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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'85 NOV 29 A10:53

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

OL; OL-2

CASE OPPOSITION TO APPLICANTS' PETITION
FOR DIRECTED CERTIFICATION OF
LICENSING BOARD ORDER OF OCTOBER 31, 1985

INTRODUCTION

In the Petition Applicants describe their principal objection to the October 31 order as follows (Pet. p.9):

> The real problem is the Licensing Boards' avowed intention of simply allowing parties, after the evidentiary hearing is over, to decide in which docket it will advance what evidence.

In its November 6, 1985 Memorandum (Fair Warning of Citations to Other Docket) the Hearing Board agreed with Applicants and concluded (Slip .op., p.1)

> . . . we now intend to require the parties to place each other on notice by providing a timely citation of relevant material that already in the other docket. Similarly, when relevant technical information is expected to be filed in the other docket, an affected party should be informed of the expected

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relevance.[1]

Apparently dissatisfied with having prevailed, Applicants have decided to press on by recasting the petition to object to three[2] rulings in the October 31 Order (Applicants Memorandum In Response to Appeal Board Order of November 8, 1985 (November 14, 1985), pp. 1-2):

> 1. A ruling that swept into the scope of the jurisdiction of the Docket 2 Board an extensive record created before the Docket 2 Board existed.
>
> 2. A ruling that all discovery filed in either docket would be deemed filed in the other docket and therefore no objections as to discovery would be entertained which could be obviated by simply refiling in the other docket.
>
> 3. A ruling that parties wishing to incorporate evidence in one docket from the other would be allowed to do so as late as

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[1] At a pre-hearing conference on November 12, 1985, the Hearing Board indicated that it would establish a formal process for implementing its November 6th decision on pre-notification noting, for example, the use in this proceeding of detailed preliminary proposed findings of fact filed in advance of evidentiary hearings as one possible process. To the extent Applicants are now objecting to those yet to be established procedures, their Petition here is premature and inappropriate for Appeal Board consideration. Northern States Power (Prairie Island Units 1 & 2), ALAB-419, 6 NRC 3, 6 (1977), and Toledo Edison Co. (Davis Besse), ALAB-297, 2 NRC 727, 729 (1985); see CASE Opposition to Motion for Directed Certification (November 4, 1985) at pp. 6-7. Similarly, if Applicants now claim that material from Docket 1 that is irrelevant to Docket 2 will be included in Docket 2 that too is a premature objection which should await a specific attempt at such inclusion to test the issue. The Hearing Board has certainly not prejudged the outcome and neither should Applicants. October 31, 1985, Order, p.3.

2 At no place in the petition itself does this identification of these rulings appear and on its face (judging by the title) Applicants sought to appeal all rulings contained in the October 31 Order, although from the text of the Petition they only appeared to address some of the rulings in the Order. We are of the opinion that it is the practice of the Appeal Board to require that a petition for directed certification begin with a statement of the precise question for which certification is sought.

when they filed their proposed findings.

Inasmuch as Applicants have again woefully failed to meet even the procedural pre-requisites for filing a petition for directed certification, we again urge this board to summarily reject the Petition without a written opinion. See CASE Opposition to Motion For Directed Certification (November 4, 1985), Argument II.A. In addition, the Petition is meritless and should on that basis also be summarily rejected.

Stripped of rhetoric and hyperbole Applicants' complaint is that evidence introduced by them in one part of the hearing may come back to haunt them in some other part of the hearing. Such are the viscissitudes of lengthy cases. There is nothing magic about having this one case divided into two dockets which makes that problem anymore troublesome here than in any licensing case and Applicants do not prove to the contrary.

II. ARGUMENT

A. The Petition Is Procedurally Defective

Directed certification is granted in those rare cases where there is a possible immediate, irreparable injury (indisputably not present here) or where a board ruling affects "the basic structure of the proceeding in a pervasive or unusual manner." Public Service Company of Indiana (Marble Hill Nuclear Generating Station), ALAB 405, 5 NRC 1109, 1192 (1977). Except for hyperbolic illusions to a deity, cosmologic phenomena and oriental games, Applicants do not really attempt to meet the second Marble Hill test.

The basic structure of this proceeding remains unaffected by

the October 31 Order. Had no such order been issued CASE would have been free to use evidence developed in one docket to support its position in the other docket by 1) introducing any prior testimony of applicants or the staff as the admissions of a party Federal Rules of Evidence, Rule 801(d)(2), 2) relying on Board rulings as collateral estopped or 3) offering any prior CASE evidence as pre-filed testimony. The Board in its October 31 Order, as modified by the November 6 Order, has given Applicants advance notice that this approach may be used and offered to establish a process to assure that the use of previously produced evidence will be more carefully controlled and cause the minimum confusion.

One possible reading of the Applicants' Petition is that the heart of their objection is the Board's recognition that data related to technical issues may be introduced into Docket 2 although the data on the technical issues was developed in Docket 1. In Section B, infra, we discuss why this objection is meritless. However without reaching the merits this Board can reject the Applicants' argument. Although Applicants imply that the basic structure of the proceeding will be affected by the inclusion of technical issues in Docket 2, in fact Docket 2 is already replete with technical issues thoroughly discussed by all parties on the record and as to which substantial evidence has been received. Significantly, Applicants are primarily responsible for introduction of this technical evidence after asserting at the outset of Docket 2 that the technical merits of a safety concern raised by an alleger is a legitimate part of the harassment and intimidation inquiry.

In its filing of May 8, 1984, Applicants describe one of the elements which make up their view of harassment and intimidation as

follows (Applicants Proposal Standard For Litigating Allegations of Intimidation, p.9):

> Thus, if QC inspectors are intentionally (or even unintentionally) using incorrect criteria or are not properly applying pertinent criteria, the licensee under Appendix B has an affirmative obligation to assure that this situation is corrected and that the quality assurance program is implemented properly. If a QC inspector claims that he/she was intimidated but the underlying basis for the claim was action taken for failing to inspect in accordance with the correct procedures, then the incident would not constitute a claim of intimidation.

Consistent with this view of the harassment and intimidation issue Applicants introduced substantial testimony regarding the technical merits of safety concerns raised by former QC inspectors who claimed they were discouraged or otherwise harassed and intimidated in their attempts to raise these safety concerns. E.g. Pre-filed Testimony of Antonio Vega (August 17, 1984) Tr.36685-6 and Prefiled Testimony of C. Thomas Brandt (August 16, 1984) Tr.45314-25. The Brandt testimony was offered to directly challenge the testimony of former QC inspector Susie Neumeyer that she was forced to improperly sign-off hold points on inspection travellers for fuel pool liner plates where the work was done several years earlier and she did not witness that work. Subsequent investigations by the Staff's Technical Review Team have confirmed that the procedure which Ms. Neumeyer was required to follow were improper (SSER No. 11, p.0-206):

> The TRT concludes that there are record anomalies aparent in the liner plate travelers which are not adequately explained on the face of the travelers (e.g., dates changed), which

> violate procedures (e.g., failure to transfer sign-off from chits to travelers daily), and which employ inadequate procedures (i.e., confusion over the use of the five-line traveler).
>
> It appears to the TRT that the QC documentation relating to the liner plate welds did not meet the standards expected of an effective QA/QC program, or the standards required by Gibbs & Hill specification 2323-SS-18, and 10 CFR 50 Appendix B.

The special consultant retained by the Staff Panel on Harassment and Intimidation concluded with respect to this same incident (Comanche Peak Steam Electric Station: Alleged Climate of Intimidation - Supplementary Report (EG&G Idaho, September, 1985) p. B-13):

> Ms. Neumeyer alleged she was instructed to sign off a number of weld hold points on some old liner plate travelers that she felt were inadequately documented. According to her, she was threatened with loss of a weekend off if she failed to obey. Ms. Neumeyer voiced to her supervisors and co-workers her concerns about the impropriety and signed of on some of the work under protest. The actions of her supervisor, including the use of threats, were reasonably likely to influence her and other employees to perform work they believed was not in accordance with requriements. Thus the Study Team concludes that this incident meets the criteria for being intimidating.

Thus Docket 2 is already full of technical material relating to Applicants' attempt to establish that pressuring QC inspectors to sign-off inspection reports was acceptable because on the merits the QC inspector was wrong. Recognition that more technical evidence may be included in Docket 2 does not constitute a basic change in the structure of this proceeding.

Since all that is involved in the October 31 and November 6 Orders is establishment of a process to assure the orderly and timely

inclusion of relevant material from one docket to the other and continuation of the Applicant initiated practice of using technical evidence in Docket 2, there is no threshold showing that this Board should consider directed certification. We urge summary rejection of the Petition.

B. The Objections Raised In The Petition For Directed Certification Are Meritless

Applicants now appear to object to three portions of the October 31 ruling. First, they object to the possible inclusion of the technical merits of issues in Docket 2 that were originally presented in Docket 1. Second, they object to the fact that objections to discovery that can be cured by filing in the other docket are no longer permitted. Third, they object to the yet to be developed process by which parties can include relevant data from one docket in the other docket.

As already noted, supra, the October 31 Order does not sweep all data in Docket 1 into Docket 2. The Hearing Board ruled that (Order, p.3):

> We will consider evidence relevant to one docket to be available for citation in the other docket, providing that it is relevant to the issues in the second docket.

Applicants' objection, when viewed in the light of the actual Hearing Board ruling, is obviously speculative (see Section A) and meritless. Since, by definition, only relevant evidence from one docket may be used in the other docket and since a process for prior notice will be required to protect the rights of the parties there can be no objection. Applicants assert that this will create a confused record. They do not explain how that will occur and it is not self-evident. The

manageability of the record will be improved by incorporating by reference rather than having identical evidence appear in two places in the record. Admittedly this is a complex case but the October 31 Order alleviates the problem, it does not exascerbate it.

Another view of Applicants' objection is that it believes that all technical data is irrelevant to Docket 2. As already discussed in Section A, supra, Applicants are the architects of the use of technical data in Docket 2. In addition, direct evidence of harassment and intimidation is not the only way CASE can prove its point. If, for instance, a number of specific examples of harassment and intimidation are documented, and if, as the EG&G Report indicates, those examples have implications for many workers not involved in the specific incident,[3] and if there is evidence of

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[3] In the EG&G Report for September 1985, supra, they found inter alia:

> The conclusion, therefore, appears to be that, in the eyes of a significant minority of these respondents in 1979, there was, indeed, intimidation. It came almost exclusively from craft/construction, not from management or supervision, but in a sizable [sic] minority of cases involved acquiescence by these latter persons or groups. [p. A-17]
>
> ****
>
> Ms. Neumeyer alleged she was instructed to sign off a number of weld hold points on some old liner plate travelers that she felt were inadequately documented. According to her, she was threatened with loss of a weekend off if she failed to obey. Ms. Neumeyer voiced to her supervisors and co-workers her concerns about the impropriety and signed off on some of the work under protest. The actions of her supervisor, including the use of threats, were reasonably likely to influence her and other employees to perform work they believed was not in accordance with requirements. Thus the

plant-wide failures of QA/QC to detect construction deficiencies (SSER No. 11, p.P-35) for which Applicants produce no credible explanation, then it is a reasonable and acceptable inference from the evidence that the cause of the QA/AC breakdown was harassment and intimidation. It is in recognition of the importance of the sheer volume of undetected deficiencies for the issues in Docket 2 that the Staff, the Hearing Board and the parties have assumed for over a year that the full results of the TRT review would become a part of the Docket 2 record. See Statement of Staff Counsel, September 10, 1984 (Tr., 14826-27). To this extent technical issues are an integral part of Docket 2.

Of course, to the extent that Applicants do not contest the existence of identified deficiencies which QA/QC should have found, only the existence of the deficiency will become relevant for Docket 2. In Docket 1 the parties will litigate whether the solution to the deficiency offered by the Applicants (as opposed to its root cause, generic implications or safety significance which are potentially

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> Study Team concludes that this incident meets the criteria for being intimidating. [p. B-13]
>
> ****
>
> The inspectors' T-shirts could have been read to convey a message that their job was to report safety concerns described by craft or coatings foreman Williams as "nits." Management's response was inappropriately severe to an occurrence that possibly was intended as a joke. That response, highly visible to other employees, was reasonably likely to dissuade employees from identifying or reporting some safety concerns or otherwise making waves. The Study Team has concluded that this incident was one of intimidation. [p. B-22-23]

also relevant also in Docket 2) is adequate.

Applicants second objection relates to the discovery process. They complain that the Hearing Board has decided to avoid the formalistic and non-productive course of requiring CASE to refile discovery deemed irrelevant in one docket, but relevant to the proceeding, in the other docket. This process avoids expensive and record expanding formalism that in no way aids the legitimate interest of any party.

Finally, Applicants still complain that the process for notification, not yet articulated, will be prejudicial to them. The process that will ultimately be followed has not yet been decided. If the Board follows the procedure it has utilized twice before of having all parties simultaneously file detailed preliminary proposed findings of fact with reference to all portions of the record upon which they rely and this is done well in advance of hearings (although perhaps after evidentiary depositions) there can not be any prejudice. All parties have once before accepted this process and the hearing has benefitted from its use.

CONCLUSION

Applicants are again complaining about what they fear might happen and not what has happened. Their only even arguably ripe complaint is about the use of relevant technical data developed in Docket 1 for Docket 2. But Applicants long ago introduced this kind of data in Docket 2 and acquiesced in the Staff position that the full output of the TRT was essential to decide the harassment and intimidation question. Applicants are either too early or too late or, more likely both. In any event this frivolous Petition should be

summarily rejected.

Respectfully submitted,

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of CASE's Opposition to Applicants' Petition for Directed Certification of Licensing Board Order of October 31, 1985 have been sent to the names listed below this 26th day of November, 1985, by: Express mail where indicated by *; Hand-delivery where indicated by **; and First Class Mail unless otherwise indicated.

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