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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

DOCKETED
USNRC

'85 DEC -4 P1:31

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

OFFICE OF SECRETARY
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NRC STAFF ANSWER TO APPLICANTS' PETITION
FOR DIRECTED CERTIFICATION OF
LICENSING BOARD ORDER OF OCTOBER 31, 1985

Geary S. Mizuno
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 2nd day of December, 1985

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION.....	1
II. BACKGROUND.....	2
III. DISCUSSION.....	10
A. THE LICENSING BOARDS' ORDER AFFECTS THE DOCKETS 1 AND 2 PROCEEDINGS IN AN UNUSUAL AND PERVASIVE MANNER.....	10
B. THE LICENSING BOARDS' ORDER, BY FAILING TO CLEARLY DEFINE AND DISTINGUISH THE RESPECTIVE JURISDICTIONS OF THE DOCKETS 1 AND 2 LICENSING BOARDS, ADVERSELY AFFECTS THE PARTIES' CAPABILITY TO PREPARE AND PRESENT THEIR RESPECTIVE CASES IN BOTH DOCKETS.....	23
IV. CONCLUSION.....	28

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>NUCLEAR REGULATORY COMMISSION PROCEEDINGS</u>	
<u>Atomic Safety and Licensing Appeal Board</u>	
<u>Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 (1983).....</u>	11
<u>Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1756 (1982).....</u>	11
<u>Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-438, 6 NRC 633 (1977).....</u>	12
<u>Kansas Gas and Electric Co. (Wolf Creek, Unit 1) ALAB-327, 3 NRC 408, 413 (1976).....</u>	12
<u>Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-318, 3 NRC 186 (1976).....</u>	11
<u>Niagra Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 354-55 (1975).....</u>	24
<u>Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 408, 410 (1978)...</u>	12
<u>Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981).....</u>	11
<u>Philadelphia Electric Co. (Peach Bottom Atomic Power Plant, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974).....</u>	24
<u>Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-393, 5 NRC 767, 768 (1977).....</u>	12
<u>Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1110 (1977).....</u>	11
<u>Texas Utilities Electric Co. et al. (Comanche Peak Steam Electric Station, Units 1 and 2) (unpublished order) (November 8, 1985).....</u>	9

	<u>PAGE</u>
TABLE OF AUTHORITIES (CONT.)	
<u>Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371 (1983).....</u>	11
<u>Wisconsin Electric Co. (Point Beach Nuclear Plant, Unit 1) ALAB-696, 16 NRC 1245, 1263 (1982).....</u>	26
<u>Atomic Safety and Licensing Board</u>	
<u>Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-69, 16 NRC 751, 752-53 (1982).....</u>	13
<u>Illinois Power Co., et al. (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1737 (1981).....</u>	24
<u>Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-20, 17 NRC 1132, 1138 (1983).....</u>	16, 17
<u>Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-56, 16 NRC 281, 287-89 (1982).....</u>	16
<u>Texas Utilities Electric Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-32, 22 NRC 434 (1985).....</u>	7
<u>Texas Utilities Electric Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-41, 22 NRC ____ (October 31, 1985).....</u>	1, 27
<u>Texas Utilities Electric Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), "Memorandum (Fair Warning of Citations to Other Docket)" (unpublished memorandum) (November 6, 1985).....</u>	9, 26, 27
<u>Texas Utilities Generating Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), "Memorandum and Order (Additional Scheduling Order)" (unpublished order) (January 3, 1984).....</u>	4, 18
<u>Texas Utilities Generating Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), "Memorandum (Procedure Concerning Quality Assurance)" (unpublished order) (October 25, 1983).....</u>	3, 4

TABLE OF AUTHORITIES (CONT.)

PAGE

REGULATIONS

10 C.F.R. § 2.718.....	16
10 C.F.R. § 2.718(1).....	16
10 C.F.R. § 2.721.....	16
10 C.F.R. § 2.721(d).....	16
10 C.F.R. § 2.722(a)(2).....	15

MISCELLANEOUS

<u>Statement of Policy on Conduct of Licensing Proceedings,</u> CLI-81-8, 13 NRC 452 (1981).....	26
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DECEMBER 2, 1985

UNITED STATES OF AMERICA
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NRC STAFF ANSWER TO APPLICANTS' PETITION
FOR DIRECTED CERTIFICATION OF
LICENSING BOARD ORDER OF OCTOBER 31, 1985

I. INTRODUCTION

On November 4, 1985, the Applicants filed "Applicants' Petition for Directed Certification of Licensing Board Order of October 31, 1985" ("Applicants' Petition"). Applicants request the Atomic Safety and Licensing Appeal Board ("Appeal Board") to instruct the Atomic Safety and Licensing Boards ^{1/} ("Licensing Boards") to "conduct their activities as separate entities within their respective jurisdictions and to rule accordingly," rather than conducting the proceeding in conformance with the procedural principles outlined by the Licensing Boards in their "Memorandum and Order (Procedural Rulings, Board Concerns about QA for Design)," Texas Utilities Electric Co., et al. (Comanche Peak Steam

^{1/} Two Licensing Boards have been constituted for this proceeding. See discussion in Section II below.

Electric Station, Units 1 and 2), LBP-85-41, 22 NRC ____ (October 31, 1985) ("Licensing Boards' Order", "October 31, 1985 Order").

The NRC Staff ("Staff") agrees with Applicants that the Licensing Boards' Order adversely affects the basic structure of the operating license proceeding for Comanche Peak in a pervasive manner. Accordingly, the Staff supports Applicants' Petition requesting directed certification of the Licensing Boards' Order.

II. BACKGROUND

Currently there are two Licensing Boards in this proceeding. The first Licensing Board ("Docket 1 Licensing Board") was empaneled on March 9, 1979 to "rule on petitions for leave to intervene and/or requests for hearings and to preside over the proceeding in the event that a hearing is ordered." 44 Fed. Reg. 15815 (March 15, 1979). Only one contention, Contention 5, remains to be resolved in this proceeding. Contention 5 alleges:

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 (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.

Litigation of Contention 5, which commenced in 1982, included among other subjects, allegations of intimidation or harassment at the Comanche Peak site. During 1983, the Staff informed the Docket 1 Licensing Board that the NRC Office of Investigations ("OI") had pending a number of investigations into allegations involving, inter alia, harassment and intimidation at Comanche Peak. Subsequently, representatives from OI briefed the Licensing Board on these investigations in an in camera, ex parte session.

On October 21, 1983, the Docket 1 Licensing Board heard argument from the parties on whether the Docket 1 Licensing Board should adopt an alternative course of action proposed by the Licensing Board in order to avoid a delay in issuing a final partial initial decision until the conclusion of the then-pending OI investigations. Tr. 9074-81 (Transcript of October 21, 1983 telephone conference). Thereafter, the Docket 1 Licensing Board issued a Memorandum ^{2/} which stated:

Because of the complexity of the charges of quality assurance deficiencies, and without having determined that those charges have merit, we have decided to adopt an alternate route of consideration. In that route, we will conduct hearings concerning the acceptability of the finished construction at Comanche Peak. For the purpose of this consideration, we adopt the hypothetical assumption that the unproven quality assurance allegations are correct, and we will examine the evidence concerning the plant with this hypothetical assumption in mind.

For this purpose, the Board plans to conduct hearings concerning: the first two staff walkdowns

^{2/} Texas Utilities Generating Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), "Memorandum (Procedure Concerning Quality Assurance)" (unpublished memorandum) (October 25, 1983).

of finished safety systems (in addition to the fuel building), the Cygna report, and Applicant's follow-up inspection of protective coatings. Our purpose will be to determine whether these reports can provide us with sufficient assurance of the safety of the plant for us to conclude that the plant may be licensed.

Id., p. 2.

The Staff understood that the Board's proposed alternative litigation procedure was intended to preclude the need for, and would be in lieu of litigation of issues regarding intimidation and harassment. However, in a subsequent memorandum, ^{3/} the Docket 1 Licensing Board stated otherwise:

We believe our use of the word "alternate" may have misled both the Applicants and the Staff into believing that this would be the only route we would progress along. This we never intended, as can be gleaned by reading the preceding paragraph in the October 25 memorandum . . . After considering the filings of the parties (and the in camera, ex parte, representations made to us by the Office of Investigations pursuant to agreement by the parties) on the seriousness of the pending charges, we have concluded that some of the charges will require hearings.

Id., pp. 5-6.

On March 30, 1984, a second Licensing Board ("Docket 2 Licensing Board") was empaneled and noticed in the Federal Register as follows:

Pursuant to delegation by the Commission dated December 29, 1972, published in the Federal Register, 37 FR 28710 (1972), and §§ 2.105, 2.700, 2.702, 2.714, 2.714a, 2.717 and 2.721 of the Commission's Regulations, all as amended, and pursuant to the Statement of Policy on Conduct of Licensing Proceedings, 13 N.R.C. 452 (1981), and the request of the

^{3/} Texas Utilities Generating Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2) (unpublished order) (January 3, 1984).

Atomic Safety and Licensing Board already established to preside in this operating license proceeding, a separate Atomic Safety and Licensing Board is being established to preside over the proceeding on all allegations of intimidation and harassment.

In preparation for litigation in Docket 2, the parties submitted legal briefs to the Docket 2 Licensing Board setting forth their proposed standards for adjudicating allegations of intimidation. ^{4/} Following oral argument by the parties at a June 14, 1984 prehearing conference on the proposed intimidation standard, the Docket 2 Licensing Board set forth a "general guideline" concerning the scope of the intimidation issue, viz:

The burden of going forward rests on CASE. It must show that management was aware of incidents or actions that might have been interpreted by workers as a discouragement to the proper reporting of deficiencies in the QC program. At that point the burden shifts and applicant must show that it has responded reasonably to the information available to it in light of the requirements of Appendix B.

Tr. 13,939 (June 14, 1984 Prehearing Conference). The Docket 2 Licensing Board subsequently modified its guideline to indicate that harassment of craft personnel would not be litigated. Tr. 13,740 (July 2, 1984 Prehearing Conference).

^{4/} "Applicants' Proposed Standard for Litigating Allegations of Intimidation" (May 8, 1984); "NRC Staff's Proposed Standard for Litigating Allegations of Intimidation" (June 12, 1984); "CASE's Proposed Standard for Litigating Allegations of Intimidation" (June 12, 1984).

Numerous "evidentiary depositions" ^{5/} were conducted in July and early August 1984. In accordance with the procedure agreed to by the parties at the June 14 and July 2, 1984 prehearing conferences, the parties filed proposed pre-hearing findings of fact in Docket 2. ^{6/} Hearings in Docket 2 commenced in September 1984, and hearing sessions and additional evidentiary depositions were conducted in the fall and winter of 1984, and January 1985.

Litigation in both Dockets 1 and 2 was suspended in early 1985 by the Licensing Boards at the request of Applicants. See Letter from Robert Wooldridge to Peter Bloch (January 20, 1985); Letter from Robert Wooldridge to Peter Bloch (March 21, 1985), item 9. In the interim, Applicants developed and began implementing a corrective action program -- the Comanche Peak Response Team ("CPRT") -- to respond to outstanding technical issues identified by the Staff's Technical Review Team ("TRT"), as well as other sources. Although Applicants have proposed to the Licensing Boards that the CPRT Program effort precludes the need to

^{5/} The parties agreed that the Docket 2 depositions would be in lieu of formal testimony in the presence of the Board and that they would be in evidence unless objections were presented at the deposition, with the Board to rule on the objections at a more convenient time. Tr. 13,940 et seq.

^{6/} "Applicants' Prehearing Proposed Findings of Fact Concerning Allegations of Harassment, Intimidation and Threats of Quality Control Inspectors at the Comanche Peak Steam Electric Station (September 4, 1984)"; "NRC Staff Proposed Findings of Fact on Allegations of Intimidation, Threatening and Harassment of Quality Control Inspectors and other Quality Assurance Personnel at the Comanche Peak Steam Electric Station" (September 4, 1984); "CASE's Preliminary Proposed Findings of Fact on Harassment and Intimidation" (September 4, 1985).

continue the litigation in Docket 2, ^{7/} the Licensing Boards did not agree with the Applicants' proposal. Texas Utilities Electric Co., et al. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-85-32, 22 NRC 434 (1985). However, the Licensing Boards ruled that discovery on the activities and findings of the CPRT "that are directly or indirectly related to Contention 5 is currently in order." Texas Utilities Electric Co., et al. (Comanche Peak Steam Electric Station, Units 1 & 2), "Memorandum and Order (Current Status of Discovery) (unpublished memorandum) (August 16, 1985), p. 2.

On September 4, 1985, CASE filed a discovery request in Docket 2; ^{8/} Applicants objected to this discovery on the grounds that discovery was either cumulative of previous discovery, or that it was irrelevant to the Docket 2 issues. ^{9/} As a result of this and other discovery disputes between the Applicants and CASE, ^{10/} the Licensing Boards' Chairman initiated an informal telephone conference among the Chairman and the parties, at which time the parties were requested to respond to the following propositions:

^{7/} "Applicants' Current Management Views and Management Plan for Resolution of All Issues" (June 28, 1985), pp. 62-66.

^{8/} "CASE's Request for Document Production" (September 4, 1985).

^{9/} "Applicants' (1) Response to CASE's 9/4/85 Request for Production of Documents and (2) Motion for Protective Order" (October 9, 1985).

^{10/} See, e.g., "CASE's Interrogatories Regarding the CPRT" (July 29, 1985) and "Applicant's Response to CASE Interrogatories Regarding the CPRT" (August 19, 1985).

This is a single case:

- (a) in which CASE's representatives should make a good faith effort to coordinate their discovery activities;
- (b) in which Applicants should provide more specific responses to discovery, identifying prior responses whenever they believe that they have been subject to a redundant request; and
- (c) in which objections as to relevance may not be restricted to relevance to a particular docket.

Following the filing of responses by the parties, ^{11/} the Licensing Boards issued their October 31, 1985 Order holding that "discovery requests in one docket shall be deemed to be filed in the other docket as well."

According to the Licensing Boards, this ruling would preclude the need for the Licensing Boards to make "narrow procedural rulings whose only consequence would be refileing in the other docket." Boards' Order, p. 2. The Licensing Boards also noted that "technical questions in docket 1 may bear on issues in docket 2," such that a party may wish to rely upon evidence developed in the other docket. Id. Thus the Licensing Boards ruled that they would "consider evidence relevant in one docket to be available for citation in the other docket, providing it is relevant to the issues in the second docket." Id., pp. 2-3. The Licensing Boards indicated that they did not see any fair notice problem with their ruling, since "the extent to which a party in one docket relies on evidence in the other docket will be revealed when the party files

^{11/} "Applicants' Brief in Response to Conference Call of October 15, 1985" (October 23, 1985); "NRC Staff Response to Licensing Board Questions Raised During October 15, 1985 Conference Call" (October 29, 1985); "CASE's Response to Questions Raised by Board During Conference Call on October 15, 1985" (October 28, 1985) (Docket 2); "CASE's (Main Docket) Response to Board's 10/15/85 Request Regarding Discovery Matters" (October 26, 1985) (Docket 1).

proposed findings of fact . . . Lawyers in both dockets must, therefore, be alert to implications for the other docket." Id., p. 3.

Applicants filed their "Petition for Directed Certification of the October 31, 1985 Licensing Boards' Order" on November 4, 1985. On November 6, 1985, the Licensing Boards issued a "Memorandum (Fair Warning of Citations to Other Docket)" ("Fair Warning Memorandum"), ^{12/} in which the Licensing Boards acknowledged that "Applicants appear to be correct in being concerned about the procedure adopted by the Board to permit parties in one docket to cite relevant material in the other docket." Fair Warning Memorandum, p. 1, citing Applicants' Petition. Accordingly, the Licensing Boards stated that parties must:

place each other on notice by providing a timely citation of relevant material that is 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 relevance.

Fair Warning Memorandum, p. 1. The Licensing Boards provided an opportunity for the parties to file "comments" on the Fair Warning Memorandum by December 7, 1985. Id., p. 2.

In response to the Appeal Board's Order of November 8, 1985, ^{13/} Applicants filed a memorandum on November 14, 1985. "Applicants' Memorandum in Response to Appeal Board Order of November 8, 1985"

^{12/} Texas Utilities Electric Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), "Memorandum (Fair Warning of Citations to Other Docket)" (unpublished order) (November 6, 1985).

^{13/} Texas Utilities Electric Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), (unpublished order) (November 8, 1985).

("Applicants' Memorandum"). Applicants acknowledged that the Fair Warning Memorandum now requires "timely citation" of the evidence from another docket that a party is relying upon, rather than waiting until the filing of proposed findings of fact. Applicants' Memorandum, p. 2. However, Applicants pointed out that the term, "timely" is not defined; the right to respond, if any, is "unarticulated"; and that the timing as to the Licensing Boards' rulings on admissibility is not specified. Id. Apart from these concerns, Applicants argued that the Fair Warning Memorandum "does nothing to address the fundamental jurisdictional question raised by the petition, nor does it serve . . . to obviate the problems that Applicants believe will lead to an unnecessarily confused and complex trial and appellate record." Applicants' Memorandum, pp. 2-3.

III. DISCUSSION

A. THE LICENSING BOARDS' OCTOBER 31, 1985 ORDER AFFECTS THE DOCKETS 1 AND 2 PROCEEDINGS IN AN UNUSUAL AND PERVASIVE MANNER

Applicants argue that the Licensing Boards' Order affects the basic structure of this proceeding in a pervasive or unusual manner because it "does away with any and all limitations or distinctions as to the scope of the individual jurisdiction of the two Licensing Boards," and therefore denies the Applicants "important procedural rights." Applicants also contend that the Licensing Boards' Order will result in "procedural chaos" in both dockets, and an incomprehensible record in this case. Applicants' Memorandum, p. 1; Applicants' Petition, pp. 6-8. The Staff agrees with Applicants that the Licensing Boards' Order affects

the Dockets 1 and 2 proceedings in an unusual and pervasive manner such that Appeal Board intervention is necessary.

The legal principles for adjudging directed certification petitions are clear and well-understood. As the Appeal Board has stated in Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1110 (1977), directed certification is exercised "only upon a clear and convincing showing that the licensing board order under attack either (1) threatens the party adversely affected by it with serious and irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affects the basic structure of the proceeding in a pervasive or unusual manner." That a licensing board may have committed legal error is insufficient to demonstrate that the basic structure of a proceeding has been affected in a pervasive or unusual manner. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 375 (1983). Nor is directed certification warranted where the complaint is that a party may be required to litigate issues that it believes should not be tried, thereby resulting in increased expenses and delay. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 (1985); Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981); North Anna, *supra*, 18 NRC at 378, n.11; Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1756 (1982).

Discovery rulings are seldom the subject of successful certification appeals, *see, e.g.*, Long Island Lighting Co. (Jamesport Nuclear Power

Station, Units 1 and 2), ALAB-318, 3 NRC 186 (1976), absent a "strong showing by an aggrieved party that the impact of the order upon that party or upon the public interest is indeed 'unusual'." Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-438, 6 NRC 638 (1977), citing Kansas Gas and Electric Co. (Wolf Creek, Unit 1), ALAB-327, 3 NRC 408, 413 (1976). Similarly, certification will not be granted on questions of admissibility of evidence. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-393, 5 NRC 767, 768 (1977); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978).

The Staff believes that the Licensing Boards' Order, as modified by the Fair Warning Memorandum, does affect the basic structure of both dockets in this proceeding in a pervasive and unusual manner. The Licensing Boards have failed to clarify, either in the October 31, 1985 Order or the Fair Warning Memorandum, the nature and relationship of each Licensing Board's respective jurisdiction, and to distinguish the matters at issue before the Docket 2 Licensing Board from those matters before the Docket 1 Licensing Board. This failure will ultimately undermine the basic structure of this proceeding, in which two licensing boards have been established in two separate dockets to consider different issues in this proceeding.

The Staff agrees with the Licensing Boards' initial proposition ^{14/} that the Comanche Peak operating license proceeding is a "single case" with one ultimate determination -- whether a license to operate the

^{14/} See discussion supra at 8.

Comanche Peak facility should be granted to Applicants. ^{15/} However, it is difficult to apply the "single case" concept to this proceeding, in light of the Licensing Board's Order of October 31, 1985, as modified by the Fair Warning Memorandum.

As discussed in Section II above, prior to the formal establishment of the Docket 2 Licensing Board, the then-single Docket 1 Licensing Board had jurisdiction over all matters in controversy encompassed by Contention 5. In litigating Contention 5, specific allegations of intimidation were raised. Subsequently, the Docket 2 Licensing Board was established by a notice in the Federal Register.

Under Commission law, the scope of the subject matter jurisdiction for an atomic safety and licensing board is the Federal Register notice which creates it. ^{16/} Duke Power Co., et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC ____ (November 21, 1985); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983); Northern Indiana Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90, n.6

^{15/} The Staff's position on this subject was originally articulated to the Licensing Boards in the NRC "Staff's Response to Licensing Board Questions Raised During October 15, 1985 Conference Call" (October 29, 1985), pp. 3-9. The Staff's position is shared at least in part by CASE, but not by Applicants.

^{16/} The jurisdiction of an atomic safety and licensing board can also be limited by, among other things, a Commission decision, a Commission Policy Statement, or Commission rulemaking. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-69, 16 NRC 751, 752-53 (1982).

(1979). However, the relationship of the Docket 2 Licensing Board vis-a-vis the Docket 1 Licensing Board, which is ostensibly responsible for resolving Contention 5, is not made clear in the Federal Register notice. Indeed, it is not clear whether the Docket 1 Licensing Board alone, or both the Docket 1 and 2 Licensing Boards (either independently or jointly), bear responsibility for the ultimate decision as to whether, in light of Contention 5, an operating license should be granted to Applicants for the operation of the Comanche Peak facility.

In short, the parties do not have a definitive statement by the Licensing Boards regarding the scope of jurisdiction of each docket, the role and relationship of the Docket 2 Licensing Board with respect to the Docket 1 Licensing Board, and consequently the proper docket in which issues should be litigated. ^{17/}

^{17/} The Staff had requested the Licensing Boards to define the "role of the respective Licensing Boards in the two dockets and the scope of the issues properly before each Board." See "NRC Staff Response to Licensing Board Questions Raised During October 15, 1985 Conference Call" (October 25, 1985), pp. 4, 10-11. However, the Licensing Boards refused the Staff's request:

Given the way in which the Boards have determined that this case may be considered a single case for purposes of discovery, there is no need for us to clarify the scope of Docket 2, as Staff requests. Docket 2 deals with harassment and intimidation -- terms bearing a natural meaning. We also recall having commented on the meaning of these terms previously.

Licensing Boards' Order, p. 3, n.1. The Staff reiterated its request to the Licensing Boards at a November 12, 1985 prehearing conference. Tr. 24,217-26. To date, the Licensing Boards have not acted on this Staff request.

The Licensing Boards' Order exacerbates the ambiguous status of this proceeding because, contrary to the Licensing Boards' belief expressed in their October 31, 1985 Order that "intimidation and harassment" are terms "bearing a natural meaning" and that there is no need to clarify the scope of Docket 2, the Staff submits that there is overt disagreement on each of these subjects among the Applicants, the Staff, and CASE. As will be argued in Section III.B. below, the Licensing Boards' Order, though modified by the Fair Warning Memorandum, leaves the parties in the position where they will be unable to determine (at least until the time when a party informs the other parties of its intent to rely upon evidence generated or expected to be generated in the other docket) the legal issues and factual contentions that must be addressed in each of the Comanche Peak dockets.

In the context of this case, there are several ways of viewing the jurisdiction of and interrelationship between the two Licensing Boards. ^{18/} On the one hand, it is possible to view the intended functions of the Docket 2 Licensing Board as being somewhat akin to those of a Special Master. A Special Master, appointed pursuant to 10 C.F.R. § 2.722(a)(2),

^{18/} The parties are not privy to the request made by the Docket 1 Licensing Board for establishment of the Docket 2 Licensing Board which is referred in the Federal Register notice establishing the Docket 2 Licensing Board. Thus, the parties do not know whether the request would shed any light on the issues before the Appeal Board. The Staff also notes that in constituting the Docket 2 Licensing Board, one of the technical members of the Docket 1 Board was replaced by a second attorney member. One may speculate whether by so constituting the Docket 2 Licensing Board, it was contemplated that litigation of "allegations of intimidation and harassment" in Docket 2 would entail such far-reaching consideration of technical matters as CASE seems to anticipate.

hears evidentiary presentations by the parties on specific technical matters and prepares a report which becomes part of the record. Such reports are advisory only; the "presiding officer" retains final authority with respect to the issues heard by the Special Master, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-82-56, 16 NRC 281, 287-89 (1982), and renders the initial decision resolving all matters in controversy.

On the other hand, unlike the case of a Special Master, the Docket 2 Licensing Board is a "separate . . . Board." This Board was to "preside," a term not limited to just taking evidence. Furthermore, the Docket 2 Licensing Board was set up pursuant to, inter alia, 10 C.F.R. § 2.721, which states that a licensing board "shall have the duties and may exercise the powers of a presiding officer as granted by § 2.718." 10 C.F.R. § 2.721(d). Section 2.718 in turn gives the presiding officer, among other things, the power to issue initial decisions. 10 C.F.R. § 2.718(1). Thus, the Docket 2 Licensing Board was not relegated to simply an advisory capacity, but rather was empowered to perform concurrently the functions of a licensing board including issuing an initial decision, albeit limited by the terms of the notice of its establishment to issues pertaining to the allegations of harassment and intimidation.

However, in the circumstances of this proceeding, the role of the Docket 2 Licensing Board appears to be somewhat different than the traditional role of a separate licensing board established to preside in the same proceeding. Separate boards normally issue separate, appealable partial initial decisions on separate major segments of a case, just as a single board might do. See Long Island Lighting Co. (Shoreham Nuclear

Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1138 (1983). While the Federal Register notice establishing the Docket 2 Licensing Board is similar to the notice of establishment of a separate board in Shoreham (48 Fed. Reg. 22235, May 17, 1983), the relationship of the issues pending before the two Shoreham Boards is different from the relationship between the issues before the two Comanche Peak Boards. As was pointed out in Shoreham:

The pending emergency planning litigation is totally unrelated to the new contention. Moreover, the Phase II emergency planning issues comprise a separate major segment of the case which has been long recognized as such by the Board and the parties in the scheduling of the litigation. A separate, appealable partial initial decision will be issued on the completed evidentiary hearing issues, and a later one will be issued on the Phase II emergency planning issues. This procedure was in place before it was known that a separate Licensing Board would be convened to hear the Phase II emergency planning segment of the case. It would remain a separate segment of the case even if there was not a separate Licensing Board, but the fact that a separate Board could be appointed with no practical difficulties of overlapping subject matter still existing between two Boards demonstrates the lack of connection of the Phase II issues to any non-emergency planning issues. Moreover, although not an essential element, under the normal application of the regulations, the pending Phase II emergency planning segment of the case need not be completed prior to possible issuance of a low-power operating license. Shoreham, Id. (footnotes omitted).

The Staff's position is that any decision reached by the Docket 2 Licensing Board on "harassment and intimidation" would be but one element, inextricably interwoven with the overall licensing decision to

be rendered by the Docket 1 Licensing Board on QA/QC issues. ^{19/} Thus, the Comanche Peak proceeding is markedly different from the Shoreham proceeding, where the licensing boards were responsible for separate and unrelated issues. By contrast, in Comanche Peak, the only relevance of "intimidation and harassment" to this proceeding is with regard to the subject of Contention 5 -- that is, whether the Comanche Peak QA/QC Program for construction complies with 10 C.F.R. Part 50, Appendix B such that there is reasonable assurance that Comanche Peak can be operated without endangering the health and safety of the public. ^{20/} No discrete contention on intimidation and harassment ^{21/} was ever admitted by the Docket 2 Licensing Board; rather, the issue(s) before that tribunal, in the context of the Docket 1 Board's expression of its concerns, ^{22/} is but a component of the sole contention remaining in this proceeding, Contention 5. Consistent with this discussion, the Staff stated to the Licensing Boards at a November 12, 1985 prehearing conference that:

^{19/} This is consistent with the Staff's position expressed in the "NRC Staff's Response to Licensing Board Questions Raised During October 15, 1985 Conference Call" (October 25, 1985).

^{20/} See "NRC Staff's Proposed Standard for Litigating Allegations of Intimidation" (June 12, 1984), pp. 2-3.

^{21/} The Staff also disagrees with the Licensing Board's view that "intimidation and harassment" are "terms bearing a natural meaning." Resolution of the definition of these terms may be important to resolving the uncertainty regarding the jurisdiction of, and the scope of issues properly before the Docket 2 Licensing Board, versus the Docket 1 Licensing Board. The Staff's definition of "intimidation and harassment" is set forth in the "NRC Staff's Proposed Standard for Litigating Allegations of Intimidation" (June 12, 1984).

^{22/} See Texas Utilities Generating Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2) (unpublished order) (January 3, 1984).

[T]he [Docket 2] Board was set up to preside over allegations of harassment and intimidation. That doesn't include general, far-reaching inquiries in our view into all technical issues, to probe them to see if perhaps there is some involvement of harassment or intimidation.

Tr. 24,218. The Staff went on to say that to the extent that:

a particular [allegation] entails harassment and intimidation, that much is in Docket 2, but then the significance of that [incident] in terms of the overall QA/QC program is something which is referred back to Docket 1. It is not a finding to be made by the Docket 2 Board.

Tr. 24,222; see also Tr. 24,217-226 (remarks by Lawrence Chandler, counsel for NRC Staff). ^{23/}

Applicants share the Staff's view that the scope of Docket 2 is "extremely narrow" ^{24/} (Applicants' Petition, p. 7). Applicants have opposed CASE's Docket 2 discovery requests on the CPRT discovery requests on the basis that CASE's understanding of the issues in Docket 2 is too

^{23/} The Staff recognizes that certain information developed by the TRT may be relevant to specific allegations of harassment and intimidation in Docket 2. This does not mean, however, that the "full results of the TRT review would become a part of the Docket 2 record." "CASE Opposition to Applicants' Petition for Directed Certification of Licensing Board Order of October 31, 1985" (November 26, 1985). The TRT's effort initially focused on technical elements associated with all known allegations, and not just allegations of harassment and intimidation. Moreover, the TRT activities ultimately encompassed technical matters beyond the scope of the allegations in an effort to ascertain whether deficiencies beyond those alleged existed at the Comanche Peak facility.

^{24/} Although Applicants agree with the Licensing Board's view that "intimidation and harassment" are "terms bearing a natural meaning" (Applicants' Petition, p. 8), the Staff points out that Applicants' definition of these terms in their Petition (Id.) conflicts with the Docket 2 Licensing Board "general guideline," as well as Applicants' definition of these items as proposed in 1984. "Applicants' Proposed Standard for Litigating Allegations of Intimidation" (May 8, 1984).

broad. ^{24/} Applicants have also stated in their proposed case management plan that Docket 2 should not include any technical issues. "Applicants' Current Management Views and Management Plan for Resolution of All Issues" (June 28, 1985), pp. 60-61.

^{24/} See, e.g. "Applicants' (1) Response to CASE's 9/4/85 Request for Production of Documents and (2) Motion for Protective Order" (October 9, 1985), pp. 8-10, where Applicants state:

[M]uch of CASE's 9/4/85 Discovery concerns the CPRT and Applicants' recent management changes. However, the CPRT and present management are irrelevant to the merits of the Docket-2 proceeding. In its June Management Plan, Applicants argued that Docket-2 is moot because the CPRT will render any past incidents of harassment, intimidation, or threats irrelevant to the issue of whether reasonable assurance exists, following implementation of the CPRT, that the plant can be safely operated. After filing its Management Plan and advancing this argument, Applicants acknowledged that CASE was entitled to available information with respect to the CPRT and Applicants' management changes in order for CASE to intelligently address the mootness argument. Applicants provided that information to CASE in both dockets. However, in the Board's August 29, 1985 Memorandum (Proposal for Governance of this Case) ("Memorandum (Governance)"), the Board rejected Applicants' argument that Docket-2 is moot. See Memorandum (Governance), at 9. Consequently, the status of Docket-2 is not altered by the existence of the CPRT or the recent management changes. The issue for Docket-2 still remains only the past events at Comanche Peak the docket was originally created to address - alleged incidents of harassment and intimidation occurring prior to July 1, 1984. The recent CPRT, management changes, and the competence of current management are irrelevant to that issue.

The Board recently issued Memorandum (Applicants' Motion for Modification) (October 2, 1984) [sic], deciding over Applicants' objections that "management" is a matter as to which the Board views that further evidence should be presented. Nevertheless, Applicants maintain that if management is an issue under Contention 5, it is an issue in Docket-1 rather than Docket-2. Docket-2 was created to include only one discrete, easily severable issue under the contention. Furthermore, deficien-

CASE has a different perspective than either the Staff or Applicants with respect to the subject matters that must be litigated before the Docket 2 Licensing Board, versus those that are to be litigated before the Docket 1 Licensing Board. ^{25/} CASE has stated that the technical issues addressed by the Staff's TRT, the adequacy of the Applicants' CPRT, and the "evidentiary standard" that Applicants must meet in order to establish that the Comanche Peak facility is safe are all issues that need to be resolved in Docket 2. ^{26/} Consistent with its understanding

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

cies identified in Docket-2 are technical matters to be addressed in Docket-1. Discovery on the CPRT and the Board's concerns regarding management, therefore, if pending at all, should be strictly limited to Docket-1.

Further, many other of CASE's 9/4/85 Discovery requests are irrelevant to Docket-2 and therefore objectionable. For example, CASE seeks management speeches; documents on the status of licensing provided to owners, investors, and financial institutions; information concerning the SAFETEAM; communications between Applicants and various governmental officials; documents on CYGNA Phase IV; and various scheduling forecasts and cost projections. CASE has demonstrated no relationship between these requests and issues properly before the Board in Docket-2. None of these matters is relevant to the past events alleged by CASE which are the subject of Docket-2. (footnotes omitted).

^{25/} CASE disagrees with Applicants' definition of "intimidation and harassment." See "CASE's Proposed Standard for Litigating Allegations of Intimidation" (June 12, 1984).

^{26/} See "CASE's Proposed Case Management Plan (Docket 2)" (May 9, 1985), attaching an April 17, 1985 letter from Anthony Roisman, Counsel for CASE in Docket 2, to the Docket 2 Licensing Board. On page 3 of the April 17, 1985 letter, CASE states that it "assumes the following issues are in the hearing:"

(FOOTNOTE CONTINUED ON NEXT PAGE)

of the issues to be litigated in Docket 2, CASE has filed several discovery requests in Docket 2, which request information on the TRT, the CPRT, and other design and hardware adequacy concerns. ^{27/} Most recently, in a prehearing conference, CASE discussed at some length what matters in controversy were appropriate for litigation in Docket 2. See Tr. 24,165-174. According to CASE:

[E]verything about the CPRT's investigation of past events is directly relevant to Docket 2, because the CPRT is the Applicants' version of the TRT, and the TRT was the Staff's version of the allegations. And its all one piece of the same puzzle.

As the Board will remember, not we, but Applicants introduced into this case in their original filing in May of 1984, in Docket 2, the issue if an indi-

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

- a) What caused the breakdown of the QA/QC program as documented by the TRT findings on specified aspects of the plant and on the overall QA/QC program?
- b) How does Applicant's response to QA/QC problems, including employee complaints and TRT findings, reflect on the competence and character of management in the past and at present?
- c) What is the status of the safety of the plant in light of the breakdown of the QA/QC program?
- d) The adequacy of Applicant's proposed plan to address the concerns expressed in the TRT findings and the SSERs.
- e) The adequacy of Applicant's correction of any hardware problems identified by its response to the TRT findings and the SSER.
- f) What evidentiary standard must the Applicant meet to establish that the plant as built is safe?
- g) The correctness and completeness of the Staff findings on all issues relevant to CPSES.

^{27/} See, e.g., "CASE's Request for Document Production" (September 4, 1985); "CASE's Interrogatories Regarding the CPRT" (July 29, 1985).

vidual claimed he was harassed or intimidated, the Applicants may defend that allegation, among other things, by saying he deserved it, he was wrong . . .

* * *

If [CASE is] to continue to litigate Docket 2, [CASE is] entitled to know everything the Applicant is learning about failures of past programs to detect deficiencies.

* * *

In Docket 2, what [CASE] is interested in is the question, what was it that caused [Applicants'] people to miss all those deficiencies at a time when they were required to find them. That's a Docket 2 question.

Tr. 24,167-169.

To summarize, there is a substantial difference in interpretation between the parties regarding the jurisdiction of the Docket 2 Licensing Board, its relationship to the Docket 1 Licensing Board with regard to the overall licensing decision to be made in this proceeding, and the scope of issues to be litigated before the Docket 1 Licensing Board versus the scope of issues to be litigated before the Docket 2 Licensing Board. The Licensing Boards' failure to resolve these differences is becoming an increasingly larger impediment to the conduct of the proceeding.

- B. THE LICENSING BOARDS' ORDER, BY FAILING TO CLEARLY DEFINE AND DISTINGUISH THE JURISDICTIONS OF THE DOCKETS 1 AND 2 LICENSING BOARDS, ADVERSELY AFFECTS THE PARTIES' CAPABILITY TO PREPARE AND PRESENT THEIR RESPECTIVE CASES IN BOTH DOCKETS

The Licensing Boards' failure to clearly define the jurisdiction of the Docket 1 and Docket 2 Licensing Boards (in particular the jurisdiction of the Docket 2 Licensing Board) and to delineate the

matters to be resolved by each Licensing Board, will have a continuing and pervasive adverse effect on the parties' capability to prepare and present their respective cases in a rational and reasonable manner in Dockets 1 and 2. It is a basic principle of Commission law and practice that the parties are entitled to fair notice as to what they must defend against or oppose in a proceeding. See Illinois Power Co., et al.

(Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1737 (1981); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974); Niagra Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 354-55 (1975). However, the practical effect of the Licensing Boards' October 31, 1985 Order is to foreclose the parties from timely knowing what legal issues and factual contentions they must litigate in each of the two dockets.

As discussed earlier in Section III.A., there is no separate contention on "intimidation and harassment" in Docket 2, and the Licensing Boards' Order does not define either "intimidation and harassment", or the relationship of the Docket 2 Licensing Board to the Docket 1 Licensing Board. Against the background of ambiguity with respect to matters at issue before the two Licensing Boards (see Section III.A. above), the effect of the Licensing Boards' Order is to render indeterminable what legal and factual issues are to be litigated before and resolved by the Docket 2 Licensing Board, and which issues and contentions are to be litigated and resolved by the Docket 1 Licensing Board. Unless all parties have a clear and uniform understanding as to (1) which legal issues and factual matters are to be resolved in Docket 1 and which are to be resolved in Docket 2, and (2) the definition of the terms, "intimi-

ation and harassment" such that the parties have a uniform understanding of what elements of "intimidation and harassment" are to be considered by the Docket 2 Licensing Board and what elements are to be litigated before the Docket 1 Licensing Board, the parties will be unable to prepare testimony appropriate to the scope of issues to be resolved in each docket, conduct effective cross-examination and make appropriate relevancy and materiality objections. ^{28/}

The Licensing Boards' Order, by permitting evidence developed in one docket to be cited in the other, compounds the problem. The parties are effectively precluded from conducting meaningful cross-examination or interposing appropriate objections, because the significance of the evidence being developed in one docket will not become clear until it is cited in the other docket.

The Fair Warning Memorandum does not alter this analysis by its requirement that relevant material already in the other docket be cited to the adverse parties in a "timely" fashion, and that information filed in the future in one docket be "informed of the expected relevance" to

^{28/} The Staff disagrees with Applicants' argument that the Licensing Boards' ruling that "discovery requests filed in one docket shall be deemed to be filed in the other as well" will necessarily have a detrimental impact on the proceeding. As the Staff has previously argued, this is a single proceeding and therefore it is more efficient to conduct discovery jointly for the proceeding as a whole. "NRC Staff Response to Licensing Board Questions Raised During October 15, 1985 Conference Call" (October 29, 1985). This would, as the Licensing Boards recognized, avoid time-consuming procedural objections where the only result would be refiling of a discovery request in the other docket. The Staff also differs with Applicants' assessment that this discovery procedure will contribute to the development of a "large amorphous record;" discovery does not automatically become part of the evidentiary record.

the other docket. Fair Warning Memorandum, p. 1. With regard to already developed evidence, the Licensing Boards did not define what "timely" citation would constitute. Nor did the Fair Warning Memorandum indicate when potential objections to "citation" in the other docket should be filed by an opposing party and when those objections would be ruled upon by the appropriate Licensing Board. ^{29/} These procedural provisions are crucial because the timing of the citation, the objections, and the Licensing Board ruling will determine whether the adversely-affected party will have a meaningful opportunity to present affirmative evidence. The same considerations also apply to evidence expected to be developed in the future, e.g., the Fair Warning Memorandum did not indicate when an "affected party should be informed of the expected relevance." ^{30/}

Apart from these points, the Staff submits that the "notice" that the Licensing Boards believe will be sufficient to obviate the Staff's and Applicants' concerns regarding "fair notice" is, in fact, inadequate

^{29/} However, the Licensing Boards have subsequently indicated at the November 12, 1985 prehearing conference that they had in mind a procedure whereby the parties would file "preliminary findings of fact prior to hearing," as was previously done in Docket 2. Tr. 24,333. The Staff disagrees with the Licensing Boards' suggestion at the November 12, 1985 prehearing conference that "fair notice" could be satisfied by the filing of prehearing proposed findings of fact immediately before the hearing. While the Commission has encouraged boards to conduct proceedings with appropriate expedition consistent with the Rules of Practice, 10 C.F.R. Part 2, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), the procedures devised to achieve such outcome must assure fairness to the parties, id., and not depart fundamentally from the Rules of Practice. Wisconsin Electric Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982).

^{30/} But see note 25 above.

to serve that purpose. In illustrating how such notice can be given, the Licensing Board stated:

For example, the Board informed the parties that Staff information and conclusions about the quality of coatings might be relevant to whether or not Mr. Lipinski and certain quality assurance coatings inspectors had been intimidated.

Fair Warning Memorandum, p. 1. ^{31/} The Staff does not regard this one-sentence statement as the kind of "fair notice" that would allow any party to adequately prepare testimony and litigate its case in both Dockets 1 and 2. For example, the Licensing Boards' "notice" does not identify with particularity the Staff information that is likely to be relevant nor does the "notice" explain how and why the Staff's information is relevant to whether Mr. Lipinsky or other QC coatings inspectors had been intimidated.

In sum, the Staff's argument with the Licensing Boards' Order and Fair Warning Memorandum is not founded upon concerns over discovery, or complexity of record (although the Staff acknowledges that the Licensing Boards' Order may well result in a needlessly complex record). Nor is the Staff here complaining about the particular scope of issues in the

^{31/} The Licensing Boards also discussed the relationship between protective coatings quality and intimidation in their October 31, 1985 Order as follows:

To the extent that there may be a pervasive breakdown in paint quality assurance, this appears to be relevant to the question of whether paint quality assurance inspectors or Mr. Lipinski may have been subjected to harassment or intimidation. Thus, technical questions in docket 1 may bear on issues in docket 2.

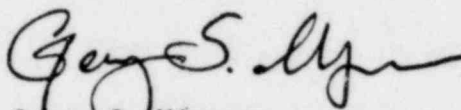
Licensing Boards' Order, p. 2.

overall proceeding. Rather, it is because the Licensing Boards have not clarified the jurisdiction of each of the Licensing Boards and divided the issues between the two dockets, and in fact have adopted a procedure that precludes these questions from being definitively answered prior to the commencement of litigation, that the Staff supports directed certification of the Licensing Boards' Order.

IV. CONCLUSION

The Appeal Board should grant Applicants' Petition, and direct the certification of the Licensing Boards' Order for its review.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Geary S. Mizuno".

Geary S. Mizuno
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 2nd day of December, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO APPLICANTS' PETITION FOR DIRECTED CERTIFICATION OF LICENSING BOARD ORDER OF OCTOBER 31, 1985" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 2nd day of December, 1985:

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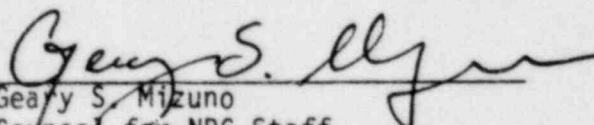
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