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RELATED CORRESPONDENCE

7/22/85

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

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. 50-445 OL and 50-446 (Application for an Operating License)

'85 JUL 26 A11

OFFICE OF SECRETARY
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CASE'S MOTION TO COMPEL ANSWERS TO
CASE'S 6/24/85 INTERROGATORIES
TO APPLICANTS AND REQUESTS TO PRODUCE

RE: THE MAC REPORT AND ISSUES RAISED BY THE MAC REPORT

On 6/24/85, CASE filed its 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. Applicants responded on 7/8/85 /1/.

Pursuant to 10 CFR 2.740(f), CASE (Citizens Association for Sound Energy), Intervenor herein, moves that the Board compel Applicants to answer CASE's 6/24/85 Interrogatories to Applicants and Requests to Produce Re: the MAC Report and Issues Raised by the MAC Report.

Regardless of whether or not hearings and/or evidentiary depositions are ever held on the MAC Report and issues raised by it, CASE is clearly entitled to discovery in accordance with our 6/24/85 discovery requests.

/1/ Received by CASE on 7/10/85. Although Applicants sent their response by Federal Express, a typographical error was made and Applicants addressed it to the wrong zip code (75225 instead of 75224). A telephone call to Federal Express from CASE on 7/10/85 confirmed that this was the reason it was not delivered to CASE until 7/10/85.

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We note that CASE in Docket -2 filed a Motion to Compel on 7/18/85. Clearly the matter at hand which is the subject of our discovery requests bears equally on both Dockets of these proceedings. Most of the arguments and comments set forth in CASE's -2 pleading are equally applicable to Docket -1 (the main docket), and we incorporate them herein by reference.

In addition, there are some comments which we wish to make. CASE finds Applicants' Response to be truly amazing and puzzling in some respects. For instance, Applicants argue on the one hand that CASE's discovery requests are premature (pages 7-11), while on the other hand they argue that "the MAC Report is largely (if not entirely) superseded by recent developments in this case" -- therefore, CASE's discovery requests are too late. However, even in their convoluted logic, Applicants ignore the fact that (if one were to accept their argument that CASE's discovery requests are too late, which obviously CASE does not accept) the reason CASE's discovery requests are too late is that **Applicants, admittedly, knowingly and willfully withheld what they knew to be a legitimately discoverable document which should have been provided to CASE in 1980.** If the Board were to allow Applicants' argument to prevail, a dangerous and unfair precedent would be set: an applicant would be allowed to knowingly and willfully withhold a legitimately discoverable document for a period of time, then provide it, while at the same time arguing that it was too late for the intervenor to even have discovery regarding it. Thus, the applicant would be able to circumvent duly established and applicable NRC regulations, and deliberately withhold the most damaging documents -- all with the blessing of the licensing board! Obviously, this is not the intention of NRC regulations, and the Licensing

Board in these proceedings should not (and surely will not) allow themselves to be used by Applicants to achieve Applicants' illegal and unsupportable aims.

Equally amazing and puzzling are Applicants' arguments in section B. Discovery is Premature where Applicants appear to argue: that CASE is not entitled to discovery on the MAC Report because we have not designated an admitted contention; and that CASE should have filed discovery on the MAC Report directly following admission of contentions, during scheduled discovery. It was precisely during just such a period of scheduled discovery that CASE did file the very interrogatory under which Applicants themselves stated they were supplying the MAC Report (see Applicants' 5/29/85 letter to Licensing Board under subject of "Supplementation of Applicants' Response to CASE's Request for Production," page 1).

Further, CASE specifically identified the particular question under which Applicants' filed the MAC Report as pertaining specifically to Contention #5 (at the time, CASE had several contentions, and identified which specific contention each question pertained to) /2/. Further, in

/2/ See CASE's 7/7/80 First Set of Interrogatories to Applicant, pages 1 and 2, questions 10 and 11; Applicants' 7/28/80 Answers to CASE's First Set of Interrogatories and Requests for Clarification, pages 2, 4, 5, and 6, where Applicants themselves identified question 10 as being under Contention 5; CASE's 8/4/80 Response to and Motion Regarding Applicants' Answers to CASE's First Set of Interrogatories and Requests for Clarification, pages 3 through 7; Applicants' 8/11/80 Response to CASE's Requests for Production of Documents, pages 1, 3, and 4, where Applicants again identified questions 10 and 11 as being under Contention 5; Applicants' 9/8/80 Response to CASE's Requests for Production of Documents As Clarified by CASE, page 2, where Applicants yet again identified questions 10 and 11 as being under Contention 5.

CASE's 8/4/80 Response to and Motion Regarding Applicants' Answers to CASE's First Set of Interrogatories and Requests for Clarification, we stated specifically (excerpted from pages 3 through 7):

> "Question 9. . . Question 10: How many outside or sub-contractor evaluations, studies or audits have been conducted (by sub-contractors or agents of sub-contractors or by consulting firms or others, etc.)?
>
> "Applicants have objected to these two questions 'as being overly broad and requesting information not relevant ot the matters at issue in Contention 5. Further, to respond to such vague interrogatories would cause undue burden and expense in researching voluminous materials.' Applicants then requested that 'CASE specify the topics of the valuations, studies or audits with which CASE is concerned, the relationship of such studies, evaluations or audits to Contention 5 and, with respect to Interrogatory 10, the sub-contractors or consulting firms on which Applicants might have performed the audits, evaluations or studies which CASE seeks.'
>
> "As stated in our 7/7/80 filing, 'Each Interrogatory has been identified as to which specific accepted Contention it pertains to.' By listing these two questions under Contention #5, CASE clearly indicated that we were concerned with these two questions insofar as they apply to Contention #5. If no such evaluations, studies or audits have been performed which might bear on this contention, Applicants have only to say so. Applicants' statement that responding 'would cause undue burden and expense in researching voluminous materials' would appear to indicate that Applicants are in violation of 10 CFR Part 50, Appendix B, XVII, Quality Assurance Record, and XVIII, Audits, which state in part:
>
> ". . . 'Records shall be identifiable and retrievable. . . applicant shall establish requirements concerning record retention, such as duration, location, and assigned responsibility.' (Emphases added.)
>
> ". . . 'Audit results shall be documented and reviewed . . .' (Emphasis added.)"

"The topics of the evaluations, studies or audits with which CASE is concerned are any and all of them which might have a bearing on Contention #5. We do not know which specific audits may have been performed or the names of the sub-contractors or consulting firms which might have performed such audits, evaluations or studies. However, 10 CFR 2.740(b)(1) allows parties to request information as to whether or not such audits exist and what they are:

"'Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.'

"Further, 10 CFR 2.740(b)(1) states regarding objections:

"'It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.'"

CASE then gave a couple of examples of possible evaluations, studies, or audits under questions 9 and 10 (under question 10, by the consultant who performed a microseismic (sonic) evaluation regarding extensive concrete honeycombing on the exterior face of the wall areas around and above the reactor area sometimes referred to as the core walls). We then stated:

"Clearly these examples <u>are</u> relevant to Contention 5 and are therefore subject to discovery, as are any other such evaluations, studies or audits which may pertain to Contention 5. Applicants should be aware of which specific evaluations, studies or audits have been done which may pertain to Contention 5, and they should have such information in identifiable and retrievable form, as required by Appendix B of 10 CFR Part 50. CASE therefore requests the Applicant to supply the information requested in these two Questions [9 and 10], along with the corresponding information in Questions 11(a,b,c and d)."

In their 9/8/80 Response to CASE's Requests for Production of Documents As Clarified by CASE, Applicants agreed to produce for inspection and copying the documents within the scope the requests under questions 9, 10, and 11, as clarified by CASE. Further, Applicants supplemented their responses under question 10, advising that the following documents had been placed in TUGCO's Dallas offices for inspection and copying:

"Final Report on Concrete Evaluation in Dome Roof Section of Comanche Peak Unit 1, Glen Rose, Texas," Muenow and Associates, Applicants' 12/22/80 letter to CASE

"Review of the Quality Assurance Program for the Design and Construction of the Comanche Peak Steam Electric Station," Prepared by F. B. Lobbin (February 4, 1982), Applicants' 3/5/82 letter to CASE

"Report of Independent Review and Analysis of QA Records Management Systems for Texas Utilities Services, Inc.," prepared by Ebasco Services Incorporated (June 16, 1981), Applicants' 4/19/82 letter to CASE

There can be no doubt that, had Applicants supplied CASE with the MAC Report at the time it should have been supplied (by Applicants' own admissions), CASE would have been allowed not only initial discovery but follow-up discovery as well. Applicants have not presented any precedents which are binding on this Board or legitimate reasons for their being allowed to circumvent NRC regulations in this instance. The Licensing Board should not allow Applicants to now benefit from their own deliberate and illegal acts. Similarly, the Licensing Board should not allow Applicants to avoid answering CASE's legitimate discovery requests, thereby further delaying these proceedings.

Particularly amazing is the following portion which Applicants quoted from the South Texas operating license proceeding (South Texas, Memorandum and Order (unpublished), at 6 (July 10, 1984) (emphasis added by Applicants):

"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."

Although CASE is still reviewing and preparing our response regarding the CPRT, one aspect of it immediately struck CASE: the same individuals who were previously involved in the design issues (and even in testifying in

Applicants' Motions for Summary Disposition, which Applicants now want to withdraw) are still participating and advising the CPRT regarding design issues. Thus, Applicants' quotation regarding the design activities at South Texas, rather than supporting Applicants' position, argues in favor of CASE's position -- since many of the same personnel who were involved in the oversight of design activities are still so involved, one way or another, in the design activities at Comanche Peak. Although Applicants have made changes in the QA/QC organization, they have not made correspondingly similar changes regarding design activities.

Applicants have, through a series of legal ploys and strategies, deliberately delayed these proceedings while they developed their latest strategy, the CPRT, which allegedly will solve all their problems. However, the CPRT's independence, capability, credibility, extent of knowledge of currently-existing problems at Comanche Peak, their mandate from Applicants, and other as-yet unanswered questions (not to mention implementation and follow-up to CPRT findings) is still unknown and unproven at this point in time. There is a good probability that these issues themselves will have to be the subject of hearings. It is inappropriate for the Licensing Board to base a decision regarding CASE's legitimate discovery requests on the MAC Report and issues raised by the MAC Report upon an as-yet unproven and possibly unacceptable plan of Applicants. CASE and the Licensing Board are not bound by the assertions in Applicants' Management Plan; CASE is not required to "demonstrate . . . the relationship of the MAC Report to what Applicants propose should be the current focus of this proceeding." (Emphases added.)

It must be remembered that, at this point in time, the "current posture of of this proceeding" to which Applicants refer is nothing more than Applicants' own posturing and is yet another of Applicants' many trial strategies -- in this particular instance, to avoid answering difficult discovery questions regarding the implication of Applicants' upper management in what is very questionable, and possibly even criminal, activity.

NRC Regulations Regarding Discovery

The rules regarding discovery are so well established and have been cited so many times in these proceedings that it hardly seems necessary to cite them yet again. However, for the record, we repeat them here once again (as cited previously in CASE's 4/16/84 Motion to Compel Applicants to Provide Complete Answers to CASE's Seventeenth, Eighteenth, Nineteenth, and Twentieth Sets of Interrogatories and Requests to Produce to Applicants, but just as appropriate now).

There are many important principles applicable to the discovery process which are well established in NRC proceedings. Applicants are well aware of thesed principles, as demonstrated by the following which was taken primarily from Applicants' own Motions to Compel CASE (before we really understood what the regulations were) dated September 18, 1980, and February 23, 1981. Applicants have been an excellent teacher in this regard.

However, it should be pointed out that the very fact that Applicants are so well acquainted with NRC requirements in these matters clearly indicates that they are being deliberately evasive and uncooperative

regarding this specific item. This is precisely the sort ofo nonresponsiveness CASE feared when we wrote our 3/15/84 letter to theh Board (Supplementation of Interrogatories and Requests to Produce to Applicants from CASE), to which Applicants' counsel strenuously objected.

Discovery in litigation before the courts, as well as in NRC licensing proceedings, is intended to insure that "the parties have access to all relevant, unprivileged information prior to the hearing." Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 582 (1975). Indeed, discovery in modern administrative practice is to be liberally granted "to enable the parties to ascertain the facts in complex litigation, refine the issues, and prepare adequately" for the hearing. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978).

As to the scope of permissible discovery, it is well-settled that a party has the right to find out what the other parties know with respect to a particular contention, viz., the positions of adversary parties and the information available to those parties to support their position. Pennsylvania Power & Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), ASLB Memoranda and Orders, January 4, 1980, slip op. at p. 6 and August 27, 1979, slip op. at pp. 5-6. Discovery inquiries are limited only by the requirements that they be reasonably relevant to a sensible investigation, Pilgrim, LBP-75-30, supra at 582, and the information sought is reasonably calculated to lead to the discovery of admissible evidence, 10 CFR 2.740(b)(1).

The Appeal Board in Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2) 12 NRC 317 (1980) discussed the conduct of discovery in NRC proceedings. That decision reinforces the preceding.

A party to an NRC licensing proceeding is not excused from making timely responses to discovery requests because of a lack of complete knowledge or because the party has only partial knowledge of the answer. See Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 583 n. 10 (1975). That party must answer discovery requests to the best of its ability, and if the party claims a lack of sufficient information to provide any response at the time answers are due, the party should answer by providing the information when available. Id. Answers must be responsive and complete to the extent information is now available. See Pilgrim, supra 1 NRC at 583 n. 10, 586; see also 10 CFR 2.740(f).

With respect to objections to discovery requests, the burden of persuasion is on the objecting party to show that the interrogatory should not be answered. Pilgrim, LBP-75-30, supra at 583. General objections are not sufficient. Id. Indeed, answers to discvoery requests are important to a party's ability to prepare its case for trial. Claims that responses would be unduly burdensome, time-consuming and expensive are merely general, unsupported assertions, and thus are insufficient to sustain the burden of persuasion. Pilgrim, supra, 1 NRC at 583.

See also NRC Rules of Practice, 10 CFR 2.740b(b) and 2.741(d). These regulations require that a party must timely respond or state its objections with respect to each interrogatory or request to produce.

In conclusion, CASE urges that the Board grant CASE's Motion to Compel, which is necessary for efficiency of operation in the discovery procedure and to allow CASE to properly prepare for hearings.

It is also important for the Licensing Board to include in its order that Applicants are to preserve not just the documents which Applicants may decide are relevant, but that they preserve all documents which are reasonably relevant to a sensible investigation, information from which is reasonably calculated to lead to the discovery of admissible evidence. Without such an order, the information which is retained by Applicants may be far different from what CASE is entitled to.

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 Motion to Compel Answers to CASE's 6/24/85 Interrogatories to Applicants and Requests to Produce re: the MAC Report and Issues Raised by the MAC Report

have been sent to the names listed below this 22nd day of July, 1985,** by: Express Mail where indicated by * and First Class Mail elsewhere.
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