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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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USNRC

before the

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ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of )

TEXAS UTILITIES GENERATING )  
COMPANY et al. )

Docket Nos. 50-445-OL & OL-2  
50-446-OL & OL-2

(Comanche Peak Steam )  
Electric Station, )  
Units 1 and 2) )

APPLICANTS MEMORANDUM IN SUPPORT OF  
MOTION FOR MODIFICATION  
WITH RESPECT TO THE BOARDS'  
MEMORANDUM OF AUGUST 29  
1985 (PROPOSAL FOR GOVERNANCE  
OF THIS CASE)

Introduction

On August 29, 1985 the Boards issued a Memorandum and Order on "Proposal for Governance of this Case" (hereafter "Memo") in which the Boards addressed what were termed "crucial procedural issues", Memo at 1, in this proceeding. Because of the significance of such pronouncements to the future litigation of this matter, because the applicants believe that certain of the declarations contained in the Memo either are, or could be interpreted as, erroneous as a

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matter of law or fact, and because certain statements of the Boards appear to us to evidence a misunderstanding of the role of CPRT, the applicants herein have filed of even date a Motion for Modification (the Motion).

I. Apparent Errors of Law

A. CPRT "Independence"

Paragraph 2 on page 4 of the Memo states:

"The lack of independence of the CPRT from management may seriously affect our willingness to accept the CPRT's findings, particularly with respect to management's responsibilities. Consequently, the lack of independence might affect the admission of evidence concerning past QA/QC failures and management's responsibility for these failures". (Emphases added)

Prescinding from the question of whether or not CPRT has any role in assigning responsibility for any past problems to management or particular members thereof,<sup>1</sup> the portion of the above quoted language set forth with emphasis may be read as suggesting that testimony from CPRT personnel might be inadmissible as a matter of law by virtue of CPRT's so-called "lack of independence" from TUGCO management. If that is the thrust of the Boards' position, it is respectfully suggested that it is in error. While, after

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<sup>1</sup> See infra § I.B.

hearing a given witness, a Licensing Board of the NRC may conclude that a lack of "independence" affects the weight to be accorded the testimony, such lack of independence does not affect admissibility. Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1091 (1983).

It may well be that the reading which gives rise to applicants' concern is erroneous. An article in The Dallas Morning News on August 30, 1984 (p. 16A) purports to quote the Chairman of the Licensing Board in the main docket as commenting upon the above quoted language in the Memo as follows:

"'[W]e would just feel more comfortable if they [CPRT] were [independent] 'We're only saying that if they structure it this way, it will affect the weight of the evidence,' Bloch said 'The proof could be stronger if there were more independence - and it's also possible that without independence they could do it so thoroughly and so convincingly that they persuade us anyway.'"

Assuming the Chairman was correctly quoted in the paper, we respectfully suggest that paragraph 1 of the Motion should be granted and that the Memo should be corrected to reflect clearly the views of the Chairman expressed to the press, viz, (1) that lack of independence does not affect admissibility and (2) that no prejudgment has been made as to the weight to be accorded CPRT expert testimony.

B. Past Management Competence or Character

There are numerous statements in the Memo which can be read as assuming that management competence is an admitted issue in this proceeding. It is not. The last remaining contention admitted in this proceeding is Contention No. 5, which, in its entirety, reads as follows:

"The Applicants' failure to adhere to the quality assurance/quality control provisions required by the construction permits for Comanche Peak, Units 1 and 2, and the requirements of Appendix B of 10 C.F.R. Part 50, and the construction practices employed, specifically in regard to concrete work, mortar blocks, steel, fracture toughness testing, expansion joints, placement of the reactor vessel for Unit 2, welding, inspection and testing, materials used, craft labor qualifications and working conditions (as they may affect QA/QC) and training and organization of QA/QC personnel, have raised substantial questions as to the adequacy of the construction of the facility. As a result, the Commission cannot make the findings required by 10 C.F.R. 50.57(a) necessary for issuance of an operating license for Comanche Peak. (Emphasis added)

The contention as framed deals with adequacy of construction, not the competence and character of management. There can be no question about this. If Contention 5 had been deemed by its proponent, CASE, to encompass management competence and character, CASE would not have deemed it necessary twice to attempt, unsuccessfully, to have accepted for litigation specific

contentions with respect to these matters. See CASE Proposed Contention No. 1 in Intervenor's Supplement to Petition for Leave to Intervene and Contentions (May 7, 1979); CASE's Motion to Add a New Contention (Sept. 14, 1982). CASE's actions preclude any assertion that management competence and character is encompassed by Contention No. 5.

CPRT is charged with the duty of rigorously investigating and resolving all the technical concerns raised by the External Sources enumerated in the Program Plan with respect to CPSES, regardless of whether any given concern is within the ambit of the matters being litigated before the Boards. But CPRT is not assigned any role of placing blame with respect to such concerns on any individuals involved in the past management of this project. While it is possible that some "root cause" findings of CPRT may, by their nature, "point the finger" at certain individuals, this is not a goal, as such, of CPRT. Yet the Memo seems to assume that the trial of this proceeding involves a wholesale investigation of past and/or present management competence and character. For example, in paragraph 1 on page 4 of the Memo reference is made to CPRT delving into "the extent to which management has fulfilled its responsibility to comply with the FSAR, Commission Regulations and plant quality." The already quoted and

discussed paragraph 2 on page 4 apparently assumes a plethora of CPRT findings on management responsibility. On pages 6-7 of the Memo the Board raises the question of "How the CPRT will address management's responsibility for:" a host of past events. None of these matters come within the ambit of contention 5 as framed. And, as will be seen below, the issue of past management competence is, by law, not relevant to the present proceeding.

As noted in a prior pleading, an NRC operating license adjudicatory hearing is not a forum for exploring "past follies" of utilities, real or imagined. This view is confirmed by the Commission's decision in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-9, 21 NRC 1118, 1137-39 (1985), affirmed, Three Mile Island Alert v. NRC, \_\_\_\_\_ F.2d \_\_\_\_\_ (3d Cir. 1985). There may well be in the legal universe a forum for discerning and punishing past mistakes of miscreants in nuclear power plant construction, but the operating license proceeding before an ASLB is not one of them.

Prescinding from the legality of exploring past errors of management in any operating license proceeding, in the proceeding such an effort would amount to a misallocation of resources. CPRT is thoroughly "auditable". CPRT Program Plan Rev. 2, § III. J. at pp. 22-24 (June 28, 1985). CPRT is now charged with the duty of providing the requisite

assurance that all construction or design deficiencies that would present a technical bar to licensure have been detected and evaluated. Thus whether management errors were made in the past is now simply irrelevant to the one paramount concern in all NRC licensing proceedings, i.e., whether the plant is in conformity with the regulations which, in turn, means that the plant is licensable. Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1009-10 (1973), affirmed sub nom., Citizens for Safe Power v. NRC, 524 F.2d 1291 (D.C. Cir. 1975).

With respect to management competence to operate the plant: It is now too late for CASE to file and sustain under the provisions of 10 CFR § 2.714 the admission of a late-filed contention on management competence. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468-69 (1982), rev'd. on other grounds in part, CLI-83-19, 17 NRC 1041 (1983).

Similarly there is no basis at this time for this Board to inject any management competence and character issues into this case by exercise of its extraordinary sua sponte authority under 10 CFR § 2.760a in conformity with the procedures delineated in the Commission memorandum of June 2, 1981. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-22, 14 NRC



150, 162-63, reversed as to substance, CLI-81-36, 14 NRC 1111 (1981). With respect to persons no longer involved in CPSES management, as the Commission instructed in CLI-85-9, supra, the character and competence of those individuals are irrelevant to an operating license proceeding. Furthermore, with respect to all management issues, this Board is under the same duty as an intervenor to raise new issues sua sponte in a timely fashion. The time has long since passed for injection of any such issues into this proceeding.

Thus all of the references that could be read as reflecting the Board's intent and jurisdiction to litigate the issue of management competence should be deleted as requested by paragraphs 2, 3 and 6 of the Motion.

II. The Memo Indicates an Assumption By  
the Board that CPRT is Undertaking  
Tasks That It is Not

As already noted above, CPRT is not charged with the duty of placing blame on past management personnel for past mistakes. The statements made in the Memo to the effect that CPRT is investigating such matters are, therefore, factually in error. Thus, for this independent reason, paragraphs 2, 3 and 6 of the Motion should be allowed.

In addition CPRT has not been chartered to study and reach conclusions as to how this litigation has been conducted in the past. CPRT contains no legal expertise;



and, in any event, it is the task of the Board to determine on the record before it, if relevant, whether past litigation steps were appropriate. However a number of statements in the Memo seem to assume that such a task is assigned to CPRT viz:

"Consideration should be given to whether Applicants incorrectly defended design errors or incomplete design documents before this Board." Memo, p. 5, ¶ 7.

"How CPRT will address managements' responsibility for . . . (b) failure to disclose one or more management studies to CASE pursuant to discovery requests, (c) possible inadequacies in the technical analyses contained in Applicants' filings in this case, including its summary disposition filings, . . . (e) Applicants' conduct with respect to Mr. Lipinski and to Witness F, both of whom appear to have made at least some charges of technical validity . . . (f) the attempt to defend the quality of QA/QC for coatings and for the liner plate (g) the apparent inability to understand and properly evaluate the engineering contentions of Mark Walsh and Jack Doyle, including the apparently erroneous argument that Applicants' engineering practices were standard industry practice . . ." Memo at 6-7.

None of the items listed is on CPRT's agenda. To be sure, in the course of its assigned activities CPRT might, as a matter of course, provide information from which a conclusion could be drawn as to whether a design was erroneous or a design document is complete. On the other hand, economics or expeditiousness may dictate in some cases

substitution of a new design or analysis of record. When this approach is adopted, the original design or analysis will become functionally moot. The foregoing provides additional grounds for the grant of part of the request in paragraph 6 and the basis for the grant of the request in paragraph 5 of the Motion.

### III. Miscellaneous Matters.

#### A. CYGNA

It is not clear to us that the Board's understanding of CYGNA's role vis-a-vis CPRT is correct. This matter will be addressed in detail in response to the Board's Memorandum of September 17, 1985 "(Cygna Review of Revised Designs)" in a subsequent filing.

#### B. Applicants Summary Disposition Motion

The applicants hereby unequivocally withdraw all of their summary disposition motions on file and as yet not ruled upon. Thus paragraph 4 of the Motion should be granted.

Conclusion

The motion to modify should be granted in its entirety.

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