

13155

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'92 AUG 12 P1:29

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket No. 50-446-CPA
)	
TEXAS UTILITIES ELECTRIC)	Construction Permit Amendment
COMPANY, <i>et al.</i>)	
)	
(Comanche Peak Steam Electric)	
Station, Unit 2))	

NRC STAFF RESPONSE TO PETITION TO INTERVENE
AND REQUEST FOR HEARING OF B. IRENE ORR,
D.I. ORR, JOSEPH J. MACKTAL, JR., AND S.M.A. HASAN

INTRODUCTION

On July 27, 1992, a petition for leave to intervene and request for hearing was filed by B. Irene Orr, D.I. Orr, Joseph J. Macktal, Jr., and S.M.A. Hasan (Petitioners) in connection with the NRC Staff's July 28, 1992 "Order Extending the Latest Construction Completion Date" (Order) for Construction Permit No. CPPR-127 for Comanche Peak Steam Electric Station (CPSES), Unit 2. Petitioners filed their petition for intervention and request for a hearing in response to the NRC Staff's June 23, 1992 "Environmental Assessment and Finding of No Significant Impact" relating to the proposed extension, which was published in the *Federal Register* on June 29, 1992. 57 Fed. Reg. 28885. The July 28, 1992 Order granting the extension was published in the *Federal Register* on August 4, 1992. 57 Fed. Reg. 34323.

9208180162 920811
PDR ADDCK 05000446
G PDR

DS07

The petition for leave to intervene and request for a hearing should be denied because two of the Petitioners, Messrs. Macktal and Hasan, have failed to demonstrate that they possess the requisite standing to intervene in the above-captioned proceeding. In addition, all of the Petitioners have failed to satisfy the aspect requirement of 10 C.F.R. § 2.714 of the Commission's regulations.

BACKGROUND

Construction Permit No. CPPR-127, authorizing construction of Comanche Peak Steam Electric Station (CPSES) Unit 2, was issued by the Atomic Energy Commission on December 19, 1974, specifying a latest date for completion of construction of August 1, 1983. The latest construction completion date specified in the Construction Permit was most recently extended by Commission Order dated November 18, 1988, to August 1, 1992. 53 Fed. Reg. 47888 (November 28, 1988). By letter dated February 3, 1992, as supplemented on March 16, 1992, the Texas Utilities Electric Company (TU Electric) filed a request for extension of the latest construction completion date specified in the Construction Permit to August 1, 1995. The NRC Staff (Staff) prepared an "Environmental Assessment and Finding of No Significant Impact" relating to the proposed extension. The Environmental Assessment was published in the *Federal Register* on June 29, 1992. 57 Fed. Reg. 28885. In response to publication of the "Environmental Assessment and Finding of No Significant Impact," the Petitioners filed the instant Petition.

DISCUSSION

A. Standards for Intervention

Section 189a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239 (a), provides that:

In any proceeding under the Act, for the granting, suspending, revoking, or amending of any license. . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

A person seeking to intervene in a Commission proceeding must satisfy the requirements of 10 C.F.R. § 2.714 of the Commission's regulations. The regulations permit any person whose interest may be affected by a proceeding to file a petition for leave to intervene. 10 C.F.R. § 2.714(a)(1). In ruling on a petition to intervene, the Commission, Presiding Officer, or Licensing Board must consider, *inter alia*, the nature of a petitioner's right under the Atomic Energy Act to be made a party to the proceeding, the nature and extent of petitioner's property, financial or other interest in the proceeding, and the possible effect of any order which may be entered in the proceeding on the petitioner's interests. 10 C.F.R. § 2.714(d); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327 (1983). An intervention petition must, under 10 C.F.R. § 2.714(a)(2), set forth with particularity certain factors regarding the petitioner's interest in the proceeding, including how the results of the proceeding will affect that interest, and address the criteria set forth in 10 C.F.R. § 2.714(d). *Florida Power and Light Co.* (Turkey Point Plant, Units 3 and 4), CLI-81-31, 14 NRC 959, 960 (1981). The petitioner must also identify the specific aspect or aspects of the subject matter of the proceeding

with respect to which the petitioner wishes to intervene. 10 C.F.R. § 2.714(a)(2). The burden of meeting these requirements is on the petitioner. *Three Mile Island*, CLI-83-25, 18 NRC at 331.

In determining whether the requisite interest prescribed by both Section 189a of the Atomic Energy Act and 10 C.F.R. § 2.714 of the Commission's regulations is present, the Commission has held that contemporaneous judicial concepts of standing are controlling. *Portland General Electric Company* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). To establish personal standing, an individual must show that the action sought in the proceeding will cause an injury in fact and that the injury is within the zone of interest protected by the relevant statute. *Sierra Club v. Morton*, 405 U.S. 727, 732-36 (1972); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 152-54 (1970). In a Commission proceeding, a petitioner must allege an injury that is within the zone of interest protected by the Atomic Energy Act of 1954, as amended, or the National Environmental Policy Act of 1969 (NEPA), as amended. *Pebble Springs*, CLI-76-27, 4 NRC at 613-14. Standing must be clearly and specifically established before intervention can be granted by the Commission, Presiding Officer, or Licensing Board pursuant to 10 C.F.R. § 2.714 of the Commission's regulations.

In order to establish standing, a petitioner must have a real stake in the outcome of the proceeding. *Sierra Club*, 405 U.S. at 731. First, the Petitioner must have suffered an "injury in fact," an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there

must be a causal connection between the injury and the conduct complained of; the injury being traceable to the challenged action. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S. Ct. 2130, 2136 (1992).

Allegations of injury to the health and safety of a petitioner residing near a nuclear power reactor may be sufficient to establish standing to intervene. See *Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979); *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 223-24 (1974). In the context of a construction permit or operating license proceeding, distances of up to 50 miles from a nuclear power plant have been found to be within the geographical zone of interest. See *Texas Utilities Generating Company* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-79-18, 9 NRC 728, 730 (1979); see also *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977). But in connection with an amendment proceeding, the Commission has determined that, absent situations involving major alterations to the facility with a clear potential for offsite consequences, a petitioner must allege some specific "injury in fact" that will result from the action taken. *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989).

In addition to demonstrating the requisite standing, a petitioner must set forth "the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(2). While there is little guidance in NRC

case law as to the meaning of "aspect" as the term is used in 10 C.F.R. § 2.714, it appears that a petitioner may satisfy this requirement by identifying general, potential subject areas of the licensing action or areas of concern which are within the scope of matters that may be considered in the proceeding which the petitioner wishes to challenge. *See Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2)*, ALAB-146, 6 AEC 631, 633 (1973).

The scope of a construction permit extension proceeding, as defined by the Commission's decision in *Washington Public Power Supply System (WPPSS Nuclear Projects Nos. 1 and 2)*, CLI-82-29, 16 NRC 1221 (1982), is narrow. Any issue addressed by a construction permit extension proceeding must be related to whether the applicant has shown "good cause" for the delay in completion of the facility. *Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1)*, CLI-86-4, 23 NRC 113, 121 (1986). The petitioner must seek to challenge the reasons for the delay or to show that other reasons, not constituting good cause, are the principal bases for the delay. *WPPSS*, CLI-82-29, 16 NRC at 1230.

With respect to issues going beyond "good cause," the Commission has determined that "the avenue afforded for the expression of health, safety, and environmental concerns in any pending operating license proceeding, or, in the absence of such a proceeding, in a petition under 10 C.F.R. § 2.206, would be exclusive despite the pendency of a construction permit extension request." *WPPSS*, CLI-82-29, 16 NRC at 1229. It has been emphasized that permit extension proceedings are not intended to permit "periodic relitigation of health, safety, or environmental questions. . . between the time a

construction permit is issued and the time the facility is authorized to operate." *Washington Public Power Supply System* (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1189 (1984), *citing*, WPPSS, CLI-82-29, 16 NRC at 1228. Contentions having no discernable relationship to the construction permit extension are inadmissible in a permit extension proceeding; a petition under 10 C.F.R. § 2.206 is the exclusive remedy. *See Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear 1), LBP-81-6, 13 NRC 253, 254 (1981), *citing*, *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558 (1980); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-41, 15 NRC 1295, 1302 (1982).

B. Two Petitioners Have Failed to Allege Facts Sufficient to Support Standing

The Staff does not contest the standing of either Petitioners B. Irene Orr or D.I. Orr, since they allege that they live and work within a 50-mile radius of CPSES, Unit 2. *See Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear 1), LBP-80-22, 12 NRC 191, 196, *affirmed*, ALAB-619, 12 NRC 558, 563-565 (1980).

Petitioners Joseph J. Macktal and S.M.A. Hasan, two former employees at CPSES, do not have the requisite standing to intervene in the above captioned proceeding. Petitioners do not assert standing based on residence in the proximity of CPSES. Judicial concepts of standing require a showing that (a) the action sought in a proceeding will cause "injury-in-fact," and (b) the injury is arguably within the "zone of interests" protected by statutes governing the proceeding. *Three Mile Island*, CLI-83-25, 18 NRC at 332. Judicial concepts of standing also require a showing that the "injury-in-fact" be

concrete and particularized, actual or imminent, and is likely to be redressed by a favorable decision in this proceeding. *Lujan*, ___ U.S. ___, 112 S. Ct. at 2136.

Neither Petitioner has shown that the action sought in the proceeding, an extension of the construction completion date, would lead to an "injury-in-fact" that can be redressed by a favorable decision in this proceeding. The injuries alleged by both of these Petitioners, *i.e.* personal harm caused by management misconduct, do not relate to the issue in a construction permit extension proceeding, *i.e.* whether "good cause" exists for the requested extension. An administrative hearing on a construction permit extension for CPSES, Unit 2, cannot redress the alleged personal harm to the Petitioners caused by TU Electric's alleged management misconduct. As the Commission stated in *WPPSS*, CLI-82-29, 16 NRC at 1230-31:

If a permit holder were to construct portions of a facility in violation of NRC regulations, when these violations are detected and corrections ordered or voluntarily undertaken, there is likely to be some delay in the construction caused by the revisions. Nonetheless, such delay, as with delay caused by design changes, must give 'good cause' for an extension. To consider it otherwise could discourage permit holders from disclosing and correcting improper construction for fear that corrections would cause delays that would result in a refusal to extend a construction permit, a result obviously inconsistent with the Commission's efforts to ensure the protection of the public health and safety.

See also Comanche Peak, CLI-86-15, 24 NRC 397, 401 (1986). In addition, Petitioners have failed to show that the construction permit extension requested by TU Electric would cause Petitioners to suffer a concrete, actual or imminent "injury-in-fact" to an interest protected by the governing statutes. The only interest enumerated in the petition is a

personal, financial interest.¹ Such financial interests do not provide grounds for standing in Commission proceedings. See e.g. *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980); *Consumers Power Co.* (Palisades Nuclear Power Facility) LBP-81-26, 14 NRC 247, 250-251 (1981).

C. All Petitioners Have Failed to Satisfy the Aspect Requirement of 10 C.F.R. § 2.714(a)(2) of the Commission's Regulations

None of the Petitioners made an attempt to identify the specific aspects of the subject matter of the proceeding on which they sought intervention, as required by 10 C.F.R. § 2.714(a)(2) of the Commission's regulations. Petitioners only address the standing requirement. The Petitioners fail to indicate what part of the justification for the extension requested by TU Electric they wish to challenge in this proceeding.²

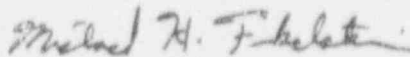
¹ In fact, Petitioner S.M.A. Hasan has explicitly stated, and Petitioner Macktal has implied, that they have a financial interest in the *grant* of this Construction Permit Extension amendment request. Petition at 3.

² In its justification for the extension request, TU Electric stated that the estimated one-year suspension of Unit 2 construction, which began in April 1988, was necessary to allow TU Electric to concentrate its resources on the completion of Unit 1. Order Extending Latest Construction Completion Date, Comanche Peak Steam Electric Station, Unit 2 (Docket No. 50-446), dated July 28, 1992, at 1. Since the completion and startup of Unit 1 took longer than anticipated, it forced TU Electric to delay significant design activities on Unit 2 until June 1990, followed by the resumption of significant construction activity in January 1991. *Id.* The Staff has concluded that pursuant to 10 C.F.R. § 50.55(b), TU Electric has shown good cause for the delay and that the requested extension is for a reasonable time period. *Id.*

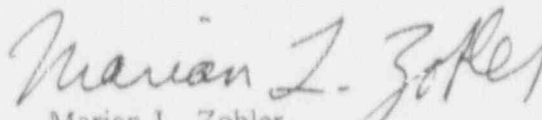
CONCLUSION

For the foregoing reasons, the Staff opposes the petition for leave to intervene and request for hearing filed by B. Irene Orr, D. I. Orr, Joseph J. Macktal, Jr., and S.M.A. Hasan and urges that the petition be denied.

Respectfully submitted,



Michael H. Finkelstein
Counsel for NRC Staff



Marian L. Zabler
Counsel for NRC Staff

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DUCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'92 AUG 12 P1:29

In the Matter of)
)
TEXAS UTILITIES ELECTRIC)
COMPANY, *et al.*)
)
(Company: Peak Steam Electric)
Station, Unit 2))

Docket No. 50-446-CPA

Construction Permit Amendment

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

NOTICE OF APPEARANCE

Notice is given that I hereby enter my appearance in the above-captioned proceeding.

Pursuant to 10 C.F.R. § 2.713, the following information is provided:

Name: Janice E. Moore
Address: Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Telephone: (301) 504-1588
Admissions: District of Columbia Court of Appeals
Name of Party: NRC Staff

Respectfully submitted,



Janice E. Moore
Counsel for NRC Staff

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD '92 AUG 12 P1:29

In the Matter of)	Docket No. 50-446-CPA
)	
TEXAS UTILITIES ELECTRIC)	Construction Permit Amendment
COMPANY, <i>et al.</i>)	
)	
(Comanche Peak Steam Electric)	
Station, Unit 2))	

OFFICE OF SECRETARY
ROBERT L. SERVICE
BRANCH

NOTICE OF APPEARANCE

Notice is given that I hereby enter my appearance in the above-captioned proceeding.

Pursuant to 10 C.F.R. § 2.713, the following information is provided:

Name: Marian L. Zobler

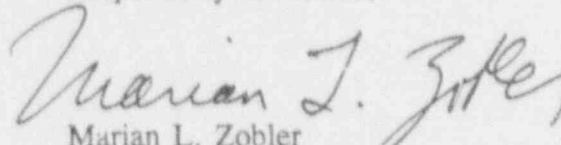
Address: Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Telephone: (301) 504-1572

Admissions: New York State Supreme Court
Appellate Division, Second Dept.
District of Columbia Court of Appeals

Name of Party: NRC Staff

Respectfully submitted,


Marian L. Zobler
Counsel for NRC Staff

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD '92 AUG 12 P1:30

In the Matter of)	Docket No. 50-446-CPA
)	
TEXAS UTILITIES ELECTRIC)	Construction Permit Amendment
COMPANY, <i>et al.</i>)	
)	
(Comanche Peak Steam Electric)	
Station, Unit 2))	

OFFICE OF SECRETARY
DOCKETING & RECORDS
BRANCH

NOTICE OF APPEARANCE

Notice is given that I hereby enter my appearance in the above-captioned proceeding.

Pursuant to 10 C.F.R. § 2.713, the following information is provided:

Name: Michael H. Finkelstein

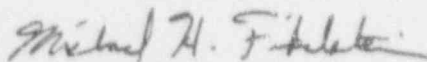
Address: Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Telephone: (301) 504-1535

Admissions: New York State Supreme Court
Appellate Division, Second Dept.
District of Columbia Court of Appeals

Name of Party: NRC Staff

Respectfully submitted,



Michael H. Finkelstein
Counsel for NRC Staff

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'92 AUG 12 P 1:30

In the Matter of)	Docket No. 50-446-CPA
)	
TEXAS UTILITIES ELECTRIC)	Construction Permit Amendment
COMPANY, <i>et al.</i>)	
)	
(Comanche Peak Steam Electric)	
Station, Unit 2))	

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF RESPONSE TO PETITION TO INTERVENE AND REQUEST FOR HEARING OF B. IRENE ORR, D.I. ORR, JOSEPH J. MACKTAL, JR., AND S.M.A. HASAN" and "NOTICE OF APPEARANCE" of Janice E. Moore, Marian L. Zebler and Michael H. Finkelstein in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 11th day of August, 1992.

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

Peter S. Lam*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

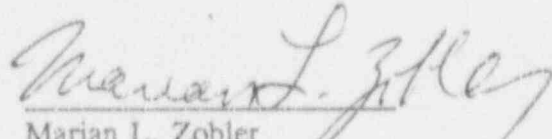
Office of the Commission Appellate
Adjudication*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Adjudicatory File (2)*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Secretary*
U.S. Nuclear Regulatory Commission
Washington, DC 20555
Attn: Docketing and Service

George L. Edgar
Steven P. Frantz
Nancy L. Ranek
Newman & Holtzinger, P.C.
Suite 1000
1615 L Street, N.W.
Washington, DC 20036

Michael D. Kohn
Stephen M. Kohn
Kohn, Kohn and Colapinto, P.C.
517 Florida Ave., N.W.
Washington, DC 20001


Marian L. Zohler
Counsel for NRC Staff