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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'93 MAR 30 P2:25

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

SERVED MAR 30 1993

In the Matter of

TEXAS UTILITIES ELECTRIC COMPANY

(Comanche Peak Steam Electric
Station, Unit 2)

Docket No. 50-446-CPA

MEMORANDUM AND ORDER

CLI-93- 10

The Atomic Safety and Licensing Board in LBP-92-37, 37 NRC
____ (Dec. 15, 1992), has denied two joint petitions for
intervention and for hearing with respect to an amendment to
extend the completion date under the construction permit for Unit
2 of the Comanche Peak Steam Electric Station (CPSES). The Board
denied the joint petition of B. Irene Orr and D.I. Orr for
failure to submit an admissible contention under 10 C.F.R. §
2.714(b)(2).¹ The Board denied the second joint petition, filed

¹ The Licensing Board also held that Joseph Macktal and
S.M.A. Hasan, two other petitioners who filed jointly with the
Orrs, had not shown sufficient interest for standing and,
accordingly, denied their petition to intervene and request for
hearing. LBP-92-37, slip op. at 10. Messrs. Macktal and Hasan
have not appealed.

by R. Micky Dow and Sandra Long Dow, "doing business as" (dba) Disposable Workers of Comanche Peak Steam Electric Station, on the ground that the petitioners had failed to show the requisite interest for standing. Both the Orrs and the Dows have appealed the Licensing Board's decision.² For the reasons stated in this order, we dismiss the proceeding and the pending appeals as moot.³

I. Background

The construction permit for Unit 2, issued December 19, 1974, established August 1, 1983 as the original construction completion date.⁴ The completion date for construction of Unit 2 has been extended several times. Applications for operating licenses for Units 1 and 2 were filed in 1978, and a notice of opportunity for hearing was published in 1979. 44 Fed. Reg. 6995 (Feb. 5, 1979). At that time three parties were admitted into the operating license proceeding. Neither the Dows nor the Orrs were among the admitted parties in the operating license proceeding or in any other proceeding concerning extension of the

² On March 15, 1993, the Orrs filed a motion to stay the issuance of a full power license for CPSES Unit 2. Their motion, responses thereto, and other related filings are under consideration. The Commission will decide the motion in a subsequent order no later than the time that the Commission determines whether or not to authorize full power operation of CPSES Unit 2.

³ As discussed in section II of this order, the Dows' appeal is also dismissed in view of their failure to perfect the appeal by filing a brief.

⁴ Construction Permit No. CPPR-127, 39 Fed. Reg. 44,796-97 (Dec. 27, 1974).

construction permits for either Unit 1 or Unit 2. By 1983 the Citizens Association for Sound Energy (CASE) remained as the sole intervenor in the operating license proceeding and the only contention remaining for litigation challenged the adequacy of quality assurance and quality control over the construction of CPSES. CASE was also granted intervenor status in a construction permit extension proceeding concerning CPSES Unit 1.⁵

In June 1988, CASE, Texas Utilities Electric Company (TU), and the Nuclear Regulatory Commission (NRC) staff reached an agreement to settle and dismiss the pending adjudicatory proceedings concerning the operating license and the Unit 1 construction permit extension. As a result of the settlement, the Licensing Board concluded that it knew of no remaining matters in controversy,⁶ and on July 13, 1988, the Board dismissed both proceedings.⁷

At TU's request, on November 18, 1988, the NRC staff granted construction permit extensions for both Units 1 and 2.⁸ The staff found good cause for the construction delays at both units. As to Unit 1, the "good cause" stemmed from TU's expanded program

⁵ Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), LBP-86-36A, 24 NRC 575, 581 (1986), aff'd, ALAB-868, 25 NRC 912 (1987).

⁶ Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18A, 28 NRC 101, 102 (1988).

⁷ Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18B, 28 NRC 103, 104 (1988).

⁸ Order Extending Latest Construction Completion Date, 53 Fed. Reg. 47,888 (Nov. 28, 1988).

to reinspect the design and construction of both units. The good cause for the delay at Unit 2 was TU's remedial efforts since mid-1985 at Unit 1, a program that limited the resources directed to Unit 2. The good cause justification for Unit 2 also included consideration of the licensee's intention to suspend the construction at Unit 2 for approximately one year to allow time for a review of Unit 2. This review would utilize the results gleaned from the reinspection and corrective program at Unit 1, to identify possible modifications that might be required for Unit 2. These extensions were not challenged by anyone, including the parties now before us. The NRC issued an operating license for Unit 1, initially limited to low power operation, on February 8, 1990, and subsequently permitted full power operation under the license on April 17, 1990.⁹

Pursuant to 10 C.F.R. § 50.55(b), TU filed the construction extension request that is the subject of this proceeding by letter dated February 3, 1992, as supplemented on March 16, 1992. Although TU estimated that it would complete construction in December 1992, TU sought an extension of the construction completion date from August 1, 1992 to August 1, 1995, in order to provide adequate time for construction and a contingency period for any unanticipated delays.¹⁰ As the good cause justification, TU asserted that the completion of construction

⁹ See 55 Fed. Reg. 5525 (Feb. 15, 1990); 55 Fed. Reg. 17,329 (Apr. 24, 1990).

¹⁰ Letter from W. J. Cahill, Jr., to NRC, at 2 (Feb. 3, 1992).

and start-up at Unit 1 required more time than had been anticipated, thereby resulting in an extended suspension of intensive construction activities at Unit 2.¹¹ Based upon its determination that good cause had been shown and that no significant hazards considerations were involved, the NRC staff on July 28, 1992, granted the construction permit amendment.¹²

Two joint petitions to intervene and for a hearing were filed in this proceeding. B. Irene Orr, D.I. Orr, Joseph J. Macktal, Jr., and S.M.A. Hasan filed their joint petition on July 27, 1992. These petitioners filed a Supplement with the following contention on October 5, 1992:

The delay of construction of Unit 2 was caused by Applicant's intentional conduct, which had no valid purpose and was the result of corporate policies which have not been discarded or repudiated by the Applicant.

TU and the staff argued that Messrs. Macktal and Hasan did not meet the requirements for standing. TU and the staff also opposed the petition on the ground that the petitioners had failed to submit an admissible contention. In LBP-92-37, the Board ruled that Messrs. Macktal and Hasan had failed to demonstrate sufficient interest for standing. Slip op. at 8-10. The Board also concurred with staff and the licensee that, though the Orrs had demonstrated standing, the petitioners had not

¹¹ Id. at 1.

¹² Order Extending Construction Completion Date, 57 Fed. Reg. 34,323 (Aug. 4, 1992). The staff earlier had published a notice regarding its environmental review. Environmental Assessment and Finding of No Significant Impact, 57 Fed. Reg. 28,885 (June 29, 1992).

submitted a viable contention. Accordingly, the Board denied the petition. Slip op. at 31-32.

R. Micky Dow and Sandra Long Dow, "dba" the Disposable Workers of Comanche Peak Steam Electric Station, filed the second joint petition on July 28, 1992. The Board denied the Dows' intervention petition on the ground that the Dows lacked the requisite interest for standing. Slip op. at 43-45.

B. Irene and D.I. Orr timely filed a notice of appeal and supporting brief challenging the Licensing Board's ruling that they failed to submit a viable contention.¹³ On appeal, the Orrs argue that the Board misapplied the requirements for contentions in construction permit extension proceedings.¹⁴ The staff and the licensee filed replies opposing the appeal on January 18, 1993. The Dows have also appealed, as described more fully in section II of this order.

Based in part upon a determination that the facility has been substantially completed, the NRC staff issued an operating license for CPSES Unit 2 on February 2, 1993.¹⁵ The issuance of this license authorized fuel loading and the operation of Unit 2 at up to five percent of rated power. In our order of March 5,

¹³ Orrs' Notice of Appeal, December 30, 1992; Orrs' Appeal Brief, filed January 8, 1993. By order dated December 31, 1992, the Orrs were granted an extension until January 8, 1993, to file their brief.

¹⁴ Orrs' Appeal Brief at 4-6.

¹⁵ Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2), Facility Operating License No. NPF-88, 58 Fed. Reg. 7822 (Feb. 9, 1993).

1993, we directed the parties to the appeals to show cause, given the status of construction, why the Commission should not: (1) dismiss the proceeding and the pending appeals as moot; (2) vacate the Licensing Board's order in accordance with United States v. Munsingwear, Inc., 340 U.S. 36 (1950), (3) and deny any further extension as unnecessary, thereby treating the construction permit as having expired as of the date of a Commission order dismissing the proceeding as moot. The licensee replied on March 9, 1993, and staff and the appellants followed with their replies on March 12, 1993.

II. Dismissal of the Dows' Appeal

Before addressing the mootness question, we consider whether the Dows' appeal should be dismissed for failure to file a brief in support of their appeal, as required by 10 C.F.R. § 2.714a. The Dows' notice of appeal and supporting brief were originally due on December 31, 1992. On January 7, 1993, the Dows filed a late notice of appeal with a motion for an extension of time to file a brief. Pursuant to a January 19, 1993 order, the Commission's Secretary granted the Dows their requested extension of time -- until January 22, 1993 -- in which to file their appellate brief. However, they have never filed a brief and, thus, their appeal has never been perfected.

Commission appellate practice has long stressed the necessity of a brief.¹⁶ A mere recitation of an appellant's

¹⁶ See, e.g., Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-3, 35 NRC 63, 66 (1992).

prior positions in a proceeding or a statement of his or her general disagreement with a decision's result "is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below."¹⁷ Accordingly, the appeal filed by R. Micky Dow and Sandra Long Dow, "dba" Disposable Workers of Comanche Peak Steam Electric Station, is dismissed.¹⁸

III. The Parties' Positions on Mootness

A) Licensee

TU submits that since January 30, 1993, the "design, construction, and pre-operational testing of CPSES Unit 2" has been substantially completed.¹⁹ TU argues that upon the issuance of the operating license for Unit 2, the facility's construction permit converted to the operating license, pursuant to 10 C.F.R. §§ 50.23 and 50.56.²⁰ This conversion, TU maintains, constructively terminated Unit 2's construction permit as of February 2, 1993, the date of the license's issuance. Thus, TU stresses that the appeals before the Commission are moot

¹⁷ Id. at 67.

¹⁸ See Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238, 240-41 (1991). In response to our March 5, 1993 order, R. Micky Dow presented arguments against a finding of mootness. In view of the Dows' dismissal, we need not consider Mr. Dow's arguments against finding the proceeding moot. Nonetheless, we believe that the merits of his arguments are addressed in our analysis.

¹⁹ On January 30, 1993, TU informed the staff that CPSES Unit 2 was ready for fuel load and operation. Response of TU Electric to the Commission's Order Dated March 5, 1993, at 13.

²⁰ Id. at 8-9.

because a construction permit extension is no longer needed and, given the conversion, is no longer even a relevant issue.²¹ TU concludes that the appeals of the Licensing Board's December 15, 1992 decision should be dismissed as moot, that the Commission should vacate the Licensing Board's decision in accordance with Munsingwear, and that the Commission should find that the construction permit for Unit 2 expired as of February 2, 1993.

B) NRC Staff

The NRC staff asserts many of the same arguments as the licensee. The staff claims that the construction permit amendment is moot because there no longer exists a construction permit, the permit having been converted to an operating license on February 2, 1993.²² The staff maintains that the appeals must be dismissed as moot because the Commission simply cannot grant the relief sought by the petitioners -- the denial of the construction permit extension request.²³ The staff also argues that when a proceeding becomes moot pending appeal, the Commission should vacate the unreviewed decision below, *i.e.*, LBP-92-37, in accordance with Munsingwear.²⁴

²¹ Id. at 9.

²² NRC Staff Response to the Commission's Order to Show Cause Why the Proceeding Should Not Be Dismissed As Moot, March 12, 1993, at 5.

²³ Id.

²⁴ Id. at 6.

C) Petitioners

B. Irene and D.I. Orr make several arguments against a finding that the proceeding is moot. The Orrs assert that the Commission should not have allowed TU to continue construction of Unit 2 without first granting them a hearing on the construction permit amendment.²⁵ The Orrs further claim that the Commission cannot issue an operating license until their challenge of TU's asserted "good cause" for the construction permit extension has been adjudicated.²⁶ More specifically, the Orrs argue that TU's ability to have their construction permit converted to an operating license is dependent upon whether TU showed good cause for the construction permit extension and that, consequently, the challenge to TU's asserted "good cause" is not a moot issue.²⁷

IV. Mootness Analysis

The mootness doctrine derives from the "case" or "controversy" requirement of Article III of the Constitution.²⁸ Generally, a case will be moot when the issues are no longer "live," or the parties lack a cognizable interest in the

²⁵ Petitioners' Response to the Commission's Order Dated March 5, 1993, at 4-6.

²⁶ Id. at 1-4.

²⁷ Id. at 8-10.

²⁸ The Commission is not strictly bound by the "case or controversy" requirement, but generally follows the doctrine absent the most compelling reasons. See, e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978), remanded on other grounds sub nom. Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979).

outcome.²⁹ Unless there is a substantial controversy "admitting of specific relief through a decree of a conclusive character," a case is moot.³⁰ Accordingly, a test for mootness is "whether the relief sought would, if granted, make a difference to the legal interests of the parties (as distinct from their psyches, which might remain deeply engaged with the merits of the litigation)."³¹ The mootness doctrine applies to all stages of review, not merely to the time when a petition is filed.³² Consequently, when effective relief cannot be granted because of subsequent events, an appeal is dismissed as moot.³³

In response to our order to show cause, the licensee and the staff maintain that this proceeding is moot, primarily on the basis that the construction permit was "converted" into an operating license on February 2, 1993. Although we agree with

²⁹ County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979); Murphy v. Hunt, 455 U.S. 478, 481 (1982).

³⁰ Preiser v. Newkirk, 422 U.S. 395, 401 (1975) (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937)).

³¹ Air Line Pilots Ass'n Int'l v. UAL Corp., 897 F.2d 1394, 1396 (7th Cir. 1990) (citing North Carolina v. Rice, 404 U.S. 244, 246 (1971)).

³² See Preiser v. Newkirk, 422 U.S. 395, 401 (1975); Roe v. Wade, 410 U.S. 113, 125 (1973).

³³ See, e.g., Westmoreland v. National Transp. Safety Bd. 833 F.2d 1461, 1462 (11th Cir. 1987); Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 575 (D.C. Cir. 1990) ("A case is moot if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than speculative chance of affecting them in the future"). See also Fair v. EPA, 795 F.2d 851, 854-55 (9th Cir. 1986) (sewer assessment district residents' challenge of EPA's approval of construction grant made moot by completed construction of sewer project).

the licensee and the staff that the proceeding is moot, we do not rest our analysis on their arguments regarding conversion of the permit. Rather, the licensee's substantial completion of construction, lawfully undertaken during the pendency of petitioner's challenge to the extension request, has rendered moot any controversy over further extension of the construction completion date in the permit.

Our determination that this construction permit amendment proceeding is moot derives from an understanding of the applicable provisions of the Atomic Energy Act (AEA), the Commission's regulations, and the Administrative Procedure Act (APA). With respect to construction permits, Section 185 of the AEA, 42 U.S.C. § 2235, provides in pertinent part:

The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification c) the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date.³⁴

The clear implication of the language is that if construction has been completed prior to expiration of the permit, then expiration will not occur. Rather, the permit will remain in force to be

³⁴ As we noted in an earlier decision concerning an extension of the completion date for CPSES Unit 1, the reason for requiring a specification of the earliest and latest completion dates for construction of a facility had nothing to do with the safe construction of the facility but was based on concerns over the allocation of scarce fuel at the time the AEA was enacted in 1954. Although the requirement for a termination date has remained in the statute, the policy reasons underlying that requirement have long ceased to exist. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 117-18 (1986).

converted to an operating license following the necessary findings set out in the remainder of section 185. Thus, section 185 establishes that a construction permit will not expire and no rights under the permit will be forfeited unless two circumstances are present: (1) the facility is not completed, and (2) the latest date for completion has passed. If construction is complete, no further extension of the completion date is required. Under such circumstances, the permit will not expire, and by clear implication the permit holder retains its rights under the permit.³⁵

TU did not complete construction of Unit 2 by August 2, 1992, the completion date specified in the construction permit prior to the latest request for an extension. Although the staff found good cause for further extension on July 28, 1992, the Orrs contend that in light of their challenge to TU's application, TU should be required to "demonstrate that it did not forfeit its right to construct and, as such, its right to obtain an operating

³⁵ 42 U.S.C. §2235. By way of contrast, in the unusual circumstance in which the permit holder allows the completion date to pass without making a prior request for a further extension, the construction permit does not automatically expire, though the permit holder loses its right to continue construction pending further Commission action. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 120 n.5 (1986), aff'd sub nom. Citizens Ass'n for Sound Energy v. NRC, 821 F.2d 725 (D.C. Cir. 1987). Commission regulations provide that the "substantial completion" of a facility satisfies the AEA's requirements regarding completion of the facility. See 10 C.F.R. §§ 50.56 & 50.57(a)(1) (1993) ("Pursuant to § 50.56, an operating license may be issued ... upon finding that ... [c]onstruction of the facility has been substantially completed....").

license for CPSES Unit 2."³⁶ They also claim that the Commission should have prohibited TU from continuing construction on Unit 2, once they filed a timely request for hearing.³⁷

The Orrs' arguments overlook, however, the applicability of the "timely renewal" doctrine in section 9(b) of the APA, 5 U.S.C. § 558(c), to TU's application for an extension of the completion date under the construction permit. This doctrine is adopted in NRC regulations at 10 C.F.R. § 2.109. Generally, if a licensee files an application for renewal or for a new license for an activity previously authorized at least 30 days prior to the expiration of the existing license, the existing license "will not be deemed to have expired until the application has been finally determined".³⁸ In the context of a construction permit, the filing of a timely request for an extension of the completion date maintains the construction permit in force by operation of law and, accordingly, the licensee may lawfully

³⁶ Petitioners' Response to the Commission's Order dated March 5, 1993, at 2.

³⁷ Id. at 4-6. The Orrs did not raise their objections to continued construction at the time that they filed their petition in July 1992; rather, they assert them for the first time in response to our March 5 order to show cause.

³⁸ 10 C.F.R. § 2.109(a)(1993). A construction permit is a "license" for these purposes. See AEA § 185, 42 U.S.C. § 2235 ("For all other purposes of this Act, a construction permit is deemed to be a 'license'"); see also 10 C.F.R. § 2.4.

continue construction activities pending a final determination of its application.³⁹

On February 3, 1992, well before 30 days prior to the August 2, 1992 completion date, TU filed a timely application for an extension of the date specified in the construction permit for completion of Unit 2. Had no petition for intervention and for hearing been received on TU's application, the staff's determination that good cause had been shown and its concomitant issuance of the order extending the completion date for Unit 2 would have ended the matter. Indeed, the timely renewal doctrine would not have even come into play. However, to the extent that petitioners' challenge to the application for extension left a final determination of the validity of the permit extension an open question pending any necessary hearing, the construction permit remained in force by virtue of both TU's timely application for an amendment to extend the completion date and the staff's issuance of the order extending the completion date.⁴⁰ Accordingly, TU did not forfeit its rights under the

³⁹ See Public Service Company of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 977 (1984). Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1 & 2), CLI-82-29, 16 NRC 1221, 1230 (1982) (hereinafter WPPSS). Our interpretation is consistent with the application of the APA's timely renewal doctrine to permits and licenses issued by other federal agencies. See, e.g., Natural Resources Defense Council, Inc. v. EPA, 859 F.2d 156, 213-14 (D.C. Cir. 1988) (continuance of pollution discharge permits); Committee for Open Media v. FCC, 543 F.2d 861, 867-68 (D.C. Cir. 1976) (continuance of broadcast license).

⁴⁰ See supra note 39. This case stands in marked contrast to the circumstances presented in 1986 when TU allowed the
(continued...)

construction permit and lawfully could continue construction of Unit 2.

The Orrs' argument that TU improperly continued to construct Unit 2 is plainly wrong. Their objection to staff's issuance of the extension of the permit prior to hearing upon a finding of "no significant hazards consideration" is inapposite. As we held in an earlier case, "[a] finding that the staff was incorrect in its decision regarding this procedural matter would have no effect on the continuing substantive validity of the [licensee's] construction permit pending any final agency action on the merits of the extension request."⁴¹

The petitioners argue that because they have challenged the underlying validity of the construction permit amendment granted by the staff in July 1992, it would be an abuse of discretion for the Commission to dismiss this case as moot.⁴² The Orrs thus

⁴⁰(...continued)

construction completion date for Unit 1 to pass without seeking an extension of the construction permit. In those circumstances, the timely renewal doctrine did not apply, but the court of appeals noted that a timely application automatically would have continued the permit in force pending the outcome of the proceeding. Citizens Ass'n for Sound Energy v. NRC, 821 F.2d 725, 731 (D.C. Cir. 1988). Even in Brooks v. Atomic Energy Comm'n, 476 F.2d 924, 925 (D.C. Cir. 1973) on which petitioners heavily rely, the court declined to order cessation of construction activities pending a hearing on extension of the permit, though the court did not address the applicability of the timely renewal doctrine.

⁴¹ WPPSS, CLI-82-29, 16 NRC at 1230. Even if the staff had denied TU's application, the permit would have remained in effect pending the outcome of any hearing on that denial.

⁴² Petitioners' Response to the Commission's Order Dated March 5, 1993, at 7.

demand the right to dispute the validity of staff's finding of "good cause" for TU's delay in completion of Unit 2. In support of their claim, the Orrs refer to Brooks v. Atomic Energy Comm'n, 476 F.2d 924, 928 (D.C. Cir. 1973), for its holding that "[t]he continuing validity of the amendment of the construction permit is made subject to the outcome of a hearing on this issue."⁴³

If there existed a need for the amendment granted by staff, the "continuing validity" of staff's "good cause" determination would remain a litigable issue. However, unlike in Brooks, the continued validity of the construction permit amendment granted by staff has become a moot issue. Contrary to the petitioners' arguments that they are guaranteed a right to a hearing under section 189(a) of the AEA,⁴⁴ the petitioners have no absolute entitlement to a hearing when a case has become moot, just as there is no statutory right to a hearing where petitioners lack standing or have failed to submit a viable contention.

On January 30, 1993, TU informed the staff that TU had "substantially completed the design, construction, and pre-operational testing of CPSES Unit 2" and that Unit 2 was ready for fuel load and operation.⁴⁵ The staff has found that the

⁴³ Petitioners' Response at 6.

⁴⁴ Id. at 3-4, 10.

⁴⁵ Response of TU Electric to the Commission's Order dated March 5, 1993, at 5-6 (citing Letter to NRC from William Cahill, Jr., Group Vice Pres. (Jan. 30, 1993)).

construction of CPSES Unit 2 is substantially complete.⁴⁶ Under section 185 of the AEA, a construction permit requires an extension only if construction is not complete by the time the permit expires. See 42 U.S.C. § 2235. Here, however, construction was substantially completed before any expiration of the permit. Therefore, during the time that TU continued construction activity, the construction permit did not expire and TU retained all rights under it, given the effect of the timely renewal doctrine under the APA and our regulations. Now that the facility is substantially completed, the licensee has satisfied the condition that would otherwise cause the construction permit to expire. Under section 185, no further need exists for an extension of the completion date under the construction permit and TU retains full rights to convert its construction permit, as previously amended, into an operating license in accordance with section 185 and the Commission's regulations.

The construction status of Unit 2, therefore, renders this proceeding moot. Because Unit 2 has been substantially completed, TU no longer requires a construction permit extension for CPSES Unit 2 to prevent the permit from expiring. Consequently, the relief that the intervenors seek -- a denial of the construction permit extension -- would not make a difference to their interests. The only question litigable in the construction permit amendment proceeding -- whether TU had

⁴⁶ NRC Staff Response to the Commission's Order to Show Cause Why the Proceeding Should Not Be Dismissed As Moot, at 5.

demonstrated "good cause" for a construction permit extension for Unit 2 -- is no longer of legal interest now that TU lawfully completed construction under the permit and requires no further extension of the expiration date.

This is not a case, as the Orrs imply, where the Commission simply has "dispensed" with a hearing because the staff has made a "no significant hazards consideration" finding.⁴⁷ The petitioners' appeal of the denial of their intervention petition would not be moot if the construction permit extension otherwise remained a "live" issue. Rather, the proceeding has become moot because a supervening event -- the licensee's substantial completion of Unit 2's construction -- has obviated the need for a further extension of the completion date under the construction permit. Thus, the only matter that could be challenged in the proceeding -- TU's asserted "good cause" for an extension -- became moot.⁴⁸ No effective relief can be granted the petitioners even if they were to prevail on their claim that further extension of the permit should be denied, because no further extension is required.

The petitioners argue that their underlying challenge to the permit extension prevents further action by the Commission to

⁴⁷ See Petitioners' Response to the Commission's Order Dated March 5, 1993, at 5.

⁴⁸ Even if we had summarily reversed the Licensing Board within days of receiving the Orrs' brief and ordered admission of their contention or if the Licensing Board itself had found the contention admissible, it is doubtful that the proceeding would have progressed beyond pretrial discovery and motions before subsequent events mooted the proceeding.

grant TU an operating license for Unit 2. Petitioners' Response at 8-10. Proceedings on construction permit extensions are, however, limited in scope and are not an avenue to challenge a pending operating license.⁴⁹ The Orrs have not previously sought intervention in the operating license proceedings for CPSES Unit 1 or Unit 2. They cannot now transform their challenge to a now-unnecessary extension of the construction completion date into an attack on the legitimacy of issuing an operating license.⁵⁰ Instead, they must either file a petition for late intervention and a motion to reopen the record of the operating license proceeding before issuance of a full power license or file a petition under 10 C.F.R. § 2.206 after issuance of a full power license.⁵¹

In addition, this case does not fall within the exception to the mootness doctrine for those disputes "capable of repetition, yet evading review."⁵² The principle applies only to cases in which both the challenged action was in its duration too short to be litigated, and there is a reasonable expectation that the same

⁴⁹ See Citizens Ass'n for Sound Energy, 821 F.2d at 729; WPPSS, 16 NRC at 1227-29.

⁵⁰ Cf. Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-68 (1991) (petitioner denied standing where alleged injury would not abate if challenged amendment were denied, and petitioner had failed to challenge separate amendment more directly causing injury).

⁵¹ See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-04, 37 NRC ____, slip op. at 3-7 (Mar. 9, 1993); id., CLI-92-1, 35 NRC 1, 6 (1992).

⁵² Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911).

complaining party will be subject to the same action again.⁵³ There is no "reasonable expectation" that the controversy over a construction permit extension for Unit 2 will recur because construction has been substantially completed and, thus, no further consideration of an extension of the completion date under the construction permit is necessary.

When prior to the end of the appellate process, the proceeding becomes moot through happenstance, we normally vacate the decision below.⁵⁴ Such action is appropriate in the circumstances before us.

⁵³ Securities & Exchange Comm'n v. Sloan, 436 U.S. 103, 109 (1978). The Orrs submit that the reasoning in Sholly v. NRC, 651 F.2d 780, 787 (D.C. Cir. 1980), vacated and remanded, 459 U.S. 1194, vacated and remanded to the NRC as moot, 706 F.2d 1229 (D.C. Cir. 1983), prevents this case from being moot. Sholly never provided that petitioners are entitled to a hearing when an issue is no longer "live." Indeed, the court would never have engaged in an extensive mootness analysis had such been its reasoning. In Sholly, the proceeding was not moot because the two challenged Commission actions were found "capable of repetition, yet evading review." 651 F.2d at 785-86. The court, however, stressed that the "decision to maintain the appeal, in the interest of sound judicial administration, is dependent on a prediction of a recurrence" of essentially the same legal dispute. Id. at 786.

⁵⁴ See United States v. Munsingwear, Inc., 340 U.S. 36, 39-41 (1950); A.L. Meckling Barge Lines, Inc. v. United States, 368 U.S. 324, 329 (1961); Fewell Geotechnical Eng'g, Ltd. (Thomas E. Murray, Radiographer), CLI-92-5, 35 NRC 83, 84 (1992); Consumers Power Co. (Palisades Nuclear Power Facility), CLI-82-18, 16 NRC 50, 51 (1982).

V. Order

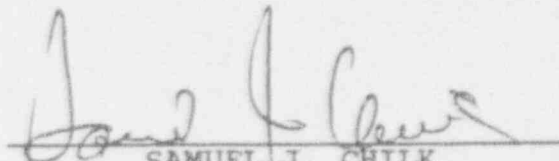
For the reasons stated in this decision, we hereby order that:

1. The appeal filed by R. Micky Dow and Sandra Long Dow, "dba" the Disposable Workers of Comanche Peak Steam Electric Station, is dismissed both as moot and for failure to perfect the appeal.
2. The appeal filed by B. Irene and D.I. Orr is dismissed as moot.
3. The Licensing Board's decision, LBP-92-37, 37 NRC ____, (1992) is vacated, pursuant to United States v. Munsingwear, Inc., 340 U.S. 36 (1950).
4. The proceeding is terminated.

IT IS SO ORDERED.

For the Commission




SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of March 1993.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

TEXAS UTILITIES ELECTRIC COMPANY

(Comanche Peak Steam Electric
Station, Unit No. 2)

Docket No.(s) 50-446-CPA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM M&O (CLI-93-10) DTD 3/30 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Morton B. Margulies, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
James H. Carpenter
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Peter S. Lam
Atomic Safety and Licensing Board
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Docket No.(s)50-446-CPA
COMM M&O (CLI-93-10) DTD 3/30

Juanita Ellis, President
Citizens Association for Sound Energy
1426 S. Polk
Dallas, TX 75224

Dated at Rockville, Md. this
30 day of March 1993


Office of the Secretary of the Commission