts of such meetings, usually from the NRC Staff. This means that sometimes we must wait for weeks before we receive such transcripts. In the instance of the 3/14/85 Cygna/CPRT meeting in San Francisco, where Applicants supplied a copy to CASE of the transcript, we did not receive a copy until 4/24/85, one day short of six weeks later. (The Staff usually does better, and this length of time is a little hard to understand, since we know from past experience with these Applicants, both in operating license hearings and rate hearings, that they usually get overnight, sometimes same day, service on transcripts.) In that particular instance, we were able to get Mr. William Van Meter to attend the meeting for us; however, he is not thoroughly familiar with the issues. Further, he will not always be available for such meetings, which will probably mean that CASE will not have a representative even in attendance at meetings in California (such as the one scheduled for May 21, 22, 23, and perhaps 24).

CASE was quite concerned recently because at the 4/22/85 NRC Staff/ Applicants meeting in Bethesda regarding the representativeness of the U-bolt sample (an issue of great concern to CASE), CASE was unable to have anyone cover the meeting who was familiar with the issues due to the short notice (we were informed of the meeting on Thursday for the meeting held the following Monday, to the best of our recollection at this time). We were able to have someone at the meeting and planned to have her tape it and send us the tapes; however, the meeting was held in a restricted area at the NRC and we were not even allowed to tape it. We have not yet received a transcript of that meeting.

For the most part, waiting for the transcripts has not been really detrimental to CASE, since we were not being rushed to take actions or make decisions without having necessary information in hand. However, it appears that Applicants are about to go back to their past tactics of attempting to rush things. In addition, the Board should not think that CASE has been participating as a full party to most meetings.

been trying to cooperate with Applicants and the NRC Staff, and have not objected to their having meetings in Bethesda, Washington, New York City, or San Francisco (rather than in Texas) if it was more convenient to do so. However, this means two things: (1) CASE must then depend more on informal or written formal discovery in order to get necessary facts (a process which CASE has not abused); and (2) the Board must not allow CASE's due process rights to be damaged by not allowing adequate time for review and discovery following receipt of such transcripts.

If Applicants are now ready to proceed as discussed in their 4/26/85 Proposed Case Management Plan, they are obviously now in a position to answer all of CASE's open discovery requests /9/, answer all of CASE's Motions for Summary Disposition, and respond to all of CASE's answers to Applicants' Motions for Summary Disposition. In addition, clearly CASE must be allowed adequate discovery and time to pursue any new information on which Applicants seek to moot open issues, change their position, change personnel, hire new consultants, etc. CASE has the right to have answers to our duly authorized discovery requests. CASE has the right to have answers to our Motions for Summary Disposition, from both Applicants and the NRC Staff. CASE has the right to have responses from both Applicants and NRC Staff to our answers to Applicants' Motions for Summary Disposition /10/. Fairness and NRC regulations require it.

/9/ CASE has informed the Staff that we will want discovery regarding some of their SSER's; however, we have agreed to let the Staff complete its QA/QC SSER before we file such requests.

/10/ It appears that Applicants may attempt to withdraw or severely modify their previously-filed Motions for Summary Disposition, although they have not yet officially made such a request. Should they attempt to do so, at that time CASE would move that CASE's responses to Applicants' Motions be accepted by the Board as Motions for Summary Disposition from CASE, and that they be ruled on as the record stands at this time.

Further, CASE should not be forced to go to hearings prematurely on issues before the parties or their agents have a firm position and we have had adequate opportunity for discovery and review regarding such firm positions /11/. All concerned will recall the problems involved with having such hearings as those on the Cygna Reports in February, April, and May 1984. CASE should not be forced to have hearings on materials we have just received and have had no time for adequate discovery, or proper review and preparation (which is what happened during the February 1984 Cygna hearings). It is far more logical and fairer to all parties and the Board, and a much better use of everyone's resources, to be certain that adequate discovery and review time has been allowed so that the issues on which we have formal hearings will have been narrowed down to those on which there is truly disagreement. This is one of the primary reasons for discovery.

IN CONCLUSION

Applicants' 4/26/85 Proposed Case Management Plan makes it clear that the time has come for the Board to get involved in what is going on, especially regarding the design/design QA issues. Applicants have already embarked on, and purport to have committed large amounts of resources to, a program which CASE does not believe can pass the first basic criteria for independence, which is being carried on without active participation by

/11/ CASE still intends to file, in the near future, an additional pleading regarding design/design QA issues, including suggestions regarding how the Board should proceed on the design issues. We had hoped that Applicants' presentation at the meeting scheduled for 5/8/85 (now postponed until the last week of this month at the earliest) would provide us with sufficient information for us to be able to make viable logical suggestions.

CASE, without Applicants even having to answer CASE's legitimate and duly authorized discovery requests (both those already filed and those which will be filed because of new and significant information) -- in short, without any semblance of due process for CASE as the Intervenor, regarding duly accepted issues in these proceedings.

Applicants and the NRC Staff have already made clear that they do not want to have to go through this whole process again. (Neither does CASE.) It is therefore imperative that the Licensing Board immediately order Applicants to provide the Board and parties with information as to who these allegedly independent individuals and organizations are, what their backgrounds and qualifications are, the contracts and all other documents relating to what they have been hired to do, etc.

Otherwise, Applicants will continue as they have been, totally outside the hearings process, to the irreparable damage of CASE's due process rights. Then, on their own terms and in their own time, Applicants will present the Board with a fait accompli, file Motions for Summary Disposition based on this new information, and ask to load fuel and receive an operating license. By that time, it will be too late for the Board to say that the procedures, independence criteria, etc. set up by Applicants is inadequate. Applicants will have too much time, money, and effort invested by that time and could arguably claim that the Board should have told them earlier if their new plan was not acceptable. The time for the Board to take control in this regard is NOW.

For the reasons discussed herein, CASE moves that:

1. The Board deny Applicants' 4/26/85 Proposed Case Management Plan in its entirety.

2. The Board order Applicants to immediately provide the Board and parties with information as to who Applicants' allegedly independent individuals and organizations are, what their backgrounds and qualifications are, the contracts and all other documents relating to what they have been hired to do, and whatever other information is necessary for the Board to make a determination regarding the independence of such individuals and organizations, whether or not the procedures and methodology proposed is adequate, etc.

3. The Board order Applicants to answer all of CASE's open discovery requests, answer all of CASE's Motions for Summary Disposition, and respond to all of CASE's answers to Applicants' Motions for Summary Disposition (i.e., respond to all the open items which are presently on the table before being allowed to proceed to new matters).

4. The Board bar Applicants from proceeding with new matters (such as the filing of additional Motions for Summary Disposition) until such time as they have complied with items 2 and 3 above.

5. The Board confirm in writing its off-the-record assurances to CASE (in both dockets) that our waiting to receive answers to discovery requests will not be allowed to work to CASE's disadvantage later and that we will be given sufficient time for discovery and digesting information before having to go to hearings or answer Motions for Summary Disposition.

6. The Board rule that If Applicants believe that consideration of any of the open items set forth in the Board's 3/15/84 Memorandum (Clarification of Open Issues) has been rendered unnecessary or moot, or that the "intervening changes, studies, and undertakings" have had a substantive effect on those items, Applicants should address each such item and state precisely when, in what manner, and by what means it has been changed. Neither CASE nor the NRC Staff has to respond to Applicants' filing in this regard unless the Board believes Applicants have made sufficient showing that the Board might consider granting Applicants' request; in that event (and only then), CASE and the Staff will be given the opportunity to respond to Applicants' filing. Otherwise, each open item set forth in the Board's 3/15/84 Memorandum should still be considered open, absent proof by Applicants to the contrary. And CASE will have full discovery rights to any new information on which Applicants rely to attempt to prove that each such issue is closed.

7. The Board rule that Applicants address precisely what effect each of the "numerous changes in the management of the lead applicant" have on: Applicants' reliance on the testimony of each such individual in these proceedings; and each of the items in the Board's 3/15/84 Memorandum which was closed out based upon the affidavit of any of the individuals who have been changed to other positions or who are no longer employed by Applicants or its agents (for whatever reason).

8. The Board put the parties on notice that it expects to go to hearings only on issues on which all parties and consultants or other agents of parties have a firm position, and that the Board expects the cooperation

of all the parties in achieving this as promptly and efficiently as possible.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of CASE's 5/13/85 Answer to Applicants' 4/26/85 Proposed Case Management Plan (in Main Docket, 50-445 and 50-446)

have been sent to the names listed below this 13th day of May, 1985, by: ~~Express Mail where indicated by * and~~ First Class Mail, ~~elsewhere.~~

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