'88 JUL 13 P6:30

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	:	Docket Nos. 50-445-OL 50-446-OL
TEXAS UTILITIES ELECTRIC CO., et al.,	:	(Application for an Operating License)
(Comanche Peak Steam Electric Station, Units 1 and 2)	:	Docket No. 50-445-CPA
	:	(Construction Permit Amendment)

Response of Applicants to Motions to Stay, to Intervene and for Sua Sponte Relief Filed by Various Petitioners

On July 1, 1988, the parties to these proceedings, after approximately nine years of litigation and extensive negotiations, filed with this Atomic Safety and Licensing Board (Board) a "Joint Stipulation and Joint Motion For Dismissal" (Joint Stipulation). The Joint Stipulation, inter alia, committed Applicants to the continuation of the various corrective action programs which they have undertaken to ensure the safe operation of Comanche Peak Steam Electric Station (CPSES) and provides Citizens Association for Sound Energy (CASE) a mechanism for participating in the resolution of its technical concerns without resort to the adjudicatory process. In light of the commitments made in the Joint Stipulation, on July 5, 1988, this

Board issued a "Memorandum and Order (Terminating Proceedings Subject to Condition)" (Termination Order). The Termination Order terminated the proceedings subject only to the completion of the act of admitting certain documents referenced in the Joint Stipulation into the record at a prehearing conference to be held on July 13, 1988.

On July 7, 1988, an individual styled as "John Doe" (Petitioner) filed in these proceedings a "Notice of Intent to File a Motion Requesting Substitution of Parties or in the Alternative Notice of Intent to File a Motion For Intervention", "Motion to Proceed as John Doe" and a "Motion to Make Public all the Settlement Agreements Enacted by the Parties." 1/

Subsequently, on July 9 and 11, 1988, Applicants were served with five additional motions to intervene by the following parties: (1) Citizens for Fair Utility Regulation ("CFUR"); (2) "Individual Residents" claiming to live or work within 50 miles of Comanche Peak; (3) Comanche Peak Citizen's Audit; (4) Fort Worth Sierra Club; and (5) a "Second Group of Individual Residents." Since the papers filed by each of these groups

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1/ By a letter and motion accompanying these documents, substantially similar papers filed by "John Doe" on July 6, 1988, were withdrawn. The papers filed on July 6 indicated that the attorneys representing "John Doe" were associated wit the Government Accountability Project (GAP). However, the July 7 filings indicate that these attorneys are no longer associated with GAP, a fact that "John Doe" apparently believed is somehow relevant to his filings. GAP is not a party to these proceedings or to the Joint Stipulation filed by the parties.

(hereinafter referred to as "Petitioners") are substantially identical, Applicants have chosen to respond to them in this single pleading. 2/

As noted in its Motion to Intervene, CFUR was previously an intervenor in the operating license proceeding but voluntarily withdrew as a party more than six years ago on the ground that it did not have adequate resources to address the issues it had raised. CFUR's request to withdraw was granted by the Board on April 2, 1982. Order (Following Conference Call), dated April 2, 1982, at 2. The remaining Petitioners have never previously attempted to participate in these proceedings.

On July 11, 1988, Applicants received a "Notice of Withdrawal Without Prejudice" filed by "John Doe" requesting the Board to "grant his withdrawal without prejudice."

Although styled as Motions to Intervene, 3/ in fact, the pleadings filed by the Petitioners fail to address any of the requirements of 10 C.F.R. § 2.714 but simply advise the Board that they intend to file further motions to intervene and motions for the substitution of parties within sixty days. Without specifying any actual safety concerns or alleging any harm to themselves that would occur if dismissal of these proceedings is

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2/ The filings of "John Doe" and each of the subsequent petitioners were all prepared by the same counsel.

3/ With the exception of the filing by Comanche Peak Citizens Audit, which is styled a "Motion for Stay and for Sua Sponte Relief." The text of this motion is, however, substantially identical to that of the other Petitioners.

completed, Petitioners request the Board to disrupt the settlement reached by the parties in accordance with NRC policy, grant Petitioners the extraordinary remedy of a stay and needlessly prolong these proceedings to the substantial detriment of the parties. 4/

Under these circumstances, Applicants submit that Petitioners' pleadings should be summarily rejected by the Board for a number of reasons. First, because Petitioners are not parties, they have no legal status in these proceedings and hence no right to request a stay or any other affirmative action by the Board. See 10 C.F.R. § 2.715. Second, because the Board has already decided to dismiss these proceedings, the relief sought by Petitioners cannot be granted. Third, because CFUR, which years ago chose to withdraw from further participation in the operating license proceeding, and the remaining Petitioners have not provided any legally cognizable justification for filing to intervene out of time, their petitions must therefore be rejected under 10 C.F.R. § 2.714. Finally, to the extent that Petitioners seek to stay the Board from taking the remaining actions under the Termination Order, none of the showings necessary for the

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4/ Petitioners also request public disclosure of agreements between the parties that are not now before the Board (and that are only effective upon dismissal of ther proceedings). For the reasons discussed in Sections A and C of this Response, Applicants assert that Petitioners have no right to make such a request, and that it therefore be denied. In any event, the parties will describe the provisions of the settlement agreement at the July 13, 1988 hearing, and will make it public upon completion of the actions terminating this proceeding.

issuance of such a stay have been made. The summary rejection of Petitioners' pleadings and the dismissal of these proceedings will not foreclose Petitioners, if they choose, from availing themselves of the procedures established by the NRC Rules of Practice to raise any concerns they may identify.

In summary, there is no legal or factual basis upon which the Board could grant Petitioners any relief whatsoever. Their eleventh hour attempt to invoke the authority of the Board is plainly improper, and the requested relief should be summarily denied.

A. Petitioners, as Non-Parties, Have No Right to the Relief They Seek

Petitioners are not now, nor have they established the right to become, parties to these proceedings. Indeed, Petitioners have merely stated their intent to attempt to seek to become parties at some time in the future. Nonetheless, Petitioners have through their patently deficient pleadings requested the Board to take various actions that would have substantial adverse impact upon the parties. As non-parties, Petitioners cannot through the expedient of their various irregular motions grant themselves substantive participatory rights to the severe detriment of the existing parties. Under the Commission's regulations, the rights of non-parties like Petitioners are confined to limited appearances (at the discretion of the Board) and a non-party "may not otherwise participate

in the proceeding." 10 C.F.R. 2.715(a). Thus, Petitioners have no right to seek a stay or any other affirmative relief from the Board. In short, there are no motions pending before the Board upon which any relief could be granted. Petitioners' motions should therefore be summarily rejected by the Board and these proceedings unconditionally dismissed.

B. These Proceedings Have Already Been Terminated

Petitioners' pleadings ignore the fact that the Board has already decided to dismiss these proceedings, subject only to the admission into the record of certain documents referred to in the parties' Joint Stipulation. Termination Order at 2. Thus, the relief sought by Petitioners can no longer be granted. Nothing stated in Petitioners' pleadings suggests any basis for reconsidering the Termination Order or otherwise holding in abeyance the unconditional dismissal of these proceedings.

C. Petitioners Have Wholly Failed to Satisfy the Requirements of 10 C.F.R. § 2.714(a)

Even if Petitioner's filings are generously construed to be Motions to Intervene, Petitioners have not and cannot make the requisite showing that they should be permitted to intervene out of time. Pursuant to 10 C.F.R. § 2.714(a)(1) an untimely petition to intervene may be granted only upon a balancing of the following factors:

(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.

In moving to intervene out of time, the burden of persuasion on those factors is clearly upon the petitioners and the factors must be addressed in the petition itself. Boston Edison Company, (Pilgrim Nuclear Power Station) ALAB-816, 22 NRC 461, 466 (1985). Although all of the factors must be considered, a failure to demonstrate good cause for failure to file on time requires a compelling showing on the remaining four factors. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1NRC 273 (1975); Philadelphia Electric Company (Limerick Generating Station, Unit 1) LBP-86-9, 23 NRC 273, 279 (1986).

In this case, Petitioners' patently deficient pleadings wholly fail to meet this burden. Indeed, their various pleadings demonstrate that they could never meet this burden. CFUR's only excuse for failing to intervene in a timely fashion is its alleged expectation that CASE would litigate Contention 5 before the Board. In fact, CASE has actively litigated Contention 5 for more than 6 years since CFUR's withdrawal. Recognizing that the

interests of itself and the public are best served by entering into the Joint Stipulation filed by the parties, CASE has concluded that the wisest course is to settle these proceedings and pursue its technical concerns through the mechanisms provided in the Joint Stipulation. Now, after having left the burden and responsibility of participating in these proceedings solely to CASE, and having wholly failed to participate itself, CFUR seeks to reenter these proceedings after years of absence and after they have been terminated.

In any event, claiming to have relied on the actions of another party provides no excuse for late intervention. Such a claim has never been considered to constitute good cause for an untimely petition to intervene. In Gulf States Utilities Co. (River Bend Station, Units 1 and 2) ALAB-444, 6 NRC 760, 796 (1977), for example, the Appeal Board specifically held that reliance on the representation of a withdrawn party does not constitute good cause under 10 C.F.R. § 2.714(a)(1). See also Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3) ALAB-440, 6 NRC 642, 645 (1977); Consolidated Edison Co. of New York (Indian Point Station, Unit No. 2) LBP-82-1, 15 NRC 37, 39-40 (1982). 5/

5/ It is interesting to note that in its February 23, 1982 "Motion For Voluntary Withdrawal of Contentions Two, Three, Five and Seven by CFUR," in which CFUR withdrew the last of its contentions, no mention of any expectation that CASE would pursue these contentions for CFUR was made.

The remaining Petitioners have not even attempted to provide an excuse for late intervention, although these proceedings have been ongoing for more than nine years. Such tactics are obviously abhorrent to the fair and orderly conduct of administrative proceedings. As the Court of Appeals for the District of Columbia has stated in a case affirming a Commission order denying a late intervention petition:

> [A] person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome . . . and then permit the whole matter to be reopened in his behalf, would create an impossible situation.

Easton Utilities Commission v. Atomic Energy Commission, 424 F.2d 847, 851 (D.C. Cir. 1970), quoting Red River Broadcasting Co. v. FCC, 98 F.2d 282, 286-87, cert. denied, 305 U.S. 625, 59 S.Ct. 86 (1938). The court further stated:

> We do not find in statute or case law any ground for accepting the premise that proceedings before administrative agencies are to be constituted as endurance contests modeled after relay races in which the baton of proceeding is passed on from one legally exhausted contestant to a newly arriving legal stranger.

424 F.2d at 852. These principles are clearly applicable to all of the Petitioners' filings, which should accordingly be rejected.

As to the remaining four factors, Petitioners have failed to make any showing, much less a compelling showing, that they should be permitted to intervene. For example, under the third factor, Petitioners were required to "set out with as much particularity as possible the precise issues [they plan] to cover, identify [their] prospective witnesses, and summarize their proposed testimony." Mississippi Power & Light Co., et al. (Grand Gulf Nuclear Station, Units 1 and 2) ALAB-704, 16 NRC 1725, 1730 (1982); see also Long Island Lighting Company (Shoreham Nuclear Power Plant Station, Unit 1) ALAB-743, 18 NRC 387, 399 (1983). In this case, however, Petitioners make no attempt to explain the matters they propose to raise, to identify the witnesses they might call or to summarize any evidence they might give. In light of the present status of these proceedings the only thing that is clear from Petitioners' vague and unorthodox pleadings is that their participation will unnecessarily broaden the issues and inevitably delay the proceedings. 6/

Under analogous circumstances the Appeal Board has held that

> a licensing board simply has no latitude to admit a new party to a proceeding . . . where (1) the extreme tardiness in seeking

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6/ Petitioners' suggestion that they intend to file "formal" motions to intervene in the future provides absolutely no excuse for their failure to meet the requirements of 10 C.F.R. § 2.714. As the Appeal Board in Boston Edison Company (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 468 (1985) has held, a person seeking to intervene is not entitled to a second chance to cure a patently deficient motion to intervene.

> intervention is unjustified; (2) the certain or likely consequence would be prejudice to other parties as well as delay in the progress of the proceeding, particularly attributable to the broadening of issues; and (3) the substantiality of the contribution to the development of the record which might be made by that party is problematic.

South Carolina Electric and Gas Company, et al. (Virgil C. Summer Nuclear Station, Unit 1) ALAB-643, 13 NRC 898, 900 (1981). This situation is exactly what is presented here. Petitioners have not and cannot justify their belated attempt to participate in these proceedings. Nor can there be any doubt that Petitioners' intervention would broaden the issues and delay these proceedings, and there is no indication that they could contribute to the development of a record. In short, Petitioners have not and cannot demonstrate any entitlement to participate as parties and their pleadings should be summarily rejected.

D. Petitioners Have Shown No Basis for Grant of A Stay

Finally, Petitioners have not provided a sufficient basis for the extraordinary remedy of a stay of the dismissal of these proceedings. Petitioners seek such a stay without making any of the showings required before a stay can be issued. In considering a request for a stay, the Board must consider:

> (1) whether the moving party has made a strong showing that it is likely to prevail on the merits;
>
> (2) whether the party will be irreparably injured unless the stay is granted;
>
> (3) whether the granting of the stay would harm other parties; and

(4) where the public interest lies.

Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); Cuomo v. U.S. Nuclear Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir. 1985); Pacific Gas & Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-85-14, 22 NRC 177, 178-80 (1985); Texas Utilities Electric Company, et al. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 121-122 (1986).

Petitioners have not attempted to and cannot satisfy any of these criteria. As discussed in section C above, there is no likelihood that Petitioners can prevail in their attempts to become a party to this proceeding, much less prevail on any (as yet unspecified) issues they might raise. Petitioners have not alleged any harm, irreparable or otherwise, that will result if dismissal of these proceedings is not stayed. Dismissal will not prevent them from filing proper papers with the NRC should they ever actually identify any safety concerns. Conversely, the issuance of a stay would disrupt the parties' settlement and require the parties unnecessarily to participate further in these proceedings and face the uncertainties associated with their continuance. Finally, NRC and public policy favors settlements such as that entered into by the parties in this case. 10 CFR § 2.759; Commission Policy Statement on Conduct of Proceedings, 46 Fed. Reg. 28533 (May 27, 1981). Because Petitioners have

failed to provide even a minimal basis upon which to justify a stay of these proceedings, their Motions to Intervene must be rejected.

CONCLUSION

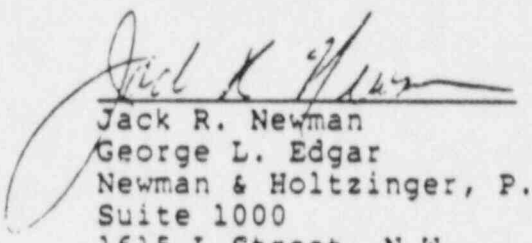
WHEREFORE, for all the foregoing reasons, Applicants respectfully request that:

1. The papers filed by Petitioners be summarily rejected and denied;

2. Dismissal of these proceedings be completed as contemplated in the Termination Order.

Respectfully submitted,

TEXAS UTILITIES ELECTRIC COMPANY
For the Owners of CPSES



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(Comanche Peak Steam Electric Station, Units 1 and 2)	)	and
	)	Docket No. 50-445-CPA
	)	
	)	(Construction Permit Amendment)
	)	

CERTIFICATE OF SERVICE

I, George L. Edgar, hereby certify that the foregoing letter was served this 12th day of July, 1988, by mailing copies thereof (unless otherwise indicated), first class mail, postage prepaid to:

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