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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

SERVED AUG 12 1992

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

MEMORANDUM AND ORDER

CLI-92-12

I. Introduction.

This matter is before the Commission on a motion for late intervention and a motion to reopen the record by Sandra Long Dow, representing the "Disposable Workers of Comanche Peak Steam Electric Station" ("Disposable Workers"), and R. Micky Dow (collectively "petitioners"). Petitioners seek to reopen the Comanche Peak operating license and construction permit amendment proceedings which were closed pursuant to a settlement agreement in 1988. Petitioners have also filed a motion seeking oral argument on their motions before the Commission. The Texas Utilities Electric Company ("TU Electric") and the NRC Staff oppose all three requests.

For the reasons stated below, we find that oral argument is unnecessary in this situation. We also find that petitioners have failed to satisfy the requirements for late intervention. Even assuming arguendo that those

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requirements were satisfied, petitioners have failed to satisfy the requirements to reopen the record.

II. Background.

On November 20, 1991, these same petitioners filed a motion to reopen the record in the underlying Comanche Peak proceedings. We denied their request, pointing out that only a "party" could seek to reopen the record but that even if petitioners had been "parties" to the underlying proceedings, their submissions were not sufficient to meet the reopening criteria. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-01, 35 NRC 1 ("CLI-92-01"). However, we also pointed out that "because 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 ...." See CLI-92-01, 35 NRC at 6, n.5.

On February 20, 1992, petitioners filed a petition for late intervention not only in the Unit 2 operating license ("OL") proceeding but also in both the Unit 1 OL proceeding and the Unit 1 construction permit amendment ("CPA") proceeding. Neither of the latter proceedings now exists. On February 21, 1991, petitioners filed a motion to reopen the record in all three proceedings, assuming arguendo that they had satisfied the criteria for late intervention. We directed that both the Staff and TU Electric file consolidated responses to the two motions and established a response time which took into account an anticipated supplement to the petitioners' motions. Petitioners filed their supplement on March 13, 1991. Both TU Electric and the Staff responded in opposition to the two pleadings as supplemented.

On April 4, 1992, petitioners filed a motion requesting an oral argument on the other two motions, alleging "material false statements" and "perjury" by the Staff and TU Electric in their responses to petitioners' motions. TU Electric and the Staff have responded in opposition to the request for oral argument.

III. Analysis.

A. The Unit 1 Proceedings.

Initially, petitioners have disregarded our statement in CLI-92-01 that only the proceeding for the issuance of the operating license for Unit 2 was available for late intervention and potential reopening. Instead, petitioners seek late intervention in both the Unit 1 OL and CPA proceedings. However, these proceedings are no longer available to them. The NRC has issued the operating license for Unit 1. That action has closed out the Notice of Opportunity for a Hearing for both the Unit 1 operating license, 44 Fed. Reg. 6995 (Feb 5, 1979), and the Unit 1 construction permit amendment. 51 Fed. Reg. 10480 (Mar. 26, 1986). Any challenge to the Unit 1 license must take the form of a petition under 10 C.F.R. §2.206 for an order under 10 C.F.R. §2.202. In fact, petitioners have already filed such a petition which is now under consideration by the Staff. Thus, we summarily reject petitioners' request insofar as it requests late intervention in the Unit 1 OL and CPA proceedings.

B. The Unit 2 Proceeding.

1. The Motion For Oral Argument.

We are unclear as to what petitioners actually seek in their request for oral argument. Petitioners use the terms "oral argument" and "hearings"

interchangeably in their motion. Under our regulations, the terms clearly imply different concepts. "Oral argument" as contemplated by our regulations is an appellate-style argument, without witnesses. However, under NRC regulations the word "hearings" generally refers to an evidentiary procedure, which is what petitioners' original motion seeks. Accordingly we have treated petitioners' request as a request for oral argument on the motion for late intervention and the motion to reopen the record.

Our regulations provide that "[i]n its discretion, the Commission may allow oral argument upon the request of a party made in the notice of appeal or brief, or upon its own initiative." 10 C.F.R. §2.763. Because oral argument is clearly "discretionary," we have previously held that a party seeking oral argument must explain "how [oral argument] would assist us in reaching a decision." In re Joseph J. Macktal, CLI-89-12, 30 NRC 19, 23 n.1 (1989). We have denied requests for oral argument when "based on [written] submissions [the Commission] fully understands the positions of the participants and has sufficient information upon which to base its decision." Advanced Nuclear Fuels Corporation (Import of South African Enriched Uranium Hexaflouride), CLI-87-9, 26 NRC 109, 112 (1987).

Petitioners make two arguments in support of their request.[1] First, they allege that responses filed by the Staff and the licensee to their motions are "wrought with inaccuracies." Request at 2.[2] In addition,

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[1]Petitioners include other arguments, but in our judgment these arguments go to their requests for late intervention and to reopen the record. Accordingly, we will deal with these other arguments when we address the merits of petitioners' motions now pending.

[2]Petitioners filed two pleadings before us entitled "Motion for ...." In order to develop a convenient shorthand to distinguish between these two pleadings when citing to them, we will refer to the Motion for Oral Argument as the "Request" and the Motion to Reopen the Record as the "Motion."

petitioners allege that the responses are "rift (sic) with material false statements ... that border if not completely encompass perjury." Id.[3] However, petitioners do not provide any examples of these alleged statements. We will not accept bare allegations of such statements -- without more -- as support for a motion for agency action.

Moreover, as the petitioners concede -- Request at 6 -- they could seek permission to reply to these pleadings in writing. Contrary to petitioners' view, we do not believe that such a reply would "inundate" the record or "confuse" us. Id. Thus, petitioners have failed to demonstrate that they could not counter any alleged misstatements by the Staff and licensee by seeking leave to file a reply and responding to the alleged misstatements in writing.

Second, petitioners argue that "it would be in the best interest of the public to hold oral argument ...." Request at 2. See also Request at 5. However, we do not see how the public interest would be better served in this instance with an oral argument as opposed to a decision based solely upon the written public record. In sum, we believe that we "understand the positions of the participants and [have] sufficient information upon which to base [our] decision." Advanced Nuclear Fuels Corporation, supra. Accordingly, we exercise our discretion to deny the request for oral argument.[4]

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[3]Because petitioners' pleading contains this allegation, it has been forwarded to the Office of Inspector General for appropriate action.

[4]We reject the Staff's argument that petitioners cannot request oral argument on a petition for late intervention. Because the pleadings before us do not constitute an "appeal," the requirement that a request for oral argument be made in a "brief" does not apply. See generally 10 C.F.R. §2.763.

2. The Motion For Late Intervention.

Petitioners can seek late intervention in the Unit 2 OL proceeding. That proceeding is still open for late intervention because that license has not been issued. However, in addition to the criteria that must be addressed in their petition under 10 C.F.R. §2.714(a)(2), petitioners must also demonstrate that a balancing of the five criteria set forth in 10 C.F.R. §2.714(a)(1)(i)-(v) weighs in favor of their intervention. See, e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 n.3. (1983); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 608-09 (1988) ("CLI-88-12"), aff'd, Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1990), cert. denied, 111 S.Ct. 246 (1990). Those five factors are: (1) good cause, if any, for failure to file on time; (2) the availability of other means for protecting petitioners' interest; (3) the extent to which petitioners' participation might reasonably assist in developing a sound record; (4) the extent to which petitioners' interest will be represented by existing parties; and (5) the extent to which petitioners' participation will broaden the issues or delay the proceeding. 10 C.F.R. §2.714(a)(1)(i)-(v). Reviewing petitioners' Motion for Late Intervention, we find that petitioners have failed to satisfy these five criteria.

a. Good Cause For Late Intervention.

Petitioners allege that they have good cause for the lateness of their filing because

> [p]etitioners were not involved in this issue when it first came to light, and/or when the original licensing hearings were in session. They only became involved in this matter in January, 1991. [Subsequently] they received more and more information ... and, then, based on vast portions of their

> evidence, became convinced that the hearings needed to be reopened in order to get this material on the record, as they believed that it would have prevented the licensing [of Comanche Peak], had it been brought to the attention of the original Atomic Safety [and] Licensing Board.

Petition at 1-2. In essence, petitioners allege that they have demonstrated "good cause" because they themselves have just come into possession of information which they believe would have had an impact on the Comanche Peak licensing proceeding. However, our jurisprudence has specifically held that such an allegation standing alone does not satisfy the "good cause" requirement.

The test for "good cause" is not simply when the petitioners became aware of the material they seek to introduce into evidence. Instead, the test is when the information became available and when petitioners reasonably should have become aware of that information. In essence, not only must the petitioner have acted promptly after learning of the new information, but the information itself must be new information, not information already in the public domain.

For example, the discovery of information which was publicly available six months prior to the date of the petition has been held insufficient to establish "good cause" for late intervention. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764-65 (1982). In that case, the Appeal Board rejected the concept that the "discovery" of information already publicly available would constitute "good cause" for late intervention. Quite simply,

> [a] subjective test of this kind provides an incentive for remaining uninformed and creates the prospect of collateral factual contests aimed at ascertaining the state of mind of the prospective intervenor. We would not allow a party to the proceeding to press a newly

> recognized contention ... unless the party could satisfy an objective test of good cause. Among other things, ... the party seeking to reopen must show that the issue it now seeks to raise could not have been raised earlier. ... We see no reason to employ a different and more lenient good cause standard for the late petitioner for intervention than for a party who is already in the proceeding and seeks to raise new issues.

ALAB-707, 16 NRC at 1765 (emphasis in original) (citation omitted) (footnote omitted).

In this case, petitioners may have only recently become aware of certain information, but they do not demonstrate that this information is only now available for the first time, i.e., could not have been raised earlier. Instead, the information petitioners seek to introduce is extremely dated information. For example, all information relied on by petitioners in their previous motion to reopen (filed on November 20, 1991) was over a year old at the time and all but two documents had been in the public domain for a much longer period of time. See CLI-92-01, 35 NRC at 7-9. Thus, that information cannot constitute "good cause" for late intervention.

In their request for late intervention, petitioners name two individuals, Ron Jones and Dobie Hatley, who would be prospective witnesses if petitioners were allowed to intervene. See Petition at 3.[5] Petitioners claim that "[t]hese two individuals who ... have held their silence, out of fear of reprisal, are now willing to come forward and testify, for the first time in four years." Id. However, as the Staff points out, both persons claim that they were willing to testify in the original proceeding. See Jones Statement attached to Petition; Hatley Statement attached to Motion to Reopen.

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[5]As the Staff notes, this is the only substantive information in the petition itself to support petitioner's request. Moreover, as the Staff also notes, Mr. Hatley's statement is neither notarized nor made under oath.

Staff Response at 9. In fact, as the Staff also points out, Ms. Hatley's testimony was actually filed before the Lic nsing Board in 1984 by the intervenor in that proceeding, the Citizens Association for Sound Energy ("CASE"). Id. Thus, the mere availability of these individuals does not constitute "good cause" for petitioners' late intervention. Furthermore, neither of these individuals states what new information they have to provide that is not already in the public domain.

In an effort to provide petitioners with a complete evaluation of the information they allege supports their late intervention, we have also reviewed the allegations contained in their Motion to Reopen the Record, the Supplement, and the Motion for Oral Argument. However, the information in those documents does not constitute "newly discovered" information which would support a finding of "good cause" for late intervention.

In the Motion to Reopen the Record, petitioners allege that TU Electric attempted to cover-up fire watch violations. Motion at 4. However, TU Electric itself reported those violations to the NRC in October of 1990. See NRC Response at 24; see also Affidavit of Amarjit Singh, Exhibit B to NRC Staff Response. The Staff issued a Notice of Violation on the issue. See Exhibit C to NRC Staff Response. Thus, not only was the NRC aware of the issue, but the NRC has reviewed TU Electric's resolution of the issue and has approved it. See Singh Affidavit, supra. Petitioners do not offer any additional information on this issue that could constitute "good cause" for late intervention.

Petitioners also allege that they have discovered evidence about "on-site and off-site waste dumps for both toxic and radiation contaminated materials ...." Motion at 4. However, petitioners concede that various

organizations have had access to this information since August, 1990, including CASE and the Texas Water Commission ("TWC"), an agency of the State of Texas. Moreover, another organization, the Citizens for Fair Utility Regulation ("CFUR") has already presented this issue to the NRC in the form of a request for enforcement action under 10 C.F.R. §2.206. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), DD-91-04, 34 NRC 201 (1991). In its decision on that petition, the NRC Staff reviewed this information and determined that (1) the information did not raise a "substantial concern ... regarding the safe operation of [Comanche Peak]," (2) that no violations of NRC regulations had been identified, and (3) that the NRC Staff would monitor proceedings before the TWC to determine if any other action was necessary after conclusion of those proceedings. 34 NRC at 207. Petitioners do not explain how their information could supplement the information already in the public domain or why it could not have been presented sooner.[6]

Next, petitioners submit nine Non-Conformance Reports ("NCR") which they allege "show significant errors in the seismic restraint compression fitting crimps ...." Motion at 3. However, these NCRs were filed and resolved in 1984. Petitioners do not explain why this issue could not have been raised sooner. Petitioners also allege that other NCRs "were never placed in the record or addressed." Id. However, petitioners do not provide these NCRs

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[6]Petitioners also allege that they have taken samples from these dumps and that these samples have been tested as radioactive. Motion at 5. In addition, petitioners allege that they offered to provide this material to the Region IV Staff but that the Staff refused to accept the information or even to open an allegation file on the issue. Id. The Staff has not responded to this allegation other than to point out -- correctly -- that petitioners have not provided any documentation of these tests. Staff Response at 25-26. However, the Staff should contact petitioners to see if documentation exists and take appropriate follow-up action.

which were allegedly "withheld" or offer any other specifics about them. Absent such an explanation, these vague allegations cannot constitute "good cause" for late intervention.

In their Supplement, petitioners allege that Ms. Hatley altered the records in J Electric's files regarding the NCRs and that the NRC cannot rely on those written records for an analysis of the NCRs. Supplement at 4. However, the NCRs were resolved after Ms. Hatley left Comanche Peak. See NRC Staff Response at 26-27, 32-33; see also Affidavit of Robert M. Latta, attached as Exhibit F to the Staff Response. Thus, it appears that Ms. Hatley could not have affected the resolution of these NCRs and, accordingly, this information does not constitute "good cause" for late intervention.[7]

Next, petitioners submit an anonymous handwritten note dated January 30, 1992 regarding an incident at Comanche Peak in which a worker was injured. However, the note itself documents that the incident was reported to the NRC. Moreover, that incident, which occurred on October 6, 1991, has long been public knowledge and has been resolved by the NRC. See Affidavit of William D. Johnson, attached as Exhibit E to the NRC Staff Response. Again, this does not constitute "new" information which would constitute "good cause" for late intervention.

Finally, petitioners submit a group of documents that appear to be related to claims by Joseph J. Macktal regarding a disputed settlement

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[7]Ms. Hatley alleges that she "was asked to falsify records and documents and drawing numbers etc in order to pass audits of the NRC[,]" Hatley Statement at 1, implying that she did so. She also states that she "would like to testify and have my concerns in the record ...." Id. We direct the Staff to communicate with Ms. Hatley in an effort to obtain whatever additional information she wishes to present. Ms. Hatley can "place her concerns on the record" by providing documents to or meeting with the NRC Staff. The Staff should follow up on any allegations provided by Ms. Hatley in this regard.

agreement. However, there is no showing that these documents are "new." In fact, many of these same documents were also submitted to the NRC as attachments to petitioners' November 20, 1991 Motion to Reopen the Record. As we noted then, this "information is simply not timely in any sense of the word." CLI-92-01, 35 NRC at 8. For example, in this group of documents only the legal memorandum is less than two and a half years old.

Moreover, there is no showing that any of this information is not already well known. In fact, Mr. Macktal's claims have been well-documented before the NRC, as reflected by the fact that many of the documents cited by petitioners are NRC documents. In addition, the Commission reviewed Mr. Macktal's claims as they related to Comanche Peak. See, e.g., Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-06, 29 NRC 384 (1989), aff'd sub nom. Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1990); In re Joseph J. Macktal, CLI-89-12, 30 NRC 19 (1989); In re Joseph J. Macktal, CLI-89-14, 30 NRC 85 (1989); In re Joseph J. Macktal, CLI-89-18, 30 NRC 167 (1989).

Furthermore, both the DOL and the NRC have acted on Mr. Macktal's allegations. For example, the DOL has voided the settlement agreement which Mr. Macktal claimed illegally prevented him from testifying before the NRC. See Macktal v. Brown & Root, Docket No. 86-2332 (Nov. 14, 1989). Furthermore, the NRC has adopted a regulation specifically preventing the type of agreement which Mr. Macktal alleges that he was "coerced" into signing. See 10 C.F.R. §50.7(f). Finally, Mr. Macktal has explained all his concerns to the NRC Staff during a transcribed interview. Thus, the responsible federal agencies have reviewed Mr. Macktal's concerns and these materials do not constitute "good cause" for late intervention.

In conclusion, we find that petitioners have failed to demonstrate "good cause" for their attempt to intervene in the OL proceeding for Unit 2, thirteen years after TU Electric's request for an operating license was published in the Federal Register.[8]

b. The Remaining Four Factors.

"[W]here no good excuse is tendered for the tardiness, the petitioner's demonstration on the other factors must be particularly strong." Duke Power Co., (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977) "When the intervention is extremely untimely ... and the petitioner utterly fails to demonstrate any 'good cause' for late intervention, it must make a 'compelling' case that the other four factors weigh in its favor." CLI-88-12, 28 NRC at 610 (citing cases). As we will demonstrate below, we do not find that petitioners have made a compelling case here on the remaining four factors.

The NRC Staff concedes that petitioners satisfy the second and fourth prongs of the test. Assuming arguendo that petitioners have an "interest" in the proceeding, i.e., that they have standing to participate in the proceeding, there is no other means by which that interest can be protected. Likewise, because there is currently no proceeding, there is no other party able to represent their interest. However, these two factors are the least important of the five factors. South Carolina Electric & Gas Co. (Virgil C.

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[8]Petitioners attempt to resurrect their claims from their earlier attempt to reopen the record which we denied in CLI-92-01 by incorporating those claims into this petition. However, as we pointed out then, with only two exceptions, those records had long been in the public domain. In fact, many of them dealt with Mr. Macktal's claims and -- as we have seen above -- those have been resolved. Thus, even factoring those documents into the arguments and allegations presented here, petitioners have failed to demonstrate "good cause" for late intervention.

Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 894-95 (1981), aff'd sub nom. Fairfield United Action v. NRC, 679 F.2d 261 (D.C. Cir. 1982); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767 (1982).

More importantly in our view, petitioners have failed to satisfy the third prong of the test: that they have the ability to contribute to the development of a sound record. As we noted in a similar situation, "the Appeal Board has repeatedly stressed the importance of providing specific and detailed information in support of factor (iii)." CLI-88-12, 28 NRC at 611. "When a petitioner addresses this [third] criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.'" Id., quoting Mississippi Power & Light Co., (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). See also Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983).

In this case, petitioners alleged that they would introduce "a massive amount of evidentiary material ... [and] witnesses who had extensive testimony ...." Petition at 3. However, as we noted above, petitioners have identified only two prospective witnesses, Mr. Ron Jones and Ms. Dobie Hatley. Furthermore, they have failed to summarize their testimony, except to state that Mr. Jones had discovered "massive wiring violations" and evidence of drug use in the control room. Petition at 3.

Additionally, as we have also noted above, the documentary evidence specifically identified by petitioners or submitted as attachments to their

pleadings and the information contained therein is already in the public domain and is generally extremely out of date. Moreover, petitioners have failed to demonstrate any disagreement with the NRC's resolution of the matters they have raised. Thus, petitioners have failed to demonstrate how this evidence would create a record that would assist us in determining whether we should issue an operating license to Unit 2. Moreover, petitioners have completely failed to address how their concerns -- many of which date from the 1984 time frame -- would have been affected by the extensive corrective programs undertaken at the plant since that time. See, e.g., CLI-88-12, 28 NRC at 611. In sum, we find that the third factor weighs heavily against granting petitioners' request for late intervention.

Moreover, the fifth factor -- the possibility of delay and expansion of the hearings -- also weighs heavily against granting petitioners' request. "[I]ndeed -- barring the most compelling countervailing considerations -- an inexcusably tardy petition would (as it should) stand little chance of success if its grant would likely occasion an alteration in hearing schedules." Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 650-51 (1975) (opinion of Mr. Rosenthal speaking for the entire Board on this point).

In this case, there is currently no formal proceeding at all. Thus, granting the petition will result in the establishment of an entirely new formal proceeding, not just the "alteration" of an already established hearing schedule. Moreover, as we noted in an earlier Comanche Peak opinion, "there will be an inevitable delay while [petitioner] acquaints itself with the proceedings." CLI-88-12, 28 NRC at 611. As we noted there "[t]he petition indicates that [the petitioner] apparently has no knowledge of the extensive

proceedings that have occurred ...." Id. In that case, we found that because a former intervenor had been absent from the proceedings for six years, there would be an inevitable delay while the petitioner reacquainted itself with the proceedings.

In this case, petitioners have never been involved in the formal proceedings involving Comanche Peak and they have only been involved in matters related to Comanche Peak since last spring. At no time have petitioners demonstrated that they are familiar with the factual background of the extensive proceedings that occurred from 1979 through 1988. Nor have they demonstrated any familiarity with NRC rules and procedures. Thus, we find that there will inevitably be a long delay while petitioners prepare for the hearing process.

In sum, we find that petitioners' have not established "good cause" for their request for late intervention. Moreover, we find that they have failed to make a "compelling" case on the remaining four factors. While they arguably satisfy the two minor factors, those factors are clearly insufficient, standing alone, to satisfy the balancing test required for late intervention. See, e.g., ALAB-707, 16 NRC at 1767; ALAB-704, 16 NRC at 1730-31. Moreover, petitioners clearly fail to satisfy the two remaining major factors, the ability to contribute to the development of a record and delay and/or expansion of the proceedings. Thus, we find that petitioners have failed to demonstrate a favorable balancing of the five factors required for granting a petition for late intervention and we hereby deny their request.[9]

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[9]In view of this finding, we need not reach the question of petitioners' standing. However, we have strong doubts that petitioners could satisfy our standing requirements. First, the Dows themselves live in Pennsylvania while Comanche Peak is in Texas. Thus, it is unlikely the Dows themselves have standing. Moreover, the Staff raises several possibly valid concerns

3. The Motion To Reopen The Record.

As the Commission pointed out in CLI-92-01, a person cannot seek to reopen the record unless that person first becomes a party to the proceeding. CLI-92-01, 35 NRC at 6. Because we have determined above that petitioners cannot become parties to the Unit 2 OL proceeding based on the record now before us, we find that they cannot seek to reopen the record of the proceeding.

Additionally, as the Staff correctly points out, petitioners have failed to satisfy the requirements of our regulations which provide that a motion to reopen the record "must be accompanied by one or more affidavits which set forth the factual and/or technical basis for the movant's claim that the [reopening] criteria have been satisfied." 10 C.F.R. §2.734(b). We have denied requests to reopen the record because of this defect. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-01, 29 NRC 89, 93-94 (1989). Neither of the attachments to the Motion to Reopen the Record meets this requirement.

Moreover, petitioners have again misinterpreted the "timeliness" requirement. The issue is not whether the motion to reopen is filed "within 24 hours of the petition for late intervention." Motion at 2. Instead, the test is whether the information upon which the movant relies could have been presented to the NRC at an earlier date. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 202 (1985); Vermont

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regarding the standing of the Disposable Workers organization. See Staff Response at 17-20. See also Puget Sound Power and Light Co. (Skagit/Handford Nuclear Power Project, Units 1 and 2), ALAB-700, 16 NRC 1329, 1333-34 (1982); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 411 (1984).

Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 n.12 (1973).

Here, as we noted above -- and in CLI-92-01 -- the material relied upon by petitioners has been in the public domain for some time and has -- generally -- been acted upon either by the DOL or the NRC. In those cases where either the DOL or the NRC has acted on the material, petitioners have failed to allege some reason for taking additional action, i.e., they have failed to allege where either agency acted incorrectly. For example, as we noted above, both the NRC and the DOL have acted on the concerns raised by Mr. Joseph J. Macktal. As another example, TU Electric reported -- on its own -- the fire-watch violations raised by petitioners and the NRC has already acted on that issue by issuing a Notice of Violation. In both cases, petitioners have failed to allege any inadequacy in the resolution of these issues.

C. Request For Protective Orders.

Petitioners request protective orders for seven (7) named persons -- including both Mr. and Ms. Dow -- and six (6) unnamed persons under 10 C.F.R. §2.734(c). Motion at 6. Assuming arguendo that this request constitutes a request for "confidentiality" status under NRC Manual Chapter 0517, we deny that request at this time. Quite simply, such requests should not be granted on a blanket basis; instead, they are fact-specific and should be granted only on a fact-specific showing that the requesting party meets the requirements of Manual Chapter 0517.

Turning to the specific requests, we are unclear why petitioners request a protective order for known individuals. In a similar situation, we questioned how a person who was a known critic of Comanche Peak could demonstrate how he could be harmed if his name became associated with

additional allegations. "The purpose underlying a grant of confidentiality is to preserve the alleger's identity from public disclosure where such disclosure could cause harm to the alleger." In re Joseph J. Macktal, CLI-89-12, 30 NRC 19, 24 (1989). Nevertheless, in that case we pointed out that if the petitioner could demonstrate that some harm might befall him -- or his sources, for example -- the Staff would be empowered to grant that request. However, the burden was on the petitioner to demonstrate that harm to the Staff. Id. The same is true of the individuals who are named by petitioners in this case.

Turning to the unnamed individuals, they also can seek "confidentiality" status from the NRC Staff even though we have denied both intervention and reopening of the record. The NRC's guidelines for confidentiality are set forth in NRC Manual Chapter 0517. They -- like the seven named individuals -- should address their individual requests to the Allegations Coordinator of Region IV or the Allegations Coordinator in the Office of Nuclear Reactor Regulation at NRC Headquarters.

D. Request For Suspension Of License(s).

Petitioners also request that we suspend the operating licenses for both Unit 1 and Unit 2 -- presumably during the pendency of the hearing sought by petitioners -- for alleged deficiencies in the labeling of pressure valves and limit switches. [10] Motion at 6-7. However, as the Staff notes, again, this matter has already been reviewed and resolved by the Staff. See Affidavit of William D. Johnson. Moreover, this is a matter more properly placed before the Staff under 10 C.F.R. §2.206. Petitioners currently have a section 2.206

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[10] We presume that petitioners mean the Unit 2 construction permit. Unit 2 does not have an operating license.

petition pending before the Staff; accordingly, we deny this request and refer this issue to the Staff for their consideration as an additional issue in conjunction with the current petition under section 2.206.

IV. Conclusion.

For the reasons stated above, we (1) deny petitioners' request for oral argument; (2) summarily deny petitioners' requests for late intervention in the Comanche Peak, Unit 1 proceedings; and (3) find that petitioners have failed to satisfy a balancing of the five factors necessary for late intervention in the Comanche Peak Unit 2 OL proceedings. Moreover, assuming arguendo that petitioners were eligible to participate in the Unit 2 OL proceeding, they have failed to meet the standards necessary to reopen the record of that proceeding. Finally, we deny the requests for protective orders and for a suspension of the Unit 1 operating license.

It is so ORDERED.

For the Commission[11],

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland
this 11th day of August, 1992

[11]Commissioners Rogers and Curtiss were not present for the affirmation of this order, if they had been present they would have affirmed it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

TEXAS UTILITIES ELECTRIC COMPANY, ET AL.
(Comanche Peak Steam Electric Station, Units 1 and 2)

Docket No.(s) 50-445/446-OL/CPA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM M&O (CLI-92-12) - 8/12/92 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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12 day of August 1992

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Office of the Secretary of the Commission