October 25, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO LICENSING BOARD QUESTIONS
RAISED DURING OCTOBER 15, 1985 CONFERENCE CALL

I. Introduction

During the telephone conference held on October 15, 1985, the Chairman of the Licensing Board requested the parties to respond in writing to two items of discussion: (1) a statement regarding discovery as applied to the two dockets in this proceeding and (2) recommendations as to a prehearing conference to be held in the near future.

II. Background

On October 9, 1985, Applicants filed "Applicants' (1) Response to CASE's 9/4/85 Request for Production of Documents and (2) Motion for Protective Order" ("Response"). Applicants' Response was filed in Docket-2 of this proceeding, as was CASE's September 4, 1985 discovery request. In their Response, Applicants generally objected to CASE's discovery request on the grounds that (1) the discovery is cumulative and redundant to previous CASE discovery in Docket-1, (2) the requests are irrelevant to the issues in Docket-2, and (3) the September 4, 1985

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discovery is duplicative of discovery filed by CASE on July 3, 1985 in Docket-2.

As a result of Applicants' Response, the Licensing Board Chairman initiated an informal telephone conference among the parties.

During this untranscribed telephone conference, the Licensing Board Chairman requested that the parties respond to the following propositions: 1/

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.

1/ At the time of this conference call, there also appeared to be agreement among the parties that a prehearing conference should be called to resolve disputes over pending discovery requests. Thus, in addition to responding to the above propositions, the Board asked that the parties propose a time, place and agenda for such a conference, and to recommend procedures to keep the conference efficient. This matter is discussed in Section III.B, infra.

III. Discussion

A. Comments on the Licensing Board's Propositions

The Staff generally agrees with the Board's propositions. The underlying premise, namely, that this is a "single case" is discussed below. However, in the Staff's view, items (a) and (b) are reasonable statements of proper discovery practice in any context. It is important to recognize that CASE is a single party to this proceeding. With that premise as a starting point, there is no reason why any single party, regardless of the number or type of representatives it has, should not be expected to have imputed to it knowledge of the facts and issues developed thus far in a proceeding. 2/ The obligation to assure coordination among a party's representatives/counsel is the obligation of each party; CASE's status in the proceeding is no exception. CASE has the responsibility, as a party, to keep abreast of the developments in this proceeding, and such responsibility includes a reasonable, good faith effort to ensure that discovery requests are not redundant.

On the other hand, in a case of this length and complexity, it is not unreasonable to expect Applicants to be specific as to previously

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2/ The Staff is not aware of any NRC cases dispositive of this question as it applies to discovery. However, an analogy can be drawn to the situation in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1246-47 (1984). In that case, there was a change of representatives by the intervenor, and it was claimed that the Licensing Board committed error in imputing knowledge of what had previously transpired to the new lay representative. The Appeal Board disagreed, holding that such knowledge was "of course" imputed. 19 NRC at 1246. The Appeal Board stated that "[e]xpecting [the lay representative] to be familiar with her organization's own case neither is unfair nor violates due process." 19 NRC at 1247.

answered discovery requests. Even were this proceeding not split into two dockets, it would not be unusual to find discovery requests that at some time in the past may have been covered by a previous request.

Accordingly, the Staff agrees that items (a) and (b) of the Board's proposition are reasonable statements of the discovery duties of the parties.

With respect to item (c), while the Comanche Peak licensing proceeding may be a "single case" with a single (multipart) contention, for the purpose of expeditious conduct it has been separated into two dockets. Such complications as evidenced by the Applicants' October 9, 1985 filing were not foreseen at the time the Docket-2 Board was established. It seems evident that there is now a need to clarify the role of the respective Licensing Boards in the two dockets and the scope of the issues properly before each Board. Without such clarification, the current discovery disputes between parties will not be completely resolved and will likely carry over into other phases of the proceeding with the potential for causing unnecessary disputes and attendant delays in the future.

There is no doubt that there is disagreement among the parties regarding the scope of the issues properly before the separate Boards. In the Staff's view, a major factor contributing to this disagreement is the lack of a definitive statement as to the respective roles the Boards in Dockets 1 and 2 are expected to play in the licensing process.

Prior to the formal establishment of the Docket-2 Board, the then-single Licensing Board was established to address all matters in controversy. These matters properly included the implications of the

allegations of intimidation which were raised in the hearing process. During the course of the proceeding, however, the Licensing Board, in its Memorandum and Order (Additional Scheduling Order) issued January 3, 1984, stated:

> In our memorandum of October 25, 1983, we established an "alternate route" for considering the consequences for Comanche Peak if certain allegations of intimidation of quality assurance inspectors were found to be true. The alternate route was to consider the present state of the plant on the assumption that the quality assurance allegations were correct.
>
> 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. In that paragraph we laid forth a method of assisting the Board in determining the seriousness of the pending charges of intimidation; and that avenue of consideration has been open.
>
> 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. To the extent that intimidation of inspectors may be isolated events, the inspection of plant quality may be sufficient to assure us of plant safety. If, however, the intimidation may be shown to be sufficiently serious, then it may reflect on the quality of plant management. Furthermore, serious intimidation could result in hidden plant conditions that are not readily inspected on walkdowns. Either of these possible conclusions concerning intimidation allegations would have serious adverse implications for licensing.
>
> Nevertheless, the two track procedure we have adopted should help us to focus hearings on the scope of intimidation and on whether or not hidden conditions may reasonably be expected to exist.

Memorandum and Order (Additional Scheduling Order), January 3, 1984, at 5-6 (emphasis added).

Thereafter, on March 30, 1984, the Docket-2 Board was established 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 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.

49 Fed. Reg. 13613 (April 5, 1984).

Given the language used by the Board in its January 3, 1984 Memorandum and Order, emphasized above, it is not unreasonable, on the one hand, to view the intended functions of the subsequently established Docket-2 Board as being somewhat akin to those of a Special Master. A Special Master, appointed pursuant to 10 CFR § 2.722(a)(2), 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, a "separate . . . Board" was established. This Board was to "preside," a term not limited to just taking evidence. Furthermore, the Board was set up pursuant to, inter alia, 10 CFR § 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 CFR § 2.721(d). Section 2.718 in turn gives the presiding officer, among other things, the power to issue initial decisions. 10 CFR 2.718(1).

Thus, the Docket-2 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.

In the circumstances of this proceeding, however, the role of the Docket-2 Board is somewhat different than the traditional role of a separate licensing board established to preside in the same proceeding. Separate boards 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 notice establishing the separate Licensing Board Comanche Peak, supra, is similar to the notice of establishment of a separate Board in Shoreham (48 Fed. Reg. 22235, May 17, 1983), issues pending before the two Shoreham Boards is different from the relationship between the issues 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 compromise 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 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).

In the instant proceeding, however, it appears that any decision reached by the Docket-2 Board on harassment and intimidation would be but one element, inextricably interwoven with the overall licensing decision to be rendered by the Docket-1 Board on QA/QC issues. In fact, no discrete contention was ever admitted by the Docket-2 Board; rather, the issue(s) before that tribunal, in the context of the Docket-1 Board's expression of its concerns, reflected in its January 3, 1984 Memorandum and Order, supra, would appear to be only a component of the sole contention remaining in this proceeding, Contention 5.

Thus, while the Staff agrees with the underlying premise that the Comanche Peak Operating License proceeding is a "single case", it is difficult to apply this concept to the proceeding at the present time in the absence of further clarification of the role of the two Licensing Boards. This is particularly important at this stage since much of the evidence may have a potential bearing on either the technical issues pending before the Docket-1 Board or on the harassment and intimidation issues pending before the Docket 2 Board; indeed there can be a substan-

tial overlap if one takes a very expansive view of the scope of the harassment and intimidation issues.

With respect to discovery, since there is at present two separate Boards with separate authority, it is fully consistent with Commission practice to treat discovery in the two dockets as separate activities (in which case relevance to matters in issue in a particular docket could be appropriately raised, but redundancy of questions raised in the other docket would not appear to be a grounds for objection). On the other hand, recognizing that the Comanche Peak operating license proceeding is a "single proceeding" with only one ultimate determination - whether an operating license should be authorized - and recognizing that the same evidence may have bearing on the issues before the two Boards, we believe that the presiding Licensing Boards have sufficient authority for the efficient conduct of the proceeding to authorize discovery to be carried out jointly for the proceeding as a whole. The staff believes that this course would be the preferable, more efficient one, and would eliminate redundancy.

B. Recommendations As To A Prehearing Conference

During the telephone conference held on October 15, 1985, the Chairman requested the parties to make recommendations as to a time, place and agenda for a prehearing conference. Subsequently, a telephone conference was held on October 23, 1985 and the date of November 12, 1985 was reserved for a prehearing conference to be held, if necessary, in the Dallas, Texas area.

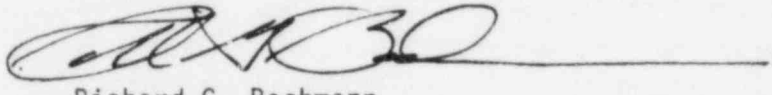
As discussed above, there is no doubt that there is disagreement among the parties regarding the scope of the issues properly before the separate boards in the two dockets in this proceeding. The current discovery disputes between parties cannot be completely resolved and likely will carry over into other phases of the proceeding if the jurisdiction of the respective Licensing Boards in the two dockets and the scope of the issues properly before each are not clarified. For this reason, the Staff recommends that such clarification should be the first item on any agenda for a prehearing conference. The parties should be prepared to discuss what issues, and the scope and breath of such issues, are in each docket. To make the discussion among the parties and Boards most meaningful, the parties should exchange their views in writing among themselves a reasonable period of time prior to the prehearing conference. In this way, the parties will have had an opportunity to consider the positions of the other parties and be prepared to engage in a considered exchange of views rather than an ad hoc response at the time of the prehearing conference. The Staff recognizes that the process described above may require an adjustment of the date. Nonetheless, the clarification of the matter seems so fundamental to the resolution of discovery disputes and to the further phases of the proceeding that the delay is warranted. Following rulings by the Boards as to the jurisdiction of each and the scope of the issues before each. 3/

3/ The Staff notes that this entire discovery dispute is currently before only the Docket-2 Board. That Board does have the power in

(FOOTNOTE CONTINUED ON NEXT PAGE)

the outstanding items of discovery in controversy could be ruled upon to determine the disposition of objections, if any remain, in accordance with the Commission's Rules of Practice.

Respectfully submitted,



Richard G. Bachmann
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 25th day of October, 1985

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

the first instance to rule on the scope of its jurisdiction. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741 (1980). However, as seen in our discussion, these matters affect the scope of both dockets. Accordingly, this pleading is filed in both dockets and we urge a prehearing conference in both dockets.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO LICENSING BOARD QUESTIONS RAISED DURING OCTOBER 15, 1985 CONFERENCE CALL TO CASE'S REQUEST FOR ADMISSIONS" 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 25th day of October, 1985:

Peter B. Bloch, Esq., Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Kenneth A. McCollom
Administrative Judge
Dean, Division of Engineering
Architecture and Technology
Oklahoma State University
Stillwater, OK, 74078

Elizabeth B. Johnson
Administrative Judge
Oak Ridge National Laboratory
P.O. Box X, Building 3500
Oak Ridge, TN 37830

Dr. Walter H. Jordan
Administrative Judge
881 W. Outer Drive
Oak Ridge, TN 37830

Mrs. Juanita Ellis
President, CASE
1426 South Polk Street
Dallas, TX 75224

Renea Hicks, Esq.
Assistant Attorney General
Environmental Protection Division
P.O. Box 12548, Capital Station
Austin, TX 78711

Nicholas S. Reynolds, Esq.
William A. Horin, Esq.
Bishop, Liberman, Cook,
Purcell & Reynolds
1200 17th Street, N.W.
Washington, DC 20036

Herbert Grossman, Alternate Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Billie Pirner Garde
Citizens Clinic Director
Government Accountability Project
1901 Que Street, N.W.
Washington, DC 20009

Ellen Ginsberg, Esq.*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Robert A. Wooldridge, Esq.
Worsham, Forsythe, Samples
& Wooldridge
2001 Bryan Tower, Suite 2500
Dallas, TX 75201

Mr. James E. Cummins
Resident Inspector/Comanche Peak
Steam Electric Station
c/o U.S. Nuclear Regulatory Commission
P.O. Box 38
Glen Rose, TX 76043

William H. Burchette, Esq.
Mark D. Nozette, Esq.
Heron, Burchette, Ruckert
& Rothwell
Suite 700
1025 Thomas Jefferson Street, N.W.
Washington, DC 20007

Robert D. Martin
U.S. Nuclear Regulatory Commission
611 Ryan Plaza Drive, Suite 1000
Arlington, TX 76011

Anthony Z. Roisman, Esq.
Trial Lawyers for Public Justice
2000 P Street, N.W., Suite 611
Washington, DC 20036

Joseph Gallo, Esq.
Isham, Lincoln & Beale
Suite 840, 1120 Connecticut Avenue, N.W.
Washington, DC 20036

Mr. W. G. Counsil
Executive Vice President
Texas Utilities Generating Company
400 North Olive Street, L.B. 81
Dallas, TX 75201

William L. Brown, Esq.*
U.S. Nuclear Regulatory Commission
611 Ryan Plaza Drive, Suite 1000
Arlington, TX 76011

Lanny Alan Sinkin
3022 Porter Street, N.W., #304
Washington, DC 20008

James T. McGaughy
Southern Engineering Co. of Georgia
1800 Peachtree Street, N.W.
Atlanta, GA 30367-8301

Atomic Safety and Licensing Board
Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Appeal
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Robert A. Jablon, Esq.
Spiegel & McDiarmid
1350 New York Avenue, N.W.
Washington, DC 20005-4798

Thomas G. Dignan, Jr., Esq.
Ropes & Gray
225 Franklin Street
Boston, MA 02110

Richard G. Bachmann
Counsel for NRC Staff