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TU ELECTRIC

Log # TXX-92374
File # 10004

August 6, 1992

William J. Cahill, Jr.
Group Vice President

Dr. Thomas E. Murley, Director
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

SUBJECT: COMANCHE PEAK STEAM ELECTRIC STATION (CPSES)
DOCKET NOS. 50-445 AND 50-446
RESPONSE TO KOHN 2.206 PETITION REGARDING
TEX-LA

REF: Letter from National Whistleblower Center to
Chairman Ivan Selin dated June 11, 1992,
Subject: "New Evidence of Illegal Settlements
at Comanche Peak"

Dear Dr. Murley:

In the letter referenced above, the National Whistleblower Center (NWC) states that it is bringing to the NRC's attention the existence of a "hush money" Agreement between Texas Utilities Electric Company (TU Electric) and Tex-La Electric Cooperative (Tex-La). The Agreement in question provided for the sale of Tex-La's ownership interest in CPSES to TU Electric and the settlement of pending litigation between TU Electric and Tex-La. NWC alleges that the Agreement violates 10 CFR § 50.7 of the Commission's regulations and Section 210 of the Energy Reorganization Act of 1974 because it allegedly "prohibits all Tex-La employees, attorneys, and consultants from 'assisting or cooperating' with any third party in all 'proceedings' related to 'the licensing of Comanche Peak.'" Based upon these allegations, NWC has requested the NRC to suspend the operating license for CPSES Unit 1, to suspend the construction permit for CPSES Unit 2, and to take certain other actions.

TU Electric understands that the NRC is treating the NWC letter as a request for action under 10 CFR § 2.206; therefore, we are hereby responding to NWC's request. As is demonstrated below, the Agreement between TU Electric and Tex-La does not present new information, nothing in the Agreement is inconsistent with 10 CFR § 50.7 or Section 210 of the Energy Reorganization Act, and the provisions in the Agreement are consistent with the public interest. Accordingly, NWC's request for action should be denied.

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1. The NWC Letter Does Not Identify Any New Information

NWC implies that it is bringing new information to the attention of the NRC. However, the NRC has long been aware of the existence and content of the Agreement between Tex-La and TU Electric.

The original version of the Agreement was dated March 23, 1989. On May 4, 1989, TU Electric submitted to the NRC an application to amend the CPSES construction permits to reflect the change in ownership. This application enclosed the March 23, 1989 Agreement between TU Electric and Tex-La. Thus, the Agreement has been a matter of public record for years.

Subsequent amendments to the original Agreement were made on December 21, 1989 and January 30, 1990. However, the December 21, 1989 amendment merely extended the automatic termination date of the Agreement, and the January 30, 1990 amendment was made in order to facilitate the closing of the sale of Tex-La's ownership interest in CPSES. Neither amendment made any substantive changes in the Agreement in general or the particular article (Article IX) which appears to be of concern to NWC. 1/

Because NWC has not identified any new information of which the NRC was not previously aware, its request for action should be denied.

1/ As is stated in Recital G of the January 30, 1990, amendment, the amended Agreement "does not change the substantive result or effect of the Original Agreement, but merely revises certain methodology in connection therewith." In particular, the provisions in Article IX in the original and amended Agreements are identical, except (1) the language italicized below was deleted from Section 9.7 of the amended Agreement:

"To the extent that Tex-LA can, and not be in violation of Section 210 of the Energy Reorganization Act, 42 USC Section 5851 (1983), upon the execution of this Agreement, Tex-La, for itself and on behalf of any person or entity, private or governmental, claiming by, through or under Tex-La, including without limitation" (emphasis added).

and (2) Tex-La's promise "to immediately abate" pending actions was changed to a promise "to continue to abate." The language which was deleted and changed is not relevant to NWC's allegations.

2. The Agreement Does Not Violate 10 CFR § 50.7

Section 50.7(f) states as follows:

No agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, may contain any provision which would prohibit, restrict, or otherwise discourage, an employee from participating in protected activity as defined in paragraph (a)(1) of this section, including, but not limited to, providing information to the NRC on potential violations or other matters with NRC's regulatory responsibilities.

For a number of reasons, the Agreement does not violate Section 50.7(f).

First, the Agreement between TU Electric and Tex-La is not an agreement "affecting the compensation, terms, conditions, and privileges of employment," and is not a settlement of a Section 210 complaint. Instead, the Agreement is a sales contract and settles a business dispute between two utilities. Thus, the Agreement is not subject to the provisions of Section 50.7(f).

Second, the Agreement does not contain any provision that would "prohibit, restrict, or otherwise discourage, an employee from participating in protected activity" under Section 210 of the Energy Reorganization Act. Instead, Article IX of the Agreement (which appears to be the Article of interest to NWC) only contains provisions in which Tex-La promises that it (and those acting on its behalf) will not sue or initiate action adverse to TU Electric related to CPSES. Nothing in the Agreement prevents a Tex-La employee, acting on his own behalf, ^{2/} from engaging

^{2/} Neither the Agreement in general nor Article IX in particular discusses the rights of Tex-La employees. Although various restrictive provisions in Article IX do refer to Tex-La's employees, such references occur in the
(continued...)

in protected activity, such as providing information to the NRC, requesting the NRC to take action, or appearing as a witness in an NRC proceeding. In fact, Section 9.7 of the Agreement states that Tex-La has an obligation not to bring actions adverse to TU Electric, but only "[t]o the extent that Tex-La can [fulfill the obligation] and not be in violation of Section 210 of the Energy Reorganization Act." Thus, the provisions of the Agreement explicitly accommodate Section 210, and the Agreement does not address the types of activities that are the subject of Section 50.7(f).

Finally, NWC claims that the Agreement violates Section 50.7 because it prohibits Tex-La's attorneys and consultants from assisting third persons who oppose TU Electric in matters related to CPSES. NWC claims are misplaced. First, Section 9.2 of the Agreement explicitly recognizes that "Tex-La can only encourage and solicit its consultants to take or refrain from taking certain actions and does not have the right to prevent or cause such actions on their part." In any case, even a prohibition on assisting third persons would not violate Section 50.7. In promulgating Section 50.7, the Commission explicitly considered a proposal that would have prohibited agreements that restrict a party from communicating with third persons. The Commission explicitly rejected this proposal. (55 Fed. Reg. 10397, 10402 (March 21, 1990)). Thus, contrary to NWC's claims, 10 CFR § 50.7 does not prohibit agreements in which parties agree to refrain from assisting third persons who oppose a nuclear plant. 3/

2/ (...continued)
following context:

Tex-La, for itself and on behalf of
any person or entity, private or
governmental, claiming by, through,
or under Tex-La, including . . .
insurers, agents, servants,
employees, officers, directors,
consultants, attorneys, and
representatives. .

Such language clearly indicates that the Agreement applies to employees who act on behalf of Tex-La, not employees who act on their own behalf.

3/ NWC argues that Section 210 provides it with "the right to gain assistance from employees of the CPSES minority owners." Section 210 contains no such provision. As
(continued...)

In summary, the Agreement is not within the scope of Section 50.7(f), and the provisions of the Agreement are not otherwise in conflict with the requirements in Section 50.7(f). Thus, NWC's request for action should be denied because it does not identify any violation of NRC requirements or Section 210 of the Energy Reorganization Act.

3. The Agreement Is Consistent With The Public Interest

The public interest favors parties who settle their disputes rather than resort to litigation. For example, in NRC proceedings, the Commission has stated that settlements are encouraged. Statement of Policy of Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981).

It is standard practice for settlement agreements to include covenants not to sue or bring action on the same or related matters that are the subject of the settlement agreement. Such covenants are necessary to effectuate the purpose of the settlement. If a party were free to settle and then later to bring a suit or an action on the same or related matters, the other party would have little or no inducement to settle. Settlement without a covenant not to sue is, as a practical matter, impossible.

NRC itself has accepted settlement agreements that contain covenants not to sue, including covenants not to contest NRC licensing actions. For example, the Settlement Agreement between TU Electric and Citizens Associations for Sound Energy (CASE) contained such a provision. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18B, 28 NRC 103, 127 (1988). In hearings before the Senate Subcommittee on Nuclear Regulation, the Chairman of the Subcommittee, Senator John Breaux, "commended" this settlement agreement. In contrast, Senator Breaux was highly critical of other settlement agreements that restricted the rights of individuals to

3/ (...continued)

discussed above, 10 CFR § 50.7(f) does not ban settlement agreements that prohibit employees from assisting NWC or other persons. Furthermore, even absent such a prohibition, employees would not be compelled to provide NWC or other third persons with assistance, and Tex-La employees, attorneys, and consultants may voluntarily refuse to provide such assistance or otherwise respond to any questions or inquiries by NWC or other third persons.

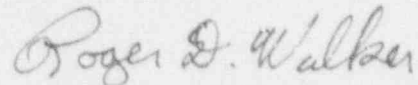
testify or provide information to the NRC. See Hearing Before the Senate Subcommittee on Nuclear Regulation (May 4, 1989), pp. 90-94.

NWC's complaints regarding the Agreement between Tex-La and TU Electric appear to pertain entirely to the covenants not to sue in Sections 9.2 and 9.7 of the Agreement. The provisions in these covenants are typical of those contained in settlement agreements in general, including settlement agreements accepted by the NRC. Furthermore, these covenants do not prohibit Tex-La (or its employees, consultants, or attorneys) from informing NRC of safety concerns or appearing as a witness in NRC proceedings. Thus, the covenants not to sue in the Agreement are consistent with the public interest.

4. Conclusions

NWC's request for action contains no new information, does not identify any violation of 10 CFR § 50.7(f) or Section 210 of the Energy Reorganization Act, and does not identify anything inconsistent with the public interest. Accordingly, the request should be denied.

Sincerely,



Roger D. Walker
Manager of Regulatory
Affairs for NEO

RSB/grp

c - National Whistleblower Center