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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before Administrative Judges:

Peter B. Bloch, Chairman
Dr. Kenneth A. McCollom
Dr. Walter H. Jordan



SERVED FEB 5 1986

In the Matter of

TEXAS UTILITIES ELECTRIC COMPANY, et al.

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

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

ASLBP No. 79-430-06 OL

February 4, 1986

MEMORANDUM AND ORDER

MEMORANDUM

(CASE'S January 1986 Motions to Compel and Clarify)

This Memorandum discusses Citizen Association for Sound Energy's (CASE's) Motion to Compel Responses to CASE's November 15, 1985, Interrogatories (filed January 10, 1986; hereinafter "Motion to Compel")¹ and CASE's Request for Clarification and/or Motion for Reconsideration of Board's 12/12/85 Memorandum and Order (Period for Discovery; Motion for Reconsideration) (filed January 6, 1986; hereinafter "Motion for Clarification").

¹ Applicants' Opposition to "Motion to Compel Responses to CASE's November 15, 1985, Interrogatories" was filed January 27, 1986 (hereinafter, "Applicants' Opposition").

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I. CASE's Motion to Compel

The narrow issue before us with respect to CASE's Motion to Compel is whether or not to direct Applicants to respond to the following questions:

12. How many persons hired by Applicants since January 1, 1984, are experts hired by Applicants for the purpose of preparation for, or in anticipation of this licensing hearing? This question does not seek a legal conclusion but a corporate answer using the corporation's opinion of the meaning of the question.

13. How many persons working for consultants, contractors, and subcontractors since January 1, 1984, do Applicants claim are 1) experts hired by Applicants, 2) for the purpose of preparation for, or in anticipation of, this licensing hearing? How many of these persons are included in the answer to question 12?

14. How many of the persons identified in the answer to Question 12 and 13 would have been hired irrespective of the existence of this licensing hearing? List those persons, or if more than one person is employed by the same organization, list the organization and the number of persons employed by it.

To the objective observer of this controversy, some further explanation is necessary in order to understand the heat that both parties have generated over the desire either to obtain answers or to avoid answering these questions. A partial explanation of this deadlock is that both sides are represented by lawyers. Furthermore, the lawyers have invested these questions with deep, philosophical significance. For both sets of lawyers, it is a matter of principle.

The principle the lawyers are excited about is whether or not Applicants can claim a privilege for "non-testifying experts." Applicants state that they should be able to hire experts whose testimony they may choose to use in court but that they should have the freedom to examine the findings of those experts prior to making a final decision

about whether or not to use their findings. If they choose not to use experts whom they have hired, then they wish to be able to conceal the identity of those experts because their use of the experts was merely pretrial preparation and consequently should not be available to the intervenors.

Well, obviously, when lawyers for Applicants become excited about that principle, lawyers for the intervenors become excited about the possibility that important information will be concealed from them. So CASE obviously takes the position that there is no such privilege.

The problem with this controversy in its current posture is that there are insufficient tangible facts with which the Licensing Board may currently deal.² The purpose of discovery is to obtain facts about any matter relevant to the claim or defense of any party. Consequently, before we have a ripe controversy over discovery there must be:

² We agree with Applicants' lawyers that there is no direct connection between the availability of non-conformance report (NCR) or "deficiency paper" information to CASE and the interrogatories before us. The questions do not seek the identities of individuals responsible for preparing deficiency paper and no other connection is apparent. Motion to Compel at 2-3; Opposition at 6-7.

We offer our preliminary, non-binding view that we consider it to be a wild idea that the entire Comanche Peak Response Team (CPRT) is performing a consultative function and that all of its work could be shielded by privilege. Most of the work being done by the CPRT appears to be intended to contribute to the assurance of adequate safety. It is part of the QA/QC system of the plant. There appears to be no more reason to uphold a privilege blanketing the CPRT than there would be to permit a plant to have its entire QA/QC system be conducted by experts and to claim that their documents were not plant records and could not be discovered.

(1) ~~A~~ legitimate request for information by CASE.

(2) A response by Applicants that the matter is privileged because of the non-testifying witness rule.

It is clear to us that they only legitimate way for Applicants to claim this privilege is to assert it. We know of no principle, despite suggestions by Applicants' counsel, that would permit Applicants to refuse silently (without asserting privilege) to supply requested information.

Once a tangible context is available, it will not be difficult for us to rule. In fact, we anticipate that when specific fact situations are at stake, there is unlikely to be any situation that the parties will not see clearly themselves. If the specific factual matter involved is a safety deficiency, we would expect the deficiency to be documented in plant records and for the documentation to include relevant sources of information. If the matter involved has no safety significance, then it is likely to be irrelevant to the proceeding and the claim of privilege would therefore be moot. Some other specific contexts are imaginable, but we prefer not to speculate further into the realm of fantasy.

CASE's Motion to Compel shall be denied as not ripe.

II. Motion for Clarification

It is easiest to understand CASE's Motion for Clarification by placing it in historical context. On November 25, 1985, we denied Applicants' January 7, 1985 Motion for Reconsideration and we reopened

discovery—for 60 days. Then, on December 12, 1985, we restricted the purpose for the reopened discovery to follow-up on answers previously obtained by CASE to questions filed by it within the original discovery period with respect to the misrepresentation matters before the Board.

We are somewhat troubled by CASE's Motion for Clarification because it displays a failure to apply common sense to the problems at hand. For example, Applicants filed corrections to their original affidavits. Those corrections are entirely new information. Obviously, there is a right to ask questions about those corrections. Assuming that the Board and the world were rational, CASE could merely ask questions about that new information. Applicants would not be expected to oppose such requests as stale or out of time.

Nor is there any reason to believe that we prescribed the form of discovery allowable, limiting it so that admissions could not be requested. And if Applicants delay their responses to requests that have now been approved by the Board, a request for an extension of time for discovery obviously will be in order.

Except to the extent this Memorandum has resulted in a clarification, the Motion for Clarification is denied.

O R D E R

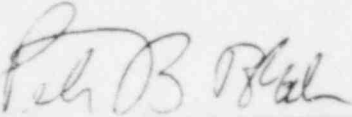
For all the foregoing reasons and based on consideration of the entire record in this matter, it is this fourth day of February 1986

ORDERED: _____ .

Citizens Association for Sound Energy's (CASE's) Motion to Compel, filed November 15, 1985 is denied as not ripe.

CASE's Motion for Clarification, filed January 6, 1986 is denied except to the extent that clarification may have been granted in the accompanying memorandum.

FOR THE
ATOMIC SAFETY AND LICENSING BOARD



Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland