

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

DOCKETED
USNRC

'93 JAN 26 P4:18

In the Matter of)

TEXAS UTILITIES ELECTRIC)
COMPANY)

(Comanche Peak Steam Electric)
Station, Unit 2))

) Docket No. 50-446-ØL

NRC STAFF'S REPLY TO CITIZENS FOR FAIR UTILITY
REGULATION'S REQUEST FOR PUBLICATION OF
PROPOSED ACTION WITH RESPECT TO THE LICENSING
OF COMANCHE PEAK STEAM ELECTRIC STATION, UNIT 2

Marian L. Zobler
Counsel for NRC Staff

Catherine L. Marco
Counsel for NRC Staff

January 26, 1993

9301280052 930126
PDR ADDOCK 05000446
G PDR

D50

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
BACKGROUND	1
DISCUSSION	
I. CFUR'S REQUEST SHOULD BE TREATED EITHER AS A MOTION TO REOPEN A CLOSED RECORD OR A PETITION FILED PURSUANT TO SECTION 2.206 OF THE COMMISSION'S REGULATION	4
A. CFUR Incorrectly Relies On Section 2.104(a) Of the Commission's Regulations To Request An Opportunity To Request A Hearing	5
B. CFUR's Request Does Not Demonstrate That Renoticing Is Necessary	7
II. CFUR FAILS TO SATISFY THE FACTORS NECESSARY TO SUPPORT A MOTION TO REOPEN THE RECORD	10
A. Standards For The Granting Of Motions To Reopen The Record	11
B. CFUR Fails To Meet The Requirement of Section 2.734(b)	13
C. CFUR Fails To Meet The Requirements of Section 2.734(a)	13
1. CFUR's Request is Not Timely	13
2. CFUR's Request Does Not Raise a Significant Safety Issue	15
3. Petitioners Fail to Show that a Materially Different Result Would Have Occurred	18

III. CFUR FAILS TO SATISFY THE REQUIREMENTS FOR
LATE INTERVENTION PETITIONS AND LATE FILED
CONTENTIONS

A. CFUR Fails To Satisfy the Standards for Late Intervention	20
1. Legal Standards for Granting a Late Filed Intervention Petition	20
2. CFUR Fails to Satisfy the Factors of Section 2.714(a)(1)	21
CONCLUSION	23

TABLE OF AUTHORITIES

<u>ADMINISTRATIVE DECISIONS</u>	<u>Page</u>
<u>Commission:</u>	
Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89 (1989)	12, 13
Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1 (1986)	12
Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327 (1983)	20, 21
Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483 (1990)	14
Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605 (1988), <i>aff'd sub nom. Citizens for Fair Utility Regulation v. NRC</i> , 898 F.2d 51 (5th Cir.), <i>cert. denied</i> , 111 S. Ct. 246 (1990)	3, 19, 21, 22
Texas Utilities Electric Co., (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-01, 35 NRC 1 (1992)	12, 19
<u>Appeal:</u>	
Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-577, 11 NRC 18 <i>motion to modify denied</i>	6
Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 907 (1982)	19
Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760 (1982)	20, 21, 22
Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 <i>reh'g denied</i>	8, 9, 10
Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387 (1983)	20
Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-815, 22 NRC 198 (1985)	13

Mississippi Power & Light Co., (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982)	21, 22
Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427 (1989)	12, 13
Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973)	13
Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167 (1983)	2

Licensing:

Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), LBP-73-41, 6 AEC 1057 (1973)	19
Rochester Gas & Electric Co. (R.E. Ginna Nuclear Plant, Unit 1), LBP-83-73, 18 NRC 1231 (1983)	8, 9, 10
Texas Utilities Electric Co., (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18A, 28 NRC 101 (1988)	2, 3
Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18B, 28 NRC 103 (1988)	3, 4, 7, 8, 10

Directors Decisions:

Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), DD-91-05, 34 NRC 209 (1991)	14, 16
--	--------

REGULATIONS

10 C.F.R. § 2.104(a)	5
10 C.F.R. § 2.206	4, 5, 6
10 C.F.R. § 2.714(a)(1)(i)-(v)	3, 20, 21
10 C.F.R. § 2.734	4, 11, 12, 13
10 C.F.R. § 2.206(c)(1)	5
10 C.F.R. § 2.734(a)(1-3)	11

10 C.F.R. § 2.104(a)	5, 6, 7
10 C.F.R. § 2.714	20
10 C.F.R. § 2.714(a)(1)	21
10 C.F.R. § 2.734	11
10 C.F.R. § 2.734(a)	11, 13
10 C.F.R. § 2.734(a)(1)	13
10 C.F.R. § 2.734(a)(2)	15, 16
10 C.F.R. § 2.734(a)(3)	18
10 C.F.R. § 2.734(b)	13
10 C.F.R. § 2.734(d)	18

MISCELLANEOUS

57 Fed. Reg. 38702	15
--------------------	----

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S REPLY TO CITIZENS FOR FAIR UTILITY REGULATION'S
REQUEST FOR PUBLICATION OF PROPOSED ACTION WITH RESPECT TO
THE LICENSING OF COMANCHE PEAK STEAM ELECTRIC STATION, UNIT 2

INTRODUCTION

On January 13, 1993, Citizens for Fair Utility Regulation (CFUR) requested, by letter to the Office of the Commissioners, that the Commission publish in the *Federal Register* a notice of proposed action with respect to the issuance of an operating license to Comanche Peak Steam Electric Station (CPSES), Unit 2 which would allow affected parties to request hearings (Request). On January 21, 1993, the Commission directed that the Staff of the Nuclear Regulatory Commission (Staff) respond to CFUR's request by close of business, January 26, 1993.¹ The Staff's response, opposing CFUR's request, is set forth below.

¹ The Commission also directed that the Applicant respond by close of business on January 25, 1993.

BACKGROUND

In 1979 the notice of hearing with respect to the consideration of the issuance of the operating licenses for the CPSES, Units 1 and 2, was published in the *Federal Register*. "Availability of Applicant's Environmental Report, Consideration of Issuance of Facility Operating License, and Opportunity for Hearing," 44 Fed. Reg. 6995 (February 5, 1979). The Licensing Board designated to preside over the operating license proceeding (OL Proceeding) granted leave to intervene to Citizens Association for Sound Energy (CASE), CFUR, and the Texas Association of Community Organizations for Reform Now (ACORN). "Order Relative to Standing of Petitioners to Intervene," (June 27, 1979). In 1981, ACORN withdrew from the proceeding. "Memorandum and Order," (July 24, 1981); "Order," (January 12, 1982). In 1982, CFUR also withdrew from the proceeding, leaving CASE as the sole intervenor. "Order (Following Conference Call)," (April 2, 1982).

On July 1, 1988, CASE, Texas Utilities Electric Company (TU), the applicant, and the Staff filed a motion to dismiss the OL and CPA proceedings as a result of a joint stipulation agreed to by the parties. "Joint Motion for Dismissal of Proceedings," (July 1, 1988).² On July 5, 1988, the Licensing Board issued an order approving the stipulation and scheduling a prehearing conference for July 13, 1988. "Memorandum and Order (Terminating Proceedings Subject to Condition)," (July 5, 1988), *Texas Utilities*

² A construction permit amendment proceeding relating to Unit 1 was also dismissed as a result of the joint stipulation.

Elec. Co., (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18A, 28 NRC 101 (1988). The purpose of the prehearing conference was to facilitate the admission of certain documents into the record as required by the Joint Stipulation. *Id.* at 102. At the end of the prehearing conference, the Licensing Board signed an order dismissing both proceedings. "Memorandum and Order (Dismissing Proceedings)," (July 13, 1988), *Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18B, 28 NRC 103 (1988).

On August 11, 1988, CFUR filed a late petition to intervene in the proceedings. "Request for Hearing and Petition for Leave to Intervene by Citizens for Fair Utility regulation." The Commission denied CFUR's late intervention petition for failure to satisfy the five-factor balancing test for late filed intervention petitions (10 C.F.R. § 2.714(a)(1)(i)-(v)). *Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 609 (1988), *aff'd sub nom. Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir.), *cert. denied*, 111 S. Ct. 246 (1990).

DISCUSSION

I. CFUR'S REQUEST SHOULD BE TREATED EITHER AS A MOTION TO REOPEN A CLOSED RECORD OR A PETITION FILED PURSUANT TO SECTION 2.206 OF THE COMMISSION'S REGULATIONS

CFUR's Request should be treated either as a motion to reopen a closed record filed pursuant to 10 C.F.R § 2.734 or as a petition filed pursuant to 10 C.F.R § 2.206. The notice providing the opportunity to request a hearing regarding the licensing of CPSES, Unit 2 was published in 1979. 44 Fed. Reg. 6995. A hearing was held regarding the licensing of Unit 2 and was terminated in 1988 by a settlement agreement. *Comanche Peak*, LBP-88-18B, 28 NRC 103. CFUR's Request that the Commission provide another opportunity for interested persons to request a hearing on the licensing of Unit 2 is, in essence, a request that a hearing be held in order to consider new information. The Commission's regulations provide two methods whereby an individual or organization may request that a hearing be held on new information: a motion to reopen a closed record, filed pursuant to section 2.734 of the Commission's regulations; or a petition, filed pursuant to section 2.206, requesting that a proceeding be instituted to modify, suspend, or revoke a license, or for such other action as may be proper. See 10 C.F.R. §§ 2.734; 2.206. CFUR should not be allowed to circumvent the requirements of either section by erroneously relying on section 2.104(a) of the Commission's regulations. Because CFUR has failed to address the requirements necessary to support a motion to reopen a closed

record, its Request should be referred to the Staff as a petition filed pursuant to section 2.206.

A. CFUR Incorrectly Relies On Section 2.104(a) Of the Commission's Regulations To Request An Opportunity To Request A Hearing

CFUR requests that the Commission provide for an opportunity to request a hearing regarding the licensing of Unit 2 because CFUR claims it would be in the public interest to hold a hearing.³ Request at 1. CFUR erroneously relies on section 2.104(a) of the Commission's regulations to support its request. *Id.* However, section 2.104(a) does not permit CFUR to request a hearing on the licensing of CPSES, Unit 2.

The relevant portion of section 2.104(a)⁴ requires that once an application for an operating license (OL), construction permit (CP), or an amendment to either, is submitted to the Commission, in the case where a hearing is not mandatory pursuant to section 189

³ CFUR also requests that the Commission review its petition filed pursuant to section 2.206 regarding the failure of the Borg-Warner valves. Request at 2. CFUR is, however, precluded by section 2.206 from requesting Commission review of its petition. 10 C.F.R. § 2.206(c)(2). The Commission may, on its own motion, review a director's decision issued pursuant to section 2.206. § 2.206(c)(1).

⁴ Section 2.104(a) states:

In the case of an application on which a hearing is required by [the Atomic Energy] Act or this chapter, or in which the Commission finds that a hearing is required in the public interest, the Secretary will issue a notice of hearing to be published in the *Federal Register*. . . .

10 C.F.R. § 2.104(a).

of the Atomic Energy Act (42 U.S.C. § 2239), the Commission may require, nonetheless, that a hearing be held if it finds that the public interest so requires. *See Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-577, 11 NRC 18, 28, *motion to modify denied*, ALAB-581, 11 NRC 233, *rev'd in part on other grounds*, CLI-80-12, 11 NRC 514 (1980). In *Shearon Harris*, the Appeal Board determined that a hearing on an OL application may be initiated in two ways: either, the Commission may, pursuant to section 2.104(a), require that a hearing be held, based on the application, if the Commission determines a hearing would be in the public interest; or, if an interested person requests a hearing and the Commission's requirements regarding intervention are satisfied, a hearing will be held. *Shearon Harris*, ALAB-581, 11 NRC at 234.

Section 2.104(a) is, therefore, the means by which the Commission may on its own initiative require a hearing on an application where a hearing would not otherwise be required by the Atomic Energy Act. Section 2.104(a) does not permit an individual to assert that a hearing be held in the public interest. If an individual wishes to request a hearing where no application is pending, that person must file a petition pursuant to 10 C.F.R. § 2.206 which sets forth the factors that constitute the basis for the request. If an application is pending and a hearing has already been held, an individual must file a motion to reopen a closed record in order for further hearings to be held. Here, TU has not submitted a new application to the Commission. Rather, the low-power license to CPSES, Unit 2 is being issued pursuant to the application which was noticed in 1979 and

a hearing was already held on that application. Section 2.104(a), therefore, does not apply to the issuance of the low-power license for Unit 2.⁵

B. CFUR's Request Does Not Demonstrate That Renoticing Is Necessary

Furthermore, CFUR's Request should not be granted since a notice was already published regarding the licensing of Unit 2 and the circumstances warranting a renoticing of the issuance of an OL for Unit 2 are not present here. CFUR's Request that a notice be published regarding the licensing of Unit 2, therefore, should be denied.

CFUR requests that the Commission publish in the *Federal Register* a notice of proposed action with respect to the issuance of the OL for CPSES, Unit 2. Request at 1.

⁵ Even if section 2.104 of the Commission's regulations did apply, CFUR has not demonstrated that the public interest requires that a hearing be held. CFUR asserts that since it has been well over eight years since public hearings were held regarding the licensing of Unit 2, the public interest requires that hearings be held now. Request at 3. The public, according to CFUR, has the right to hear the "final issues of safety surrounding this plant debated under the openness that can only happen when all parties are under oath and subject to cross examination." *Id.* Finally, CFUR asserts that only a hearing can restore the public confidence that the NRC is fully able to regulate licensees and protect the public. *Id.* at 3-4.

CFUR has failed to demonstrate that the public interest requires that a hearing be held prior to the issuance of low-power license for Unit 2. The OL proceeding for Unit 2 was terminated in July 1988, approximately four and an half years ago. *Comanche Peak*, LBP-88-18B, 28 NRC 103. As discussed below, the two issues which CFUR raises in its Request have been fully reviewed by the Staff and do not raise a significant safety concern. Furthermore, CFUR's statements that only a public hearing can restore the public's confidence in the ability of the NRC to regulate licensees are unsupported. In light of the fact that a hearing on the issuance of the OL has already been held, and in fact, CFUR had been an intervenor in that hearing, and because CFUR has failed to raise a significant safety concern, it would not serve the public interest to hold additional hearings and delay the operation of Unit 2.

CFUR further requests that this notice provide an opportunity for affected parties to request a "hearing in the public interest be instituted, allowing public participation and intervention." *Id.* A notice of proposed action regarding the licensing of CPSES, Unit 2, however, has already been published and the issuance of the low-power license for Unit 2 does not involve any new proposed action. *See* 44 Fed. Reg. 6995. In essence, it appears, then, that CFUR is requesting that the Commission renote the proposed action regarding the licensing of Unit 2. For the reasons discussed below, CFUR's request to renote the licensing of Unit 2 is inappropriate.

Although not specifically provided for in the Commission's regulations, there have been occasions where it was found to be necessary to renote an opportunity to request a hearing in certain circumstances. Renoting has been found to be necessary where there has been a long delay between the notice and the start of the evidentiary hearing relating to all safety concerns regarding an application. *See Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, *reh'g denied*, ALAB-539, 9 NRC 422 (1979); *Rochester Gas & Elec. Co.* (R.E. Ginna Nuclear Plant, Unit 1), LBP-83-73, 18 NRC 1231 (1983). Here, although there will be a delay between the issuance of the low-power license to TU for CPSES, Unit 2, and the termination of the hearing, there was not a long delay between the notice of hearing and the start of the hearing regarding the licensing of Unit 2. Accordingly, renoting of the opportunity to request a hearing regarding Unit 2 is not necessary.

In *Ginna*, the Licensing Board held that where a proceeding had been held in abeyance for several years and never terminated, while the Staff completed its review of an operating license application, the passage of time had vitiated the original notice for an opportunity to request a hearing. *Ginna*, LBP-83-73, 18 NRC at 1235. The Ginna plant had received a provisional operating license in 1969. *Id.* In 1972, the applicant requested conversion of the provisional operating license to a full-term operating license. *Id.* This request was noticed in the *Federal Register* and one intervenor was admitted into the proceeding in 1975. *Id.* Since the original notice was published, however, the applicant had made modifications to the plant and the proceeding was held in abeyance while the Staff completed its review of the application. *Id.* at 1232-33. In 1983, the Staff completed its review and the Licensing Board was ready to resume the proceeding. *Id.* at 1233.

The Licensing Board determined that due to the long time which had elapsed between the original notice and the resumption of the hearing, it was necessary to renounce the opportunity to request a hearing on the application. *Id.* The Licensing Board relied on *Allens Creek* in determining that a notice which is 5 to 10 years old is "manifestly stale." *Id.* at 1234; see also *Allens Creek*, ALAB-353, 9 NRC at 386-87. The Licensing Board also noted that at the time of the original notice, in 1972, there was little public interest in issues involving nuclear power, but since that time, the issues concerning nuclear power had become more crystallized. *Id.* at 1236. Moreover, the Licensing Board determined that since the original notice had been issued, a significant number of people had moved

into the vicinity of the plant and to not renounce the opportunity to request a hearing would deny these people the opportunity to become involved. *Id.* Renouncing of the opportunity to request a hearing was, therefore, required. *Id.* at 1233.

Unlike *Ginna*, in which a full evidentiary hearing had not yet been held at the time the Licensing Board determined that renouncing was required, a hearing was held regarding the licensing of CPSES, Unit 2. The opportunity to request a hearing had been duly published and a hearing was held within a reasonable time.⁶ Moreover, unlike *Ginna*, which involved a resumption of an ongoing hearing, the hearing regarding CPSES has already been terminated. Also, unlike the situation in *Ginna*, issues regarding nuclear power were very much a concern to the public as evidenced by the fact that originally there were three intervenors admitted in the proceeding. Finally, CFUR cannot claim that it did not have an opportunity to request leave to intervene at the time of the filing of the original notice, since it had in fact intervened in the hearing. CFUR's Request for a new notice for the opportunity to request a hearing regarding the licensing of CPSES, Unit 2 should, therefore, be denied.

⁶ Although the hearing on the OL for Unit 2 was delayed for a period of time, it was terminated in 1988. *Comanche Peak*, LBP-88-18B, 28 NRC 103. In both *Ginna* and *Allens Creek* the opportunities to request a hearing had been noticed, but the hearings themselves had not been terminated at the time renouncing was required. *Ginna*, LBP-87-73, 18 NRC at 1233; *Allens Creek*, ALAB-535, 9 NRC at 382-83.

II. CFUR FAILS TO SATISFY THE FACTORS NECESSARY TO SUPPORT A MOTION TO REOPEN THE RECORD

A. Standards For The Granting Of Motions To Reopen The Record

As discussed above, CFUR's Request should be treated as a motion to reopen a closed record or as a petition filed pursuant to section 2.206. To the extent that CFUR's Request is treated as a motion to reopen a closed record, it should be denied because CFUR has failed to satisfy the three factors listed in the Commission's regulation regarding motions to reopen. *See* 10 C.F.R. § 2.734.⁷ Section 2.734 of the Commission's regulations clearly spells out the criteria and requirements to reopen a closed record. Section 2.734(a) requires that the motion be timely, unless it presents "an exceptionally grave issue"; the motion must raise a significant safety or environmental issue; and the motion must demonstrate that "a materially different result would be or would have been likely had the proffered evidence been considered initially." § 2.734(a)(1-3).

Further, a motion to reopen must be accompanied by "one or more affidavits which set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied." 10 C.F.R. § 2.734(b). Also, since CFUR's Request raises two issues not in contention in the previous hearing regarding

⁷ CFUR did not specifically state its Request was in fact a motion to reopen the record and, therefore, it did not address the criteria listed in section 2.734. The Staff submits, however, that, based on the discussion below, even if CFUR had specifically addressed the factors of 2.734 in its Request, it still would not have prevailed.

Unit 2, CFUR must also address the factors of section 2.714(a) regarding the filing of late contentions. 10 C.F.R. § 2.734(d). Finally, the proponent of a motion to reopen must have been a party to the original proceeding.⁸ *Texas Utilities Elec. Co.*, (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-01, 35 NRC 1, 6 (1992).

In order to satisfy the requirements of section 2.734, a movant faces a heavy burden. *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). A movant must comply with the requirements of both paragraphs (a) and (b) of section 2.734. 10 C.F.R. § 2.734. See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93 (1989). Adjudicatory boards are expected to enforce these requirements rigorously, rejecting "out-of-hand reopening motions that do not meet those requirements within their four corners. . . ." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 432 (1989). CFUR's Request fails to meet any of the requirements of section 2.734. Its motion is untimely; it fails to raise a significant safety or environmental issue; and it fails to demonstrate that a different outcome in the proceeding is likely. CFUR's Request, to the extent it is treated as a motion to reopen the record, should, therefore, be denied.

⁸ As will be discussed below, CFUR, since it withdrew from the proceeding in 1982, must now address the factors of section 2.714(a) of the Commission's regulations regarding the filing of late intervention petitions.

B. CFUR Fails To Meet The Requirement of Section 2.734(b)

As mentioned above, 10 C.F.R. Section 2.734(b) of the Commission's regulations requires that a motion to reopen be accompanied by affidavits "setting forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied." Failure to provide such affidavits is fatal to a motion to reopen a record. See *Shoreham*, CLI-89-1, 29 NRC at 93-94 (Commission denied intervenor's request to reopen the record for failure to provide any affidavits). See also, *Seabrook*, ALAB-915, 29 NRC at 431. CFUR's Request is not accompanied by any affidavits. It should, therefore, be denied.

C. CFUR Fails To Meet The Requirements of Section 2.734(a)

1. The Timeliness Of CFUR's Request

Section 2.734(a)(1) requires that the motion be timely, "except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented." The test for timeliness is whether the issues sought to be presented could have been raised at an earlier stage. *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 n.12 (1973). The relevant time period is measured as the difference in time between when the information concerning the issues sought to be raised was available and the time a movant makes a motion to reopen. See *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-815, 22 NRC 198, 202 (1985). The Commission has denied a request to reopen the record as untimely where a movant waited as little as four weeks from the time

that the information became available until filing the motion. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 487 (1990).

CFUR, in its Request, raises two issues; the failure of Borg-Warner check valves in both Unit 1 and Unit 2, as well as the breakdown in the quality assurance (QA) program at the Borg-Warner facility, and the failure of the fire barrier, Thermo-Lag, which is currently being installed in Unit 2. Request at 1-2. All but one aspect of the issues CFUR raises fail to relate to new information.

The breakdown of the QA program at the Borg-Warner facility was documented in January 1990, over three years ago. *See Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Unit 1), DD-91-05, 34 NRC 209, 217 (1991). Moreover, CFUR, itself was aware of the problems at the Borg-Warner facility as early as November 1990 when it filed a petition, pursuant to section 2.206, regarding the breakdown of the QA program. *See id.* CFUR's Request as it relates to the QA problems at Borg-Warner is not based on new information. Furthermore, the failure of the Borg-Warner check valves at Unit 1 was also referenced in CFUR's petition filed pursuant to section 2.206 and addressed by the Staff in a director's decision. *See id.* To the extent that CFUR raises an issue regarding the failure of the valves at Unit 2, CFUR's Request is timely. However, as discussed below, the failure of these valves does not raise a significant safety issue.

The failure of Thermo-Lag configurations being tested for qualification of the fire barrier system for Unit 2 was first detected in 1992. Affidavit of Ralph E. Architzel, at ¶ 3. (Architzel Affidavit), attached hereto. The general failure of Thermo-Lag was the

subject of a petition filed pursuant to section 2.206 by the Nuclear Information and Resource Service (NIRS) in July 1992, over one year ago, which specifically mentioned the failure at Unit 2.⁹ 57 Fed. Reg. 38702 (August 26, 1992). CFUR's concern, accordingly, does not relate to new information.

CFUR's concerns regarding the QA problems at Borg-Warner and Thermo-Lag are untimely. Its Request, as far as it relates to those issues, should be denied. However, section 2.734(a)(1) does provide that if a motion is untimely, it still may be considered if it raises an "exceptionally grave issue." As will be discussed below, the issues raised by CFUR are not safety or environmentally significant, let alone any that could be considered exceptionally grave.

2. CFUR's Request Does Not Raise A Significant Safety Issue

Section 2.734(a)(2) of the Commission's regulations provides that a motion to reopen a closed record must also address a significant safety or environmental issue. The two issues raised by CFUR do not raise any safety concerns. Both of these concerns are known to the Staff and the Staff has concluded that neither of them raises a significant

⁹ Additionally, the Commission is aware of the Thermo-Lag issue as it relates to Unit 2 and had referred the issue to the Staff to be reviewed in conjunction with NIRS', and others', including CFUR's, petition filed pursuant to section 2.206. NIRS, and others including CFUR, had specifically requested, *inter alia*, that the construction permit for CPSES, Unit 2 be suspended. See 57 Fed. Reg. 38702. The Staff rejected NIRS' request in a letter dated August 19, 1992. On September 3, 1992, NIRS filed an "appeal" of the Staff's denial of its request. In a letter dated November 9, 1992 from the Secretary of the Commission, NIRS was informed that its appeal had been referred to the staff in conjunction with the Staff's review of NIRS' petition.

safety or environmental issue. CFUR, therefore, fails to satisfy section 2.734(a)(2) of the regulations.

CFUR claims that Borg-Warner valves installed at Units 1 and 2 have failed on numerous occasions. Request at 2. Additionally, CFUR asserts that the Borg-Warner facility has had a break down in its QA program. *Id.* Furthermore, CFUR asserts that a follow-up inspection regarding that break down has never been conducted. *Id.* at 2- 3. Although the Staff does not dispute the fact that these valves have failed and that there was a problem with Borg-Warner's QA program, CFUR fails to demonstrate why the failure of these valves raises a serious safety concern.¹⁰

The significance of the failure of the Borg-Warner check valves at Unit 1 and the QA problems at the Borg-Warner facility was addressed in the Director's Decision issued pursuant to CFUR's petition filed pursuant to section 2.206. *Comanche Peak*, DD-91-05, 34 NRC at 212-18.

The Staff has reviewed the circumstances surrounding the failure of the valves at Unit 2 and has determined that they do not raise a significant safety concern. During an inspection, the Staff reviewed actions taken with respect to installation procedures, replacement of swing arms, correction of alignment programs, the addition of a counterweight to the disc stud in one valve, and the retesting of check valves to ensure their correct operation. Joint Affidavit of Ian Barnes and Francis T. Grubelich (Barnes

¹⁰ The reasons for the delay in the follow up inspection at the Borg-Warner facility is detailed in Affidavit of Robert L. Pettis, attached hereto.

and Grubelich Affidavit) at ¶ 4, attached hereto. Based on this review, the Staff determined that TU had taken adequate measures to assure proper operation of the check valves at Unit 2. *Id.* The Staff further determined that TU has taken appropriate measures to assure the proper operation of the Borg-Warner check valves. *Id.* at ¶ 7.

CFUR also raises the issue of the failure of the fire barrier, Thermo-Lag, and its installation at Unit 2. Request at 2. CFUR asserts that Thermo-Lag does not meet the NRC criteria for fire protection; that Thermo-Lag itself is combustible; and that the material has been installed with "confusing and wrong ampacity ratings." *Id.* at 2-3. Thermo-Lag, itself, could, therefore, be an initiator of a fire. *Id.* at 3. The Staff has reviewed the issue of the failure of Thermo-Lag as it relates to Unit 2. The Staff has concluded that the installation and testing of Thermo-Lag at Unit 2 is acceptable because, as of this date, test reports submitted by TU demonstrate that properly designed and installed Thermo-Lag systems do meet NRC criteria. Architzel Affidavit at ¶ 5. These procedures, in conjunction with the practice of weighing prefabricated sections in order to prevent excessive voiding and overloading, provides reasonable assurance of Thermo-Lag's adequate performance. *Id.* at ¶ 6. Furthermore, TU has performed tests on samples which demonstrates the adequacy of its revised procedures. *Id.*

Moreover, CFUR's concern regarding the combustibility of Thermo-Lag does not raise a safety significant issue. TU has stated that Thermo-Lag is not used in Unit 2 to eliminate intervening combustibles or as a radiant heat shield inside containment. *Id.* at ¶ 8. Accordingly, the combustibility of Thermo-Lag in these areas is not a concern. *Id.*

In those areas where the combustibility of Thermo-Lag could be a concern, TU has demonstrated that adequate fire protection features exist to address this concern. *Id.* Furthermore, CFUR's concern regarding the "confusing and wrong" ampacity ratings is unfounded. The Staff has reviewed this concern and has concluded that based on the conservatism present in the design and operation of Unit 2, this issue is not of immediate concern and will be resolved over the long term. *Id.* at ¶ 9.

3. Petitioners Fail to Show that a Materially Different Result Would Have Occurred

Section 2.734(a)(3) of the Commission's regulations requires that a motion to reopen demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. In its Request, CFUR states that hearings should be held on at least the two issues it raises in its Request.¹¹ *See* Request at 2, 3. Because CFUR has not demonstrated that even if a hearing were held, a materially different result would have occurred, it fails to satisfy section 2.734(a)(3).

Section 2.734(d) of the Commission's regulations further requires that if a motion to reopen relates to a contention not previously in controversy, the movant must also satisfy the requirements of section 2.714(a)(1)(i)-(v). Because CFUR must also satisfy the requirements of section 2.714(a)(1)(i)-(v) in order to be admitted as a party to the Unit 2

¹¹ It also appears that CFUR is not just requesting hearings on the two issues it raises in its Request, but on any issues relating to licensing of Unit 2. *See* Request at 1, 3.

proceeding, the discussion below demonstrates that CFUR has failed to satisfy this requirement of the Commission's regulations as well.

III. CFUR FAILS TO SATISFY THE REQUIREMENTS FOR LATE INTERVENTION PETITIONS AND LATE FILED CONTENTIONS

Only parties to the proceeding may seek to reopen the record in that proceeding. *Comanche Peak*, CLI-92-01, 35 NRC at 6. CFUR had originally been a party in the proceeding regarding the licensing of Unit 2, but had withdrawn from the proceeding in 1982. *See Comanche Peak*, CLI-88-12, 28 NRC at 608. After the hearing was terminated, CFUR unsuccessfully attempted to come back into the proceeding. *Id.* CFUR was denied intervention because it had failed to satisfy the criteria necessary to support a late filed intervention petition. *Id.* CFUR must now reestablish its party status in the proceeding relating to Unit 2 because parties should not be allowed to "dart in and out of proceedings on their own terms and at their own convenience." *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 907 (1982). In order to regain party status, CFUR must satisfy a balancing of the five requirements for a late filed petition. *See Comanche Peak*, CLI-88-12, 28 NRC 605. *See also Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), LBP-73-41, 6 AEC 1057, 1057-1058 (1973). Because CFUR has failed to address the five factors for late intervention, its Request should be denied.

A. CFUR Fails To Satisfy the Standards for Late Intervention

1. Legal Standards for Granting a Late Filed Intervention Petition

Section 2.714 of the Commission's regulations provides that late filed intervention petitions will not be considered unless the balancing of the five factors listed in section 2.714(a)(1) favors late intervention. 10 C.F.R. § 2.714(a)(1). The five factors are:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Id. The petitioner bears the burden of proof in showing that a balancing of these five factors favors intervention. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 (1983). Although the regulations call for a balancing test, it has been held that where a petitioner fails to show good cause for filing its petition late, the other four factors must weigh heavily in its favor in order for its petition to be granted. *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982). *See also, Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983).

2. CFUR Fails to Satisfy the Factors of Section 2.714(a)(1)

As noted above, CFUR must show good cause for filing a late intervention petition. 10 C.F.R. § 2.714(a)(1)(i). CFUR has not articulated with any specificity good cause for

its failure to timely file its Request. Since CFUR bears the burden of demonstrating good cause, it has failed to meet its burden. See *Three Mile Island*, CLI-83-25, 18 NRC at 331. However, even if CFUR were able to establish good cause, the balancing of the remaining four factors does not favor intervention. This is especially true given the advanced stage of the proceeding. See *Washington Public Power Supply System (WPPSS Nuclear Project No. 3)*, ALAB-747, 18 NRC 1167, 1172-73 (1983).

Also of significance with respect to late intervention is the third factor, the contribution that a petitioner might make to the development of a sound record in the proceeding. See *Enrico Fermi*, ALAB-707, 16 NRC at 1766. CFUR, here, fails to demonstrate that it has the ability to contribute to the development of a sound record. When addressing the third factor, a petitioner must "set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." *Mississippi Power & Light Co.*, (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). In short, CFUR does not demonstrate any knowledge of the details of the technical issues beyond what the NRC staff has been able to provide to it. CFUR, most importantly, has "identified no special expertise or experience that its members possess which would enable it to address those issues." *Comanche Peak*, CLI-88-12, 28 NRC at 611. CFUR does not indicate that it has any further ability to contribute to the development of the record. Accordingly, the third factor should weigh heavily against CFUR's intervention.

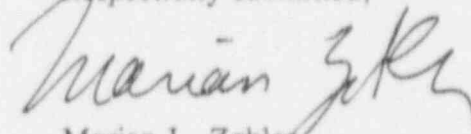
CFUR also fails to satisfy the fifth factor, the extent of the delay and possibility of broadening the issues. There is no doubt that granting CFUR's Request would lead to a delay in the proceedings. It is the Staff's understanding that the low power license for Unit 2 will soon be issued. Clearly, granting CFUR's Request would delay the issuance of an OL for Unit 2 and thus, the start of commercial operation of Unit 2.

CFUR only arguably meets the remaining two factors. No other means exists whereby CFUR's interest will be protected and, since no hearing is presently taking place, no other party is able to represent its interest. However, these two factors are the least important of the five factors of the test. See *Enrico Fermi*, ALAB-707, 16 NRC at 1767; *Grand Gulf*, ALAB-704, 16 NRC at 1730-31. When weighed against the other three factors which CFUR has failed to satisfy, CFUR has failed to demonstrate that the balancing of the factors favors intervention. See *Comanche Peak*, CLI-88-12, 28 NRC at 610.

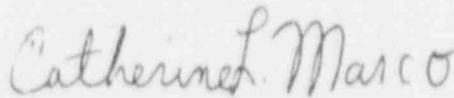
CONCLUSION

For the reasons set forth above, CFUR's Request that a notice regarding the licensing of Unit 2 be published permitting affected parties to request hearings should be denied. CFUR's concerns expressed in its Request should be referred to the Staff for consideration pursuant to section 2.206 of the Commission's regulations.

Respectfully submitted,



Marian L. Zabler
Counsel for NRC Staff



Catherine L. Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 26th day of January, 1993