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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CASE RESPONSE TO MEMORANDUM
(FAIR WARNING OF CITATIONS TO OTHER DOCKET)

In their November 6 Order the Boards appeared to accept the premise of Applicants' argument that special prior notification of the intended use of relevant evidence in this proceeding should be given by the party that intends to use the evidence. No special prior notification of the intended use of evidence is normally required in a licensing hearing. The normal process is that at or shortly before an evidentiary hearing a party offers evidence or begins cross-examination and any party which believes the proposed evidence or cross-examination is objectionable files or raises an objection to it. Significantly, absent a challenge to relevancy, the party offering the evidence never has to identify the reasons for its introduction until the conclusion of the hearing. Even a relevancy challenge does not require a party to disclose all possible relevance of the evidence nor limit its use to the stated purpose for its introduction.

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In a single proceeding which has several issues, evidence introduced or adduced during hearings on one issue may and often is used in proposed findings of fact related to other issues. All parties are expected to see and understand the possible implications of the evidence being received for any and all issues in the proceeding.

In the instant proceeding we have a single case divided by order of the Commission into two dockets. Had the harassment, intimidation and discouragement of reporting safety problems merely been another issue in Docket 1 there would be no special treatment required with respect to other evidence received in other hearings on other issues in Docket 1. For instance evidence was received regarding Robert Hamilton, Charles Atchison and Darlene Stiner in the context of hearings on specific technical issues when there was only one docket. What emerged was also evidence relevant to harassment, intimidation and discouragement of reporting safety concerns which would have been used on those issues if they remained in Docket 1 and which has been used in Docket 2. No special prior notification would have been or was required as a pre-requisite to reliance on this evidence.

We therefore believe the Boards erred to the extent they concluded that any party has a <u>duty</u> to specially notify other parties of their intent to rely on relevant evidence anywhere in the record of this single case with respect to any open issue in any docket of this case.

Nonetheless, we believe that the process for managing Docket 2 in CASES's Proposed Schedule and Procedures for Resolution of Harassment and Intimidation Issues (6/1/84), pp. 8-9, is a sound process the continued implementation of which will serve the ends of justice and also solve any fair warning problem. Built into the process is a provision for Preliminary Proposed Findings of Fact. A similar mechanism was previously adopted by the Docket 1 Board. See Memorandum and Order (Scheduling Matters) 12/12/83, pp. 2-3 (Expected Findings of Fact). The Preliminary Proposed Findings of Fact as implemented by the parties in Docket 2 provided a full and complete statement of prior evidence on which the parties relied to support their position. These filings were used sufficiently in advance of evidentiary hearings to provide fair warning to a party of the reliance on record evidence regardless of its source - i.e., whether the evidence came from evidentiary depositions, exhibits, prior hearings or the other docket.

In their November 6 Order the Boards only indicated that the parties should give fair warning of evidence to be used from the other docket by identifying the evidence to be used. The use of the Preliminary Proposed Findings of Fact adds important additional information by requiring that the parties specifically identify the proposed finding with respect to which the evidence is deemed to be relevant. This is an additional benefit of the continued use of Preliminary Proposed Findings

of Fact. Since the filing of these proposed findings precedes evidentiary hearings there is ample opportunity for any party to object, to offer rebuttal testimony and/or to call for cross-examination of witnesses which a party did not previously have a fair opportunity to question.

These procedural safeguards are at least as substantial as any used by the Appeal Board when it makes new factual findings based on a licensing boards' evidentiary record. See, Public Service Company of New Hampshire (Seabrook) ALAB-422, 6 NRC 33,42 (1977).

In sum, while we do not believe any party has a right to be told in advance of the conclusion of the hearing of the reliance another party intends to place on record evidence, we nonetheless believe that one of the additional advantages of the continued use (which we urge) of Preliminary Proposed Findings of Fact in Docket 2 is to provide more than adequate fair warning of such intended reliance plus a clear statement of the particular factual findings which the record evidence supports.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of CASE's Response to Memorandum (Fair Warning of Citations to Other Docket) have been sent to the names listed below this 6th day of December 1985, by: Express mail where indicated by *; Hand-delivery where indicated by **; and First Class Mail unless otherwise indicated.

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