

NATIONAL WHISTLEBLOWER CENTER

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October 6, 1992

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

Re: Comanche Peak Steam Electric Station
Docket Nos. 50-445 and 50-446, concerning
the June 11, 1992 letter from the National
Whistleblower Center to Chairman Ivan
Selin, subject "New Evidence of Illegal
Settlements at Comanche Peak," (TAC No.
M84073)

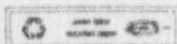
Dear Dr. Murley:

I am writing in response to the letter from Roger D. Walker, the Manager of Regulatory Affairs for TU Electric dated August 6, 1992 regarding the above-referenced matter. Mr. Walker's letter was in direct response to the National Whistleblower Center's (NWC) letter of June 11, 1992 regarding improper restrictive settlements at Comanche Peak. As a matter of law, and on the basis of public policy and nuclear safety, the arguments raised by TU Electric must be dismissed. Additionally, the arguments raised by TU Electric are contrary to the written decisions of the U.S. Secretary of Labor concerning the nature and scope of protected activities under Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851.

At the time the NWC wrote its June 11th letter to the NRC Chairman, the Center did not possess a copy of the controverted Tex-La settlement. The Center recently obtained a copy of that agreement from the NRC's Public Document Room. Unfortunately, the NWC still does not have a copy of the other settlement agreements entered into between TU Electric and the other former minority owners. Once those agreements have been obtained and reviewed we will file additional comments, if necessary.

On the basis of the actual language of the Tex-Law settlement, its inappropriate restrictions are obvious:

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ADD. Tom Bergman

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I. THE CONTRACTUAL RESTRICTIONS IMPOSED BY THE TEX-LAW SETTLEMENT INHIBIT THE FREE FLOW OF INFORMATION.

On March 23, 1989 Tex-La and TU Electric executed a settlement agreement concerning Tex-La's status as a minority owner of the Comanche Peak nuclear facility. Prior to the settlement, Tex-La (along with the other minority owners of Comanche Peak) had been in litigation with TU Electric. During the course of that litigation, Tex-La (and the other minority owners) had amassed a wealth of information directly related to the safety of Comanche Peak, the improper actions of TU Electric in constructing Comanche Peak and to outstanding issues being litigated before the NRC Atomic Safety and Licensing Board (ASLB) in the Operating License (OL) and Construction Permit Amendment (CPA) dockets.

For example, one former minority owner was asked, in formal interrogatory questions submitted to the NRC, what information it had concerning Contention 2 in the ASLB CPA proceeding.^{1/} In response to that question, the minority owner stated that it had information that TU Electric engaged in "misrepresentations, non-disclosures, and threats" and interfered with the "minority owners' obligations to the ASLB, to the parties to these proceedings [i.e. the ASLB proceedings], and to the NRC." The minority owner stated that these improper corporate policies had "not been discarded or repudiated by TU Electric." See, Objections and Responses of Brazos Electric Power Cooperative, Inc. to Consolidated Intervenor's Interrogatories and Request for Production of Documents, dated August 14, 1987. Additionally, the minority owner listed scores of

^{1/} Contention 2 in the CPA hearing was:

The delay in construction of Unit 1 was caused by Applicants' intentional conduct, which had no valid purpose and was the result of corporate policies which have not been discarded or repudiated by Applicants.

This contention, which directly relates to the safety of Comanche Peak and the character and competence of TU Electric to operate said facility, is identical to a new contention filed by clients of the NWC on October 5, 1992 concerning a new CPA hearing for Unit 2 of Comanche Peak. See Supplement to Petition to Intervene and Request for Hearing of B. Irene Orr, D.I. Orr, Joseph J. Macktal, Jr, and S.M.A. Hasan, Docket No. 50-446-CPA and ASLB No. 92-668-01-CPA. Significantly, the intervenors in this new CPA proceeding are being denied access to the information amassed by the former minority owners due to the restrictive settlement.

"misrepresentations and failures to disclose material information" concerning the "licensing" of Comanche Peak, including:

- ▶ "Misrepresentations and failures to disclose material information as to the construction of CPSES and the adequacy thereof;"
- ▶ "Misrepresentations and failures to disclose material information as to TUEC's compliance with applicable regulations;"
- ▶ "Misrepresentations and failures to disclose material information as to TUEC's adherence to commitments made to the NRC;"
- ▶ "Misrepresentations and failures to disclose material information as to the competence of TU Electric to perform the duties of project manager;"
- ▶ "Misrepresentations and failures to disclose material information as to the competence of contractors and subcontractors;"
- ▶ "Misrepresentations and failures to disclose material information as to the competence of the architect/engineers;"
- ▶ "Misrepresentations and failures to disclose material information as to the viability of CPSES QA/QC programs;"
- ▶ "Misrepresentations and failures to disclose material information as to the competence of TU Electric and other Texas Utilities personnel;"
- ▶ "Misrepresentations and failures to disclose material information as to the accuracy of statements made by TU Electric to the NRC."

Id., pp. 3-4.

As can be seen from this one document alone, the minority owners of Comanche Peak had assembled a wealth of information relevant to the licensing of CPSES Units 1 & 2. Also see, CPA Docket created before the ASLB, 50-445-CPA. Consequently, the suppression of evidence caused by the TU Electric -- minority owner settlements was significant. Moreover, the prejudice caused by the inability of present intervenors before the NRC to obtain informa-

tion from the minority owners in order to use the data in NRC proceedings is likewise apparent.

This prejudice is obvious from even a cursory review of the Tex-La agreement. First, the Tex-La agreement is not limited to restricting the speech of one single employee (such as the now highly discredited Macktal and Polizzi agreements). The Tex-La agreement encompassed the activities of literally hundreds and thousands of "employees," "officers," "directors," "consultants," "attorneys," "agents," "servants" and "representatives." Agreement pp. 42; 45 and Settlement Agreement Exhibit M.

Second, the agreement prohibits these above-referenced persons from engaging in a wide variety of actions which "will directly or indirectly, oppose, challenge, contest or assert any complaint in any court or administrative agency or body in any forum whatsoever with respect to, or in any manner involving, concerning, arising out of, or relating to, Comanche Peak and the incidents and attributes thereof including, without limitation, the planning, design, construction or licensing or any other aspect of such planning, design, construction or licensing . . . and the management of such planning, design, construction or licensing" Agreement pp. 42-43. Accord, Agreement Appendix M.

This blanket prohibition includes Tex-La employees, attorneys and agents from assisting in any manner whatsoever in activities related to the NRC's licensing of CPSES and prohibits any Tex-La employee, attorney and agent from assisting the current intervenors at CPSES. Thus, it comes as no surprise that Mr. William H. Burchette, the lead attorney for Tex-La in its former dispute with TU Electric, informed an intervenor at CPSES that "Tex-La, as well as its employees, attorneys and other consultants, are precluded from assisting or cooperating in any way with your organization, or with any other third party, in opposing TU Electric in connection with the licensing of Comanche Peak." Burchette to Dow, May 20, 1992.

But the agreement goes even further than these blanket prohibitions. It was widely known that the attorneys and consultants hired by Tex-La (and the other minority owners) has assembled a wealth of information extremely critical of TU Electric's construction and operation of CPSES. The agreement suppressed this extremely important information:

. . . it being understood and agreed that Tex-La's consultants and attorneys may have obtained or developed information regarding Comanche Peak in the course of the

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Pending Litigation that arguably could be inequitable for them to otherwise utilize in view of the consideration being rendered by TU Electric . . . Tex-La covenants and agrees that it will take all such action as may be necessary or appropriate in order to prevent the consultants and attorneys . . . from participating or assisting in any manner adverse to Tex-La's duty of cooperation herein or to TU Electric in connection with . . . any current or future proceeding or matter before the PUC or the NRC involving or relating to Comanche Peak, or any current or future proceedings before any court or before any administrative agency or body or in any other forum whatsoever with respect to, or in any manner involving, concerning, arising out of, or relating to . . . the acts or omissions of TU Electric . . . the acts or omissions of TU Electric or the Project Manager with respect to Comanche Peak

Agreement pp. 45-46.

Incredibly, TU Electric contracted for the suppression of Tex-La assembled information before all "NRC" proceedings "involving or relating to Comanche Peak." This suppression of evidence is not only prejudicing intervenors at CPSES, it has already jeopardized the public health and safety. For example, the information outlined in the above-referenced interrogatory answers was suppressed by this agreement.

Even more incredibly, TU Electric has asserted in its August 6, 1992 letter to Dr. Murley, that these types of restrictions serve the "public interest." What public interest could possibly be served by forcing Tex-La's consultants to suppress information amassed over a long investigation regarding significant safety related matters?

TU Electric alleges that the restrictive elements of its agreement with Tex-La "pertain entirely to the covenants not to sue." Walker to Murley, p. 6. This is not correct. The Tex-La employees, consultants and agents, etc. are expressly prohibited not merely from filing new litigation against TU Electric, but from "assisting" in any manner any person opposing the licensing of Comanche Peak. The agreement was explicitly designed to suppress the information gathered by Tex-La's consultants and attorneys. Agreement pp. 45-46. Additionally, TU Electric does not understand that it is a violation of law and public policy for any person to enter into an agreement restricting their right to file a safety

complaint with the NRC and/or to assist in the investigation/adjudication of such a safety complaint. No person can legally waive the right to file a complaint against TU Electric with the NRC. 29 C.F.R. § 24.2(b)(1); 42 U.S.C. § 5851(a)(1).

For example, in EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir, 1987), the court held that a waiver of the right to file a charge with the EEOC was void as against public policy. The Cosmair decision was cited to and reaffirmed by the Secretary of Labor in her decision in Polizzi v. Gibbs & Hill, Inc., 87-ERA-38, D&O of SOL, p. 5-7 (July 18, 1989). Thus, under both Polizzi and Cosmair the type of prohibition contained in the Tex-La settlement against filing a charge with the NRC concerning safety related matters at Comanche Peak is patently illegal.

In any event, the prohibitions outlined above violate public policy and the Congressionally mandated rights of employees under the Energy Reorganization Act.

II. THE TEX-LA AGREEMENT VIOLATES THE ENERGY REORGANIZATION ACT AND IMPORTANT PUBLIC POLICIES.

TU Electric asserts that the Tex-La agreement does not violate 10 C.F.R. § 50.7(f). These assertions demonstrate that TU Electric still does not understand the importance of preserving the free flow of information from informants to the NRC and/or the relationship of Section 210 to nuclear safety.

TU Electric alleges that its agreement with Tex-La does not violate § 50.7(f) because it does not affect the "terms" or "conditions" of employment, does not prohibit persons from "participating in protected activity" and that restrictions on "communicating with third persons" does not violate the regulation. Walker to Murley, pp. 3-5. These assertions are without merit.

First, Section 210 and its implementing regulations (29 C.F.R. Part 24 and 10 C.F.R. Part 50) explicitly protect the right of persons to "communicate" potential safety concerns with "third persons." For example, in the legislative history for Section 210, the right of employees to contact non-NRC sources with information (i.e. such as a labor union) was explicitly recognized: "Under this section, employees and union officials could help assure that employers do not violate requirements of the Atomic Energy Act. S. Rep. 95-848, reprinted in 1978 U.S. Code Cong. & Admin. News 7303-04 (emphasis added).

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This recognition that persons covered under Section 210 may want to utilize third parties to engage in protected activity was codified by Congress in the statute itself. Section 210(a) recognizes that employees may engage in protected activity directly or through third parties: ". . . the employee (or any person acting pursuant to a request of the employee)" 42 U.S.C. § 5851(a).

If there was any doubt about an employee's right to work with third parties in making disclosures about potential safety problems, the statutory definition of protected activity explicitly protects this form of conduct. Protected activity includes "assisting" persons (such as intervenors or persons who have filed 2.206 petitions) who are participating in NRC proceedings:

assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954

42 U.S.C. § 5851(a)(3) (emphasis added).

This statutory right to "assist" third parties in engaging in protected activity is consistent with the overall definition of protected activity. For example, no employer can bar an employee from "testify[ing]" in an NRC proceeding. 42 U.S.C. § 5851(a)(2). Consequently, if an employee wanted to provide testimony in support of a citizen intervenor or a complainant in a 2.206 proceeding, such conduct is statutorily protected. It is illegal for a corporation, such as TU Electric or Tex-Lo, to create any contractual impediments to the right of persons to "testify" or "assist" participants in NRC proceedings.

These protections are reflected in both the regulations of the U.S. Department of Labor [29 C.F.R. § 24.2(b)] and the NRC [10 C.F.R. § 50.7(a)(1)(iii)].

If there was any doubt whatsoever about Section 210's protection of persons who assist third parties, this ambiguity was fully resolved by the U.S. Secretary of Labor (SOL). In the case of Nunn v. Duke Power Company, No. 84-ERA-27, D&O of Deputy Secretary of Labor, p. 13 (July 30, 1987), the SOL explicitly ruled that employee contact with citizen intervenors was protected as a matter of law. In that case, the SOL ruled that Mr Howard Samuel Nunn's contacts with the Palmetto Alliance (a citizen intervenor group) and the Government Accountability Project (a whistleblower protection group similar to the National Whistleblower Center) were

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protected under Section 210. Nunn, D&O p. 13. This ruling under the Energy Reorganization Act was in accordance with the SOL's rulings in other cases under identical employee protection laws also administered by the SOL. See, e.g. Wedderspoon v. Milligan, No. 80-WPCA-1, D&O of ALJ at pp. 10-11 (July 11, 1980), adopted by the SOL (July 28, 1980). In Wedderspoon, an employee's contact with an environmental organization and the news media was found to be protected.

Consequently, the Tex-La agreement's provisions which prohibit Tex-La employees, attorneys, consultants and others from "assisting" citizen intervenors (such as the Disposable Workers of Comanche Peak, the National Whistleblower Center and various whistleblower-intervenor clients of the NWC) is illegal and must be voided.

Second, TU Electric's attempt to mitigate the restrictive nature of the settlement alleging that the agreement merely requires Tex-La to "encourage and solicit" its attorneys and consultants from refraining to take "certain actions" against TU Electric. Walker to Murley, p. 4. This assertion is misleading at best. Obviously, attorneys and consultants to Tex-La are under various contractual and ethical obligations to act in a manner in which the client directs. For example, it would be an ethical violation of the basic rules governing attorney conduct for Tex-La to cooperate with the NWC or the Disposable Workers on matters related to their representation of Tex-La without Tex-La's consent. Under the settlement that consent can never be given. In fact, Tex-La is presently obligated to enforce these illegal restrictions on their "consultants and attorneys" unless these agreements are voided. The Agreement states, in part, that Tex-La "will take all such action as may be necessary . . . in order to prevent the consultants and attorneys . . . from participating or assisting . . . [in] any current or future proceedings or matter before the PUC or the NRC involving or relating to Comanche Peak . . ." Agreement p. 45. Tex-La's obligations to enforce the restrictive settlement provisions upon their attorneys and consultants was not merely that of "encouraging" compliance with the agreement. Tex-La had a positive duty to enforce the restrictive covenants upon these persons.

Third, TU Electric's attempt to claim that the Tex-La agreement somehow did not violate 10 C.F.R. § 50.7(f) is absurd. Section 50.7(f) explicitly prohibits employers, such as TU Electric and Tex-La, from prohibiting "employees", including attorneys and paid consultants, from inhibiting an employee's engagement in protected activity. The regulation incorporates by reference all

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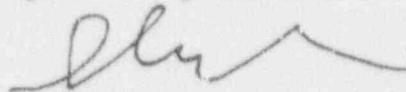
of the substantive protections afforded the public by Section 210 and even goes beyond the protections spelled out in Section 210. Simply stated, NRC regulation §50.7(f) explicated that restrictive settlements, such as the Tex-La agreement, not only violate Section 210 but also constitute a significant threat to the public health and safety requiring a formal rule prohibiting such settlements and severely sanctioning utilities who execute such agreements. 10 C.F.R. § 50.7(c).

Finally, even without the statutory and regulatory precedent outlined above, restrictive settlements such as the Tex-La agreement have been voided on public policy grounds for years. Town of Newton v. Rumery, 480 U.S. 386, 392 (1987) ("[a] promise is unenforceable if the interest in its enforcement is outweighed by a public policy harmed by enforcement of the agreement"). The public policy behind aggressively promoting the filing of safety complaints or concerns with the NRC is monumental. As the U.S. Supreme Court recently recognized, the public policy behind Section 210 of the Energy Reorganization Act is not only to protect persons from discrimination, but to "encourage" the filing of safety complaints. English v. General Electric, ___ U.S. ___ (1990). The Tex-La agreement thwarts these Congressional and NRC policies.

CONCLUSION

We greatly appreciate the Commission's careful review of the Tex-La agreement. If possible, we would like to meet with the Commission's Staff representative in order to more fully explain the serious regulatory, adjudicatory and public policy problems caused by this agreement.

Respectfully submitted,



Stephen M. Kohn
Chairperson, Board of Governors

cc:

Martin J. Virgilio
Representative John Dingell
Senator Bob Graham
and attached Service List

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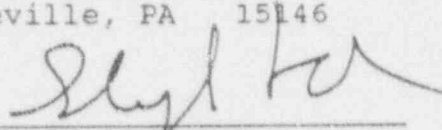
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