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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'88 APR -1 P3:35

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
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BRANCH

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

NRC STAFF'S RESPONSE IN SUPPORT OF
APPLICANTS' MOTION TO CONSOLIDATE PROCEEDINGS

I. INTRODUCTION

On March 8, 1988, Applicants filed a motion pursuant to 10 C.F.R. § 2.716 of the Commission's regulations to consolidate the Comanche Peak Operating License and Construction Permit Amendment proceedings. "Applicants' Motion to Consolidate Proceedings" (March 8, 1988) [hereinafter Applicants' Motion]. For the reasons set forth below, the Staff of the Nuclear Regulatory Commission (Staff) supports Applicants' motion.

II. BACKGROUND

By order of May 2, 1986, the Licensing Board designated to preside over the Construction Permit Amendment proceeding, which is the same board which presides over the Operating License proceeding, admitted Case and Meddie Gregory as consolidated intervenors in the Construction Permit amendment proceeding, and admitted a consolidated contention. Special Prehearing Conference Memorandum and Order (Concerning Parties and Contentions), (May 2, 1986). The Staff and the Applicants appealed

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the Licensing Board's ruling. "NRC Staff's Notice of Appeal from Atomic Safety and Licensing Board Memorandum and Order Concerning Parties and Contentions and Supporting Brief" (May 12, 1986); "On Appeal From the Special Prehearing Conference Order (ASLBP No. 86-528-02-CPA) of the Atomic Safety and Licensing Board Entered May 2, 1986 Brief of Applicants-Appellants" (May 12, 1986). The Appeal Board certified a question to the Commission as to whether the contention admitted by the Licensing Board was precluded from admission based on the decision in Washington Public Power Supply System (WPPSS Nuclear Project, Nos. 1 and 2), CLI-82-29, 16 NRC 1221, 1230-31 (1982). Memorandum and Order (July 2, 1986) (unpublished). The Commission determined that the admitted contention, which was based solely on the Applicants' past conduct, would not be sufficient to defeat a request for construction permit extension even if proven to be correct. Texas Utilities Electric Company, et al. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-15, 24 NRC 397, 402 (1986).

Shortly after issuance of the Commission's decision in CLI-86-15, Consolidated intervenors filed a motion with the Licensing Board for admission of amended contentions or, in the alternative, for reconsideration of the Licensing Board's previous rulings with respect to other contentions. "Motion to Admit Amended Contentions or, In The Alternative, For Reconsideration of Previously Denied Contentions" (September 30, 1986). The Licensing Board admitted Contention 2 as amended. Texas Utilities Electric Company, et al. (Comanche Peak Steam

Electric Station, Unit 1), LBP-86-36A, 24 NRC 575 (1986). ^{1/} The Staff and the Applicants appealed this ruling as well. ^{2/} The Licensing Board's decision was upheld. Texas Utilities Electric Company, et al. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912 (1987).

Applicants have filed the instant motion to consolidate the Construction Permit Extension proceeding and the ongoing Operating License proceeding. The grounds for the motion are that: the two proceedings raise common issues of law and fact, the consolidation would not limit the Board's authority to structure appropriate relief with respect either to the construction permit extension or the operating license, the rights of the parties would not be adversely affected and consolidation would not cause delay. ^{3/} Applicants' Motion at 1-4. The Staff agrees.

^{1/} Contention 2 states:

The delay on construction of Unit 1 was caused by Applicants' intentional conduct, which had no valid purpose and was the result of corporate policies which have not been discarded or repudiated by Applicants.

^{2/} "NRC Staff Brief in Support of Appeal From Atomic Safety and Licensing Board Memorandum and Order Admitting Amended Contentions" (November 13, 1986); "On Appeal From a Memorandum and Order of the Atomic Safety and Licensing Board Entered October 30, 1986 Brief of Permittees" (November 10, 1986).

^{3/} "The only contention remaining for litigation in the operating license proceeding states:

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 to 10 C.F.R. Part 50. and the construction practices employed, specifically in regard to

(FOOTNOTE CONTINUED ON NEXT PAGE)

In addition, the Staff submits that consolidation would allow the Staff to make the best use of its resources.

III. ARGUMENT

A. Standards for Consolidation

The Commission's regulations specifically permit the consolidation of proceedings if such consolidation is found to be conducive to the efficient conduct of the Board's business and to the ends of justice. 10 C.F.R. § 2.716. This Commission regulation has been construed to mirror Rule 42(a) of the Federal Rules of Civil Procedure. Edlow International Co. (SNM Export), CLI-77-16, 5 NRC 1327, 1328 (1977). Therefore, in judging what factors should be considered in determining whether to order consolidation, a Board should be guided by Federal cases on this matter. Id., at 1327, 1328. See, also, Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LRP-81-31, 14 NRC 375 (1981).

In deciding whether to consolidate two proceedings, the Commission and licensing boards first determine whether the proceedings involve common questions of law and fact. The federal courts have dealt with the

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

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 labor qualifications and working conditions (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.

specific question of whether all of the issues in the two proceedings of which consolidation is sought must be identical in order for the proceedings to be consolidated. As Applicants have pointed out, it has been held that identity of issues is not essential. Applicants' Motion at 3 citing Thayer v. Shearson, Loeb, Rhodes, Inc., 99 F.R.D. 522, 523 (W.D.N.Y. 1983); Rohm & Haas Co. v. Mobil Oil Corp., 525 F.Supp. 1298; 1310 (D. Del. 1981). The fact that there are other issues in the proceedings than those in common does not preclude consolidation. 5 Moore's Federal Practice ¶ 42.02[3] (2d ed. 1984). What seems to be of concern to the courts is whether the evidence to be presented in the two proceedings would overlap and whether consolidation would avoid the necessity for the parties to present duplicative testimony. See, Thayer v. Shearson, 99 F.R.D. at 523.

The Commission and Licensing Boards also consider whether the rights of the parties would be adversely affected by the consolidation, and whether the consolidation would result in unreasonable delay of one of the proceedings. LaCrosse, supra, 14 NRC at 378; Alabama Power Co. (Allan R. Barton Nuclear Plant, Units 1 and 2) and (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-75-12, 2 NRC 373, 374 (1975). Consolidation has been ordered where there is not complete identity of parties, and where to consolidate the proceedings would delay one of the proceedings to some extent. LBP-81-31, supra, 14 NRC at 377-78.

The two proceedings in question here involve the same facility and thus the same licensee and many common issues of law and fact. The parties to the two proceedings are identical. There is no indication that

either proceeding would be substantially delayed by the consolidation. Therefore, consolidation is warranted.

B. The Issues Involved in the Construction Permit Amendment Proceeding and the Operating License Proceeding Are Substantially the Same

Applicants argue that the issues in the CPA and OL proceedings are substantially the same. Applicants' Motion at 5. The Staff agrees. As Applicants point out, Contention 2 in the CPA proceeding has two parts, both of which must be established for Intervenor to prevail on the claim that there was no good cause for the extension. Id. at 5-6. First, the contention alleges that the delay in the construction of Unit 1 was due to a corporate policy of intentionally violating Commission requirements to speed up the construction of Unit 1. Second, the contention alleges that this corporate policy has not been discarded or repudiated.

The Licensing Board interpreted Contention 2 in light of the allegations which were already admitted in the proceeding, and set them forth in Appendix A to its order. LBP-86-36A, supra, 24 NRC at 583. The issues raised with respect to the first part of the contention are that Applicants deliberately failed to take positive action to improve their QA/QC program in the face of criticism of the program, and that Applicants have failed to properly design their plant. See LBP-86-36A, 24 NRC at 583. Specifically, Intervenor argues that Applicants did not design the Comanche Peak plant in accordance with fundamental engineering principles, they ignored criticisms of the design, and Applicants have failed to comply with NRC requirements. Id. at 584. As stated above, the second part of Contention 2 of the CPA proceeding

alleges that Applicants have not repudiated their earlier policies. Id. at 584. The bases for this portion of the contention are that the people in management positions responsible for the original policy are, for the most part, still in place. Next, Intervenor alleges that the program being implemented by Applicants for the identification and correction of deficiencies is, in fact, a continuation of the original policies. Id. at 584. The issues specifically raised concern whether the CPRT is truly independent of TUEC, and whether the CPRT methodology is technically correct and being implemented correctly. Id. at 584-585.

Contention 5 in the OL proceeding challenges the Applicants' implementation of their QA/QC program for construction in certain specified areas. This contention has been broadened during the proceeding to include plant design issues as well. Texas Utilities Generating Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-81, 18 NRC 1410, 1413-16 (1983). Both Contention 2 and Contention 5 will require the Board to hear much of the same evidence. For example, there could be instances where evidence of the adequacy of a given portion of the historical QA/QC program might be offered to resolve a particular issue. Such evidence could relate to both the first part of Contention 2 and to Contention 5.

Applicants have pointed to what they consider to be one significant difference between Contention 2 and Contention 5. Applicants' Motion at 8. This difference arises from their position that Applicants' past management practices are not properly considered under Contention 5. Id. As Applicants noted, the Licensing Board does not agree with this position. Id. The Staff has previously argued that although management

character and competence is not an issue under Contention 5 on which the Board must make specific findings, issues concerning management activities with respect to specific deficiencies have been raised by the evidence in the record on Contention 5. See, "NRC Staff Reply to Applicants' Petition For Directed Certification of Licensing Board Order of October 2, 1985" (November 6, 1985). This evidence could also be relevant to the first part of Contention 2. In addition, if it is necessary to present evidence on the root cause of a particular problem in order to determine whether the corrective action being taken is sufficiently comprehensive, and if that cause were determined to involve management practices, evidence could be presented relating to past management practices in connection with the resolution of Contention 5. This evidence could thus be relevant to both Contention 5 and to the first part of Contention 2. The Staff agrees with Applicants that consolidation would eliminate disputes as to the admissibility of such evidence in relation to Contention 5.

The evidence concerning the extent and adequacy of the Applicants' programs to correct previously identified deficiencies and to determine whether there is reasonable assurance that Comanche Peak can be operated safely would be the same in many respects as the evidence offered to show whether Applicants have repudiated their alleged policy of ignoring NRC requirements. The bases for Contention 2 specifically refer to aspects of the CPRT program, such as the adequacy of the reinspection efforts, which will be looked at by the Staff and by the Board to determine whether Comanche Peak's structures, systems and components are designed and constructed so as to perform their safety functions.

The evidence of repudiation and the evidence concerning the actions taken by Applicants to insure compliance with NRC requirements would of necessity be the same. Therefore, it would be duplicative to have two proceedings in which the same evidence would be heard. If there are some issues which would not necessarily be common to a decision on both contentions, these issues could be accommodated in the consolidated proceeding since the parties are the same. Thus, consolidation is warranted.

C. Consolidation Would Not Cause Substantial Delay of Either Proceeding

One of the factors to be considered in determining whether two proceedings should be consolidated is whether one or both of the proceedings would be delayed by consolidation. The Staff agrees with Applicants that consolidation should not result in the delay of either proceeding. Discovery has been continuing in both proceedings. The Staff sees no reason why discovery on both Contention 2 and Contention 5 could not continue using the litigation schedule in place for the OL proceeding. As discussed above, the evidence to be presented on the two contentions is very similar. Therefore, discovery on both contentions should be very similar. There is room in the litigation schedule for the disposition of issues relating to both contentions should a party wish to file motions for summary disposition, as Applicants argue. Applicants' Motion at 19. There is no indication that consolidation would delay a hearing in either proceeding to the extent that consolidation would not be appropriate.

D. Consolidation Would Result In The Efficient Use of the Parties' Resources

Due to the similarity of the evidence to be presented in these two proceedings, consolidation would result in the efficient use of the parties' resources. Here, the parties to the two proceedings are identical. Many of the witnesses for these parties would be the same for large portions of both contentions. Also, consolidation would result in a joint hearing which would reduce the drain on all of the parties' resources. As far as the Staff is concerned, consolidation would provide the means for the Staff to make optimal use of the resources which are available to it for the Comanche Peak project. Thus, the Staff submits that consolidation is appropriate and warranted.

IV. CONCLUSION

For the reasons set forth above, the Staff concludes that Applicants' motion for consolidation of the Comanche Peak CPA and OL proceedings should be granted.

Respectfully submitted,



Janice E. Moore
Counsel for NRC Staff

Dated at Rockville, Maryland
this 30th day of March, 1988

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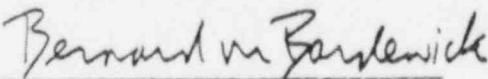
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)	50-445-CPA
(Comanche Peak Steam Electric)	
Station, Units 1 and 2))	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with § 2.713(b), 10 C.F.R., Part 2, the following information is provided:

Name:	Bernard M. Bordenick
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Telephone Number:	(301) 491-1529
Admissions:	United States Supreme Court United States Court of Appeals for the D.C. Court D.C. Court of Appeals
Names of Party:	NRC Staff

Respectfully submitted,



Bernard M. Bordenick
Counsel for NRC Staff

Dated at Rockville, Maryland
this 30th day of March, 1988

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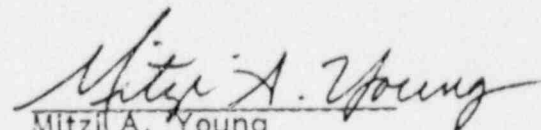
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NOTICE OF WITHDRAWAL

Notice is hereby given that effective March 31, 1988, I will withdraw my appearance in the above captioned proceeding. All mail and service lists should be amended to delete my name after that date.


Mitzi A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 30th day of March, 1988

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE IN SUPPORT OF APPLICANTS' MOTION TO CONSOLIDATE PROCEEDINGS", "NOTICE OF APPEARANCE" for Bernard M. Bordenick and "NOTICE OF WITHDRAWAL" for Mitzi A. Young 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 30th day of March, 1988:

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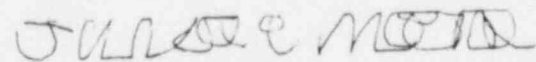
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I hereby certify that copies of "NRC STAFF'S RESPONSE IN SUPPORT OF APPLICANTS' MOTION TO CONSOLIDATE PROCEEDINGS", "NOTICE OF APPEARANCE" for Bernard M. Bordenick and "NOTICE OF WITHDRAWAL" for Mitzi A. Young in the above-captioned proceeding have 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 30th day of March, 1988:

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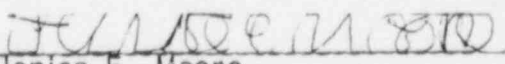
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