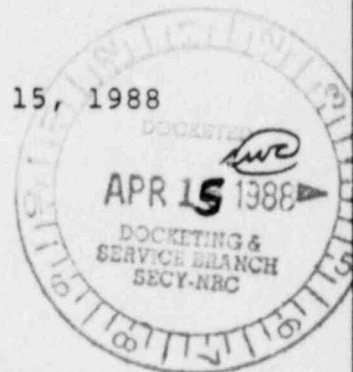


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Filed: April 15, 1988

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
before the  
ATOMIC SAFETY AND LICENSING BOARD



In the Matter of	)	Docket Nos. 50-445-OL
	)	50-446-OL
TEXAS UTILITIES ELECTRIC	)	
COMPANY et al.	)	(Application for an
	)	Operating License)
	)	
(Comanche Peak Steam Electric	)	and
Station, Units 1 and 2)	)	
	)	Docket No. 50-445-CPA

MOTION FOR RECONSIDERATION  
OF THE  
LICENSING BOARD'S MEMORANDUM AND  
ORDER OF APRIL 5, 1988 AND  
REQUEST FOR ORAL ARGUMENT

On April 5, 1988, the Atomic Safety and Licensing Board issued a Memorandum and Order denying Applicants' request for consolidation of the operating license dockets and the construction permit docket. In doing so, we believe that the Board, relying on CASE's description of the two proceedings, did not fully consider the close similarity of the issues in the two proceedings and failed to give any weight to the substantial benefits in terms of efficiency and resource allocation, which necessarily would accrue to all parties were consolidation ordered. Moreover, the Board failed to consider the serious potential delays and other adverse effects attendant to a schedule calling for consecutive rather than consolidated

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hearings. Applicants therefore respectfully request, for ... reasons set forth below, that the Board reconsider its decision and order consolidation of the OL and CPA dockets.

#### Discussion

1. The Parties Should Be Required To Address All Matters In Controversy In One Consolidated Proceeding

Before addressing the specific matters discussed in the Board's Order, it should be noted there is no serious disagreement that many of the issues in the OL docket are substantially the same as those in the CPA docket. In its Memorandum and Order, the Board, however, adopted the rationale set forth by CASE in its Answer that "since the object of the OL proceedings is to establish what the mistakes were . . . an inquiry into motive and repudiation only makes sense where the mistakes have been identified and recognized by admission or Board findings." 1/ Based on this rationale the Board denied Applicants' motion. 2/ Applicants submit that the Board should

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1/ Memorandum and Order at 2 quoting CASE's Answer to Applicants' 3/8/88 Motion To Consolidate Proceedings at 9.

2/ Applicants do not understand the other two passages from CASE's Answer quoted in the Board's Memorandum as providing any underlying basis for the denial of Applicants' Motion To Consolidate. The first passage suggests a sketchy alternative procedure for dealing with the CPA docket. The second passage simply makes the point that the CPA proceeding should be narrow and well focused -- it does not, however, provide any reason why the narrow issue of management motive cannot readily be accommodated, as Applicants and the NRC Staff have urged, in the hearing on Contention 5 in the OL Docket. Moreover, it is inconsistent with the third passage which acknowledges that the CPA inquiry extends to both motive and repudiation.

reject CASE's rationale for a number of reasons.

Applicants agree that in order for CASE to prevail on Contention 2 it must establish, among other things, (1) that "mistakes" were committed at Comanche Peak and (2) that those mistakes are traceable to some improper corporate policy. 3/ Merely because CASE must establish both of these elements in order to prevail on Contention 2 cannot, for that reason, lead to the conclusion, as CASE would have it, that two separate hearings are required. Parties to litigation are in virtually every instance faced with establishing a number of necessary and often logically connected elements in order to prevail. It goes too far to suggest, however, that because there are a number of sequential elements which must be established, there must be separate hearings to address each element seriatim.

In essence, CASE's argument that the OL proceeding should be used to determine the "mistakes" which were made by Applicants as a prelude to litigating Contention 2 relegates the OL docket to a type of discovery proceeding for the CPA docket. It ignores the fact that CASE has been involved in litigation with Applicants for a number of years and has had more than ample time to determine the "mistakes" it believes were committed by Applicants and designate which of those mistakes it believes are

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3/ Of course, CASE must also establish that Applicants failed to repudiate whatever allegedly improper corporate policy existed at Comanche Peak.

attributable to some improper corporate policy. 4/ It is no burden on CASE to be required finally to place in evidence in one hearing all of the facts that it believes supports its Contention 2. Indeed, requiring CASE to put on its entire case in support of its Contention 2 does no more than impose upon CASE the precise burden it assumed when it first filed Contention 2 in the CPA docket. Had CASE only been involved in the CPA docket, CASE would have been required to prove all elements of Contention 2 in one hearing. The fact that Contention 5 and Contention 2 raise virtually the same technical issues is hardly a basis for holding separate hearings -- rather it is a compelling basis for consolidating both dockets.

Under the circumstances present here, the resolution of the OL and CPA issues in two separate hearings will result in procedural confusion and inevitable and unnecessary delay. For example, implicit in the Board's Memorandum and Order is the concept that evidence introduced in the OL proceeding will be used to some degree in the subsequent CPA proceeding. Such a procedure can only lead to serious substantive disputes over the extent to which matters that were addressed or should have been addressed in the OL docket can be relitigated in the CPA pro-

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4/ Obviously, CASE must have had such "mistakes" in mind as early as its filing of Contention 2 or it would have had no basis for such contention. It should have properly refined its views and determined which "mistakes" were provable during discovery rather than awaiting the conduct of the OL hearing. Thus, if required to do so by the Board, CASE should be fully capable to identify such provable "mistakes" at this time, and thus achieve in a consolidated hearing the "narrow and focused" inquiry into motives it is seeking.

ceeding. The use of consecutive hearings can only lead to attempts to relitigate matters already encompassed within the OL proceeding under the guise of addressing Contention 2 in the CPA proceeding. Similarly, absent consolidation, interpretation of the scope of the single Contention admitted in each separate docket will persist as a source of dispute between the parties. If two separate hearings are held, the Board will be continually confronted with objections by all parties in both proceedings as to the scope of the proceedings and the relevancy of evidence. Moreover, separate hearings will strain the resources of all parties and require the repetitive use of witnesses. Finally, the delays attendant upon the conduct of two consecutive hearings could be substantial because of the time involved in conducting an additional round of prehearing procedures, resuming a hearing and recalling witnesses, filing proposed findings and conclusions and writing a separate decision. Not only would consolidation minimize disputes as to the scope of matters at issue, the relevant record evidence and the admissibility of evidence, but it would avoid all of the foregoing unnecessary delays in reaching a decision in both dockets.

2. Consolidation of The Two Proceedings Will  
Avoid Piecemeal Litigation And Promote  
Efficiency

As explained in Applicants' Motion to Consolidate, Contention 2 in the CPA proceeding consists of two prongs: first, that delays in construction were considered by an improper

corporate policy; and second, that Applicants have failed to repudiate that policy. In order to prevail on Contention 2, CASE must carry its burden as to both prongs. Applicants, however, may prevail on Contention 2 by persuading the Board "that their current course of conduct is so correct that it constitutes discarding and repudiating whatever the cause for past delay might have been." 5/ And as the Board and CASE are aware, Applicants have always intended to demonstrate in the OL proceeding, that the present reinspection and corrective actions which they have undertaken -- "their current course of conduct" -- establishes that they have repudiated whatever allegedly improper corporate policy might have led to past delays.

Based on the Board's Memorandum and Order, however, the parties are now in the anomalous position of addressing in the OL docket the second prong of Contention 2 which is sufficient, in and of itself, to lead to the dismissal of the CPA contention and thereafter, in a separate hearing, considering the first prong of contention 2 which is a necessary but insufficient basis for sustaining the CPA contention. This anomaly is made even

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5/ Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-86-36A, 24 N.R.C. 575, 580 (1986).



more acute by the recognition by the Board and CASE that the OL proceedings will be used, among other things, to develop evidence on the first prong of Contention 2 -- i.e., to identify past "mistakes," and thereafter to conduct a separate hearing regarding whether those mistakes evidence, in CASE's words, a "pattern and practice."

Such a piecemeal and illogical approach to the resolution of the OL and CPA dockets has little to commend it and is contrary to the Commission's policy of achieving expedition in licensing proceedings. See Statement of Policy on Conduct of Licensing Proceedings, 46 Fed. Reg. 28533 (May 27, 1981). What such an approach will achieve is the inevitable, and, in all likelihood, substantial delay which virtually always accompanies unnecessary hearings.

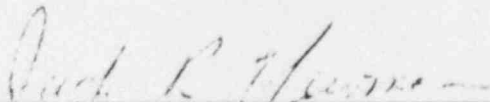
#### CONCLUSION

Accordingly, for the reasons stated herein as well as those set forth in Applicants' Motion To Consolidate, Applicants request that the Board reconsider its previous decision and order consolidation of the CPA and OL dockets. Because of the

importance of the issues raised by Applicants' instant motion, Applicants respectfully request that the Board schedule oral argument on these issues.

Respectfully submitted,

TEXAS UTILITIES ELECTRIC COMPANY  
For the Owners of CPSES

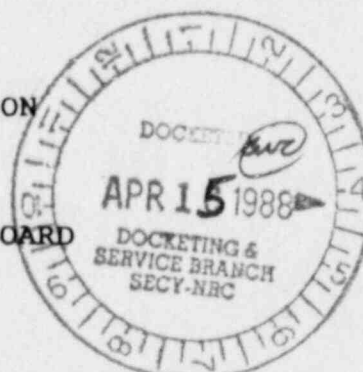
  
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April 15, 1988



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
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(Comanche Peak Steam Electric	)	and
Station, Units 1 and 2)	)	
_____	)	Docket No. 50-445-CPA

CERTIFICATE OF SERVICE

I, Thomas A. Schmutz, hereby certify that the foregoing Motion For Reconsideration Of The Licensing Board's Memorandum And Order Of April 5, 1988 And Request For Oral Argument was served this 15th day of April 1988, by mailing copies thereof (unless otherwise indicated), first class mail, postage prepaid to:

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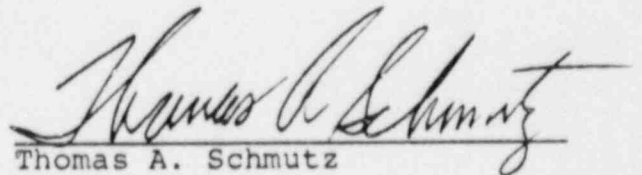
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