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

APPLICANTS' RESPONSE TO CASE'S (1) MOTION FOR BOARD TO ORDER APPLICANTS TO SUPPLY DOCUMENTS TO BOARD; (2) MOTION FOR IMMEDIATE BOARD ORDER FOR APPLICANTS TO PRESERVE EVIDENCE AND OFFER OF PROOF IN SUPPORT THEREOF; (3) CASE'S OFFER OF PROOF OF LACK OF INDEPENDENCE OF APPLICANTS' LATEST PLAN (CPRT PLAN); AND (4) CASE'S PROPOSAL REGARDING DESIGN/DESIGN QA ISSUES IN RESPONSE TO APPLICANTS' 6/28/85 CURRENT MANAGEMENT VIEWS AND MANAGEMENT PLAN FOR RESOLUTION OF ALL ISSUES

Under the dates of August 14, 15 and 19, 1985, CASE served upon the Applicants five documents, two denominated "motions", two denominated "offers of proof" that, in reality, are not offers of proof but briefs and arguments as to various items, and one denominated a "proposal". Each of

the documents evidences a total misapprehension of the purpose and scope of an NRC operating licensing proceeding. In addition, each document is premised on a total misunderstanding of the proper roles assigned in such a proceeding to the Board, the Staff, the applicants and the intervenors. As a result the applicants herein reply to all of the documents in a single filing which is divided into two parts. Part I sets forth certain of the principles that govern the conduct of an operating license adjudicatory proceeding. Part II shows that straightforward application of these principles dictates denial of the two motions and rejection of the arguments made in the "offers of proof" and "proposal".

PART I

A. The Purpose and Scope of NRC Operating License Hearings

Adjudicatory hearings on operating license applications are not mandatory. They are the result of a request for a hearing by an interested party that has contentions with respect to the facility which that party desires to have resolved. Absent extraordinary findings by the Licensing Board conducting the hearing, the scope of the hearing is confined to those issues raised by the parties requesting the hearing. 10 CFR § 2.760a. Indeed, discovery in NRC practice is strictly limited to those matters relevant to the admitted contentions. 10 CFR § 2.740(b)(1).

In an operating license proceeding of the nature here involved which is confined to questions of radiological safety (as opposed to antitrust or environmental issue), the bench marks by which safety is defined are the rules and regulations of the Commission. Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1009-10 (1973), aff'd sub. nom., Citizens for Safe Power, Inc. v. NRC, 524 F.2d 1291 (D.C. Cir. 1975); see also 10 CFR § 2.758. This is critical, for the words "safety" and "safe" are "plastic" in nature. The question: "Is it safe?," must always be properly answered "Compared to what?" Congress has mandated that a "safe" reactor is one which complies with the rules and regulations, and one which complies with the rules and regulations receives an operating license. Thus, the words "safe" and "licensable" are, in the world of nuclear power, synonymous; to attain "licensability" is to attain the requisite "safety".

It is not the business of the NRC adjudicatory hearing process to decide abstract or moot questions. See Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-419, 6 NRC 3, 6 (1977); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-557, 10 NRC 153 (1979). When an issue no longer is "live", it, and all matters relevant to it, cease to be a concern of the proceeding. Furthermore, the proceeding is not a "one shot" proposition where the

alternatives are either to license the plant presented by the applicants or forever deny it the right to run. Just as in an uncontested case where the staff decides when the license should issue, the job of the tribunal is to see that defects found are corrected before authority to run is conferred; it is not its function to simply say "you lose" to the applicant and shut the project down forever. See Commonwealth Edison Co. (Byran Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1169 (1984).

Finally, an NRC operating license adjudicatory hearing is not a forum for exploring "past follies" of utilities, real or imagined; it is not a resurrection of the stocks and whipping posts so common in 17th Century New England which provided the general populace a place and time to heap abuse upon those guilty of past sins of omission or commission, real or imagined.

B. The Roles of The Participants

1. The Licensing Board

Any NRC Licensing Board has only that power and jurisdiction which the Commission delegates to it. E.g., Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976). In an operating license proceeding, that jurisdiction is confined to deciding contentions raised by the parties or raised by the Board by appropriate "sua

sponte" procedures. 10 CFR § 2.760a. The Board does not supervise the Staff. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-80-12, 11 NRC 514, 516 (1980). "It does not . . . have general jurisdiction over the already authorized ongoing construction of the plant . . . and it cannot suspend such a previously issued permit." Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-674, 15 NRC 1101, 1103 (1982). All such supervisory authority and power is vested in the Staff.

2. The Applicants

The applicants have the burden of proof throughout an operating license proceeding on every contention admitted therein. 10 CFR § 2.732. However, how they meet that burden is up to them. An applicant in an NRC adjudicatory proceeding, like any litigant, has the right, within the rules of procedure and evidence and the constraints of the canons of ethics to make its case in whatever manner it chooses. It has the right to employ what experts it chooses; to set the terms of their contracts and to instruct them how they will accomplish the tasks.

> "The fact that a witness is employed by a party, or paid by a party, does not disqualify the witness from testifying or render the testimony valueless . . . . It should come as no surprise that most expert witnesses do receive compensation from the parties on whose behalf they testify. But their compensation is for their time and

> expertise, not for their testimony as such. There is nothing wrong or inherently suspect about that. To be sure . . . the opposing party can elicit the fact that a witness has been paid for his or her appearance, or is employed by a party. But that line of attack goes only to the persuasiveness or weight that should be accorded the expert's testimony, not its admissibility." Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1091 (1983).

The applicant is not a technical resource for the intervenor and, whether under the guise of discovery or otherwise, an applicant is under no obligation to conduct research or analyses at an intervenor's request. See Pennsylvania Power & Light Co. (Susquehana Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 334 (1980). In short, for better or worse, NRC operating license proceedings are adversary adjudicatory proceedings. Each adversary has the right to make its case its own way and is not obligated (other than complying with proper discovery requests to the extent required) to make its adversary's case for it.

3. The Staff

As noted earlier it is the Staff that has general supervision of ongoing construction of CPSES at this juncture. The Commission has stated:

> "To be sure, the staff is party to the proceedings before us. But it is also an arm of the Commission and is the primary instrumentality through which we carry out our statutory

> responsibilities. It would be contrary to the facts of the administrative process to pretend that the staff is always merely a party whose submissions are to be given no more weight than those of any other party. On some questions, such as interpretation of statutes or judicial decisions, the staff submissions have no more weight than those of any other party. But in other cases that would not be so." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-16-17, 4 NRC 451, 462 (1976).

4. The Intervenor

Of relevance to the matters at bar is not so much what duties or obligations an intervenor has in NRC proceedings, but rather what duties it does not have. It is not its function to tell the Board how to run the case or what the Board needs to decide a question. It is not an intervenor's function to dictate to the applicant how to run its case. And an intervenor has no right to a trial and decision on an issue that is moot or irrelevant.

PART II

A. The Motion for Board to Order Applicants to Supply Documents to Board Should Be Denied

CASE's Motion for Board to Order Applicants to Supply Documents to Board transgresses at least two of the principles discussed above. It constitutes a transgression of the rule that an applicant has the right to run its own case as it sees fit (and accept the consequences, if any, of mistaken efforts). And it also transgresses the principle

that the Board, not the intervenor runs the hearing. What CASE is demanding, in reality, is that the Board be given, at once, the materials that CASE believes the Board has to read before it can decide certain questions which CASE claims the applicant has asked the Board to rule on. Prescinding from the question of whether Applicants have asked for the ruling CASE claims they have,[1] the basic rule is a party can ask a board for a ruling based on what it tenders in support thereof by way of argument, evidence, etc. The opposition is free to tender what it will in opposition. The Board can always request more information if it feels it is necessary. This is how the adversary system works. Indeed, both in NRC and Federal Court practice a discovery request for documents contemplates the giving of the documents for inspection and copying to the party making the request. All documents produced are not copied and sent to the tribunal. Documents are tendered to the tribunal, rather, only when a party deems them relevant to a pending request for action.

---

[1] CASE, in its motion, states the applicants "have asked the Board to rule favorably on an incomplete CPRT plan." Applicants have not, at this juncture, requested any ruling on the CPRT plan as such. Applicants have asked for a favorable ruling on the proposed case management plan; this plan contemplates that there may be litigation (or agreement) leading to approval of the CPRT plan.

To put it bluntly, we think that at this juncture there is neither need nor NRC precedent for the Board to review the referenced documents in bulk; we assume, if the Board feels otherwise it will ask for the records and they will, of course, be furnished posthaste. CASE is always free to tender to the Board and serve on the parties whatever it believes is relevant to the issue of the appropriateness of the proposed CASE management plan. But CASE has no right to require us to do it for them especially where we deem the referenced records, at this juncture, irrelevant to the issue.

B. The Motion for Immediate Board Order for Applicants to Preserve Evidence Should be Denied

Some six weeks after Applicants served, on June 28, 1985, its Current Management Views and Management Plan for Resolution of all Issues, in which it was stated on Page 6 that "Applicants have already ordered the modification or replacement of a number of pipe supports and expect that other modifications will be required," CASE has filed a motion seeking an order from this Board enjoining the Applicants from engaging in such activity. Indeed, the motion, which is pressed as being an "urgent matter" as of six weeks after the Applicants' course of action was plainly revealed, was then expanded by an "offer of proof" filed in support of the motion to include a request for an order

forcing Applicants to keep in place not only all pipe supports, but also cable tray supports, conduit supports and anything else the CPRT may be looking at.

First of all CASE misapprehends what is and is not relevant evidence in an NRC licensing proceeding. A pipe or cable tray support which is being thrown away and not used may not be the matter least relevant to an operating license proceeding, but it is difficult to think of something less relevant. To the extent that original (but now superceded) designs are relevent to any live issue in the proceeding, they are retained in original design drawings.

CASE's suggestion that the action requested is needed so that these items can be used as evidence of past defalcations by the Applicants assumes, contrary to law, that the purpose of this proceeding is to castigate Applicant for past sins, real or imagined, rather than seeing to it that any defects are corrected.

In reality, CASE's motion, especially when the requested relief is considered along with the suggestion that the Board and not the Staff oversee a reinspection program, is an engraved invitation for this Board to exceed its jurisdiction. It amounts to asking the Board to take over general regulatory supervision of construction, an activity vested by the Commission in its Staff. Indeed, if CASE truly wants what amounts to a stop-work order, it is in the wrong forum and invoking the wrong procedure. Only the

Commission itself, see Cincinnati Gas & Electric Company (William H. Zimmer Nuclear Power Station), CLI-82-83, 16 NRC 1489 (1982), or the Staff, acting under 10 CFR § 2.206 for the Commission, can grant that relief. The division of authority between the Staff and the Licensing Boards is clear and should not be transgressed. In point of fact this Board has consistently recognized that its power to influence the methods by which defects are corrected is limited to the power of suggestion rather than command. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-81, 18 NRC 1410, 1454 (1983).

Even assuming the motion did not violate traditional Staff-Board relationships, it is without merit as a matter of logic even if one puts the question of relevancy to live contentions aside. A review of the CASE motion indicates that what CASE wants is an acknowledgment that it was right and Applicants were wrong and that certain supports were bad. To the extent that such an acknowledgment has any place in this proceeding, CASE is free to argue that the acts of pulling out and replacing the supports is sufficient basis for the making of such a finding. At a minimum the replacement of a support is an admission that it was cheaper to replace than to validate. However, we repeat, the relevancy of such findings when the support is no longer in the plant wholly escapes us.

Allowance of the motion would accomplish no legitimate objective of CASE and contrary to CASE's assertions at Page 3 of its motion that such action "would not harm any party" allowance of the motion would do severe harm to the ongoing effort to rectify the problems with the licensability of this facility. CASE's motion should be denied.

C. The Independence Arguments Set Out in the "Offer of Proof" Should be Rejected

As noted earlier one of the "Offers of Proof" was clearly denominated as being in support of one of the motions viz. the motion to preserve evidence. The August 19, 1985, package also included an "Offer of Proof of Lack of Independence of Applicants Latest Plan (CPRT)". The arguments contained in this document are stated as being further support for CASE's request for a stop-work order in the form of an order to preserve evidence, Indep. Off. of Proof at 12, and its suggestion that the Board supervise and, indeed be contractually responsible for any reinspection effort, id. at 22. Thus to complete a response to the Motion to Preserve Evidence we address the "independence" arguments contained in that "offer of proof".

Stripped to its essentials the offer of proof advances two reasons why the CPRT allegedly lacks the independence necessary and that therefore its effort is flawed and to be

discarded before it is even finished. First, it is argued that the SRT and CPRT personnel are employees (in one case) or subcontractors or contractors of TUGCO. This alone is argued as grounds for disregarding their efforts. As discussed in Part I, experts in this field have to be paid. It is their personal integrity that is relied upon by their sponsor and the Licensing Board to the extent it accepts their work. If it be so that the fact that a third party has a contract with a utility disqualifies his or her conclusions from belief by virtue of that fact, no nuclear power plant should have a license. Second, a good deal of time is devoted to establishing the proposition that the contracts involved speak in terms of obtaining a license rather than setting forth "safety" as one of the criteria. As explained in Part I above, licensability and safety are synonymous in the world of nuclear power. It would be a brave lawyer indeed who would permit a client to sign a contract binding him or her to make a product "safe," without defining "safe" by some objective criteria such as compliance with a regulation or other written standard.

CASE is right about one thing. The major goal of CPRT is to get the plant licensed. We would be surprised if CASE thought we had any other purpose. CASE has its goals too. Indeed, at Page 17 of its "offer of proof" on lack of independence it reveals its rationale for why the CPRT can now never satisfy CASE. However, it is not CASE that has to

be satisfied. It is this Board.[2] And we suggest that while the CPRT program is, like all products of human endeavor potentially imperfect, it goes a long way toward rectifying an admittedly unhappy state of affairs. Constructive criticism of the effort, such as that already offered by the Staff, will hopefully advance the effort towards perfection. Simply clutching at phrases taken in vacuo from a contract to assemble an argument as to why the effort should be discarded at the outset may be a good exercise in advocacy for a party dedicated to killing the project, but it will do nothing to enhance the safety of the plant or lessen the eventual cost to the ratepayer.

Finally, CASE is also correct in saying the Applicants do not claim "independence" as CASE defines it for CPRT. It does not need to; no rule, regulation or order of the Commission requires it.[3] Similarly, no rule, regulation, statute or order of the Commission requires (or even

---

[2] At least as to matters relevant to Contention 5, CPRT was designed to transcend the dividing line between issues admitted in the licensing proceeding (as to which the Board is the arbiter) and other licensing issues (as to which the Staff is the arbiter). It is likely, therefore, that less than the entirety of the CPRT scope will be a subject of litigation in the adjudicatory proceeding.

[3] The applicants do plan to address the question of independence as defined by the Staff in its SSER of August 9, 1985.

permits) Licensing Boards to contract, and be responsible, for reinspection efforts.

D. CASE's Proposal Regarding Design QA Issues Should Be Rejected

CASE's August 15, 1985, proposal regarding design QA issues also transgresses certain of the principles set forth in Part I. In the first instance, CASE has confused the proper order of decisionmaking. CASE in essence argues that the proceeding may not go forward with respect to the resolution of design issues until certain pleadings (Applicants' and CASE's motions for summary disposition) are ruled on by the Board. CASE contends that such action is required to determine the "status of the record" and only then will it be "appropriate to consider the next step" in the proceeding. CASE has reversed the proper course of events.[4] As discussed in Part 1, CASE has no right to

---

[4] CASE further argues that it must await receipt of discovery to set forth a "proposed schedule" regarding the remainder of the proceeding. CASE also suggested that such discovery is necessary to respond substantively to Applicants' Management Plan. Discovery on the CPRT Program Plan is not a prerequisite to addressing the Management Plan. Applicants acknowledge that additional information may need to be provided to address the CPTR Plan itself. However, detailed information regarding that Plan (beyond that already provided) is not required to address the Management Plan. Indeed, part of that Management Plan concerns the conduct and role of discovery regarding the CPRT Plan. Insistence that such discovery is a necessary prerequisite to responding to the Management Plan is illogical.

expect, and the Board has no duty to reach, a decision on matters which have been mooted by intervening events. The issue now before the Board is whether those matters have been mooted, as argued in Applicants' Management Plan. That determination may be made without ruling on the various motions which are the subject of CASE's proposal. If the Board disagrees with Applicants' arguments regarding mootness, then it may be appropriate to consider the disposition of those pleadings.

CONCLUSION

For all of the foregoing reasons the CASE motions at bar should be denied; and the CASE proposal and offers of proof should be rejected.

Respectfully submitted,

Nicholas S. Reynolds
William A. Horin
BISHOP, LIBERMAN, COOK,
PURCELL & REYNOLDS
1200 Seventeenth Street, N.W.
Suite 700
Washington, DC 20036
(202) 857-9800

Robert A. Wooldridge
WORSHAM, FORSYTHE, SAMPELS
& WOOLDRIDGE
2001 Bryan Tower, Suite 2500
Dallas, TX 75201
(214) 748-9365

Thomas G. Dignan, Jr.
R. K. Gad III
ROPES & GRAY
225 Franklin Street
Boston, MA 02110
(617) 423-6100

By _____
Thomas G. Dignan, Jr.
Counsel for Applicants

CERTIFICATE OF SERVICE

I, Thomas G. Dignan, Jr., one of the attorneys for the Applicants herein, hereby certify that on August 28, 1985, I made service of the within document by mailing copies thereof, postage prepaid, to:

*Peter B. Bloch, Esquire
Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Herbert Grossman
Alternate Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Dr. Walter H. Jordan
Administrative Judge
881 W. Outer Drive
Oak Ridge, Tennessee 37830

Mr. William L. Clements
Docketing & Services Branch
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Chairman
Atomic Safety and Licensing Appeal Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Stuart A. Treby, Esquire
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
7735 Old Georgetown Road
Room 10117
Bethesda, Maryland 20814

*Mrs. Juanita Ellis
President, CASE
1426 S. Polk Street
Dallas, Texas 75224

Renea Hicks, Esquire
Assistant Attorney General
Environmental Protection Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711

*Anthony Roisman, Esquire
Executive Director
Trial Lawyers for Public Justice
2000 P Street, N.W., Suite 611
Washington, D.C. 20036

*Dr. Kenneth A. McCollom
Administrative Judge
Dean, Division of Engineering,
Architecture and Technology
Oklahoma State University
Stillwater, Oklahoma 74078

*Ms. Billie Pirner Garde
Citizens Clinic Director
1555 Connecticut Avenue, N.W.
Suite 202
Washington, D.C. 20036

Elizabeth B. Johnson
Administrative Judge
Oak Ridge National Laboratory
P.O. Box X, Building 3500
Oak Ridge, Tennessee 37830

Nancy Williams
Cygna Energy Services, Inc.
101 California Street
Suite 1000
San Francisco, California 94111

Ellen Ginsberg, Esquire
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Joseph Gallo, Esquire
Isham, Lincoln & Beale
1120 Connecticut Avenue, N.W.
Suite 840
Washington, D.C. 20036

Mr. Lanny A. Sinkin
3022 Porter Street, N.W., #304
Washington, D.C. 20008

Mr. Robert D. Martin
Regional Administrator,
Region IV
U.S. Nuclear Regulatory Commission
Suite 1000
Arlington, Texas 76011

*Geary S. Mizuno, Esquire
Office of the Executive
Legal Director
U.S. Nuclear Regulatory Commission
Maryland National Bank Bldg.
Room 10105
7735 Old Georgetown Road
Bethesda, Maryland 20814

Mr. James E. Cummins
Resident Inspector
Comanche Peak S.E.S.
c/o U.S. Nuclear Regulatory
Commission
P.O. Box 38
Glen Rose, Texas 76043

Thomas G. Dignan, Jr.

*Federal Express