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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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

LICENSEE'S ANSWER TO THE MOTION TO REOPEN THE RECORD BY MICKY DOW AND SANDRA LONG DOW

On November 20, 1991, Mr. Micky Dow and Ms. Sandra Long Dow (the "Dows" or "Petitioners") filed a motion 1/ to reopen the record of the Comanche Peak licensing proceedings, alleging that: (1) they have uncovered "new evidence" regarding the payment of "hush" money to "whistleblowers" not to testify before this Board; and (2) Texas Utilities Electric Company ("TU Electric" or "Licensee") made material false statements before the ASLB and before the Department of Labor ("DOL").

The Licensee hereby files its response in opposition to Petitioners' motion. For the reasons which follow, the Licensee respectfully requests that the Commission direct the motion to the Secretary with instructions to summarily dismiss.

1/ Motion to Reopen the Record (November 20, 1991) ("Motion").

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The remainder of this response is divided into the following three sections:

- Section I provides a summary of Licensee's position.

- Section II provides background information related to the Petitioners' allegations, including a discussion of the disposition of past allegations that were similar to those now being raised by Petitioners.

- Section III demonstrates why Petitioners' motion is deficient and should be summarily dismissed.

I. SUMMARY

On February 27, 1978, the predecessor to TU Electric submitted an application for an Operating License ("OL") for Comanche Peak Steam Electric Station ("CPSES") Units 1 and 2. On July 13, 1988 after approximately nine years of litigation, the Atomic Safety and Licensing Board (the "Board" or the "ASLB") dismissed the OL proceeding and the Construction Permit Amendment ("CPA") proceeding 2/ on the basis of a Joint Stipulation and Joint Motion for Dismissal. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-

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2/ The CPA proceeding related to extension of the latest date of completion of construction in the construction permit for CPSES Unit 1.

18A, 28 N.R.C. 101 (1988). Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18B, 28 N.R.C. 103 (1988).

Following dismissal, several groups and individuals attempted to overturn the dismissal and reopen the proceeding based upon allegations similar to those now being raised by the Petitioners. These attempts were either withdrawn or were rejected by the Commission. See, e.g., Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 N.R.C. 605 (1988) and CLI-89-06, 29 N.R.C. 348 (1989). The Commission's refusal to reopen the CPSES proceedings was upheld by the courts. See Citizens for Fair Utility Regulation v NRC, 898 F.2d 51 (5th Cir.), cert. denied, 111 S. Ct. 246 (1990).

On November 20, 1991, the Petitioners filed a motion to reopen the record of these proceedings, alleging that: (1) they have uncovered "new evidence" regarding the payment of "hush" money to "whistleblowers" not to testify before this Board; and (2) TU Electric made material false statements before the ASLB and before the DOL. Petitioners' motion to reopen is virtually identical to the one submitted (and withdrawn) by Mr. Lon Burnam on July 13, 1989 and is the latest in a series of efforts to circumvent and undermine the Board's dismissal of the proceedings.

The motion should be denied for the following reasons:

First, once a proceeding is fully litigated and becomes final, consideration of a motion to reopen is no longer

appropriate. The Board concluded hearings in the CPA and OL proceedings for CPSES in July 1988. The OL for CPSES Unit 1 was issued in February 1990. Thus, there is no longer a pending proceeding which is subject to reopening under 10 C.F.R. § 2.734.

Second, Petitioners have no right to request that the record be reopened since they have never been a party to the proceedings. The rights of a non-party, such as Petitioners, are restricted to a limited appearance at hearings or a prehearing conference. A non-party has no other "rights" to participate in a hearing before the NRC.

Third, Petitioners have not demonstrated a right to intervene. Petitioners implicitly acknowledge that the motion itself is insufficient to constitute a petition to intervene since they state that they will not provide the basis for their intervention until 45 days from now. At most, the motion is a statement of an intent to seek intervention within 45 days. Even if the motion were construed as a petition to intervene, it is deficient because it fails to: (1) demonstrate standing and proffer at least one valid contention; and (2) address any of the five criteria governing late-filed intervention under the Commission's regulations. To allow Petitioners to reopen these proceedings after nine years of litigation, a settlement between the parties, and the issuance of the OL for CPSES Unit 1 would encourage potential intervenors to sit back and wait until a plant is operating to intervene.

Fourth, even if the deficiencies indicated above did not exist, Petitioners' motion would still not satisfy the Commission's requirements in 10 C.F.R. § 2.734 governing motions to reopen. In particular, Petitioners' motion does not indicate why any of the materials that it seeks to introduce into the record: (1) are timely raised; (2) have safety significance; or (3) would have led the Licensing Board to deny the joint motion for dismissal or the issuance of the CPA or OL. Therefore, the motion must be denied for failure to satisfy the requirements of 10 C.F.R. § 2.734(a).

Finally, Petitioners' cla. that TU Electric committed perjury because different pipe support design groups used different design criteria. This claim is utterly without merit. During the last eight years, others have raised allegations regarding the transfer of pipe support design packages among design organizations and the use of different design criteria or approaches. These allegations have repeatedly been determined to have no safety significance. Furthermore, the Petitioners have misinterpreted and mischaracterized TU Electric's statements. The statements in question accurately reflected the process used at CPSES, and Petitioners' interpretation of these statements is clearly in error.

II. BACKGROUND

This section is divided into the following three subsections: Section A discusses the history of events leading up to the Board's dismissal of the CPA and OL proceedings for CPSES,

and previous atte[illegible]s by individuals and organizations to undermine the Board's dismissal of the proceedings; Section B discusses reviews performed by the NRC Staff of the safety significance of previous allegations similar to those being raised by the Petitioners; Section C discusses the background of Petitioners, and previous allegations that they have made regarding the construction and operation of CPSES.

A. History of Licensing Proceedings at CPSES

Allegations similar to those raised by Petitioners have been submitted to the NRC in various contexts during the past eight years by other individuals and organizations. As discussed below, in each case, the NRC concluded that the allegations were baseless, or the allegations were withdrawn.

On February 27, 1978, the predecessor to TU Electric filed with the Commission an application for Operating Licenses for two pressurized water reactors, Comanche Peak Steam Electric Station, Units 1 and 2, in Somervell County, Texas. See 43 Fed. Reg. 20,583 (1978). On February 5, 1979, the Commission published a notice of consideration of issuance of the facility Operating Licenses in the Federal Register and provided the opportunity for interested persons to intervene and request a hearing on the application. 44 Fed. Reg. 6995 (1979).

The Citizens Association for Sound Energy ("CASE"), the Citizens for Fair Utility Regulation ("CFUR"), and the Texas Association of Community Organizations for Reform Now/West Texas Legal Services ("ACORN") filed timely petitions to intervene and

requests for hearing in accordance with 10 C.F.R. § 2.714. The State of Texas filed a timely petition to participate as an interested State, pursuant to 10 C.F.R. § 2.715(c). On March 15, 1979, the ASLB was established. The Board admitted CASE, CFUR and ACORN as intervenors and the State of Texas as an interested State. 3/ Twenty-five contentions were originally admitted by the Board along with three "Board Questions." 4/

ACORN withdrew from the OL proceeding in 1981, and CFUR withdrew from the OL proceeding in 1982. The Board dismissed or withdrew all the contentions and Board Questions excepted for Contention 5. 5/

3/ Order Relative to Standing of Petitioners to Intervene, (June 27, 1979).

4/ Order Subsequent to the Prehearing Conference of April 30, 1980, (June 16, 1980).

5/ Contention 5 read as follows:

> The applicants' failure to adhere to the quality assurance/quality control provision required by the construction permits for Comanche Peak, Units 1 and 2, and the requirements of Appendix B of 10 C.F.R. Part 50, and the construction practices employed, specifically in regard to 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. (CFUR 4A-ACORN 14-CASE 19 Joint Contention).

Order Subsequent to the Prehearing Conference of April 30, 1980, at 11 (June 16, 1980).

Following extensive hearings on Contention 5, the ASLB issued a decision which concluded that there was doubt about the design quality of Comanche Peak. As a result, the Board requested that TU Electric submit a plan to provide confidence in the CPSES design. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-81, 18 NRC 1410, 1452-56 (1983).

Subsequently, the remaining parties to the proceedings, TU Electric, CASE and the NRC Staff, were involved in resolving the remaining technical issues for the licensing of Comanche Peak. For its part, TU Electric instituted a third party review of CPSES through the Comanche Peak Response Team ("CPRT") and conducted a far-ranging and unprecedented Corrective Action Program ("CAP") at CPSES. This included comprehensive design and hardware validation programs to assure that CPSES met all regulatory requirements and could be operated safely.

In early 1987, TU Electric and CASE began an extensive information exchange process, including a number of technical meetings during which TU Electric explained its Corrective Action Program, and responded to any questions or concerns of CASE and its technical consultant. Due in large measure to that process and the comprehensive nature of TU Electric's ongoing programs, CASE and TU Electric entered into negotiations in mid-1988 in an effort to resolve their remaining technical differences. Those negotiations were successful and on June 28, 1988, CASE, Mrs. Juanita Ellis and TU Electric executed a "Settlement Agreement."

The Settlement Agreement and "Joint Stipulation," that was subsequently executed by TU Electric, CASE and the NRC, specified the terms of the agreements to seek dismissal of the licensing proceedings and formed the basis for the Board's dismissal of the licensing proceedings.

The essential substantive terms of the agreements between TU Electric, CASE, and the NRC Staff (as publicly disclosed by TU Electric and CASE in a July 13, 1988 prehearing conference before the ASLB) were as follows:

> 1. TU Electric agreed to the continuation of the Corrective Action Programs in accordance with the Joint Stipulation; 6/
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> 2. A CASE representative was appointed as a member of the Operations Review Committee for CPSES and was permitted to hire technical consultants at TU Electric's expense; 7/
>
> 3. The parties agreed to the Joint Dismissal of the licensing proceedings; 8/
>
> 4. TU Electric agreed to reimburse CASE in the amount of $4.5 million for its expenses, debts, attorneys fees and other costs incurred by CASE in the past and for any additional expenses CASE might incur in the future in closing out its participation in the NRC licensing proceedings and establishing its oversight role; 9/ and
>
> 5. TU Electric agreed to enter into good faith negotiations with workers who had discrimination

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6/ Joint Stipulation at 7-8.

7/ Settlement Agreement at 4; Joint Stipulation at 9.

8/ See LBP-88-18B, 28 N.R.C. 103, 104 (Joint Motion for Dismissal).

9/ Settlement Agreement at 4.

> claims as well as compensate workers assisting CASE in the total amount of $5.3 million. 10/

Neither the Settlement Agreement nor any other agreement precluded either CASE or any present or former worker at CPSES from bringing any safety-related or other matter to the attention of the NRC. 11/

Under the Joint Stipulation, the NRC staff agreed to resolve disputes between CASE and TU Electric concerning the design, construction, or operation of Comanche Peak. 12/ CASE obtained the right to appeal any such NRC staff decision on its concerns to the Director of the Office of Nuclear Reactor Regulation. 13/

On July 1, 1988, the parties to the proceedings filed with the Board a Joint Stipulation and Joint Motion For Dismissal. On July 5, 1988, the Board issued a "Memorandum and Order" terminating the proceedings subject only to the completion of the act of admitting certain documents referenced in the Joint Stipulation into the record at a prehearing conference to be held on July 13, 1988. 14/

10/ Settlement Agreement at 3; (Tr. [illegible]68-69.)

11/ *See* Joint Stipulation at 14 (which specifically states that "[n]othing in this stipulation shall prohibit CASE from continuing to exercise its existing rights to communicate with the NRC or any of its offices.")

12/ *Id.* at 12.

13/ *Id.* at 13.

14/ LBP-88-18A, 28 N.R.C. 101.

From July 7 to July 13, 1988, a number of petitions to intervene were filed with the Board which contained allegations similar to those raised by Petitioners. For example, an individual designated as "John Doe" submitted a letter to the Chairman of the Commission on July 10, 1988, with copies t the ASLB. He alleged that the NRC had no. properly investigat the concerns he had submitted several years earlier, and that TU Electric had committed perjury. Similarly, Mr. Lon Burnam made a limited appearance statement before the ASLB in which he brought up concerns about the ability of "whistleblowers" to testify and also accused TU Electric of perjury. (Tr. 25,230.) The Chairman of the Licensing Board rejected Mr. Burnam's unsubstantiated allegations and pressed Mr. Burnam for proof that any such actions were committed. (Tr. 25,230-32.) Mr. Burnam admitted: "I don't have personal proof; I have only suspicions." (Tr. 25,231 (Burnam).)

At the prehearing conference, the Board considered extensive statements by TU Electric, CASE and the NRC Staff in support of dismissal of the proceedings. (Tr. 25,266-283.) In addition, TU Electric provided a summary of the terms of the Settlement Agreement and the Joint Stipulation and agreed to make the Settlement Agreement publicly available upon dismissal of the proceedings. (Tr. 25,266-70.) On the basis of the pleadings and the argument of the parties, the Board issued an order dismissing the proceedings. (Tr. 25,269), LBP-88-18B, 28 N.R.C. 103.

The Commission subsequently denied two petitions to intervene related to the licensing of CPSES. CLI-88-12, 28 N.R.C. 605; CLI-89-06, 29 N.R.C. 348. Specifically, the Commission denied a late-filed petition from CFUR which asserted, in part, that a former Comanche Peak worker, James J. Macktal, Jr., had entered into an agreement with his former employer Brown & Root in settlement of claims before the DOL and that the settlement allegedly prevented the worker from contacting the NRC Staff. CLI-88-12, 28 N.R.C. at 612; CFUR's First Supplement To Its August 11, 1988 Request For Hearing and Petition For Leave To Intervene at 5 (Sept. 12, 1988). The Commission concluded that in addition to broadening the scope of the Comanche Peak OL proceedings, the validity of Mr. Macktal's settlement was pending before the DOL and did not constitute grounds for a hearing. 28 N.R.C. at 611 n.8. The Commission concluded that Mr. Macktal's settlement agreement did not constitute "good cause" for CFUR's failure to seek a timely intervention. Id. at 608.

The Commission also rejected a motion for limited intervention by Mr. Macktal who sought to "brief" the Commission on the interpretation of his agreement and a reconsideration of the Commission's earlier order (CLI-88-12). See CLI-89-06, 29 N.R.C. 348. Although the Commission affirmed the denial of CFUR's petition for intervention, in recognition of Mr. Macktal's pending proceedings before the DOL, the Commission expressly

withdrew any comment in CLI-88-12 concerning the validity of the agreement. 29 N.R.C. at 354-355.

Subsequently, CFUR appealed the Commission's decision not to reopen the CPSES proceedings, and Mr. Macktal intervened in that proceeding. The U.S. Court of Appeals for the Fifth Circuit affirmed the Commission's decision stating that CFUR did not present good cause for its late filing or otherwise demonstrate that its late filing should be accepted. In particular, the Court discussed the Macktal agreement, found that issues regarding the agreement were moot, and ruled that "CFUR cannot rely on such an agreement to establish good cause for its late-filed petition." Citizens For Fair Utility Regulation v. NRC, 898 F.2d 51, 54-56 (5th Cir.), cert. denied, 111 S. Ct. 246 (1990). Similarly, Mr. Macktal's petition for review of the Commission's decision was dismissed by the U.S. Court of Appeals for the District of Columbia. See Macktal v NRC, Docket No. 89-1034, (D.C. Cir. June 11, 1990). 15/

Additionally, in July 1989, Mr. Burnam submitted a motion to reopen the record in the CPSES OL and CPA Proceedings. 16/ Mr. Burnam also sought "leave to amend or file a renewed motion to intervene." (Burnam Motion at 1, 8.)

15/ In a related case, the U.S. District Court for the Fifth Circuit reversed a decision by the Secretary of Labor which excised the provision in question from the Macktal settlement agreement. Macktal v Secretary of Labor, 923 F.2d 1150 (5th Cir. 1991).

16/ Motion to Reopen the Record (July 13, 1989) ("Burnam Motion").

As grounds for reopening the record, Mr. Burnam alleged that: (1) he uncovered "new evidence" regarding Mr. Macktal's claim that he was paid "hush" money not to testify before the ASLB; and (2) "false and perjurious statements" were made by witnesses for TU Electric in a "whistleblower" action brought by Mr. S.M.A. Hasan before the DOL, and in proceedings before the ASLB between 1983 and 1985. However, Mr. Burnam withdrew his motion to reopen before the NRC could rule on it.

On February 8, 1990, the NRC issued an OL for CPSES Unit 1. Unit 1 completed its first cycle of operation in the fall of 1991.

B. Previous Reviews By the NRC Staff

On a number of occasions, the NRC Staff has reviewed allegations similar to those being raised by the Petitioners. In each case, the Staff concluded that the allegations did not have any safety significance or that the allegations were being properly addressed by TU Electric.

In the CPSES OL hearings, CASE presented testimony by Mark Walsh and Jack Doyle. One of the issues pertained to the adequacy of the organizational and design interfaces among the three groups that then had responsibility for the design of CPSES pipe supports. Among other things, Messrs. Walsh and Doyle were concerned that the three pipe support design groups were using different design approaches, and therefore were violating NRC and the industry quality requirements for design. The NRC Staff established a Special Inspection Team ("SIT") to investigate the

Walsh/Doyle issues. The SIT concluded that each of the design groups was required to satisfy the requirements of the American Society of Mechanical Engineers ("ASME") Code and Project Specification MS-46A, that each of the groups had its own approach for satisfying these design criteria, and that this arrangement did not violate any NRC regulations. 17/ The SIT inspection report was submitted into evidence in the hearings, and its conclusions were accepted by the ASLB. 18/

In early 1986, S.M.A. Hasan brought a number of concerns to the NRC, with CASE's assistance. In general, Mr. Hasan's technical concerns were similar to the pipe support design (Walsh/Doyle) issues raised by CASE in the operating license proceeding. In particular, Mr. Hasan alleged that pipe support design packages were being transferred from one pipe support design group to another group, which would utilize design criteria that were different from the criteria used by the first group. On May 28, 1987, the NRC requested that TU Electric review these allegations. 19/ TU Electric responded on July

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17/ NRC Inspection Report 50-445/82-26, 50-446/82-14 (Feb. 15, 1983) at 10-13.

18/ _Texas Utilities Generating Co._ (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-81, 18 NRC 1410, 1450-52 (1983). As the ASLB found, "since neither the [s]pecification . . . nor the ASME Code dictate in detail the means by which an engineer is to satisfy the design criteria, differences in engineering approaches occurred between the three parallel pipe support groups." LBP-83-81, 18 NRC at 1451.

19/ Letter from C.I. Grimes (NRC Office of Special Projects) to W. G. Counsil (TU Electric) (May 28, 1987).

2, 1987. 20/ On January 6, 1988, the NRC provided to Mr. Hasan not only TU Electric's response but also the Staff's evaluation of Mr. Hasan's pipe support allegations. The NRC Staff found that "the allegations, both individually and collectively, have been adequately addressed." 21/ In regard to Mr. Hasan's concerns that inconsistent design criteria were being used in the certification of pipe support design, the NRC Staff found:

> When the SWEC piping and pipe support requalification program [in the CAP program] was initiated, the design of pipe supports became the responsibility of a singe design organization (SWEC). Only one design criteria document (CPPP-7) is being used for the requalification of all ASME Code Class 1, 2, and 3 pipe supports at CPSES. Any identified deficiencies which might have resulted from the use of inconsistent design criteria will be corrected. Thus, the Staff finds that the collective allegation associated with the use of inconsistent pipe support design criteria by the previous design groups has been adequately resolved. 22/

Thus, the NRC Staff has previously concluded that the type of allegations raised by the Petitioners do not represent a safety concern. Furthermore, in various letters in 1987 and 1988, CASE provided the ASLB with copies of Mr. Hasan's allegations, TU Electric's response to the allegations, and the

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20/ Letter from W.G. Counsil (TU Electric) to U.S. Nuclear Regulatory Commission (July 2, 1987) (No. TXX-6535).

21/ Letter from Phillip F. McKee (NRC Office of Special Projects) to S.M.A. Hasan (Jan. 6, 1988).

22/ Letter from Phillip F. McKee (NRC Office of Special Projects) to Mr. S.M.A. Hasan, Enclosure 1 at 3 (Jan. 6, 1988).

NRC's disposition of the allegations. 23/ Therefore, the ASLB was fully aware of Mr. Hasan's allegations and their resolutions when it decided to approve the settlement of the CPSES OL proceeding.

C. Background Of Petitioners

The motion to reopen represents the latest of a series of claims, petitions, and law suits filed by the Dows against TU Electric and the NRC. As discussed below, the NRC has found that the Dows' claims are unsubstantiated and that they have no safety information regarding CPSES.

Mr. Dow claims that he was hired in January 1991 by an individual employed at CPSES to investigate certain matters and to attempt to negotiate a settlement between the individual and TU Electric. He also claims that, as a result, he came into possession of documents and audio tapes of CPSES switchboard conversations which allegedly identify safety violations at CPSES, including permission by NRC for CPSES to ignore possible hazardous conditions.

Subsequently, TU Electric and the NRC each met with Mr. Dow in an attempt to learn of any safety concerns he may have. However, Mr. Dow's concerns were general in nature or identified matters that were already known, and he did not divulge any specific new safety issues and/or give TU Electric or the NRC access to the tapes.

23/ CASE letters to the ASLB dated July 8, 1987, and May 17, 1988.

In May 1991, the NRC issued a subpoena requiring Mr. Dow to make materials in his possession available for copying by the NRC. Mr. Dow submitted a motion to quash the subpoena, which was denied by the Commission in June 1991. However, rather than comply with the subpoena, Mr. Dow fled to Canada in July and stated that he has requested political asylum, claiming that his life was in danger.

The Dows also initiated a number of legal proceedings against the NRC, TU Electric, and numerous other parties. These actions include a petition for an injunction against operation and construction of CPSES in the U.S. District Court for the Northern District of Texas, a complaint for damages in the U.S. District Court for the Western District of Pennsylvania, and a petition for review of issuance of the CPSES OL in the U.S. Court of Appeals for the D.C. Circuit. Additionally, on September 1, 1991, the Dows submitted a letter to Chairman Selin requesting that the CPSES OL be revoked and that a new OL proceeding be initiated. Each of these filings was also devoid of any specific safety allegations.

On October 3, 1991, the NRC decided not to pursue the subpoena against Mr. Dow. The NRC concluded that "under the circumstances, including all communications with you, there is no reasonable basis to believe that you are in possession of safety information regarding the Comanche Peak facility." (Letter from Martin to Dow of 10/3/91 at 2). On November 25, 1991, Chairman

Selin issued a letter to Mr. Dow stating that the Commission agreed with and supported the NRC's conclusion.

III. ARGUMENT

A. A Motion To Reopen Is Not The Proper Remedy In This Case

According to the Commission, "a motion to reopen under 10 C.F.R. § 2.734 goes to the need for further hearings in a formal matter which is pending before the Commission." Houston Lighting & Power Co. (South Texas Nuclear Plant) Docket Nos. 50-498-OL and 50-499-OL, slip op. at 1, (June 24, 1987) ("South Texas"). Once a proceeding is fully litigated and becomes final, consideration of a motion to reopen is no longer appropriate. 24/ Id., (citing Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 N.R.C. 261 (1979)). In the South Texas case, the Commission declined to entertain the intervenor's motion to reopen because the Board had already concluded hearings on the application for Operating Licenses for the South Texas Plant when the motion was submitted. 25/

24/ A good policy reason exists for this principle--if parties were allowed to reopen records after they had been closed, there would be little hope that the administrative process could ever be consummated. See, e.g., City of Angels Broadcasting v. FCC, 745 F.2d 656, 675 (D.C. Cir. 1984).

25/ The Commission noted that its decision did not leave the movant remediless. The Commission stated that:

> once new evidence arises after an issue has been fully litigated and a final agency decision has been

(continued...)

For similar reasons, the Petitioners' motion to reopen is not appropriate for consideration. The Board concluded hearings in the CPA and OL proceedings for CPSES in July 1988. The OL for CPSES Unit was issued in February 1990 and the construction permit for Unit 1 is no longer in effect. Thus, there is no longer a "pending" proceeding which is subject to reopening under 10 C.F.R. § 2.734.

B. Petitioners Have No Right To Request That The Record Be Reopened Since They Have Never Been A Party To The Proceedings

Petitioners seek to reopen the Comanche Peak Operating and Construction Permit Amendment licensing proceedings even though they have never been a party to the licensing proceedings. In these circumstances, they have no right to request that the Commission reopen this record. The rights of a nonparty, such as Petitioners, are clearly set forth in the Commission's regulations (10 C.F.R. § 2.715 (1991)) and are restricted to a limited appearance at hearings or a prehearing conference. A nonparty has no other "rights" to participate in a hearing before the Nuclear Regulatory Commission. Therefore, the motion to

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25/(...continued)
once new evidence arises after an issue has been fully litigated and a final agency decision has been rendered, one may seek relief by petitioning the Staff under 10 C.F.R. § 2.206.

South Texas at 1 (citing Carolina Power & Light Company (Shearon Harris Nuclear Power Plant), CLI-79-5, 9 N.R.C. 607, 610 (1979)).

reopen should be summarily denied.

C. Petitioners Have Not Demonstrated A Right To Intervene

On the face of the motion, it appears that Petitioners are seeking leave to file a petition to intervene. (Motion at 1-2.) Petitioners have not satisfied or even addressed a single requirement for a late-filed petition to intervene. Petitioners implicitly acknowledge that the motion itself is insufficient to constitute a petition to intervene since they state that they will not provide the basis for their intervention until 45 days from now. (Motion at 8.) At most, the motion is a statement of an intent to seek intervention within 45 days.

Even if the motion were construed as a petition to intervene, it is facially deficient and fails to make the requisite showing that their extremely late petition to intervene should be granted. A person seeking to intervene into a licensing proceeding before the NRC must demonstrate standing and proffer at least one valid contention. See Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 A.E.C. 423, 424 (1973); 10 C.F.R. § 2.714(a)(2) and (b) (1991).

The motion makes no showing as to standing, 26/ and does not identify a valid contention.

Furthermore, under 10 C.F.R. § 2.714(a)(1), an untimely petition to intervene may only be granted upon a balancing of the following factors:

> (i) Good cause, if any, for failure to file on time.
>
> (ii) The availability of other means whereby the petitioner's interest will be protected.
>
> (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
>
> (iv) The extent to which the petitioner's interest will be represented by existing parties.
>
> (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. 2.714(a)(1)(1991).

In filing untimely motions, the burden of persuasion is placed on the petitioner who must address each of the § 2.714(a)

26/ Judicial concepts of standing are normally applied in determining whether a party has sufficient interest in the proceedings. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-599, 10 N.R.C. 162 (1979), vacated on other grounds, CLI-80-34, 12 N.R.C. 407 (1980). Such standards require a showing that: (1) the action being challenged could cause injury-in-fact to the person seeking to establish standing; and (2) such injury is arguably within the zone of interests protected by the statute governing the proceedings. Petitioners cannot demonstrate that they have standing because they are not within the geographical zone that would be affected by an accidental release of radiation from CPSES. See e.g., Houston Lighting & Power Co., (South Texas Project, Units 1 and 2), LBP-79-10, 9 N.R.C. 439, 443 (1979); Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 N.R.C. 73, 78 (1979). Petitioners appear to reside in either Pennsylvania or Canada, while CPSES is located in Texas.

factors in the petition itself. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 N.R.C. 461, 466 (1985). Although all of the factors must be considered, a failure to demonstrate good cause for failure to file on time requires a compelling showing on the remaining four factors. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 N.R.C. 273, 274-75 (1975); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 N.R.C. 273, 279 (1986).

The Petitioners' motion is patently deficient as it fails to address any of the five criteria necessary to be granted status as a late-filed intervenor under the Commission's regulations. In particular, the Petitioners have failed to address "good cause" for the untimely filing and make no showing on the remaining factors. Thus, the Petitioners have failed to satisfy their burden and their petition should be summarily denied.

Furthermore, public policy requires the Commission to reject the tardy petition. The public, the NRC, and the parties have a substantial interest in the timely and orderly conduct of Commission proceedings. Fairness to all parties and "the obligation of administrative agencies to conduct their functions with efficiency and economy" require that adjudications be conducted without unnecessary delay. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 N.R.C. 273, 275 (1975) (citing 10 C.F.R., Part 2, app. A (1975)). As stated by the Atomic Safety and Licensing Appeals Board:

> . . . the promiscuous grant of intervention petitions inexcusably filed long after the prescribed deadline would pose a clear and unacceptable threat to the integrity of the entire adjudicatory process. See ALAB-552, supra, 10 NRC at 6-7, quoting from Duke Power Co.. (Cherokee Nuclear Station, Units 1, 2, and 3), ALAB-440, 6 NRC 642, 644 (1977). More specifically, persons potentially affected by the licensing action under scrutiny would be encouraged simply to sit back and observe the course of the proceeding from the sidelines unless and until they became persuaded that their interest was not being adequately represented by the existing parties and thus that their own active (if belated) involvement was required. No judicial tribunal would or could sanction such an approach and it is equally plain to us that it is wholly foreign to the contemplation of the hearing provisions of both the Atomic Energy Act and the Commission's regulations.

Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-599, 10 N.R.C. 162, 172-173 (1979), vacated on other grounds, CLI-80-34, 12 N.R.C. 407 (1980)(footnotes omitted).

The Court of Appeals for the District of Columbia affirmed the Commission's policy:

> [A] person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome . . . and then permit the whole matter to be reopened in his behalf, would create an impossible situation.

Easton Utilities Commission v. Atomic Energy Commission, 424 F.2d 847, 851 (D.C. Cir. 1970) (quoting Red River Broadcasting Co. v. FCC, 98 F.2d 282, 286-87, cert. denied, 305 U.S. 625 (1936)). The Court further stated:

> We do not find in statute or case law any ground for accepting the premise that proceedings before administrative agencies are to be constituted as endurance contests modeled after relay races in which the baton of proceedings is passed on from one legally

> exhausted contestant to a newly arriving legal stranger.

424 F.2d at 852.

The Commission need not look any further than the CPSES proceedings for a rationale for rejecting Petitioners' untimely motion. Specifically, the U.S. Court of Appeals upheld the Commission's rejection of CFUR's untimely petition to intervene. After noting that CFUR's petition was filed nine years out-of-time, six years after CFUR's voluntary withdrawal, and a month after the hearings had been dismissed, the Court concurred with the Commission's decision that 1) the CASE settlement did not provide good cause for an untimely petition, and 2) the grant of an untimely petition would delay the proceedings and broaden the issues in the proceeding. See Citizens For Fair Utility Regulation v NRC, 898 F.2d 51 (5th Cir.), cert. denied, 111 S.Ct. 246 (1990).

These principles are clearly applicable to the Petitioners' motion, which should accordingly be rejected. Petitioners should not be allowed to intervene into this proceeding and reopen these proceedings at such a late date. To allow Petitioners to reopen these proceedings after nine years of litigation, a settlement between the parties, and the issuance of the OL for CPSES Unit 1 would encourage potential intervenors to sit back and wait until a plant is operating to intervene. Therefore, Petitioners' motion should be denied in order to preserve the integrity of the adjudicatory process.

D. The Motion To Reopen The Record Does Not Satisfy The Commission's Requirements In 10 C.F.R. § 2.734(a)

Even if the infirmities indicated above did not exist, Petitioners' belated motion would still not support a decision by the Commission to reopen the record in the Comanche Peak proceedings. The Commission's regulations state that "[a] motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied":

> (1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
>
> (2) The motion must address a significant safety or environmental issue.
>
> (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

10 C.F.R. § 2.734(a)(1991) (emphasis added).

Similar to a person who files an untimely petition to intervene, the proponent of a motion to reopen a closed record in a licensing proceeding shoulders a "heavy burden." Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 N.R.C. 320, 338 (1978). The burden is on the movant to satisfy the requirements of 10 C.F.R. § 2.734(a). Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 N.R.C. 1 (1986). Furthermore, the motion must provide supporting information that is more than mere allegations; the information must be tantamount to evidence. Specifically, the new evidence supporting the motion must be

"relevant, material, and, reliable." Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 N.R.C. 1361, 1366-67 (1984). Further, the evidence should be in affidavit form given by competent individuals with knowledge of the facts or experts in the disciplines appropriate to the issues raised and must specifically detail why each of the requirements are satisfied. 27/

Petitioners have utterly failed to satisfy this burden. 28/ The motion consists solely of vague allegations about "hush" money, "false and misleading statements to the [Atomic Safety and Licensing] Board," and unspecified "evidence

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27/ 10 C.F.R. § 2.734(b) requires that:

> The motion must be accompanied by one or more factual affidavits which set forth the factual and/or technical basis for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issue raised. Evidence contained in the affidavits must meet the admissibility standards in § 2.743(c). Each of the criteria must be separately addressed with a specific explanation of why it has been met.

28/ Petitioners have compiled a compendium of allegations and "supporting" documents but fail to present this material in a manner that would allow the Commission to evaluate the significance of their complaints. Exhibits that are illegible, unintelligible or fail to identify their source have little probative value. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 N.R.C. 5 (1985). Petitioners' failure to cite to specific pages or portions assertively pertinent to the charge makes their exhibits of no value to the Commission. Id. The lack of organization and disorderly presentation of Petitioners' motion is a sufficient ground for denying their motion to reopen. See Pacific Gas & Electric C (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 N.R.C. 1362, 1368 n.22 (1984).

to show that there was duplicity between members of the NRC and members of the upper management of the applicant, to secure the license." (Motion at 3-5.) The motion is not supported by competent affidavits. 29/ Instead, the Petitioners attach lawyer's arguments in the form of briefs that were presented by Mr. S.M.A. Hasan before the Secretary of the DOL. (Exhibit F attached to the Motion.) These briefs are not evidence. They are merely allegations and argumentative conclusions. Furthermore, the Department of Labor has not accepted the arguments contained in these briefs 30/ Since Petitioners have not satisfied the evidentiary standard of 10 C.F.R. § 2.714(b), their motion to reopen the record should be summarily denied.

As demonstrated below, the motion does not indicate why any of the materials that it seeks to introduce into the record: (1) are timely raised; (2) have safety significance; or (3) would have led the Licensing Board to deny the joint motion for dismissal or the issuance of the CPA or OL. Therefore, the motion must be denied for failure to satisfy the requirements of 10 C.F.R. § 2.734(a).

29/ The Motion includes one "affidavit" that relates solely to Mr. Macktal's settlement agreement with Brown & Root. Mr. Macktal's agreement was considered by the Commission in an earlier decision and does not constitute grounds for a hearing.

30/ See Hasan v Nuclear Power Services, Inc., Case No. 86-ERA-24, "Recommended Decision and Order" (Oct. 21, 1987), "Final Decision and Order" (June 26, 1991). The Secretary's decision has been appealed to the U.S. Court of Appeals.

1. The Motion Is Not Timely Filed.

To be timely, the moving party must show that the issue sought to be raised could not have been raised earlier. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 N.R.C. 1361, 1366, aff'd sub nom San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), vacated in part on other grounds, 760 F.2d 1320 (1985), aff'd on reh'g en banc, 789 F.2d 26 (1986). Motions to reopen which are based on information which has been available to a party for one year or more are generally rejected by the Board. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No 1), ALAB-815, 22 N.R.C. 198 (1988). An untimely motion to reopen the record will not be granted unless the motion raises an "exceptionally grave" issue rather than just a significant issue. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-886, 27 N.R.C. 74, 76, 78 (1988) (citing 10 C.F.R § 2.734(a)(1)(1988)).

In the instant case, the motion to reopen has not been timely filed and has not raised any "exceptionally grave" issues which would warrant consideration. Petitioners' "new evidence" consists entirely of allegations that have been a matter of public record and have long been available. In fact, some of Petitioners' allegations are based upon material submitted on the CPSES docket years ago. 31/ As discussed below, the remainder

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31/ For example, Petitioners allege that they have "new evidence" concerning the payment of the "hush money" to CASE (continued...)

of Petitioners' allegations are almost identical to claims made by Mr. Burnam and other petitioners in 1988 and 1989.

Mr. Burnam raised the concern that Mr. Macktal was paid "hush" money in his July 1989 motion to reopen and in his July 1988 limited appearance statement before the Licensing Board. (Burnam Motion at 2; Tr. 25,230.) Furthermore, Mr. Macktal's allegations (including some of the exact same affidavit and exhibits cited by Petitioners) were presented by CFUR to the Commission in September of 1988. 32/ Thus, Petitioners' allegations about Mr. Macktal and his settlement agreement cannot be considered "timely".

Petitioners also claim that "false and misleading statements" were made by TU Electric before the Board and the DOL. (Motion at 4-5.) The gravamen of Petitioners' complaints is that the parties failed to disclose to the Board the allegations of "perjury" that were contained in pleadings that Mr. Hasan presented to the Secretary of Labor and that the testimony supporting these allegations conflicts with testimony

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31/(...continued)
and the "Secret Settlement Agreement" between CASE and TU Electric. (Motion at 3, 6, 8). However, the Settlement Agreement, with its provisions for reimbursal of CASE expenses, was submitted to the ASLB and made part of the record at the time the CPSES CPA and OL proceedings were dismissed. See LBP-88-18B, 28 N.R.C. 103. Similarly, the Petitioners cite other filings submitted by CASE to the ASLB. (Motion at 7-8).

32/ CFUR's First Supplement to Its August 11, 1988 Request For Hearing and Petition for Leave to Intervene (Sept. 12, 1988) (The September 9, 1988 Affidavit of Joseph J. Macktal, Jr. and Mr. Macktal's Settlement Agreement are attached to Mr. Burnam's Motion).

presented to the Board. (See Motion at 7.) In no way can this belated attempt to resurrect Mr. Hasan's allegations be considered timely. Mr. Hasan's claims are contained in briefs submitted to the Secretary of Labor on February 6, 1988 and April 18, 1988. 33/ Not only were the DOL proceedings a matter of public record, but Mr. Burnam raised his suspicions of "perjury" before the Licensing Board in July 1988 (during the prehearing conference (Tr. 25,230)) and in July 1989 (in his motion to reopen the proceedings). 34/

In summary, Petitioners seek to reopen the record on allegations that have been available to them for years and on allegations that Mr. Burnam raised more than two years ago. Therefore, the allegations raised by the Petitioners are not timely. Thus, the motion to reopen fails to satisfy the first criteria in 10 C.F.R. § 2.734(a), and should be rejected for its lack of timeliness.

2. Petitioners have not raised a significant safety or environmental concern.

The Commission's regulations mandate that a motion to reopen the record raise a serious safety or environmental issue. 10 C.F.R. § 2.734(a)(2)(1991). The Petitioners' motion fails to indicate why any of the matters that they propose to introduce

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33/ Brief to the Secretary of Labor, (Feb. 6, 1988)(Docket 86-ERA-20); Complainant's Response to Respondents Brief to the Secretary of Labor (April 18, 1988)(Docket 86-ERA-20) (Attachment G to the Motion).

34/ These allegations are currently the subject of a Section 2.206 proceeding.

could raise a serious safety or environmental concern. Consequently, the Commission should deny their motion to reopen the record in the Comanche Peak proceedings.

First, the Petitioners refer to allegations that Mr. Macktal was paid "hush" money not to bring safety concerns to the NRC. (Motion at 3, 4.) However, in 1986, the NRC Staff investigated and published an inspection report on all the allegations that Mr. Macktal was willing to disclose. 35/ A few of his concerns were substantiated by the NRC Staff and TU Electric promptly initiated corrective actions taken to resolve these concerns. 36/ Thus, Mr. Macktal's claim to have any remaining safety concerns must be viewed with skepticism. 37/ In any case, the allegations surrounding Mr. Macktal's settlement agreement with Brown & Root have not been expressed with sufficient specificity to conclude that they address a significant safety issue. Finally, the Commission has reviewed Mr. Macktal's claims of "hush" money and determined that they do not constitute grounds for a hearing and that the DOL is the proper forum for his allegations. CLI-88-12, 28 N.R.C. at 612; CLI-87-06, 28 N.R.C. at 355. The Courts have upheld the

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35/ NRC Inspection Report 50-445/86-15, 50-446/86-12, Appendix C.3.b. at 6-16 (Dec. 22, 1986).

36/ See Letters from Counsil (TU Electric) (TXX-6850) and (TXX-6466).

37/ In this regard, the Commission was forced to subpoena Mr. Macktal in order to ascertain if he had any allegations concerning safety at Comanche Peak. In re Joseph J. Macktal, No. OI-4-89-008, slip op. at 7 (June 22, 1988).

Commission's determination. See Citize.s For Fair Utility Regulation v NRC, 898 F.2d 51 (5th Cir.), cert. denied, 111 S.Ct. 246 (1990). See also, Macktal v NRC, Docket No. 89-1034 (D.C. Cir. June 11, 1990). Thus, the Comanche Peak licensing proceedings should not be reopened to consider Mr. Macktal's allegations.

Second, the Petitioners also refer to allegations raised by Mr. Hasan. (Motion at 5, 6.) However, the Petitioners seem to be unaware of the extensive investigations of Mr. Hasan's concerns that were performed by TU Electric and the NRC Staff. Mr. Hasan first brought his concerns to the NRC, with CASE's assistance, in January 1986 on a confidential basis. 38/ His technical concerns were similar to the pipe support design ("Walsh-Doyle") issues raised by CASE in the OL proceeding. Those issues played a major role in the development of both the CPRT Program Plan and the Corrective Action Program, which directly addressed most of Mr. Hasan's concerns. The NRC prepared a list of Mr. Hasan's 65 allegations, asked him to review them for accuracy, and then, on May 28, 1987, requested that TU Electric review these allegations. 39/ TU Electric responded on July 2, 1987. 40/ On January 6, 1988, the NRC

38/ See Letter from P.F. McKee (NRC, Office of Special Projects) to S.M.A. Hasan (Jan. 6, 1988).

39/ Letter from C.I. Grimes (U.S. NRC, Office of Special Projects) to W.G. Counsil (TU Electric) (May 28, 1987).

40/ Letter from W.G. Counsil (TU Electric) to U.S. Nuclear Regulatory Commission (July 2, 1987) (No. TXX-6535).

provided to Mr. Hasan not only TU Electric's response but also the Staff's Evaluation of Mr. Hasan's pipe support allegations. The Staff found that "the allegations, both individually and collectively, have been adequately addressed." 41/

The NRC Staff has considered Mr. Hasan's claim that the pipe support design groups at Comanche Peak maintained different design criteria for the certification of pipe supports. See Letter from McKee (NRC, Office of Special Projects) to Hasan Enclosure 1 at 2, Enclosure 2 at 3, item 23 (of Jan. 6, 1988). The NRC Staff concluded that the Stone and Webster ("SWEC") requalification program was initiated to requalify all American Society of Mechanical Engineers ("ASME") Code Class 1, 2 and 3 pipe supports to a single design criteria and would correct any deficiencies that would have resulted from inconsistent design criteria. Id., Enclosure 1 at 2. Thus, Petitioners' concerns about the use of different design criteria by different groups no longer has any potential safety significance.

Finally, Petitioners' allegations of perjury are based on the testimony presented by Mr. S.M.A. Hasan before the DOL. In regard to the veracity of this witness, the ALJ presiding over Mr. Macktal's section 210 complaint stated:

> As the main support for his complaint, complainant cited his frequent raising of "safety concerns" to management and his oft-repeated threat to "go to the NRC" unless his concerns were satisfied. He also claims he telephoned an employee of the NRC beginning in February of 1985 to convey these "safety concerns."

41/ Letter from Phillip F. McKee (U.S. NRC Office of Special Projects) to Mr. S.M.A. Hasan (Jan. 6, 1988).

> Having considered the entire record in this case, including the relevant documents, the testimony of the witnesses who appeared before me, the videotaped testimony of the NRC employee and, in particular, claimant's demeanor at the hearing, I find that his version of events is simply not believable.

Hasan v. NPSI, Docket No. 86-ERA-24, slip op. at 3, (Oct. 21, 1984). 42/ Thus, Petitioners' allegations are premised on the arguments of counsel and on the testimony of a witness who was determined to be without credibility.

Thus, it is clear that the concerns raised by Petitioners could not have any direct safety significance. The Commission should not reopen this proceeding to litigate these ancient and resolved allegations.

3. Petitioners Have Not Demonstrated That The Matters Would Have Caused The Board Not To Dismiss The Proceedings

In order to reopen the record, Petitioners must also demonstrate that "a different result would be or would have been likely had the newly proffered evidence been considered initially." 10 C.F.R. § 2.734(a)(3) (1991). When the motion to reopen the record is not related to a litigated issue, the effect of the proffered evidence cannot be measured against the Board's decision on a particular issue, but must be viewed against the effect on the outcome of the proceeding. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 N.R.C. 1132, 1142 (1983) (citing Vermont Yankee Nuclear Power

42/ This order was affirmed by the Secretary of Labor in a "Final Decision and Order" (June 26, 1991). The Secretary's decision has been appealed to the U.S. Court of Appeals.

Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 A.E.C. 520, 523 (1973)).

The matters Petitioners seek to introduce into the record would not have caused the Board to reject the settlement of the proceedings. Petitioners' allegations concerning Mr. Macktal's settlement with Brown & Root and "perjury" in Mr. Hasan's DOL proceeding and before the ASLB are similar to the allegations raised by CFUR and Mr. Burnam. CFUR and Mr. Burnam presented these allegations to the Board and the Commission years ago. The allegations were not a sufficient basis for reopening the hearings then, and they are not a sufficient basis now. Similarly, Mr. Hasan's concerns about pipe supports were presented to the Board in May of 1988. 43/ These allegations also were not sufficient to block dismissal of the proceedings.

Mr. Macktal and Mr. Hasan's safety concerns were also fully investigated by the NRC Staff and were found to raise no safety concern 44/. Additionally, the Commission concluded that Mr. Macktal's agreement with Brown & Root does not constitute grounds for a hearing. The Courts have upheld the Commission's determination. See Citizens For Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir.), cert. denied, 111 S. Ct. 246 (1990). See also, Macktal v. NRC, Docket No. 89-1034, (D.C. Cir. June 11, 1990).

43/ See Section D.2, infra.

44/ CLI-88-12, 28 N.R.C. 605.

Finally, Mr. Hasan's concerns about the criteria used by the three pipe support design organizations at Comanche Peak were resolved by TU Electric's Corrective Action Program. Any dispute over testimony before the DOL is properly before that tribunal, and any claim regarding TU Electric's witnesses or the conduct of counsel for the Licensee or the NRC Staff in this proceeding is based upon unsubstantiated lawyer's arguments and on the statements of a witness who was found to be without credibility. Additionally, as discussed below, these claims are utterly without merit. Thus, these allegations would not have caused the ASLB to reach a different result.

E. Petitioners' Claims That TU Electric Engaged In Perjury Are Utterly Without Merit

Petitioners allege that TU Electric committed perjury and submitted material false statements to the ASLB from 1982 to 1985, because 1) different or multiple sets of design criteria were used to certify individual pipe supports subject to field changes, and 2) the responsibility for the design of field changes for pipe supports was transferred from one pipe support design group to another group. (Motion at 4-6.) While it is unnecessary for the Commission to reach these scurrilous allegations in order to decide this matter, these charges are so patently without merit that they cannot go unanswered on the record.

Initially, there was only a single pipe support design group at CPSES. In order to maintain schedule, TU Electric

decided to utilize two additional pipe support design groups and to divide the design responsibility for pipe supports among the groups. As a result, during the early 1980's, there were three separate pipe support design groups at CPSES. Each group was responsible for certifying the design of particular supports. Additionally, the pipe support design group that performed the original design would, in general, review and certify field changes to its designs. In a relatively few cases, design responsibility for a pipe support was transferred from one design group to another group, which then became responsible for performing the calculations for and certifying the design of the entire support. However, at any particular time (including final certification), only one group had responsibility for certifying the design of any individual support (including the review of its field changes).

Contrary to the Petitioners' allegation, different or multiple sets of design criteria were not used to certify an individual pipe support. Each group was required to comply with the governing provisions of the ASME Code and Project Specification MS-46A, but was permitted to achieve compliance with these provisions by using its own methodology (which some witnesses called "design criteria," and still other witnesses and the ASLB called "design approaches"). Therefore, even though the design methodologies differed from group to group, only the methodology of the responsible design group was used in certifying an individual support. The ASLB in the CPSES OL

proceeding acknowledged this situation and found it to be acceptable, and there is nothing cited by the Petitioners which is inconsistent with the ASLB's findings. 45/

Petitioners' allegation related to the transfer of design responsibility is similarly misplaced. Such transfers were explicitly authorized by 10 C.F.R. Part 50, Appendix B, Criterion III and ANSI N45.2.11. In particular, Criterion III of Appendix B states that "[d]esign changes, including field changes, shall be subject to design control measures commensurate with those applied to the original design and be approved by the organization that performed the original design _unless the applicant designates another responsible organization_." 10 C.F.R. Part 50, app. B (1991) (emphasis added).

Some passages in TU Electric's testimony and affidavits before the ASLB stated that the review and certification of field changes would be performed by the "original design organization;" other passages stated that the review and certification would be performed by the "responsible design organization." 46/

45/ _Texas Utilities Generating Co._ (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-81, 18 N.R.C. 1410, 1450-51 (1983); Applicants' Exhibit 142 at 9; Staff Exhibit 207 at 12-13; Tr. 5014, 5279.

46/ _See, e.g._, Applicants' Exhibit 142 at 34-35; (Tr. 4954, 4957-58); Affidavit of John C. Finneran, Jr., Regarding Stability of Pipe Supports and Piping Systems (June 17, 1984) at 14, 23; Affidavit of D.N. Chapman, J.C. Finneran, Jr., D.E. Powers, R.P. Deubler, R.E. Ballard, Jr., and A.T. Parker Regarding Quality Assurance Program for Design of Piping and Pipe Supports for Comanche Peak Steam Electric Station (July 3, 1984) at 51. Additionally, in other cases, TU Electric stated that the review of field changes would be (continued...)

Petitioners imply that the use of the term "original design organization" is inconsistent with the fact that design responsibility for the entire support was on occasion transferred from one design group to another. However, the subject and purpose of the testimony was to clarify that field design changes were always approved by the design organization responsible for the entire design. There was no statement or indication that design responsibility had not been or was forever prohibited from being transferred from one design group to another. Thus, the Petitioners clearly take testimony out of context and improperly claim that TU Electric witnesses were addressing subjects that were not even at issue at the time the statements were made.

The issues before the ASLB primarily involved the adequacy of the iterative design process for pipe supports. In this particular instance, the ASLB was concerned with whether changes authorized by field engineering (which was not a design organization) were subject to review and certification by a responsible pipe support design group to ensure that any deficiencies introduced by the field changes would be identified and corrected. To address this issue, TU Electric presented testimony and affidavits which stated that field changes would be reviewed and approved by the responsible design group. It was in this context that TU Electric witnesses stated that changes authorized by field engineers were subject to review and

46/(...continued)
performed by the "proper design organization." (Tr. 5184, 5185-86.)

certification by the original design organization. These statements paraphrased the language in Appendix B, ANSI N45.2.11, and the CPSES design control procedures, and they accurately reflected that design groups (and not field engineers) were being used for certification of pipe supports at CPSES. Furthermore, TU Electric witnesses were never asked to discuss matters related to the transfer of design responsibility of individual supports, and never claimed that transfers of design responsibility had not occurred. Thus, there was no reason to discuss particular instances of such transfers since the ASLB was aware that the general scope of responsibility of the three design groups had changed over time.

Therefore, TU Electric's statements were entirely appropriate and directed to the issue in question before the ASLB. The transfer of design responsibility from one design group to another design group was not the issue, or material to the issue, being decided by the ASLB. Thus, Petitioners' allegations that TU Electric committed perjury and submitted "material false statements" are clearly in error, and Petitioners should be admonished for making such irresponsible allegations. 47/

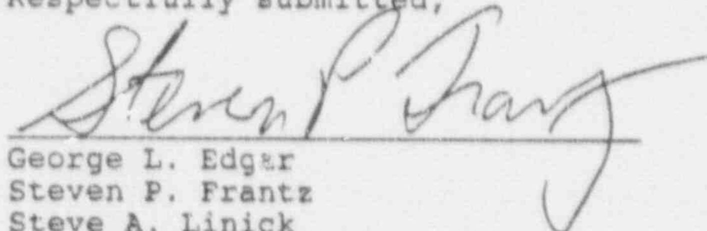
47/ Under § 2.713(c), a party or its representative may be reprimanded, censured, or suspended from a proceeding for engaging in "disorderly, disruptive, or contemptuous conduct." 10 C.F.R. § 2.713(c)(1991). Petitioners' allegations of perjury in this case are sanctionable under this provision. See, e.g., Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-85-45, 22 N.R.C. 819, 827-829 (1985)(the ASLB has authority to issue
(continued...)

CONCLUSION

Accordingly, for the foregoing reasons, Licensee respectfully requests that Petitioners' motion to reopen be summarily denied because: (1) a motion to reopen is inappropriate in this case; (2) Petitioners are not a party to these proceedings; (3) Petitioners have made no attempt to make a facial showing of their rights to intervene under 10 C.F.R. § 2.714; and (4) the motion fails to satisfy any of the requirements to reopen the record under 10 C.F.R. § 2.734(a).

The Commission should find that this motion is frivolous and should direct the motion to the Secretary with instructions to summarily dismiss the motion.

Respectfully submitted,



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Dated: December 2, 1991

47/(...continued)
sanctions against a party that makes unfounded and reckless allegations of perjury).

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of TEXAS UTILITIES ELECTRIC COMPANY (Comanche Peak Steam Electric Station, Units 1 and 2	Docket Nos. 50-445-OL 50-446-OL

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Answer to the Motion to Reopen the Record By Micky Dow and Sandra Long Dow" and the attached "Notices of Appearance of Counsel" were served upon the following persons by deposit in the United States mail, postage prepaid and properly addressed, on the date shown below:

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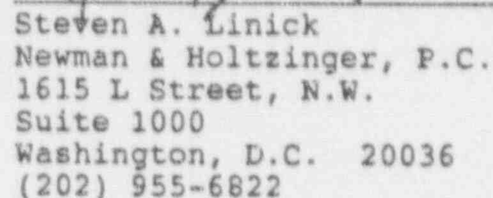
Dated this 2nd day of December, 1991



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

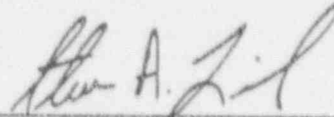
BEFORE THE COMMISSION

In the Matter of TEXAS UTILITIES ELECTRIC COMPANY (Comanche Peak Steam Electric Station, Units 1 & 2	Docket Nos. 50-445 50-446

NOTICE OF APPEARANCE OF COUNSEL

Notice is hereby given that Steve A. Linick enters an appearance as counsel for Texas Utilities Electric Company in the above-captioned proceeding.

Name:	Steve A. Linick
Address:	Newman & Holtzinger, P.C. 1615 L Street, N.W. Suite 1000 Washington, D.C. 20036
Telephone:	(202) 955-6600
Admissions:	District of Columbia
Name of Party:	Texas Utilities Electric Company Skyway Tower 400 North Olive Street Dallas, TX 75201



Steve A. Linick

Newman & Holtzinger, P.C.
1615 L Street, N.W.
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Date: December 2, 1991

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NOTICE OF APPEARANCE OF COUNSEL

Notice is hereby given that Steven P. Frantz enters an appearance as counsel for Texas Utilities Electric Company in the above-captioned proceeding.

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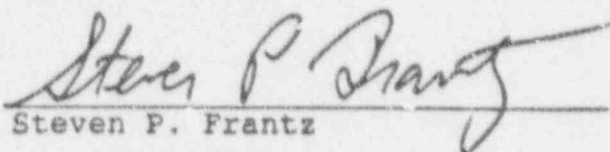

Steven P. Frantz

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Date: December 2, 1991