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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

FILED IN
DOCKET NO. 50-446
CPA

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

NRC STAFF RESPONSE TO MOTION OF PETITIONERS R. MICKY DOW AND SANDRA LONG DOW, DBA DISPOSABLE WORKERS OF COMANCHE PEAK STEAM ELECTRIC STATION, FOR LEAVE TO FILE OUT OF TIME AND REQUEST FOR EXTENSION OF TIME TO FILE BRIEF

Catherine L. Marco
Counsel for NRC Staff

January 14, 1993

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INTRODUCTION

On January 7, 1993, Petitioners R. Micky Dow and Sandra Long Dow, dba Disposable Workers of Comanche Peak Steam Electric Station (Movants), filed a "Motion For Leave to File out of Time and Request For Extension of Time to File Brief" (Motion). In their Motion, Movants request a fifteen day extension of time for filing their brief in support of their Notice of Appeal from the Order dated December 15, 1992 of the Atomic Safety and Licensing Board (Board) designated in this proceeding. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 35 NRC ___ (1992). For the reasons set forth below, the Staff of the Nuclear Regulatory Commission (Staff) submits that Movants' Motion should be denied.

BACKGROUND

On July 28, 1992, the Petitioners R. Micky Dow, Sandra Long Dow and Disposable Workers of Comanche Peak Steam Electric Station filed a request for intervention and hearing in the above-captioned construction permit extension proceeding. "Petition Of Sandra Long Dow dba Disposable Workers of Comanche Peak Steam Electric Station, and R. Micky Dow For Intervention And Request for Hearings" (Petition).¹ On December 15, 1992, the Board issued a "Memorandum and Order (Ruling on Intervention Petitions and Terminating Proceeding)" (Order) terminating this proceeding. *Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2)*, LBP-92-37, 35 NRC ____ (1992). The Board denied the Movants' petition to intervene and request for hearing. The Board stated that, pursuant to the Commission's regulations, the Order is subject to appeal to the Commission and that any such appeal must be filed within ten days after service of the Order. Order at 51-52. On January 7, 1993, the Movants filed their Motion, requesting a fifteen day extension of time for filing their brief in support of their appeal from the Board's Order. For the reasons set forth below, the Motion should be denied.

¹ On September 11, 1992, the Board set October 5, 1992 as the filing date for amended or supplemental petitions. "Memorandum and Order (Setting Pleading Schedule)." On October 5, 1992, the Movants filed a motion for an extension of time, "Motion For Extention (sic) of Time to File Brief By Sandra Long Dow dba Disposable Workers of Comanche Peak Steam Electric Station and R. Micky Dow," which the Board denied on October 19, 1992. "Memorandum and Order (Ruling On Dow Motion For Extension Of Time and Setting A Further Schedule)." On November 10, 1992, the Movant, R. Micky Dow, filed a motion for rehearing. "Motion For Rehearing By R. Micky Dow, Petitioner."

DISCUSSION

The Commission's regulations at 10 C.F.R. § 2.714a require appeals from Board orders denying intervention and hearing requests to be made within ten days after service of the order. 10 C.F.R. § 2.714a. The regulations specifically provide:

Notwithstanding the provisions of § 2.730(f), an order of the presiding officer or the atomic safety and licensing board designated to rule on petitions for leave to intervene and/or requests for hearing may be appealed, in accordance with the provisions of this section, to the Commission within ten (10) days after service of the order. 10 C.F.R. § 2.714a.

The Commission's regulations at 10 C.F.R. § 2.711(a) provide a mechanism for the extension and reduction of fixed time limitations for filings. The regulations provide that "whenever an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may for good cause be extended or shortened by the Commission or the presiding officer." 10 C.F.R. § 2.711(a).

The Movants have failed to comply with the Commission's regulations which establish time limitations for appeals, and have failed to provide good cause for the extension of such time limitations. The Office of the Secretary of the Commission served the Order on the Movants at their current address in Austin, Texas by U.S. mail, first class, on December 16, 1992. The Commission's regulations at 10 C.F.R. § 2.710 allow an additional five days for a response when notice is served upon a party by mail. 10 C.F.R. § 2.710. Therefore, the Movants had fifteen days from the date of service to file either a notice of appeal and a brief supporting their appeal, or a request for

additional time to file such an appeal. The final date for filing the appeal was December 31, 1992 and, thus, the January 7, 1993 filing is untimely.

The Movants have failed to demonstrate good cause for leave to file out of time, or for a grant of an extension of time. The Movants first claim in support of their motion that they did not receive a copy of the Order in time to appeal. Motion at 1. The Movants suggest that a copy of the Order was sent by means of the U.S. mail to their former address in Pennsylvania and that the Movants were unable to receive it there because they had previously moved to Texas. The Movants claim that they left a proper change of address with the U.S. Postal Service and that the Order "did not reach them until well after the ten day period for the filing of a Notice of Appeal had lapsed." Motion at 1.

The Movants incorrectly place blame on the U.S. Postal Service's mail forwarding procedures, when, in fact, the Order was sent directly to their Texas address. The Certificate of Service accompanying the Order shows that the Order was served by U.S. mail, first class, to the Movants in Austin, Texas. The Movants' Austin, Texas address as listed on the Certificate of Service is the same address that the Movants have used in the submittal of this Motion and is the same address that the Movants have established with the Commission for official correspondence.²

Furthermore, on December 28, 1992, the Movants filed a "Petition For Review of Administrative Order" (Petition) in the United States Court of Appeals for the District

² The Petitioners filed "Petitioners' Notice of Change of Address and Telephone Number" on December 26, 1992.

of Columbia Circuit. The Movants included a copy of the Board's Order with their Petition. Therefore, the Movants had a copy of the Board's Order in their possession at least as of December 28, 1992. The Movants, as of December 28, 1992, still had three days before the fifteen day time limit for filing their appeal expired. At the least, the Movants could have requested an extension of time from the Commission at that point in time. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454-55 (1981) (requests for an extension of time should be received by the Board well before the time specified expires, and the "good cause" standard of 10 C.F.R. § 2.711 should be satisfied before granting an extension of time).

The Movants additionally claim that due to their inexperience and the fact that they are not attorneys, they failed to follow correct procedure in seeking review of the Board's Order. Motion at 2. The Movants state that they sought review in the United States Court of Appeal for the District of Columbia Circuit because they considered such review to be "their only remaining course of action." Motion at 2. The Licensing Board's Order, however, which the Movants had in their possession no later than December 28, 1992, specifically set forth the procedures for seeking review of that Order. The Board declared in the Order that "[t]his Order is subject to appeal to the Commission pursuant to the terms of 10 C.F.R. § 2.714a, and specifically 10 C.F.R. § 2.714a(b)." Order at 51. The Board further stated that "[a]ny such appeal must be filed within ten days after service of this Order and must include a notice of appeal and accompanying supporting brief." *Id.* Therefore, the Movants cannot reasonably claim ignorance with respect to the appropriate method for seeking

Commission review of the Board's Order, and have no excuse for not following the clear terms of that Order.

In addition, the movants claim that due to their inexperience, once they discovered that the ten day period had expired, they had no other remedy left but to file an appeal to the District of Columbia Circuit. The Movants, however, have filed a request for an extension of time previously in this proceeding, and have made numerous other filings before the Board.³ The Movants are not, therefore, as inexperienced as they suggest.

The Movants state for consideration that they are not attorneys. Motion at 2. However, although lay representatives are not held to as high a standard as lawyers are, "the right of participation accorded *pro se* representatives carries with it the corresponding responsibilities to comply with and be bound by the same agency procedures as all other parties, even where a party is hampered by limited resources." *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, ALAB-772, 19 NRC 1193, 1247 (1984), *rev'd in part on other grounds*, CLI-85-02, 21 NRC 282 (1985). Moreover, the issue of filing appeals on time in accordance with the instructions in the Order itself is not a sophisticated procedure of which a layman could reasonably plead ignorance or lack of expertise. In addition, the Commission's *Statement of Policy on Conduct of Licensing Proceedings* provides that "[f]airness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by

³ See "Motion for Extension (sic) of Time to File Brief by Sandra Long Dow dba Disposable Workers of Comanche Peak Steam Electric Station and R. Micky Dow," dated October 5, 1992.

and in accordance with applicable law and Commission regulations." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).⁴ The Movants have failed to comply with Commission regulations, have shown no good cause whatsoever, and thus should not be granted any special consideration due to the *pro se* nature of their participation.

Finally, Movants claim because other petitioners in the case have been granted an extension of time in which to file a brief in support of their appeal, it is not unreasonable for the Movants also to be granted an extension of time. Motion at 3-4. The other petitioners in the proceedings who have appealed the Board's decision filed a timely request for an extension of time, unlike the Movants. Unlike the instant Motion, the other petitioners' Motion set forth reasons which the Staff believes did constitute good cause for the grant of the requested extension of time. The ability of one set of petitioners to demonstrate good cause does not guarantee that other petitioners will be able to satisfy this requirement.

⁴ The Staff submits that such obligations include the obligation to familiarize themselves with the regulations pertaining to the computation of time for the filing of documents with the Commission.

CONCLUSION

The Movants have failed to demonstrate good cause for an extension of time to seek review of the Board's Order denying them intervention in this proceeding, as required by 10 C.F.R. § 2.711(a). Therefore, the motion should be denied.

Respectfully submitted,

Catherine L. Marco

Catherine L. Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 14th day of January, 1993

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

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TEXAS UTILITIES ELECTRIC) Construction Permit Amendment
COMPANY)
)
(Comanche Peak Steam Electric)
Station, Unit 2))

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: Catherine L. Marco
Address: Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Telephone Number: 301-504-3052
Admission: Massachusetts Supreme Judicial Court
Name of Party: NRC Staff

Respectfully submitted,

Catherine L. Marco

Catherine L. Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 14th day of January, 1993

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NUCLEAR REGULATORY COMMISSION

DOCKETED
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OFFICE OF SECRETARY
DOCKETING & SERVICE
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COMPANY)	
)	
(Comanche Peak Steam Electric)	
Station, Unit 2))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MOTION OF PETITIONERS R. MICKY DOW AND SANDRA LONG DOW, DBA DISPOSABLE WORKERS OF COMANCHE PEAK STEAM ELECTRIC STATION FOR LEAVE TO FILE OUT OF TIME AND REQUEST FOR EXTENSION OF TIME TO FILE BRIEF" and "NOTICE OF APPEARANCE" of Catherine L. Marco 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, or as indicated by a double asterisk, by hand-delivery, this 14th day of January, 1993:

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Administrative Law Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
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