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July 8, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' RESPONSE IN
OPPOSITION TO CASE'S MOTION FOR
IMMEDIATE HEARINGS, EVIDENTIARY DEPOSITIONS,
AND/OR DISCOVERY REGARDING THE MAC REPORT

I. INTRODUCTION

By pleading dated June 24, 1985[1] Citizens Association for Sound Energy ("CASE") has moved this Board, in the alternative (in descending order of preference) for (1) immediate evidentiary hearings, (2) immediate sequestered, evidentiary depositions of a large number of individuals, with costs to be funded by the Applicants, and/or (3) an immediate first round of comprehensive discovery regarding "the MAC Report." The MAC Report, dated May 1978, has been the subject of letters

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1/ "Board Notification and CASE's Motions: For Discovery Regarding the MAC Report and Issues Raised by the MAC Report and/or for Hearings and/or Evidentiary Depositions," June 24, 1985 (hereafter "Motion").

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from Applicants' counsel to this Board of May 29, 1985 and June 12, 1985. By letter dated June 24, 1985, Applicants were notified that CASE considers its Motion applicable to both Dockets 1 and 2 of this proceeding.[2]

For the reasons discussed below, Applicants believe that CASE's Motion should be denied as both premature and inconsistent with the basic regulatory scheme and procedures delineated by the Commission in 10 C.F.R. Part 2 of the Rules of Practice. Applicants' position herein is consistent with its recently filed plan for management of this proceeding in light of the ongoing design and construction verification program and Applicants' new management organization.[3]

II. DISCUSSION

A. Extraordinary Judicial Procedures are Unwarranted

CASE in its Motion has made no showing to justify immediate hearings or other extraordinary judicial measures with respect to this matter. CASE requests, inter alia, immediate hearings without prefiled testimony, sequestration of witnesses, an order that witnesses not discuss the matter with "anyone" (presumably including attorneys), and in the

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2/ Letter from A. Roisman to R. Wooldridge (June 24, 1985).

3/ See "Applicants' Current Management Views and Management Plan for Resolution of All Issues," June 28, 1985 (hereafter "Management Plan").

alternative, immediate evidentiary depositions with Judge Bloch presiding. Motion at 5. However, CASE has not shown the compelling need or irreparable injury necessary to support such requests.

First, CASE requests "immediate" hearings or evidentiary depositions, apparently under the theory that evidence will disappear or routine trial preparation will somehow undermine the fact-finding process. Motion at 5-6. CASE's expedited hearing approach is unwarranted. Although CASE does not say so, its request appears to be based upon, or parallel to, Rule 27(a) of the Federal Rules of Civil Procedure, which permits a federal court to issue an order for the taking of a deposition where the court finds that failure to "perpetuate" the testimony sought might result in "a failure or delay of justice." Initially, it should be noted that Rule 27 has no counterpart in the NRC Rules of Practice. But even before federal courts, it is clear that a party seeking perpetuation of testimony under the Federal Rules of Civil Procedure must show the existence of "a substantial danger . . . that the testimony sought to be preserved by deposition would otherwise become unavailable before the complaint could be filed." In Re Boland, 79 F.R.D. 665, 667 (D.D.C. 1978) (emphasis added).[4]

4/ See also Rule 27 of the Federal Rules of Civil Procedure. Preaction depositions to preserve testimony require an affirmative showing that the evidence sought to be perpetuated is in danger of being lost. Petition

(Footnote 4 continued on next page)

CASE has offered nothing to suggest, and therefore has not met its burden to demonstrate, that such a substantial danger exists here. As indicated in a letter from Applicants' counsel to the Board, dated June 28, 1985, Applicants are not presently aware of any evidence, including relevant documentation, that will become unavailable if the Rules of Practice and orderly procedures are followed with regard to this matter. Applicants reiterate that commitment. In this connection, it should be noted that upon discovery of the MAC Report in Applicants' files, Applicants have in good faith voluntarily made the report available to the Board and parties.

Further, as will be discussed below, the MAC Report is largely (if not entirely) superseded by recent developments in this case. If CASE wishes to allege issues based upon the report, those issues should be specified and should be demonstrated to be still relevant to this proceeding prior to initiation of any proceedings on such issues. Applicants' Management Plan specifically provides an opportunity to specify such issues. Management Plan, at 43-45. An emergency review is unnecessary and could result in needless expenditure of resources.

(Footnote 4 continued from previous page)
of the State of North Carolina, 68 F.R.D. 410, 412 (S.D.N.Y. 1975). Moreover, such preaction depositions are not intended as a means of discovery to ascertain
(Footnote 4 continued on next page)

The approach of the licensing board in the South Texas proceeding, in dealing with discovery and litigation of matters relating to Houston Lighting and Power Company's ("HL&P") asserted failure to notify NRC on a timely basis of a comprehensive three-volume report (the Quadrex Report), should be contrasted with the extraordinary courses of action urged by CASE in its Motion. See Houston Lighting and Power Company (South Texas Project, Units 1 and 2), LBP-85-6, 21 NRC 447 (1985). The South Texas licensing board required a showing not only that there was an alleged failure by HL&P timely to turn over the Quadrex Report to the NRC, but also a demonstration that such a failure, if it occurred, reflected upon the issues being litigated in that ongoing operating license proceeding. South Texas, LBP-85-6, 21 NRC at 458-59 (1985). In addition, as a predicate to litigation, the Board subsequently required the intervenor to designate the particular portions of the Quadrex Report that impacted safety issues then pending before the Board, and which had not been adequately resolved, in the intervenor's opinion, by subsequent Bechtel and NRC Staff reviews. Id. at 464-65. As discussed in the Applicants' Management Plan and in the following sections, a similar procedure should be followed in this proceeding.

(Footnote 4 continued from previous page)
facts for use in framing a complaint. Petition of Johanson Glove Co., 7 F.R.D. 156, 157 (E.D.N.Y. 1945).

CASE also demands "immediate sequestration" of all witnesses, i.e., that witnesses be "immediately ordered not to discuss the issues with anyone prior to their testimony." Motion at 5. Needless to say, this is an extraordinary request and is totally unsupported by any rational basis. It is well recognized in NRC proceedings that sequestration of witnesses during the testimony of other witnesses is a highly unusual procedure. Such a measure runs contrary to the normal Rules of Practice, deprives counsel at hearing of proper expert advice, and must be supported by a "serious reason." Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-739, 5 NRC 565, 569 (1977).[5] However, CASE's request would go even farther than such "normal" sequestration, and would apparently deprive Applicants' and their witnesses the very right to prepare for trial. There is no basis shown for such an unprecedented measure. Sequestration of witnesses should not exclude contacts between attorney and client. See, e.g., United States v. Walker, 613 F.2d 1349, 1354 (5th Cir. 1980),

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5/ Similarly, Rule 26(c) of the Federal Rules of Civil Procedure has been interpreted to authorize issuance of sequestration orders by federal courts at the request of a party seeking discovery. However, such an order may be based only upon a demonstration of good cause. See, e.g., Dunlap v. Reading Co., 30 F.R.D. 129, 131 (E.D. Pa. 1962); accord, Queen City Brewing Co. v. Duncan, 42 F.R.D. 32,333 (D. Md. 1966).

cert denied, 446 U.S. 944. CASE's request is inappropriate and should be denied.[6]

B. Discovery is Premature

CASE in its Motion also requests in the alternative an immediate round of comprehensive discovery on the MAC Report matter, and has contingently filed discovery requests. However, such discovery is premature. The NRC's regulatory scheme and Rules of Practice contemplate that discovery be had only after the intervenor first has specified its concerns and the underlying reasons therefore, and the presiding Board has evaluated and ruled upon those concerns after considering the respective responses of the Staff and Applicant.

As to the relationship between the initiation of discovery and the admission of contentions, the Commission has stated:

> Accordingly, the boards should manage and supervise all discovery including not only the initial discovery directly following admission of contentions, but also any discovery conducted thereafter. . . . In virtually all instances, individual boards should schedule an initial conference with the parties to set a general discovery schedule immediately after contentions have been admitted.

6/ It is axiomatic that a court will not interfere with the right to counsel absent some compelling need. Speculations of witness coaching do not meet that test, especially in light of other built-in procedures to protect the integrity of the process. See United States v. Allen, 542 F.2d 630, 633 (4th Cir. 1976), cert. denied, 430 U.S. 908 (1977). See also Rule 615 of the Federal Rules of Evidence.

Statement of Policy On Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1980) (emphasis added). While the Commission's Policy Statement also favors the utilization of informal discovery techniques, such "informality" should not be permitted as a means to expand the scope of a proceeding into new issues without satisfying the general requirement that such new issues first be specified before discovery is had thereon. In that regard, it is apparent that the Commission's express aim was to have discovery managed by presiding boards in order to focus the discovery on specified, relevant issues. Id.

Similarly, in Duke Power Company (Catawba Nuclear Station, Units 1 and 2), LBP-74-24, 19 NRC 1418, 1431-32 (1984), the licensing board held that discovery must be directed at a specific admitted contention. Following discovery on the admitted contention, the board held that it is neither necessary nor practical to allow discovery on every concern subsequently alleged during the litigation. In that case, as here, intervenors sought discovery on a newly alleged concern under an umbrella quality assurance contention. The board refused to allow discovery as unnecessary to adequate exploration of the concern. In South Texas the licensing board also recognized that:

> A fundamental tenet of NRC discovery in operating-license proceedings such as this one is that discovery may relate "only" to matters in controversy which have previously been

> identified. 10 C.F.R. § 2.740(b)(1). Discovery prior to the formulation of contentions or issues is therefore not permissible. See also Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 929 (1974). Following discovery and prior to hearings, issues or contentions may be further defined and, if appropriate, limited. 10 C.F.R. § 2.752.

South Texas, Memorandum and Order (Denying Reconsideration but Clarifying Memorandum and Order of May 22, 1984) (unpublished), at 3 (July 10, 1984).

The logic of the Commission's usual approach (of requiring that discovery be focused on specified admissible concerns) is irrefutable and directly applicable to CASE's instant motion. It is clear from CASE's Motion, and the accompanying interrogatories and document requests, that CASE has failed to consider appropriate requirements of, and limitations upon, discovery in NRC proceedings. CASE's Motion and discovery requests are based upon unsupported speculations and seek to make wide ranging inquiries into such areas as the nature and scope of the Applicants' prudence audit conducted for ratemaking purposes, various attorney-client consultations, Applicants' responses to the substantive recommendations of the MAC Report, and the existence of any other internal audits and evaluations of the entire quality assurance program. CASE's speculations and inquiries ignore, inter alia, the scope of jurisdiction of this Board (as well as the NRC), the staleness of most, if not all, of the information in the 1978

MAC Report, the pendency of the Applicants' recently filed Management Plan and the ongoing CPRT effort, well-recognized areas of legal privilege, the legal rights of individuals CASE seeks to interrogate, and prohibitions on intervenor funding in NRC proceedings.[7]

In sum, this Licensing Board - in conformity with the Rules of Practice, generally accepted procedures in licensing proceedings, the South Texas precedent, and the posture of this case - must prior to allowing discovery require a demonstration of safety-related issues emanating from the MAC Report and its disclosure. Responses of the Applicants and the NRC Staff to any such specification are essential to focus the issues. Such a procedure avoids the numerous jurisdictional, procedural and legal problems inherent in the premature and unfocused discovery venture advocated by CASE in

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7/ With respect to the last point, each of CASE's proposals in its Motion involves aspects of intervenor funding which are beyond the authority of this Board and the NRC to grant. The NRC is simply not empowered to expend appropriated funds to provide financial assistance to intervenors, nor is the NRC empowered to exact payment from utility-applicants for that purpose. See Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-40, 16 NRC 1717, 1718 (1982). See also Metropolitan Edison Company, et al. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193 (1984); Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-625, 13 NRC 13 (1981); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-19, 11 NRC 700 (1980); Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 331 (1980).

its Motion. Such a procedure, as discussed below, would also properly place any significant aspects of this matter into the context of the Applicants' Management Plan for resolution.

C. The MAC Report Has No Independent Safety Significance

CASE filed its premature discovery request just three days prior to the announced filing date of Applicants' Management Plan for this proceeding. It has thus, by definition, failed to demonstrate, let alone consider, the relationship of the MAC Report to what Applicants propose should be the current focus of this proceeding. As discussed in Applicants' Management Plan, the Applicants have now implemented at the request of the NRC Staff a large-scale reverification and remedial action program under the auspices of the Comanche Peak Response Team ("CPRT"). That effort will either verify proper quality assurance or will assure that all identified technical lapses are corrected. The focus of this proceeding should now shift from previous questions relating to individual allegations or alleged instances of inadequate quality assurance. The relevant inquiry should concern now the adequacy of the CPRT to provide the Board with reasonable assurance as to the integrity of the facility, based upon a comprehensive reinspection and verification program. See Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-763, 19 NRC 571, 576 (1984).

Thus, much, if not all of CASE's intended discovery appears focused upon matters which have become moot or superseded by the passage of time and subsequent events.

The MAC Report was issued in 1978 and included findings and recommendations in such areas as document control and the iterative design process. CASE's Motion appears to argue that the MAC Report must be addressed in these proceedings with respect to, inter alia, these substantive issues. Motion at 3. Such a result is unsupportable. Given the current posture of this proceeding, the substantive findings and recommendations of the MAC Report are clearly irrelevant. The report was prepared seven years ago following a management review and audit of the quality assurance program at Comanche Peak and considers the PSAR which has now been superseded by the FSAR. Furthermore, the CPRT effort and other recent developments discussed in the Management Plan now will obviate exploration of the specific recommendations in the MAC Report. For example, as discussed in the Management Plan, Sections V.G.1.c and V.G.1.i, the CPRT will address Applicants' document control program, including design deficiency documentation. Also, as discussed in the Management Plan, Section V.G.3, the CPRT Design Adequacy Program will address, inter alia, Cygna findings with respect to the design process. In sum, the CPRT will provide a comprehensive basis for the Board's required finding that the plant may be safely

operated. Thus, the time for this proceeding to focus on seven-year-old findings and recommendations in the MAC Report has long passed. This proceeding should not become bogged down in litigation of matters based upon a stale report.

Similarly, much of CASE's intended discovery will be focused upon past events and upon persons who are no longer part of Applicants' nuclear organization. The licensing board in the South Texas operating license proceeding discussed above, addressed efforts by intervenors to dwell on the past and to ignore current events. The licensing board concluded:

> Moreover, as our PID pointed out, many of the personnel who were involved in the oversight of B&R's design activities no longer serve in that capacity. In particular, HL&P hired Mr. Jerome Goldberg to oversee construction, and one of his first actions was to commission the Quadrex Report to ascertain the adequacy of B&R's design-engineering efforts (id). When coupled with the eventual replacement of B&R itself, it would appear to be the equivalent of "beating a dead horse" to engage in a lengthy, excursive examination of the possible implications regarding HL&P's character of the B&R design-engineering activities evaluated by the Quadrex Report or of HL&P's pre-1981 procedures for overseeing such B&R activities. In our view, those past activities and procedures can have little impact on the potential licenseability of the project, as long as any design errors which may have occurred are satisfactorily remedied (a subject open for exploration in Phase II).

South Texas, Memorandum and Order (unpublished), at 6 (July 10, 1984) (emphasis added).

As aforementioned, the CPRT efforts are designed to assure, consistent with Diablo Canyon, ALAB-763, that any design or construction errors which may have occurred are satisfactorily remedied.[8] As the focus of this proceeding should turn to such reinspection and verification efforts, comprehensive discovery attempts which dwell on the past rather than upon current developments invite licensing board management and control of such efforts. Moreover, as reflected in FSAR Amendment No. 55 (attached to the Management Plan), Applicants' nuclear management has been completely changed since the preparation of the MAC Report. Applicants' current management organization, coupled with the reinspection and verification efforts, will render much of the existing record on specific issues irrelevant. See, e.g., Management Plan, Section III.B., at 7-9. Issues and discovery requests which dwell on individuals no longer involved in Applicants' organization should no longer be of consequence.[9]

8/ See also Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1178-79 (1984).

9/ For example, the paragraph at the top of page 2 of CASE's Motion refers generally to the MAC Report's relationship to "commitment of Applicants' management to quality" and "the adequacy of management over the design and construction practice." It is unclear whether these charges relate to the findings of the MAC Report (and if so, which ones), or to CASE's perception of the significance of discovery of the report. In either event, the matter is old news. The CPRT is designed to uncover and correct physical, safety-related implications of any past events.

Finally, this Board should avoid imposing its imprimatur on discovery that is designed to yield information that is not only undirected at a specific admitted contention, but which may also be designed to yield information for use in other forums. For example, CASE's first interrogatory seeks to obtain detailed information on management prudence issues for possible eventual use before the Texas public utilities commission. Traditional management prudence questions remain subject to state, not NRC jurisdiction. See 42 U.S.C. § 2018; Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 103 S.Ct. 1713, 1724 (1983); see also Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971); aff'd, 405 U.S. 1035, 92 S.Ct. 1307 (172). Detailed interrogatories on this subject are clearly irrelevant to this proceeding.[10] It is to avoid problems such as these that boards have required that discovery requests be limited to matters relevant to admitted contentions. Allied-General Nuclear Services (Barnwell Fuel

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10/ By this pleading Applicants do not intend to respond to CASE's discovery requests. In the event CASE intends to pursue discovery on the MAC Report, and that opportunity is afforded by the Board, Applicants reserve the right to object and seek a protective order with respect to specific requests that are unduly burdensome, irrelevant, addressed to privileged information, or otherwise properly objectionable. The filing of detailed objections and answers, if any, with regard to CASE's contingent interrogatories and document requests is not required (nor appropriate) until the Board rules upon CASE's overall Motion.

Receiving and Storage Station), LBP-77-13, 5 NRC 489, 492 (1977). See also Florida Power & Light Company (St. Lucie Plant, Unit 2), LBP-79-4, 9 NRC 164, 169 (1979); Pacific Gas & Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038.

In sum, CASE in its Motion has not demonstrated any safety significance of its unspecified, vague concerns regarding the MAC Report and has not shown any clear relevance of its discovery requests to the findings this Board must now make. Discovery and further proceedings on the MAC Report should only be granted following a Board ruling on Applicants' proposed Management Plan and the responses thereto by the parties, and then upon a showing by CASE of relevance to specific issues in the proceeding and upon a tailoring of the discovery and issues to be pursued in light of the proposed new focus of the proceeding. Absent such a specification, showing, and focusing, CASE's current Motion should be denied.

III. CONCLUSION

For all the reasons discussed above, CASE's Motion should be denied in its entirety. CASE has not demonstrated facts and circumstances surrounding this matter which would justify the extraordinary relief of hearings prior to specification of relevant issues, prior to discovery in conformance with the Commission's Rules of Practice, and prior to preparation and submittal of prefiled testimony. Similarly, CASE's discovery requests are premature and inconsistent with the basic procedural scheme of the Commission's Rules of Practice. CASE has to date not specified any issues related to the MAC Report or demonstrated safety significance in light of the current posture of this proceeding. Consistent with Applicants' recently filed Management Plan, Applicants request that any future discovery on this matter be preceded by specification of issues together with a showing of current safety significance. Once any such issues are admitted into the proceeding for purposes of discovery (following responses by the Applicants and the Staff), the Applicants also request

that the provisions of 10 C.F.R. § 2.740, et seq., and the Commission's Policy Statement on Conduct of Licensing Proceedings govern such discovery unless otherwise agreed.

Respectfully submitted,

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July 8, 1985

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response in Opposition to CASE's Motion for Immediate Hearings, Evidentiary Depositions, And/Or Discovery Regarding the MAC Report" in the above-captioned matter was served upon the following persons by express mail (*) or deposit in the United States mail, first class, postage prepaid on the 8th day of July, 1985, or by hand delivery (**) on the 9th day of July, 1985.

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