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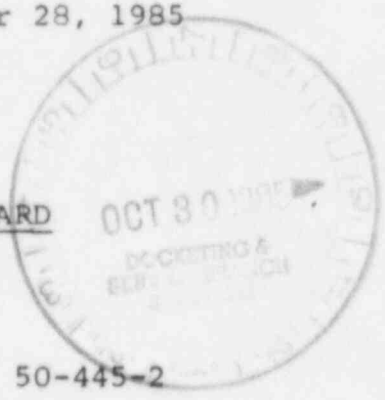
RELATED CORRESPONDENCE

October 28, 1985



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'S RESPONSE TO QUESTIONS RAISED BY
BOARD DURING CONFERENCE CALL ON OCTOBER 15, 1985

The Board has requested that the parties provide their views on two subjects. First, the Board has set forth a predicate and three propositions related to discovery and seeks the views of the parties. Second, the Board has asked the parties to propose an agenda for the soon to be scheduled pre-hearing conference on discovery issues. This document represents CASE's responses to these requests in Docket 2.

I. THIS IS A SINGLE CASE a) IN WHICH CASE 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 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.

A. Is this a single case? Yes.

Although the Board, at the request and primarily for the convenience of Applicants, divided this one case into two dockets, it is, nonetheless, one case. Each docket has its

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own issues but they are all part of one case -- no different than the more typical one docket case with multiple issues which is divided for purposes of hearing and even discovery into several separate hearings. The implications of the existence of two dockets in one case for purposes of discovery is discussed below.

In their filing Applicants argue that there are two cases. They reach this conclusion from the existence of two separate dockets with discrete issues defined by the Notices of Hearing issued for each docket.[1] The flaw in their analysis is that it ignores the undeniable fact that unavoidably the two dockets overlap as to parties (completely), as to Boards (a majority) and as to issues relevant in one docket which may also be relevant in the other docket. For instance, the T-shirt incident is an example of the intimidating and harassing conduct pursued by Mr. Tolson against the Post Construction Verification Task Force dealing with electrical inspections in the Safeguards Building. The seriousness of the harassment and intimidation is underscored by the fact that the deficiencies being identified by the Task Force were legitimate and corrective actions were required.[2]

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[1] The Notice of Hearing for Docket 2 clearly contemplates that this is one case. In the title of the notice it states that it is establishing an ASLB "To Preside in Proceeding" and the text refers to the ASLB "already established to preside in this ... proceeding" and that a separate ASLB is being established "to preside over the proceeding on all allegations of intimidation and harassment." 49 Fed.Reg. 13613 (4/5/84) (emphasis added).

[2] In defending charges of harassment and intimidation Applicants sought to prove that the inspectors were proper objects of discipline by attempting to show that the deficiencies found were not valid or were the result of impermissible destructive [fn. cont'd.]

This also underscores the extent to which the existence of an atmosphere of harassment and intimidation had a direct and adverse impact on the ability of the QA/QC program to detect construction deficiencies.[3]

However, Docket 1 is also concerned with specific hardware issues. Thus, to the extent actual construction deficiencies are now identified with the electrical wiring in the Safeguards Building, irrespective of how or why the deficiency exists, CASE in Docket 1 is directly concerned with assuring that proper and effective action is taken to repair the deficiency. One component of that repair program will be the adequacy of the

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2 cont'd./ testing. These showings were offered in Docket 2 with respect to this and numerous other instances of alleged harassment and intimidation -- e.g., liner plate traveller defects, mismatched and/or untraceable valve discs, improper weld repair, to mention only a few. Applicants also claim that unless previously undetected deficiencies were "safety related" now, it is irrelevant that they were undetected in the past -- e.g. liner plate travellers and paint coatings. Since at the time the construction deficiencies occurred the construction personnel and inspectors were operating under procedures that treated the undetected events as deficiencies, the failure of QA/QC to detect these deficiencies is directly relevant to whether QA/QC was or was not identifying deficiencies during construction. That is important and relevant to CASE's contention that during construction QA/QC failed to function properly and is properly in Docket 2. If Applicants assert that, in retrospect, the deficiency was irrelevant to safety -- that is an argument to present in support of their refusal to now correct the deficiency, but not as a rebuttal to the charges of a QA/QC breakdown.

3 CASE has maintained that the existence of sufficiently pervasive harassment and intimidation of QA/QC inspectors is itself sufficient to establish a QA/QC breakdown without finding previously undetected construction defects. As the evidence has developed in this case it is apparent that the CPSES QA/QC program was a failure both because of pervasive harassment and intimidation of QA/QC inspectors and because of plant-wide failures of QA/QC to detect construction deficiencies.

QA/QC program and the extent to which harassment and intimidation and/or other forms of discouragement of reporting safety concerns continue to exist. The latter concern is a matter related to Docket 2 issues. In short, as this example illustrates, the factual development of this case will produce information which will be relevant in both dockets.

Despite the fact that the identical data may be relevant in both dockets, CASE, with its limited resources, has no desire or intent to duplicate efforts in the two dockets. Nonetheless, information relevant to, or which may lead to information relevant to, one docket can and often will be relevant in the other docket.

The Board also will find, as it has already, that evidence properly addressed during hearings in one docket will also be of relevance in the other docket. If Applicants' argument for treating this single case in two dockets as two separate cases in two dockets is intended to inhibit or prohibit the free use and exchange of relevant information between the dockets then it should be rejected as unwarranted and inconsistent with the purpose of these hearings -- i.e., to determine, in light of the contentions and issues involved, whether CPSES was constructed in accordance with applicable rules, regulations and procedures and whether it will be operated in accordance with applicable rules, regulations and procedures. If, conversely, Applicants merely seek to point out that there are in fact some issues and some evidence relevant in only one docket, we have no quarrel with that although we do disagree with what consequences should follow from that as discussed in Paragraph D below.

We believe the proper test is a practical one. When, in the view of the Board is it more efficient and/or fair to treat this as two dockets and when is it more efficient and/or fair to treat this as one case. For purposes of discovery it is both fairer and more efficient to treat these two dockets as one case. Applicants' suggestion for CASE to refile questions asked in one docket in the other docket when they are found to be irrelevant in the first docket is ample proof of the inefficiency of such an approach.

B. Should CASE coordinate its discovery efforts in the two dockets? Yes.

CASE has always attempted to do this and has never intended to ask redundant questions in the two dockets.[4] Admittedly, some information sought in discovery may be relevant in both dockets -- because, from the Applicants' perspective essentially the same answers may be required. For instance, because Applicants used Mr. Vega as a witness in both dockets on different issues, his transfer and the basis for it has implications for his testimony in both dockets. Similarly, information on contracts with the

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[4] Occasionally CASE will identify some discovery in one docket as pertinent for the other docket. This is not redundant discovery, but an attempt by CASE to put Applicants on notice that it already knows the answers given will be relevant in both dockets and to avoid Applicants' attempts to resist discovery by the argument that data relevant to the case is not relevant to a particular docket. No attempt has been made to force Applicants to produce two sets of identical documents in these circumstances. On occasion CASE has posed the same question in both dockets because the answer is relevant in both dockets. In the future CASE will ask for the information in only one docket and share the data provided.

new contractors is relevant to both dockets as Applicants have in effect conceded by producing the same contract documents into both dockets.

In the future CASE will attempt to improve upon its discovery coordination in order to further assure that questions put to Applicants are not redundant.[5]

C. Should Applicants identify what specific information it claims has been produced in one docket when it is also objecting to produce it in the other docket? Yes.

In their filing the Applicants have agreed that they will identify where the discovery sought has been previously answered. This will greatly facilitate the discovery process.

However, we are concerned that based on past performance Applicants are essentially not answering document requests at all. Instead they reference a response in the other docket which turns out to be an objection or a totally incomplete answer to the request in this docket or an attempt by Applicants to dictate to CASE what they believe is all CASE should be allowed to see in response to the discovery. The following example is illustrative of Applicants' tactics:

In CASE's May 28, 1985 informal request we sought through

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5 The duty to coordinate is equally applicable to Applicants, which, because they are not represented by four separate law firms (three in Docket 1 and four in Docket 2), may find coordination substantially more difficult. For instance, in their filing relevant to the Board's current request for the views of the parties, Applicants argue against any prehearing conference at this time, although in the conference call at which this filing was ordered by the Board, Applicants' counsel was agreeable to such a prehearing conference.

Question 1(c) the following:

> A complete, up-to-date, list, including an organizational chart contract for all personnel doing work on design issues, and other areas relevant to Contention 5. This should be comprehensive to 1st line supervisors. Include in this list the present job of any person who was a witness for any party in Docket 2 if at the time they testified or were deposed they worked for applicant, other owners, contractors, with subcontractors or consultants at the plant.

That request was formalized through a July 3, 1985 letter to Applicants. Applicants replied with general objections and stated that we compare our question with Applicants' Second Partial Response to Ripe Discovery Requests, July 3, 1985, responses to Question 3 (CASE's Second Set), Questions 35 and 36 (CASE's Fourth Set) and Questions 36 and 38 (CASE's Fifth Set).

We did the comparison and learned that while Docket 1 questions were sometimes similar they were not the same and the answers provided were not fully responsive to the Docket 2 request.[6]

CASE's motion to compel responses was filed July 29, 1985. In its August 13, 1985 response Applicants objected to production of the material sought in Question 1(c) on the grounds that:

Objection 1: Applicants already have provided detailed information on this subject in FSAR Amendment 55 and in response to Question 36 from CASE's Fourth

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[6] Text of committment by Applicants:

> Applicants will provide information regarding the qualifications of persons on the Comanche Peak Response Team, regardless of whether they are employed by TERA, including those individuals whose responsibilities include the oversight and review of sampling and testing. Contracts with the CPRT organizations and other documentation relating to their duties as members of the CPRT will be provided.

(p. 23, Second Partial Response)

Set of Interrogatories (see "Applicants' Second Partial Response to Ripe Discovery Requests" (July 3, 1985), at 15-19).

* * * * *

Objection 2: Applicants object to discovery requests ... which go beyond information reasonably necessary to address the issue of appropriateness of the Management Plan.

* * * * *

Objection 3: With respect to the organization, personnel and conracts related to the CPRT program, CASE has been provided with such information either in the Program Plan itself or in accordance with Applicants' commitment in their second partial response to ripe requests. (at 23).

On August 16, 1985 the Board rejected the CASE Management Plan, which was never a basis for ignoring discovery requests anyway (Board Order, at 3), and ordered Applicants to proceed with discovery. Applicants still did not produce any documents.

CASE went to the documents directed by Applicants. It is true they shed some light on the questions, and to the extent that they do we have incorporated the information. The FSAR Amendment 55, for example, contains an updated organizational chart without names, and some information on newly hired management personnel. (See FSAR) However, the request sought an organizational chart to "first line supervisors" with the names. That information is not provided.

The objections also directed CASE to look at the responses to Question 36 of CASE's Fourth Set of Interrogatories in Applicants' Second Partial Response to Ripe Discovery Requests, July 3, 1985.

Question 36 a, b, c, d, e, f, g, h (1-7), and i only address the reassignment, reported in three newspaper articles, of

Messrs. Chapman and Vega and the appointment of Messrs. Wells, Halstead and McAfee, and seek documents related to their jobs for Texas Utilities.

The allegedly "detailed answer" referred to by Applicants provides no documents, stating that:

> Applicants have provided the requested information with the portion of FSAR Amendment 55 transmitted to CASE with Applicants Management plan. (p. 18, 7/3/85 Response)
>
> * * *
>
> Applicants object to providing employment contracts with the identified individuals. Information such as salary and benefits is confidential, and irrelevant to issues in this proceeding. (p. 9, supra)

Applicants direct our attention to "their commitment" in the second partial response to ripe requests, at p. 23. See fn.6 supra. That is equally inadequate. Question 36 of the Fifth Set of CASE's Interrogatories is even more isolated from the question asked in Docket 2. Question 36 of the Fifth Set asks only for documents about all independent outside consultants employed at TERA. Their commitment replies to only a subset of our question, and has -- as of yet -- produced nothing beyond publicly available information.

Nonetheless, CASE refiled the same request a second time, as Question 1.D of Intervenor's September 4, 1985 Request for Production of Documents.

In the October 9, 1985 objections Applicants narrowed their response even further than they had in mid-August, this time asserting that the Docket 2 requests are "unfocussed and unrelated to any specific allegations in Docket 2. Additionally, as the request relates to the CPRT Applicants' object on the

grounds that they are cumulative to discovery being conducted in Docket 1." (p. 16)

This example illustrates the Applicants' obstinate refusal to respond to any discovery in Docket 2 as such, their attempt to redefine the discovery request to fit their view of what is sought, to incorporate by reference responses to discovery in Docket 1 which were not only inadequately responsive to Docket 2 but were unresponsive even in Docket 1. The net affect has been an Applicant-created blackout on discovery from February when at Applicants' request this case was put into abeyance to this day.

In Docket 2 Applicants first suggested Docket 2 was moot and based on the suggestion argued it should not be subject to discovery, then filed a formal argument claiming it was moot and based on the filing it should not be subject to discovery, then, having lost on mootness argued that the underlying issues to which discovery related were irrelevant in Docket 2 (in effect converting the rejected mootness argument into a relevancy argument) and finally argue the data sought in Docket 2 has already been produced in Docket 1 when in fact the Docket 1 discovery responses have been totally inadequate.

These non-responsive tactics of Applicants are made all the more destructive of an orderly hearing process by the casual incorporation of previously provided answers. Without more precise document identification it is not possible for the Board and the parties to evaluate the completeness of the response and, where appropriate, to seek and impose sanctions in the future should it appear that Applicants are attempting to rely on data

which they had not previously produced in response to discovery. What is required is a Board direction that Applicants precisely identify what they are providing, to what part of the discovery it is responsive and what portion of the discovery is objectionable with a full articulation of the basis of the objection.

D. Should the Board disallow objections to discovery based on irrelevancy of the data for a particular docket when the data is relevant in the other docket? Yes.

The decision of this Board concerning issues involved in Docket 2 makes clear that CASE's outstanding discovery in Docket 2 is relevant to or may lead to information that is relevant to matters properly in Docket 2. For this reason the answer to the third question posed by the Board is less crucial than the magnitude of Applicants' objections to discovery based upon alleged irrelevancy in Docket 2 would suggest. Since Applicant and CASE substantially disagree on what are the relevant issues in Docket 2, we turn to that question first.

The heart of the issue in Docket 2 is whether, as a result of harassment, intimidation, threats or other discouragement of reporting safety problems, the QA/QC for construction has failed at CPSES and the extent of that failure. If the QA/QC failure is sufficiently widespread that it calls into question the entire QA/QC program then Applicants must either propose and implement an acceptable substitute for the function of the QA/QC program -- i.e., must find another way to prove that the plant was built in accordance with all applicable rules, regulations, procedures and

the construction permit -- or it must be denied an operating license for failing to comply with Appendix B.[7]

The contention has developed from specific allegations of harassment and intimidation to the exposure of Applicants' QA/QC management as persons whose attitude toward safety problems raised by inspectors was one of discouragement and disdain often manifested in adverse job actions including inspectors being forced to defend the allegation of problems before a large and hostile gathering of supervisors and construction employees, counselling (a euphimism for being sharply criticized and lectured to by a supervisor), transfer, loss of promotion, lay-off and discharge. In addition Applicants have sought to defend their actions in rejecting safety concerns by showing that the inspector was wrong. Now the TRT, as shown in their letters and the SSERs, has verified a substantial number of the allegations

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[7] Nothing in Appendix B authorizes a substitute for compliance with its requirements. Inherent in the structure of Appendix B is the premise that unless a proper QA/QC program is properly implemented during construction there is no way to establish that the plant was properly built. This premise is well-founded given the complexity of construction of a nuclear power plant and the extent to which critical components and aspects of construction are totally inaccessible and/or buried behind or under other components of the plant. For such totally inaccessible items there is no way to assure proper construction occurred except to rely upon the work product of the failed QA/QC program. While this is not the time or place to argue this issue, it is an important element of CASE's position in Docket 2 which underscores the importance of this Board deciding the extent of the past failure of the QA/QC program. Even should CASE fail to establish that the failure of the QA/QC were sufficiently pervasive to justify a finding that the entire QA/QC program had failed, it could establish sufficient failure of the QA/QC program to shift the burden to Applicants to independently establish the effectiveness of the entire program, thus rebutting any assumption that because the QA/QC program was itself adequate, it was properly implemented.

they have investigated (there are hundreds more allegations which are not included in the SSERs and which have been or are to be investigated by the Staff) and has concluded that there was a plant-wide breakdown of QA/QC. Applicants have responded by establishing the CPRT and insist that its mere existence negates the relevancy of this Board's finding out how, why, and to what extent QA/QC has failed. Except for asserting this proposition, Applicants offer nothing in support of it -- and it is insupportable.

If the root causes of the QA/QC breakdown are generic -- e.g. the past management was insufficiently committed to safety or was incompetent or refused to acknowledge safety problems whose resolution would substantially delay construction or over-optimistically assumed that they could find an interpretation of a safety requirement that would allow what they had done or in some other way harassed or intimidated the QA/QC inspectors such that they did not feel free to report safety concerns -- then not one single part of the constructed plant can be said to have been properly built based upon reliance on the QA/QC program.

Applicants now assert that the CPRT search for root causes will not even be concerned with who is responsible for the QA/QC breakdown much less why it occurred (Applicants' Motion For Modification - 9/25/85 at p. 5). In effect the CPRT is designed 1) to explain away as irrelevant to safety the maximum number of TRT identified deficiencies using the current view of what is safety related, 2) to not seek any root causes as to such "excused" deficiencies, 3) to treat as a generic concern only those deficiencies found to be safety significant based upon

today's view of safety, and 4) to only look to generic implication of the construction failure and not seek the root cause of the QA/QC failure -- e.g. find all similar cotter pins to the broken one and check them rather than re-examine all components inspected by the inspector who missed the broken cotter pin (assuming the real root cause was an improperly trained inspector).[8]

Of course the fact the CPRT will not examine the root causes of the QA/QC breakdown does not mean those root causes are not relevant in this proceeding. Examining the conduct of past management is relevant to CASE's view of the issues here. The discovery which CASE has sought in Docket 2 and which is relevant or may lead to data relevant to CASE's contention includes the following:

1) the reasons behind the discharge or departure of former key QA/QC personnel to determine whether and how their departure was linked to their past performance;

2) current management perceptions of the past performance of QA/QC personnel as admissions of a party regarding the QA/QC program for construction and as an indication of the type of QA/QC program management intends to implement for reinspection and rework and their attitude toward it;

3) the extent to which management was committed to investors, co-owners, and others to a particular cost

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[8] Now that it is clear what Applicants will not do, voluntarily, in response to the current state of the record and the TRT findings, it appears to be ripe to again look to CASE's Motion To Establish An Evidentiary Standard. We are exploring that possibility and will, if appropriate, refile our request to the Board. It seems apparent that Applicants are committed to a course of action which totally ignores the reality of the evidence developed in this proceeding. The earlier the Board rejects the Applicants' erroneous assumptions the earlier the Applicants can begin to truly seek to solve their problems.

of the plant and operation of the plant at an early date as evidence of a motive for management's attitude toward QA/QC during construction and as evidence of an over-emphasis on cost and scheduling as contrasted to safety and quality -- this data would also help rebut the Applicants' arguments as presented in the eight-point program that it was totally committed to safety and quality first; and

4) files regarding allegations of workers since June 30, 1984 to establish the continued presence of harassment, intimidation, threats and discouragement of the work force during rework, reinspection and continued construction including evidence of how management dealt with these allegations and the extent to which an allegedly improved system for receiving and processing allegations adduced more charges now with respect to the disregard of safety problems prior to June 30, 1984.

Concededly much of this data could also be used to prove that past management lacked the character and competence to build this plant and that present management lacks the character and competence to operate it but that is, for the moment, incidental to the principal justification for the data in Docket 2. In this docket the information sought by CASE will help to establish that a generic defect -- management's harassment, intimidation and discouragement of reporting safety concerns which was manifested in numerous ways -- caused the failure of the QA/QC. This will then result in a total rejection of the plant as built, at least until Applicants find a replacement for the failed QA/QC program which does not rely on that program to prove that each part of the plant was properly built. See fn.7, supra.

If, as we believe, this Board has fully recognized in its orders issued at least beginning in May of this year and continuing through the October 2 Order that CASE's view of the relevant issues in Docket 2 is substantially correct, then the objections in Docket 2 to relevance raised by Applicants are

clearly without merit. If there is an isolated relevancy objection in Docket 2 which is valid even though the question would be acceptable in Docket 1, what possible use would be served by forcing Ms. Ellis to refile the questions with all the procedural requirements? Applicants can simply answer the discovery in Docket 1 and be done with it. To state Applicants' proposal for reassessment by Ms. Ellis in Docket 1 of all allegedly irrelevant Docket 2 discovery and then her refiling of it, is to rebut it. Rational litigation has long since abandoned such formalism.[9] See Rule 1 of the Federal Rules of Civil Procedure.

II. Proposed Agenda For The November 12th Prehearing Conference

The purpose of the prehearing conference should be to definitively eliminate unacceptable objections to discovery and definitively define acceptable objections to discovery. To accomplish this we propose the following agenda:

1. Current status of discovery
2. What are the issues in Docket 2?
3. To what extent can Applicants postpone answering any part of discovery because some of the data sought is not yet in final form?

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[9] Since two-thirds of the Docket 1 Board sits in Docket 2 and vice versa the only time a Board ruling in either docket would be affected by which docket it occurred in would be if the Chairman and Dr. Jordan disagreed on the outcome. This is rare enough but add to it that the issue was one of relevance of discovery sought in Docket 2 and its likelihood approaches infinity. Surely there is insufficient probability to warrant forcing CASE through the Dickensian process proposed by Applicants.

4. To what extent can Applicants avoid providing copies of internal documents, memos, notes, drafts and the like and produce only the final finished product of some inquiry by the CPRT?

To facilitate the prehearing process we propose the Board request each party to address the agenda items in a filing to be received by the Board and the parties on Friday, November 8th. The Board, based on these filings, should establish time limits for oral presentations assuring that the prehearing conference ends by 5:00 p.m. unless it is clear that the issues require a second day to resolve. We do not think more time is required since the major controversies are already well-developed and the parties' positions relatively clear. The November 8th filing will assure each party clearly presents its views and avoid any surprises at the Prehearing Conference.

Conclusion

We believe there is a need to clear the air on a number of issues. A face-to-face conference will assure that each party is fully understood by the Board and understands the Board. Future discovery will move more smoothly when these major issues are put to rest. We have waited since February for Applicants to divulge the information needed to complete Docket 2. We are still waiting and Applicants have wasted their precious time by their obstinate refusals. Further delay is unacceptable.

Respectfully submitted,

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October 28, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of CASE's Response to Questions Raised By Board During Conference Call on October 15, 1985 have been sent to the names listed below this 28th day of October, 1985, by: Express mail where indicated by *; Hand-delivery where indicated by **; and First Class Mail unless otherwise indicated.

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