

U.S. NUCLEAR REGULATORY COMMISSION
DOCKET NO. 50-445
TEXAS UTILITIES ELECTRIC COMPANY
COMANCHE PEAK STEAM ELECTRIC STATION

RECEIPT OF PETITION FOR DIRECTOR'S DECISION UNDER 10 CFR §2.206

Notice is hereby given that by Memorandum and Order of January 17, 1992, CLI-92-01, the U.S. Nuclear Regulatory Commission (NRC) referred to the NRC staff under 10 CFR §2.206 allegations by Sandra Long Dow and Richard E. Dow (Petitioners) concerning the pipe support design at the Comanche Peak Steam Electric Station, Unit 1. These allegations were contained in a Motion to Reopen the Record (Motion) filed by Petitioners in the Comanche Peak operating license proceedings for Units 1 and 2. As provided by 10 CFR §2.206, the NRC will take appropriate action on this referral within a reasonable time.

The Petitioners assert as a basis for their Motion that Texas Utilities (TU Electric or the licensee) witnesses repeatedly made false and misleading statements to the Licensing Board between 1982 and 1985, and that these statements prompted the Board to rely on, or adopt false or misleading facts when issuing its Memorandum and Order of December 28, 1983, insofar as it addressed the question of pipe design at Comanche Peak. Specifically, the Petitioners allege that false information presented to the ASLB, the NRC staff, or both, led the ASLB to believe that

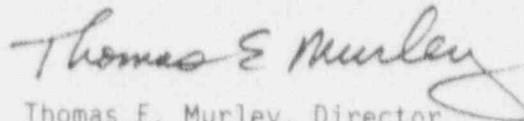
The evidence establishes that each of the three pipe support design organizations has its own specific group of supports. There is no need for cross communication between the three groups since they share no common, in-line design responsibility....The Board concludes that the Applicants have adequately defined and documented the responsibility and paths of communication between...the pipe support design groups. No NRC regulation has been violated.

The Petitioners also allege that after the NRC issued the Order, TU Electric filed a series of motions for summary disposition that included affidavits in which affiants knowingly made false statements to the effect that each of the three design organizations had "separate and distinct responsibilities for the design of pipe supports" and all design changes during construction are "returned to the original designer for correction and rechecking."

A copy of the Petition is available for inspection in the U.S. Nuclear Regulatory Commission's Public Document Room, the Gelman Building, 2120 L Street, N.W., Washington, D.C. 20555 and at the University of Texas at Arlington Library, Government Publications/Maps, 701 South Cooper, P. O. Box 19497, Arlington, Texas 76019.

Dated at Rockville, Maryland, this 18th day of February 1992.

FOR THE NUCLEAR REGULATORY COMMISSION



Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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
50-445-CPA

CLI-92-01

MEMORANDUM AND ORDER

I. Introduction.

This matter is before the Commission on a request by Sandra Long Dow and Richard E. ("R. Micky") Dow ("petitioners") to reopen the Comanche Peak operating license proceedings.¹ The Texas Utilities Electric Company ("TU Electric"), the licensee, and the NRC Staff have responded in opposition to the request. For the reasons stated below, we deny the request to reopen the proceedings.²

¹Sandra Dow represents an organization entitled "Disposable Workers of Comanche Peak Steam Electric Station."

²Petitioners styled their pleading as "before the Atomic Safety and Licensing Board." However, there is no Board currently constituted in the Comanche Peak operating license proceedings because all activity in the adjudicatory portion of that proceeding ended several years ago. Indeed, were it not for the fact that the license for Unit 2 has yet to be issued, there would be no operating license proceeding to "reopen." Accordingly, this matter is before the Commission for disposition.

The pleading also contains statements that might be construed as allegations of misconduct by NRC employees. For that reason, it has been referred to the Office of Inspector General for appropriate action.

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II. Factual Background.

The NRC initiated the Comanche Peak operating license ("OL") proceedings in 1979. See 44 Fed. Reg. 6995 (February 5, 1979). At that time, three parties were admitted into the proceeding. Neither the Dows nor the "Disposable Workers of Comanche Peak," the organization they represent, were among those parties. Subsequently, two of the three original intervenors voluntarily withdrew from the proceedings. A second proceeding dealing with a construction permit amendment ("CPA") for Comanche Peak Unit 1 was added in 1986 and consolidated with the OL proceeding. Again, neither the Dows nor the "Disposable Workers" sought intervention. In July, 1988, the NRC's Atomic Safety and Licensing Board issued an order dismissing the Comanche Peak proceedings pursuant to a settlement agreement between the parties: TU Electric, the Staff, and the Citizens Association for Sound Energy ("CASE"), the lone remaining intervenor. See Texas Utilities Electric Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18A, 28 NRC 101 (1988); LBP-88-18B, 28 NRC 103 (1988).³

II. Arguments Of Parties.

A. Petitioners' Request.

On November 20, 1991, the petitioners filed the pleading now before us. Petitioners labeled the pleading a "motion to reopen the record," but asked the Commission to both "reopen the record ... and thereafter grant the

³We subsequently denied a request for "re-intervention" by a former intervenor who had previously withdrawn from the proceedings. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605 (1988), as modified, Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-06, 29 NRC 348 (1989), aff'd Citizens Association for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1989), cert. denied, 111 S.Ct. 246 (1990).

petitioners leave to file their motion for intervention." See Motion to Reopen ("Motion") at 1. Petitioners stated their intention to "file, within 40 days, all necessary affidavits and other documentation" Motion at 8. Petitioners claimed authority for their submission under 10 C.F.R. §2.734, which governs motions to reopen a record, and addressed the three factors required by that section.⁴

A request to reopen the record must be (1) timely, (2) address "a significant safety or environmental issue," and (3) "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). Briefly, petitioners allege that they satisfy the first prong of the test "because some of the evidence, of the greatest material value to [the NRC], has only come to light within the last thirty (30) days." Motion at 2-3. Petitioners allege that this

[n]ew evidence regarding the payment of "hush" money to whistleblowers, not to testify before this Board surfaced for the first time after the record was closed; and, new evidence concerning the payment of "hush" money to the intervenor C.A.S.E., has only, now, surfaced.

Motion at 3.

Petitioners allege that they satisfy the second prong of the test because they have provided evidence of (1) money paid to potential witnesses not to testify before the Licensing Board, and another witness coerced into accepting money in exchange for not testifying before the Licensing Board,

⁴Petitioners also cite "29 C.F.R. Part 18" as authority for their submission. However, Chapter 29 of the Code of Federal Regulations contains regulations applicable to the Department of Labor ("DOL"), not the NRC. We presume petitioners have confused DOL regulations with NRC regulations, found at Chapter 10 of the Code of Federal Regulations.

Motion at 3-4; (2) false and misleading evidence submitted by TU Electric which was the basis for a Licensing Board decision in December, 1983, Motion at 4-5; and (3) false testimony by the management of TU Electric and Brown & Root, its principal contractor, in a Department of Labor ("DOL") proceeding arising from actions at Comanche Peak. Motion at 5-6.

Finally, petitioners allege that they satisfy the third prong of the "reopening" test because they believe that they would have been granted leave to intervene in the proceedings had they known about this information at that time and been able to bring it to the Board's attention. Motion at 6. Petitioners also allege that various representatives of TU Electric, CASE, and the NRC Staff either "knowingly remained silent" and deliberately failed to notify the Board of relevant information or actively perjured themselves before the Licensing Board during these proceedings. Motion at 6-8.

However, the petitioners do not submit any affidavits by themselves or anyone else in support of these allegations in this particular motion. See 10 C.F.R. §2.734(b). Instead, they submit selections from various prior pleadings before either the NRC or the DOL.

B. The Licensee's Response.

The licensee argues that petitioners cannot seek to "reopen" the record because they were never a "party" to the proceeding when it was an active, ongoing proceeding. See Texas Utilities Response ("TU Resp.") at 20-21. The licensee then argues that petitioners have failed to demonstrate any right to intervene in the proceedings because they failed to address the requirements for a late-filed petition. TU Resp. at 21-25. Finally, the licensee argues, assuming arguendo that petitioners can seek reopening of the record, that petitioners' pleading does not satisfy the requirements of section 2.734. TU

Resp. at 25-41. The licensee urges, among other things, that the allegedly "new" material is not new and that all of the concerns raised by petitioners have been reviewed and addressed by the NRC.

C. The NRC Staff's Response.

The Staff supports the licensee's argument that only a party to a proceeding can seek to reopen that proceeding. NRC Staff Response ("Staff Resp.") at 5-6. The Staff then argues that petitioners have failed to demonstrate that they have standing to intervene, Staff Resp. at 6-9, and that petitioners have failed to address the requirements for a late-filed petition to intervene. Staff Resp. at 9. Finally, the Staff argues that petitioners have failed to satisfy the requirements of a motion to reopen. Staff Resp. at 10-18. In the process, the Staff points out that, with perhaps two exceptions, the pleadings submitted as "new evidence" by the petitioners have been submitted to the NRC on previous occasions by other potential intervenors.

III. Analysis.

A. Petitioners' Request To Reopen The Record.

We find that petitioners are barred from seeking a reopening of the record because they were not parties to the proceeding itself. As the Staff correctly points out, the regulation itself does not -- by its words -- limit motions to reopen to parties. However, we believe that such is the proper interpretation.

The purpose of Part 2, Subpart G, is to set out the procedures whereby a person or organization petitions for and then exercises the right to participate in formal NRC adjudications. See generally 10 C.F.R. §2.700. A

brief review of our regulations clearly demonstrates that the word "motion" is used when describing a pleading filed by those who have become parties to a proceeding and are attempting to exercise rights gained as a result of that status. On the other hand, our regulations use the word "petition" to describe a pleading filed by one who has not yet been admitted to "party" status, *i.e.*, one who has not yet established a legal right to participate in a proceeding. Cf. 10 C.F.R. §2.714.

Here, petitioners have never been parties to the Comanche Peak proceeding; at this time they may only become parties by filing a petition for late intervention under 10 C.F.R. 2.714(a)(1) and satisfactorily addressing the five factors contained therein. Unless and until petitioners petition for, and are granted, intervention in the proceeding, they cannot move to reopen the record.⁵

Petitioners also cite Rule 60(b) of the Federal Rules of Civil Procedure ("FRCP") in support of their position that a closed proceeding may be reopened and reexamined. See Motion at 1-2 (A "court may relieve a party or a party's legal representative from a final judgment, order, or proceeding"). However, consistent with the language in that rule, all the judicial decisions we have found addressing the issue have held that only a "party" or one in privity with a party may request relief under Rule 60(b). Western Steel Erection Co. v. U.S., 424 F.2d 737, 739 (10th Cir. 1970); Ratner v. Bakery & Confectionery Workers, 394 F.2d 780, 782 (D.C. Cir. 1968); Screven v. United

⁵Because the NRC has not yet issued the license for Unit 2, there remains in existence an operating license "proceeding" that was initiated for Comanche Peak by the Federal Register Notice that was published in 1979. See 44 Fed. Reg. 6995 (Feb. 5, 1979). Accordingly, we reject the licensee's argument that petitioners have no right to seek reopening of the record because the Commission has approved the settlement agreement dismissing proceedings below. TU Resp. at 19-20.

States, 207 F.2d 740, 741 (5th Cir. 1953); United States of America v. 140.80 Acres of Land, ETC., 32 F.R.D. 11, 14 (E.D. La. 1963). See generally 7 J. Moore, Moore's Federal Practice ¶ 60.19 (2d ed. 1985); 11 Wright and Miller, Federal Practice and Procedure §2865 (1973). Thus, Rule 60(b) does not support petitioners' argument for reopening the Comanche Peak proceeding at their insistence.

B. Petitioners' Request For Late Intervention.

Petitioners' pleading asks that we "both re-open the record of the [Comanche Peak] proceedings, and thereafter grant petitioners leave to file their motion for intervention." Motion at 1. However, we find that the pleading before us clearly does not satisfy our requirements for consideration of a late-filed petition for leave to intervene. Quite simply, petitioners have not even addressed the five factors contained in 10 C.F.R. §2.714(a)(1)(i)-(v). Accordingly, we do not grant petitioners late intervention and therefore, we deny their request for reopening.

C. The Merits Of Petitioners' Reopening Request.

While we hold today that petitioners are not entitled to seek to reopen the record of the Comanche Peak operating license proceeding, we have reviewed their submission in an effort to determine if their arguments have any merit. We conclude that even if petitioners could satisfy the requirements for late intervention, their present petition clearly fails to satisfy the requirements of section 2.734 for reopening the record.

As we noted above, petitioners must first demonstrate that their request is timely. 10 C.F.R. §2.734(a)(1). However, while petitioners allege that their "new" information has only come to light "within the last thirty (30) days," we find that the information supporting their motion has been before us

on previous occasions. As the Staff notes, Exhibits A and B were formally submitted to the Commission either by the Citizens for Fair Utility Regulation ("CFUR"), Mr. Joseph J. Macktal, or Mr. Lon Burnam in their attempts for late intervention several years ago. Thus, this material is hardly "new" or "recently discovered" material supporting reopening of the Comanche Peak record.⁶

Exhibit C is an initial decision by the Department of Labor in an employment discrimination case dated May 12, 1989, almost three years ago. This decision is a public document and is hardly "new" evidence. Exhibit D appears to be a hand-written note critical of an attorney for CASE but without any date or authentication. Moreover, even if it were dated and authenticated as being an evaluation of this attorney by a DOL Administrative Judge -- as alleged by petitioners -- we find that it hardly constitutes "new evidence" warranting reopening the record of an unrelated NRC proceeding. Exhibit E is a portion of a published opinion by the NRC's Atomic Safety and Licensing Board, dated December 28, 1983. Again, this is hardly "new" evidence discovered "within the last 30 days."

Exhibits F and G are briefs filed with the DOL in support of an employment discrimination case filed by a Mr. Hasan, a former worker at Comanche Peak. However, those briefs are dated February 16, 1988 and April 18, 1988. Again, these materials are public documents which are almost four years old. Moreover, both the Commission and the NRC Staff have long been aware of the general thrust of the arguments in Mr. Hasan's case, if not

⁶The Commission denied both the CFUR and Macktal requests. See CLI-88-12 and CLI-89-09, *supra*. Mr. Burnam withdrew his request voluntarily. Petitioners allege that this withdrawal was under "suspicious circumstances." Motion at 2. However, they provide absolutely no support for that allegation.

in actual possession of these documents themselves. In fact petitioners allege that the Staff had these documents in 1988. See Motion at 6. Thus, these materials hardly constitute "new" evidence. Likewise, Exhibit I is dated July 8, 1987 and is addressed to the Licensing Board itself. We can see no reason to conclude that this document, which was filed before the Licensing Board over four years ago, can be termed "new" evidence.

Finally, Exhibit J contains two parts. The first part is a settlement agreement between CASE, Mrs. Juanita Ellis, and TU Electric. The agreement is published in full as Exhibit B to the settlement agreement. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18B, 28 NRC 103, 126-35 (1988). The second part is an affidavit by Barbara N. Boltz, a former member of CASE, reciting disagreements with the decision to settle the Comanche Peak proceeding. This document is over a year old and there is no allegation that this document contains "new" evidence. Furthermore, as the Staff correctly notes, the NRC was well aware that some CASE members disagreed with the decision to settle the proceedings. See CLI-88-12, 28 NRC at 610 n.6. Accordingly, we conclude that petitioners have failed to satisfy the first prong of the reopening test because their "new" information is simply not timely in any sense of the word.⁷

⁷On December 27, 1991, the Commission received a pleading from the Citizens Association for Sound Energy ("CASE"), seeking leave to file a response to petitioners' Motion to Reopen the Record. CASE's response is an effort to refute the allegations contained in the Boltz Affidavit and does not address the legal issues upon which we have resolved petitioners' request. We grant CASE's motion and accept the tendered response. However, because we have resolved the question of reopening the record on other grounds, we do not reach the question of the accuracy of the allegations contained in either the Boltz Affidavit or the Case response. The Staff should review both documents to determine if anything in either document affects its review of activities at Comanche Peak.

The second prong of the reopening test requires that petitioners demonstrate that the "new" evidence concerns "a significant safety or environmental issue." 10 C.F.R. §2.734(a)(2). However, petitioners point to no such issue. Instead, they raise numerous allegations regarding other Comanche Peak-related matters.

For example, petitioners allege attorney misconduct by CASE attorneys in DOL proceedings. However, as we noted before when faced with the very same allegations, "the proper forum for these complaints is likely not the NRC." CLI-88-12, 28 NRC at 612, n.8. Instead, the affected persons should seek sanctions against those attorneys before the DOL or before the appropriate state bar associations. Likewise, petitioners allege that unnamed TU Electric employees perjured themselves in the Hasan case before the DOL. However, there is no allegation -- much less a showing -- that the Licensing Board may have relied upon testimony by these employees. Again, this matter appears to be a concern for the DOL, not the NRC.

Finally, petitioners allege that TU Electric employees committed perjury before the Licensing Board prior to the Board's Order of December 28, 1983. Motion at 4-5. However, in their motion petitioners cite absolutely no documentation for that allegation. Petitioners do not even support the allegation with their own affidavit; instead, we have only their own ipse dixit in the motion. The only document cited in the motion in relation to this matter is a copy of the Licensing Board's opinion. But that opinion does not contain any verification of petitioners' allegation. This unsupported allegation simply cannot support reopening the record. Accordingly, we find

that petitioners have failed to meet the second prong of the reopening test.⁸

The third prong of the reopening test requires that petitioners "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)(3). In this situation, petitioners needed to show that the Licensing Board -- and the Commission -- might well have refused to accept the proposed settlement agreement between CASE, TU Electric, and the NRC Staff and instead would have continued the proceedings with the same or new intervenors. Instead, petitioners simply aver that they would have been allowed to intervene in the proceeding. Motion at 6.

As the NRC Staff and TU Electric have noted, many of these same arguments were made both at the public hearing to discuss the proposed settlement agreement and in various motions for late intervention. See, e.g., Transcript of Hearing (July 5, 1988); CLI-88-12; CLI-89-06. We concluded then that those arguments -- based on allegations similar to these and on these and similar documents -- were insufficient to support either challenges to the agreement or petitions for late intervention. Three years have not changed our opinion that these allegations are insubstantial and unsupported and do not constitute a basis for voiding the settlement agreement or reopening the proceedings.

⁸The petitioners' allegations appear to be addressed to the question of pipe support design at Comanche Peak. Motion at 4-5. The NRC has issued the operating license for Unit 2 of Comanche Peak and the Staff may take enforcement action against that license should circumstances warrant. Accordingly, we hereby refer the petitioners' motion to the Staff under 10 C.F.R. §2.206 for review of these allegations to the extent that they may apply to Unit 1. We also expect that the Staff will incorporate any evidence uncovered in this process into their review of activities at Unit 2.

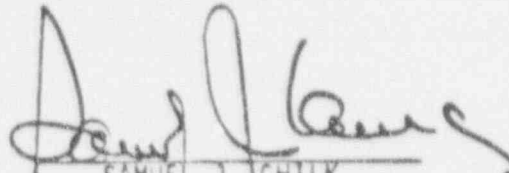
IV. Conclusion.

Because petitioners were not parties to the Comanche Peak proceeding, they cannot seek to reopen the record unless they first become parties by filing a successful petition for late intervention. Their "motion to reopen" does not address the five factors required to be satisfied in order to achieve this status. Therefore, we do not grant them late intervention. Even if petitioners had addressed and satisfied the late intervention standards, the motion to reopen would have been denied, because petitioners have failed to satisfy the reopening standards.

It is so ORDERED.



For the Commission


SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland
this 17th day of January, 1992.