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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. 50-445-2 and
COMPANY, ET AL.)	50-446-2
(Comanche Peak Steam Electric)	(Application for
Station, Units 1 and 2))	Operating Licenses)

APPLICANTS' ANSWER TO CASE'S MOTION TO
COMPEL, AND APPLICANTS' MOTIONS (1) TO
STRIKE AND (2) FOR A PROTECTIVE ORDER

I. INTRODUCTION

Pursuant to 10 C.F.R. §2.730(c), Texas Utilities Generating Company, et al. ("Applicants") hereby respond to CASE's August 28, 1985, Motion to Compel Response to Interrogatories (Re: Readiness Review) ("motion to compel"). Applicants oppose CASE's motion and urge that the Board deny the motion in its entirety. Applicants also move, pursuant to 10 C.F.R. §§2.713, 2.718, 2.730 and 2.740(c), that the Board strike from the record CASE's pleading and issue a protective order denying further discovery in this proceeding regarding the Georgia Power Readiness Review Program.

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II. BACKGROUND

On July 29, 1985, CASE filed three interrogatories, requesting that Applicants identify communications with, documentation provided by, and procedures, instructions, etc. developed and provided to Applicants by Georgia Power Company which were considered in the development of the CPRT program. These interrogatories were signed by Ms. Billie Garde. No other information was provided by CASE as to the basis for these requests.

Applicants responded to CASE's interrogatories on August 19, 1985. Although objecting to the requests as irrelevant, Applicants responded "to assist in the discovery process," consistent with the Board's Memorandum and Order (Current Status of Discovery), issued August 16, 1985. Applicants responded that they had interviewed members of the SRT and CPRT (to the Review Team Leader level), and Comanche Peak personnel to ascertain this information. Applicants stated that those persons had no knowledge of communications with Georgia Power, or site visits by or documentation received from Georgia Power, concerning the development of the CPRT or CPRT Program Plan.

On August 28, 1985, CASE filed its motion to compel, signed by Ms. Garde as "Counsel for CASE." CASE alleged, based solely on a transcript of a July 26, 1985, Commission meeting, that there has been "significant communication" between Georgia Power and Applicants "which is relevant to the CPRT program plan," and

that "there is a serious discrepancy" between Applicants' response to CASE's interrogatories and representations by Georgia Power Company at the July 26th Commission meeting. CASE contended that "it seems more likely that the interrogatory answers are in error than that Georgia Power Company representatives are in error." CASE seeks an order compelling answers to the three interrogatories and an affidavit by counsel regarding the "search for the original answers." CASE also leveled several serious charges against Applicants and their counsel which will be chronicled and addressed in Section IV, below.

Applicants demonstrate below that the statement made at the Commission meeting relied on by CASE was, in fact, in error. Thus, CASE's assertions are premised on an incorrect assumption. More importantly, however, CASE's accusations of improper conduct are also baseless, resulting from a failure by CASE to establish the relevant facts. For the reasons discussed below, the Board should deny CASE's motion, strike CASE's pleading, and issue a protective order.

III. APPLICANTS' ANSWER TO CASE'S MOTION

A. CASE's Motion

CASE requests two forms of relief in its motion to compel. CASE seeks not only that the Board compel answers to CASE's interrogatories, but that it require Applicants' counsel to "provide an affidavit detailing the depth and breadth of their search for the original answers."

CASE provides two principal bases for the requested relief. First, CASE contends that Applicants' interrogatory answers are incorrect. CASE relies on the transcript of a Commission meeting in which a representative of Georgia Power is quoted as stating that personnel from Comanche Peak visited Georgia Power and obtained procedures regarding Georgia Power's Operational Readiness Review Program. CASE also claims, again on the basis of the same transcript, that Applicants' relevancy objections are incorrect. Second, CASE argues that Applicants' answers were "incomplete" in that, in CASE's opinion, they were "representations of counsel" and did not include information from "non-lawyer employees" or disclose the nature and scope of the inquiry conducted to obtain the answers. (Motion at 2-4.)

Applicants address below CASE's charges regarding the accuracy and completeness of Applicants' interrogatory answers. Contrary to CASE's assertions Applicants' answers were both correct and complete.

B. CASE's Charges Regarding the Accuracy and Completeness of Applicants' Answers to CASE's Interrogatories Are False

1. The Statement at the Commission Meeting With Georgia Power Was Incorrect

CASE asserts that the transcript of the Commission meeting attached to its motion¹ indicates "significant communication

¹/ This transcript was neither attached, nor the meeting referenced, in CASE's interrogatories. Applicants address below in Section IV the implications of CASE's failure to provide more direct and specific interrogatories.

between Georgia Power Company and Applicant (sic) ... which is relevant to the CPRT program plan development". CASE further claims that "there is a serious discrepancy" between Applicants' answers to the motion to compel and the representations of Georgia Power, and that "it seems more likely that the interrogatory answers are in error than that Georgia Power Company representatives are in error." As explained below, CASE's assertions are wholly unfounded.

CASE's assumption regarding the accuracy of the statement at the Commission meeting is incorrect. Upon receiving CASE's motion, with the attached transcript, Applicants contacted the representative of Georgia Power quoted in that transcript (Mr. Rice). Mr. Rice informed Applicants that he had incorrectly referred to Comanche Peak in the Commission meeting. He stated that he had intended to refer to South Texas. Representatives of South Texas had visited Georgia Power and obtained at that time procedures applicable to the Operational Readiness Review Program being conducted at Georgia Power's Vogtle facility. To Mr. Rice's knowledge, no personnel from Texas Utilities visited Georgia Power in connection with, or obtained copies of procedures relating to, that program. Mr. Rice executed an affidavit confirming these facts. (See Affidavit of Paul D. Rice, attached hereto as Attachment A.) In short, the basic premise of CASE's entire pleading is factually in error. Applicants submit that on this basis alone the Board should deny CASE's motion. Nonetheless, Applicants address CASE's other arguments, below.

2. Applicants' Answers Were Complete,
Proper, and In a Form Consistent with
Past Practice In this proceeding

CASE claims that Applicants' answers were not complete because the answers, CASE believes, were provided by counsel. CASE argues that such answers are "not normally proper." Consequently, CASE seeks an affidavit from counsel regarding "the depth and breadth of their search." CASE also asks that the Board direct, apparently with regard to future answers, that they be provided by non-lawyer personnel, disclose how data was gathered for the answer, and assure data was gathered directly from "all knowledgeable people." (Motion at 2-4.)

Applicants' response to CASE's interrogatories consist both of an answer and an objection. The answer, clearly the first paragraph following the recitation of the interrogatories under the heading "Applicants' Response," is supported by the affidavit of Terry G. Tyler, signed and notarized, under oath, attached to the response. The objection, clearly the second paragraph of Applicants' response, is supported by the signature of Applicants' counsel. This form of response complies with the Rules of Practice (see 10 C.F.R. §2.740b(b)) and has been used throughout this proceeding, in both Dockets, without any apparent confusion, misunderstanding, or objection by CASE. Thus, CASE's objections not only are unfounded but inconsistent with CASE's position throughout the proceeding. The Board should, therefore, dismiss those objections as baseless.

Similarly, CASE's assertion that Applicants' answers to interrogatories need include an explanation of how data was gathered and provide (apparently express) assurance that all knowledgeable people have been inquired of is not founded on any requirement set forth in the Rules of Practice.² Indeed, CASE cites no authority for its proposition, arguing only that such action is warranted in view of its assumptions regarding the accuracy of Applicants' answers. Applicants have already demonstrated the invalidity of those assumptions.

In sum, CASE's objections to the completeness of Applicants' answers are without merit and should be denied.

3. Information Sought by CASE Is,
In Any Event, Irrelevant

CASE's final argument in support of its motion is that Applicants' objection to its interrogatories as irrelevant is wrong. Although this issue is no longer significant in view of the facts discussed above, CASE's assertions in connection with this issue warrant a brief comment.

2/ Applicants note that in any event the responses to CASE's requests were properly focussed. CASE inquired as to communications and information that concerned the development of the CPRT program. Applicants' inquiry to obtain information to respond to those questions focussed on those persons with responsibility for the development and implementation of that program. Applicants also set forth the nature of their inquiry in their response. Needless to say, the means by which CASE should have sought further specification of this matter, if it thought such was necessary, is not through an attack on Applicants.

In support of its claim of relevance CASE argues that if the information it assumed was obtained from Georgia Power has been "reviewed and considered ... in [Applicants'] quest for a path to an operating license" it is "clearly discoverable." CASE claims, but does not explain how, such information would be relevant to the "acceptability of the CPRT." (Motion at 4.) CASE's position is unfounded. Discovery may be had with respect to information relevant to matters in controversy (10 C.F.R. §2.740(b)(1)). Applicants objected to CASE's interrogatories on the grounds that even if information had been obtained from Georgia Power on its Operational Readiness Review Program, it would have no bearing on issues in the proceeding. CASE only claims, but does not demonstrate how, such information would be relevant to an issue in this case.

For the foregoing reasons the Board should deny CASE's motion to compel in its entirety. CASE presents no valid basis for the relief it seeks.

IV. APPLICANTS' MOTION TO STRIKE CASE'S MOTION

A. Standards of Conduct Governing Appearance Before the The Commission

The standards governing appearance and practice before the the Commission in adjudicatory proceedings require that "parties and representatives ... conduct themselves with honor, dignity, and decorum as they should before a court of law" (10 C.F.R. §2.713(a)). These standards further provide that persons other than attorneys may serve as a representative of a party, in

accordance with 10 C.F.R. §2.713(b),³ but do not distinguish between attorney and non-attorney representatives in establishing the bounds of acceptable conduct. (See "Changes in Rules of Practice Governing Discipline in Adjudicatory Proceedings," Summary, 45 Fed. Reg. 69877 (October 22, 1980).)

In adopting the current standards, the Commission described the type of conduct expected of representatives. The Commission stated, as follows:

In addition, the rule makes clear what conduct is expected of representatives. (See generally, ABA Code of Professional Responsibility and Ethical Considerations, EC-7-34 through and including 7-39 and 8-5.) ["Changes in Rules of Practice Governing Discipline in Adjudicatory Proceedings," Supplementary Information, 45 Fed. Reg. 69877 (October 22, 1980) (emphasis added).]

Of particular import here is Ethical Consideration 7-37, which provides, as follows:

In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel.

^{3/} Applicants address below whether CASE's "representative," Ms. Garde, has satisfied the requirements governing representation of parties to the proceeding.

^{4/} See also Summary Section of Federal Register notice accompanying the Proposed Rule, 45 Fed. Reg. 3594 (January 18, 1980).

Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

[ABA Model Code of Professional Responsibility, EC 7-37.]

Violations of these standards, including the principles set forth in EC-7-37, are not to be condoned in NRC proceedings. See Northern Indiana Public Service Company (Bailly Generation Station, Nuclear 1), 7 AEC 835, 837-38 (1974). The conduct of CASE in connection with the present discovery dispute transgresses the limits of adversarial argument, clearly violating the above standards of practice.

B. CASE's Comments Are Unjustified
Ad Hominem Attacks

CASE's comments in the motion to compel are unjustified ad hominem attacks. CASE asserts, incorrectly, that counsel did not comply with the Rules of Practice concerning answers to interrogatories. CASE also makes unfounded charges at Applicants, and in particular counsel, of misrepresentation and concealment of the truth. The particular accusations of concern are, as follows:

After claiming that there is a "serious discrepancy" between Applicants' representations in the answers to CASE's interrogatories and the statements of the Georgia Power representative, and that it is "more likely that the interrogatory answers are in error," CASE asserts,

If CASE must rely on the representations of Applicant's (sic) counsel we must be able to discover where misrepresentations originate. (Motion at 3 (emphasis added).)

CASE continues on to claim,

In addition, it appears that Applicant (sic) has many layers of knowledge which it uses to mask the whole truth -- (Motion at 3 (emphasis added).)

Finally, CASE states,

Additionally, CASE is alarmed that Applicant (sic) may be acting on less than good faith in its reply to interrogatories. (Motion at 4.)

There are several reasons why these charges represent wholly unacceptable conduct. In the first instance they constitute a wreckless disregard not only for the truth, but for the personal reputations and integrity of Applicants' representatives. CASE was all too willing to jump to incorrect conclusions regarding the cause for the apparent discrepancy and publicly level serious charges against Applicants and their counsel. Such conduct not only violates the expectations of "honor, dignity, and decorum" spelled out in the Rules of Practice (see 10 C.F.R. §2.713(a)), but far exceeds the bounds of acceptable behavior established by Ethical Consideration 7-37.

Further, CASE disregarded any one of a number of possible explanations for the apparent discrepancy between the interrogatory response and the transcript of the Commission meeting and, instead of diligently and professionally pursuing the truth, grabbed at what it believed was an opportunity to attack Applicants. Specifically, the pertinent statement in the meeting transcript suggests only (albeit erroneously) that communications took place between Applicants and Georgia Power

concerning their Operational Readiness Review Program. Several other facts necessarily should have been established before CASE could conclude that Applicants' interrogatory answers were in error. Specifically, even if the statement at the Commission meeting was accurate, it does not suggest that those communications were in fact relevant to the "development of the CPRT," as requested in CASE's interrogatories. The transcript provides no indication of when such communications took place. They could have occurred well before or well after the CPRT program was developed. In addition, the transcript does not indicate who the communications were with or what they were to be used for. They could easily have involved persons and activities not involved in the development of the CPRT.

There are two other important factors which heighten Applicants concern regarding CASE's charges. First, the situation is one wholly of CASE's own making. Had it indicated in the original interrogatories that the Commission meeting formed the basis for the inquiry, any confusion could have been avoided. Applicants could have contacted Mr. Rice before responding to the interrogatories in the first place. (Indeed, CASE could have independently verified the accuracy of his statement before even filing its interrogatories.) Rather than take this responsible course, CASE chose to play cat-and-mouse with Applicants and the discovery process, a tactic that backfired badly. The carelessness with which this matter was pursued renders CASE's false charges all the more objectionable.

Second, the Board issued Memorandum and Order (Current Status of Discovery), on August 16, 1985. The Board directed therein, as follows:

The parties should seek to avoid unnecessary technical disputes about discovery. If discovery disputes do arise, the parties should stipulate to the nature of the dispute in order to facilitate prompt resolution by this Board.
[Memorandum and Order at 2.]

CASE simply disregarded the Board's directive. It made no attempt to resolve this apparent dispute with Applicants prior to filing the motion to compel. A simple phone call to Applicants' counsel would have cleared up the confusion. Again, it appears CASE's tactic of personally attacking Applicants' personnel and counsel took precedence over the responsible course which the Board has instructed be followed.

C. The Board Should Strike
CASE's Motion to Compel

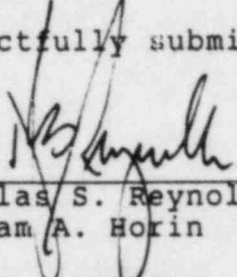
Pursuant to its authority set forth in 10 C.F.R. §§2.713(c) and 2.718(e), Applicants move that Board strike from the record CASE's motion to compel. Applicants also move that the Board require Ms. Garde to submit a notice of appearance which satisfies the requirements of 10 C.F.R. §2.713(b) or refrain from further appearances in this case. Applicants' records indicate that such a notice has not been filed.

All too often CASE has seen fit to level ad hominem attacks against Applicants' personnel and counsel. The Board previously reminded all parties that ad hominem attacks on opposing counsel are not to be tolerated (see Memorandum and Order (March 1, 1983), at 4). Applicants have endured this tactic patiently for some time, but are now committed to responding in each instance when CASE attempts to disparage and discredit Applicants' personnel and counsel (see Applicants' August 27, 1985, answer to CASE's motion for reconsideration of the welding decision). Accordingly, Applicants move that CASE's motion to compel be stricken. We urge the Board to admonish CASE for its conduct in this instance.

V. APPLICANTS' MOTION FOR PROTECTIVE ORDER

For the reasons set forth above in Sections II and III, Applicants move the Board to issue a protective order providing that Applicants not be required to provide further responses to CASE's Interrogatories Concerning The CPRT, filed July 29, 1985.

Respectfully submitted



Nicholas S. Reynolds
William A. Horin

BISHOP, LIBERMAN, COOK,
PURCELL & REYNOLDS
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 857-9817

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

Robert A. Wooldridge
WORSHAM, FORSYTHE, SAMPELS &
WOOLDRIDGE
2001 Bryan Tower, Suite 3200
Dallas, Texas 75201
(214) 979-3000

Counsel for Applicants

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