

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

TEXAS UTILITIES GENERATING COMPANY,
ET AL.,

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

Docket Nos. 50-445
50-446

NRC STAFF'S ANSWER TO CFUR'S MOTIONS AND OBJECTIONS
CONCERNING APPLICANTS' STATEMENT OF OBJECTIONS,
CFUR'S MOTION TO RECONSIDER, AND
CFUR'S PROPOSAL OF A NEW CONTENTION

Introduction

Intervenor Citizens for Fair Utility Regulation (CFUR) has filed two pleadings, as follows:

- (a) "CFUR's (1) Objection to Applicants' Statement of Objections to Prehearing Conference Order for Lack of Timeliness (2) Motion Requesting Applicants' Compliance with Regulations Regarding Extensions of Time (3) Motion for Equal-Time Extension for Responding to Applicants' Statement of Objections and Motion and (4) CFUR's Partial Substantive Objections to Applicants' Statement of Objections and Motion for Modification", ("CFUR's Partial Objections"), dated July 23, 1980;¹ and
- (b) "CFUR's Motion to Reconsider June 16, 1980 Order and Supplemental Response to the Applicant's [sic] Objections"

1/ CFUR's Partial Objections were filed seven days later than the date on which they originally were due to be filed pursuant to CFUR's first extension of time granted by the Licensing Board. "Order Relative to Additional Time for CFUR and CASE," dated July 10, 1980.

("CFUR's Supplemental Objections and Motion"), dated August 4, 1980.^{2/}

The NRC Staff ("Staff") files this Answer in response to the motions and objections raised by CFUR in its two pleadings.^{3/}

Background

On June 16, 1980, the Atomic Safety and Licensing Board ("Licensing Board") issued its "Order Subsequent to the Prehearing Conference of April 30, 1980" ("Order"), in which the Licensing Board ruled on the admissibility of contentions proposed by the three Intervenor in this proceeding, and formulated three "Board Questions" to be addressed by the Applicants and the Staff in forthcoming evidentiary sessions. In its Order, the Licensing Board accepted numerous contentions advanced by the Intervenor, which it modified and/or consolidated in part, and which it then set forth in a list of 25 "Accepted

^{2/} CFUR's Supplemental Objections and Motion were filed considerably later than the dates on which they originally were scheduled to be filed, in part pursuant to a second extension of time granted by the Licensing Board. Order entitled "Additional Time for CFUR," dated August 1, 1980. CFUR's objections to the Applicants' Statement of Objections originally were due to be filed on or before July 16, 1980, pursuant to 10 CFR §2.730(c); the time for filing was extended to July 23, 1980 pursuant to the first extension of time granted by the Licensing Board, and to August 4, 1980 pursuant to the second extension of time granted by the Licensing Board. CFUR has not obtained or sought an extension of time in which to file any of the other motions contained in its Supplemental Objections and Motion.

^{3/} The NRC Staff files this Answer pursuant to an extension of time granted by the Licensing Board on August 11, 1980, on the Staff's motion of that same date. "NRC Staff's (1) Motion for Extension of Time In Which to Respond to CFUR's Motions and Objections Concerning Applicants' Statement of Objections and (2) Answer to CFUR's Motion for an Extension of Time" ("NRC Staff's Motion for Extension of Time"), dated August 11, 1980.

Contentions". Among these, the Licensing Board accepted 10 of CFUR's 12 contentions, and formulated two "Board Questions" involving the subject matter of CFUR's remaining two contentions.

On July 1, 1980, Applicants submitted their "Statement of Objections to Prehearing Conference Order and Motion for Modification" ("Applicants' Statement of Objections").^{4/} In their Statement of Objections, the Applicants moved for reconsideration of the Licensing Board's admission of Contentions 3, 4, 9, 11, 17, and 23 or, in the alternative, as to Contention 23 the Applicants moved to reword the contention along lines they have suggested. On July 21, 1980, the Staff filed its Answer to Applicants' Statement of Objections, in which we supported the Applicants' motion to delete Contention 11, and opposed the Applicants' motion in all other respects.^{5/}

^{4/} Objections to the Licensing Board's Order of June 16, 1980 have been filed also by Citizens Association for Sound Energy (CASE) and Texas Association of Community Organizations for Reform Now (ACORN). See "ACORN's Motion for Reconsideration or in the Alternative Motion for Certification of Contentions Denied in the Board's Order Subsequent to the Prehearing Conference of April 30, 1980 and Motion for Reconsideration of the Wording of Certain Accepted Contentions Along With An Offer of Proof" ("ACORN Objections"), dated July 1, 1980; and "CASE Motion for Reconsideration of Certain CASE Contentions Denied or Reworded in the Board's Order Subsequent to the Prehearing Conference of April 30, 1980 or in the Alternative Motion for Certification of Contentions Denied in the Board's Order," along with "Supplement to Item 1 (CASE Contention 1) of CASE Motion for Reconsideration, etc." ("CASE Objections"), both dated July 14, 1980.

^{5/} "NRC Staff's Answer to Applicants' Statement of Objections to Prehearing Conference Order and Motion for Modification" ("NRC Staff's Answer to Applicants' Statement of Objections"), dated July 21, 1980.

In its Partial Objections, CFUR objects to the Applicants' having filed their Statement of Objections on July 1, 1980, five days later than they originally were due to be filed, pursuant to an extension of time granted orally by the Licensing Board (Partial Objections, at 2),^{6/} and CFUR moves to require Applicants to comply with the Commission's regulations concerning extensions of time for filing (Id., at 3-5). CFUR moves, also, for a second extension of time for its own filing of a complete response to Applicants' Statement of Objections (Id., at 5-6),^{7/} and provides a partial response to Applicants' Statement of Objections concerning Accepted Contentions 3, 4 and 9 (Id., at 7-13).

In its Supplemental Objections and Motion, CFUR provides its further response to Applicants' Statement of Objections concerning Accepted Contentions 3 and 9 (Supplemental Objections and Motion, at 8-14). In addition, CFUR seeks to add a new contention, "Proposed Contention No. 26" (Id., at 6-7). Finally, CFUR belatedly moves for reconsideration of the Licensing Board's rejection of CFUR's Contentions 4B and 9 (Id., at 1-5).

For the reasons more fully set forth below, the Staff (a) opposes CFUR's objections and motions concerning the time in which the Applicants filed their Statement of Objections; (b) concurs in CFUR's substantive opposition

^{6/} CFUR erroneously computes the additional time involved in Applicants' filing as "at least (6) days late" (Partial Objections, at 2).

^{7/} The Staff previously filed an Answer to CFUR's second motion for an extension of time (Partial Objections at 5-6), in which we stated that "[t]he Staff does not object to the granting of an extension of time until August 4, 1980, as requested by CFUR." NRC Staff's Motion for Extension of Time, at 3, n.4.

to Applicants' Statement of Objections; (c) opposes CFUR's motion for reconsideration of CFUR Contentions 4B and 9, as being without merit and as having been filed too late in time; and (d) opposes CFUR's attempt to add a new contention, as lacking sufficient basis and as failing to meet the requirements for late filings set forth in 10 CFR §2.714(a)(3). In the discussion which follows, each of these issues will be addressed seriatim.

Discussion

I. CFUR'S OBJECTIONS AND MOTIONS CONCERNING THE TIME IN WHICH APPLICANTS FILED THEIR STATEMENT OF OBJECTIONS

In its Partial Objections, CFUR complains that the Applicants filed their Statement of Objections "at least (6) days late," and that the Licensing Board's "oral authorization" for this late filing was "improper"; CFUR claims that the Licensing Board "is without authority to consider Applicants' Objections or use them as a basis for revising or modifying the Order of June 16, 1980" (Partial Objections, at 2). CFUR further contends that the Licensing Board's acceptance of Applicants' late filing (a) violates 10 CFR §2.752(c) (Id.); (b) constitutes an "improper de facto rulemaking" which effectively rescinds 10 CFR §2.758(c) (Id., at 3); (c) denies CFUR "the ability to respond to the Applicants' request for an untimely filing" in contravention of the Due Process Clause of the Fourteenth Amendment (Id., at 4); and (d) affects CFUR's "substantive due process rights" (Id., at 5). CFUR moves for an Order requiring Applicants to seek a waiver from the Commission's regulation concerning extensions of time, pursuant to 10 CFR

§2.758, or, in the alternative, for an Order requiring Applicants to file a petition for rulemaking, pursuant to 10 CFR §2.802 (Id., at 4).

CFUR's objections and motions in this regard are frivolous and are without merit in their entirety. CFUR's complaint is not that the Applicants failed to request an extension of time, but that the Licensing Board granted Applicants' request for an extension without having the authority to do so. This argument is simply wrong. Pursuant to 10 CFR §2.711(a), "whenever an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may for good cause be extended or shortened by ... the presiding officer." Pursuant to 10 CFR §2.730(b), motions need not be in writing where "the presiding officer directs otherwise." The Staff believes that the Licensing Board acted fully in accordance with its regulatory authority in granting the Applicants' oral request for an extension of time.

CFUR's suggestion that the Licensing Board was required to issue its Order in writing (Partial Objections, at 4-5) is incorrect. The Commission's regulations specify that written motions are to "be disposed of by written order and on notice to all parties" 10 CFR §2.730(e); no such requirement is specified as to oral motions. Similarly, CFUR's suggestion that the Applicants have engaged in ex parte communications with the Licensing Board in contravention of the Commission's rules (Partial Objections, at 3, 5), is without merit; the Commission's rules concerning ex parte communications

apply only to communications concerning a "substantive matter" at issue in a proceeding, 10 CFR §2.780(a), and not to matters which are simply procedural in nature. Finally, the Staff notes that CFUR, itself, has received an extension of time upon oral request to the Licensing Board;^{8/} CFUR's present objection to Applicants' having followed a course charted by CFUR, itself, demonstrates the frivolity and lack of merit inherent in CFUR's objections and motions in this regard.^{9/} For these reasons, the Staff opposes CFUR's motions concerning the time in which the Applicants filed their Statement of Objections, and urges that they be denied.

II.
CFUR'S SUBSTANTIVE RESPONSE TO
APPLICANTS' STATEMENT OF OBJECTIONS

CFUR has opposed, on substantive grounds, the Applicants' motion to delete Contentions 3, 4 and 9 from the list of Accepted Contentions (CFUR's Partial Objections, at 7-13; Supplemental Objections and Motion, at 8-14).^{10/} The Staff previously has opposed the Applicants' Statement of Objections concerning, inter alia, Accepted Contentions 3, 4 and 9, and those previous comments will not be repeated here; for the reasons set forth in the Staff's Answer

^{8/} See "Order Relative to Additional Time for CFUR and CASE," dated July 10, 1980, at 1-2.

^{9/} CFUR's other objections in this regard, referred to supra at 5-6, are similarly without merit; no "rulemaking" is present here, nor has CFUR demonstrated in any way that there has been a denial of any of its substantive or procedural due process rights. CFUR's reference to 10 CFR §§2.752, 2.758, and 2.802 are simply inapposite.

^{10/} See Applicants' Statement of Objections, at 2-12.

to Applicants' Statement of Objections,^{11/} the Staff concurs in CFUR's substantive opposition.^{12/}

III.
CFUR'S MOTION FOR RECONSIDERATION
OF CFUR CONTENTIONS 4B AND 9

As we discussed supra, at 2-3, the Licensing Board accepted 10 of CFUR's 12 contentions and rejected CFUR's two remaining contentions -- CFUR Contentions 4B and 9. In addition, the Licensing Board formulated two Board Questions concerning the subject matter of those two other contentions, which it directed the Applicants and the Staff to address during forthcoming evidentiary sessions. For the reasons set forth in the following discussion, we believe that the Licensing Board properly rejected CFUR's Contentions 4B and 9, and that reconsideration of those contentions is not warranted at this time.

A. CFUR's Contentions 4B and 9 Were Properly Rejected

CFUR Contention 4B

Applicants have failed to demonstrate sufficient managerial and administrative controls to assure safe operation as required in 10 CFR, Part 50, Appendix B. Therefore, special operating conditions should be required.

^{11/} Supra, p. 3, n.5.

^{12/} The Staff files this reply to CFUR's substantive opposition to Applicants' Statement of Objections pursuant to the Licensing Board's statement that it "expects other parties to respond to the July 23 filing [CFUR's Partial Objections]." Pursuant to 10 CFR §2.730(c), the Staff ordinarily would not be entitled to file this reply as of right.

The Licensing Board rejected this contention "as lacking adequate basis and specificity" (Order, at 5). The Licensing Board noted, however, that it is "interested in this line of inquiry" and, accordingly, propounded the following Board Question for the Applicants and the Staff to answer during evidentiary sessions (Id.):

Board Question No. 2

Applicant and Staff should describe in detail the operating quality assurance program for CPSES. A description of the provisions for conduct of QA audits should be provided, including a description of how reactor operations and reactor operator training will be audited.

CFUR, nevertheless, urges that its contention should be admitted. Thus, CFUR urges that the Quality Assurance/Quality Control (QA/QC) problems encountered at the CPSES facility during its construction phase provides sufficient basis for a contention that the facility will lack adequate administrative and managerial controls during the facility's operation (Supplemental Objections and Motion, at 4).

Except as noted below, CFUR has not provided any new information or new arguments in this regard which had not been considered previously by the Licensing Board. Thus, when CFUR initially propounded this contention, it argued that "the construction phase of CPSES shows problems in every area of quality assurance," and that the recurrence of those problems during construction demonstrates that there is "a management problem" and that "a pattern of

laissez-faire exists on the part of TUGCO insofar as QA is concerned."^{13/} CFUR then proposed a twofold remedy: (a) that Applicants' management group be required regularly to eat plants, fish and animals which would be raised on the CPSES site, and (b) that posters describing the consequences of severe accidents be displayed in prominent places at the CPSES site.^{14/} These same arguments are advanced in CFUR's motion for reconsideration. (Supplemental Objections and Motion, at 4-5).

In addition, CFUR now offers, for the first time, a further basis for this contention: CFUR states that its proposal to require the display of warning posters is appropriate in light of "various investigations conducted as a result of TMI-2," and that nuclear plant employees need to be presented with a more credible view of the consequences of nuclear accidents than either the nuclear industry's alleged "absolute safety" view or the media's alleged "overly simplistic and sometimes extreme" view (Id., at 5).

The NRC Staff believes that CFUR's reference to QA/QC problems encountered during the construction phase of the CPSES facility -- when numerous and varied subcontractors were employed at the site -- do not provide adequate basis for a contention concerning QA/QC controls to be in effect during

^{13/} "Supplement to Petition for Leave to Intervene by Citizens for Fair Utility Regulation (CFUR)," dated May 7, 1979, at 17.

^{14/} Id.

operation of the facility.^{15/} Furthermore, the Staff believes that the new ground offered by CFUR in support of this contention is overly vague and fails to satisfy the basis and specificity requirements of 10 CFR §2.714(b). Thus, CFUR has not identified which "investigations" it relies upon, nor has it demonstrated that nuclear plant employees in general (or those employed at CPSES) have failed to appreciate the consequences of nuclear accidents. In addition, CFUR has failed to demonstrate good cause for its late filing of this additional basis, as required by 10 CFR §2.714(a)(3). Finally, the Staff is of the view that Board Question No. 2 sufficiently addresses QA/QC procedures to be in effect during the operation phase of the CPSES facility. Accordingly, the Staff opposes CFUR's motion for reconsideration of CFUR Contention 4B.

CFUR Contention 9

The Applicants should be bound to any hardware modifications required to mitigate the consequences of Anticipated Transients Without Scram concerning Westinghouse reactors of the CPSES category even if the Commission grants an exemption to Applicants based upon some specific time frame.

The Licensing Board rejected this contention on the grounds that it is "too speculative" and that "insofar as it suggests the Board override any future possible Commission-granted exemptions for ATWS-related hardware modifications, it appears to be outside the jurisdiction of the Board" (Order,

^{15/} The Staff previously supported the admission of this contention. As we now read the contention, however, we are of the view that CFUR has not provided any nexus between construction phase problems and QA/QC controls which would be in effect during the operation of the facility. Accordingly, we believe the contention was properly rejected by the Licensing Board.

at 5). The Licensing Board, however, expressed interest in the subject of ATWS, and has directed the Applicants and the Staff to respond to the following Board Question during the evidentiary hearing:

Board Question No. 3

Describe the status of resolution of Safety Issue TAP A-9 (ATWS) as it relates to CPSES 1 and 2.

In our view, the Licensing Board correctly rejected CFUR Contention 9. The issue of ATWS is a generic unresolved safety issue, which CFUR had not shown to bear a nexus to the CPSES license application.^{16/} Such a nexus must be demonstrated to exist, in order for a generic unresolved safety issue to be litigated in a particular licensing proceeding. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 773 (1976).

Furthermore, the contention is totally speculative, in that its validity rests entirely upon an eventuality which may never occur. Thus, CFUR contends that "if" the Commission grants the Applicants an exemption from hardware modifications which may be required in the future, the Applicants nonetheless should be bound to those required modifications. However, as CFUR, itself, recognizes, the Commission may find that no hardware modifications are required (Supplemental Objections and Motion, at 2-3); and, in any event, no reason has been presented which would indicate that the Applicants might be granted an exemption from such requirements. Also, to the extent that CFUR urges the Licensing Board to impose licensing requirements

^{16/} See "NRC Staff's Report on Its Position Concerning the Admissibility of Intervenors' Contentions," dated April 10, 1980, at 25-26.

upon the Applicants in disregard of a Commission action, CFUR's contention is impermissible.

Finally, there is no legal basis for CFUR's request that the Licensing Board "consider and require evidence on the ability of CPSES safely to mitigate the consequences of ATWS" so that if the Commission should later require that consideration be given to this issue, "the Board will already have the necessary evidentiary record regarding CPSES" (Supplemental Objections and Motion, at 1). The litigation of such an unfounded contention at this time would needlessly expend the resources and time of the Licensing Board and of the parties. Further, there is no doubt that a myriad number of other such contingent issues could be hypothesized by an able imagination; the admission of this contingent contention would open the door to the litigation of every conceivable speculation. Furthermore, in our view, the Licensing Board's formulation of a Board Question in this regard (Order, at 6) provides a satisfactory means of dealing with the ATWS issue raised by CFUR. For these reasons, the Staff opposes CFUR's motion for reconsideration of CFUR Contention 9.

B. Reconsideration of CFUR's Contentions 4B and 9 Is Improper

In the preceding discussion, we have indicated why, on substantive grounds, the Licensing Board should not reconsider CFUR's Contentions 4B and 9. At this time, we would urge further that CFUR's objections and motion for reconsideration are barred by the Commission's regulations concerning the time for filing.

CFUR filed its objections to the Licensing Board's ruling and its motion for reconsideration on August 4, 1980, more than five weeks later than they were permitted to be filed. Thus, pursuant to 10 CFR §§2.751a and 2.710, objections to the Licensing Board's Order were required to be filed by a party other than the Staff by June 26, 1980. The other parties to this proceeding generally have adhered to the rules concerning the time for filing, or have sought and received from the Licensing Board an extension of time for such filing.^{17/} CFUR, itself, has sought--and received--extensions of time for the filing of other pleadings relating to the Order of June 16, 1980,^{18/} and yet it has failed even to request an extension of time for the filing of its objections and motion for reconsideration. CFUR certainly has been aware, all along, that the time for filing its objections and motion has passed. In our view, CFUR's deliberate decision to ignore the Commission's rules concerning the time for filing and extensions of time, and its attempt now to file its objections and motion so late in time without the permission of the Licensing Board is an egregious violation of the Commission's Rules of Practice. Accordingly, the NRC Staff opposes CFUR's motion for reconsideration on procedural grounds, as well as on substantive grounds.

^{17/} Applicants filed their objections to the Licensing Board's Order on July 1, 1980, five days late, having obtained an oral extension of time from the Licensing Board. Intervenor ACORN filed its objections on July 1, 1980, five days late, without benefit of an extension of time. ACORN Objections, supra, p. 3, n.4. Intervenor CASE filed its objections on July 14, 1980, 18 days late, having obtained an extension of time from the Licensing Board. CASE Objections, supra, p. 3, n.4. The NRC Staff has not filed objections to the Licensing Board's Order.

^{18/} See discussion supra, at 1-2, nn.1&2.

IV. CFUR'S PROPOSAL OF A NEW CONTENTION

In its latest filing, CFUR attempts to introduce an additional contention for litigation in this proceeding-- "Proposed Contention No. 26" (Supplemental Objections and Motion, at 6-7). That contention reads as follows:

CFUR's Proposed Contention 26

The physical security and safeguards contingency aspects of CPSES must be improved and actions taken to insure that previous lack of adequate performance in this regard will not cause undue risk to the health and safety of the public when CPSES is operated.

In support of this new proposed contention, CFUR cites an incident which occurred at the CPSES facility on July 6, 1980, in which a number of demonstrators were discovered on the grounds of the CPSES site (Supplemental Objections and Motion, at 6). CFUR claims that this incident demonstrates "a lack of adequate performance in regards to physical security aspects at CPSES" which could result in the risk that an "explosive (or otherwise damaging) device" could be "placed in sensitive areas of CPSES which could be activated after CPSES has been in operation" (Id., at 6-7).

In our view, CFUR has failed to satisfy the basis and specificity requirements set forth in 10 CFR §2.714(b). While CFUR has described news accounts of a recent incident at the CPSES facility, it fails to indicate where on the CPSES site the incident occurred or that the incident occurred in an area in which security has been or is intended to be established. CFUR has not alleged or demonstrated that the Applicants will fail to comply with the

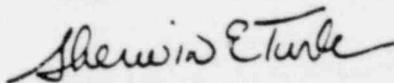
security requirements of 10 CFR Part 73, once the CPSES facility begins operation. Further, to the extent that CFUR hypothesizes that the demonstrators may have placed some sort of destructive device on the CPSES site, the proposed contention is speculative and unacceptable. Finally, CFUR has failed to make the requisite showing of good cause or to address, in any manner whatsoever, the factors required to be considered upon the late filing of contentions, pursuant to 10 CFR §2.714(a). Accordingly, the Staff opposes the admission of CFUR's Proposed Contention No. 26.

CONCLUSION

For the foregoing reasons, the NRC Staff submits (a) that CFUR's objections and motions concerning the time in which Applicants filed their Statement of Objections are without merit; (b) that CFUR's motion for reconsideration of CFUR Contentions 4B and 9 is without merit; and (c) that CFUR's attempt to introduce Proposed Contention No. 26 is without merit. The Staff concurs, however, in CFUR's opposition on substantive grounds to the Applicants' Statement of Objections.

Accordingly, the Staff opposes each of CFUR's motions and objections (except to the extent that CFUR substantively opposes the Applicants' Statement of Objections), and urges that they be denied.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

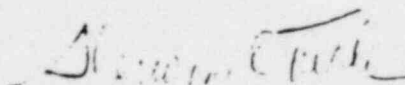
Dated at Bethesda, Maryland
this 25th day of August, 1980

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Docket Nos. 50-445
50-446

Atomic Safety and Licensing Appeal
Panel (5)*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Docketing and Service Section (7)*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

A handwritten signature in cursive script, appearing to read "Sherwin E. Turk", written over a horizontal line.

Sherwin E. Turk
Counsel for NRC Staff