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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

APPLICANTS' ANSWER TO THE REQUEST FOR HEARING AND PETITION FOR LEAVE TO INTERVENE BY CITIZENS FOR FAIR UTILITY REGULATION

On July 13, 1988, the Atomic Safety and Licensing Board (Board), after approximately nine years of litigation, dismissed the captioned proceedings on the basis of a Joint Stipulation and Joint Motion For Dismissal filed by Applicants, Texas Utilities Electric Co. et al., Intervenor, Citizens Association for Sound Energy (CASE) and the NRC Staff. Through the Joint Stipulation, the Applicants committed to the continuation of their various corrective action programs to assure the safe operation of Comanche Peak Steam Electric Station (CPSES) while at the same time providing CASE a continuing opportunity to participate in

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the resolution of its technical concerns. In essence, the parties agreed to substitute a comprehensive and technically rigorous process for satisfactorily resolving any safety concerns in place of protracted and unnecessary litigation.

Subsequently, on August 11, 1988, Citizens for Fair Utility Regulation (CFUR or Petitioner) filed a Request for Hearing and Petition for Leave to Intervene (Petition). 1/ Through this patently untimely and meritless pleading, CFUR, which previously voluntarily withdrew from the licensing proceedings, now requests the Nuclear Regulatory Commission (Commission) to disrupt the parties' agreement, reinstitute adjudicatory proceedings and permit CFUR to participate in those proceedings as a party. Moreover, CFUR makes this extraordinary request without making even a facial showing under the factors set forth in 10 C.F.R. § 2.714(a) that its untimely request to intervene should be granted. Rather, CFUR's various assertions in its pleading demonstrate a lack of understanding of either the ongoing technical programs in place at CPSES or the legal requirements governing an untimely intervention petition.

Accordingly, for the reasons which follow, Applicants respectfully request that CFUR's Request for Hearing and Petition for Leave to Intervene be summarily rejected.

1/ Although CFUR styled its Petition as "Before the Atomic Safety and Licensing Board," there is no Board with jurisdiction and the Petition lies before the Commission. Applicants would urge the Commission to act on this pleading itself in order to eliminate promptly the uncertainty created by CFUR's untimely petition.

BACKGROUND

On February 28, 1978, Applicants filed with the Commission an application for operating licenses for two pressurized water reactors, Comanche Peak Steam Electric Station, Units 1 and 2, in Somervell County, Texas. See 43 Fed. Reg. 20,583 (May 12, 1978). On February 5, 1979, the Commission published a notice of consideration of issuance of the facility operating licenses in the Federal Register and provided the opportunity for interested persons to intervene and request a hearing on the application. 44 Fed. Reg. 6995 (Feb. 5, 1979).

CASE, CFUR and the Texas Association of Community Organizations for Reform Now/West Texas Legal Services (ACORN) filed timely petitions to intervene and requests for hearing, in accordance with 10 C.F.R. § 2.714. The State of Texas filed a timely petition to participate as an interested state, pursuant to 10 C.F.R. § 2.715(c). On March 15, 1979, the Board was established. The Board admitted CASE, CFUR and ACORN as intervenors and the State of Texas as an interested state. 2/ Twenty-five contentions were originally admitted by the Board along with three "Board Questions." 3/

2/ Order Relative to Standing of Petitioners to Intervene, slip op. (June 27, 1979).

3/ Order Subsequent to the Prehearing Conference of April 30, 1980, slip op. (June 16, 1980).

ACORN withdrew from the operating license (OL) proceeding in 1981. CFUR sought to withdraw from the OL proceeding in February of 1982. 4/ CFUR's Petition to withdraw was granted on April 2, 1982. 5/ The Board dismissed or withdrew all the contentions and Board Questions except for Contention 5. 6/

Since CFUR's voluntary withdrawal, the Applicants, CASE and the NRC Staff have been actively involved in resolving the technical issues remaining at Comanche Peak. For their part, Applicants instituted a comprehensive third party review of the CPSES through the Comanche Peak Response Team (CPRT) and are

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4/ Motion for Voluntary Withdrawal of Contentions Two, Three, Five and Seven by CFUR (Feb. 23, 1982).

5/ Order (Following Conference Call), slip op. at 2 (Apr. 2, 1982).

6/ Contention 5 reads as follows:

> The Applicants' failure to adhere to the quality assurance/quality control provisions required by the construction permits for Comanche Peak, Units 1 and 2, and the requirements of Appendix B of 10 CFR Part 50, and the construction practices employed, specifically in regard to concrete work, mortar blocks, steel, fracture toughness testing, expansion joints, placement of the reactor vessel for Unit 2, welding, inspection and testing, materials used, craft labor qualifications and working conditions (as they may affect QA/QC), and training and organization of QA/QC personnel, have raised substantial questions as to the adequacy of the construction of the facility. As a result the Commission cannot make the findings required by 10 CFR § 50.57(a) necessary for issuance of an operating license for Comanche Peak. (CFUR 4A-ACORN 14-CASE 19 Joint Contention).

Order Subsequent to the Prehearing Conference of April 30, 1980, slip op. at 11 (June 16, 1980).

conducting a far-ranging and unprecedented corrective action program at CPSES. This includes a comprehensive design and hardware validation process which will assure, upon its completion, that CPSES meets all regulatory requirements and can be operated safely.

In early 1987, Applicants and CASE began an extensive information exchange process, including a number of technical meetings during which Applicants explained their various corrective action programs and responded to any questions or concerns of CASE and its technical consultants. Due in large measure to that process and the comprehensive nature of Applicants' ongoing programs, CASE and Applicants entered into negotiations in mid-1988 in an effort to resolve their remaining technical differences. Those negotiations were successful and on June 28, 1988, CASE, Mrs. Juanita Ellis and Applicants executed a Settlement Agreement. The essential substantive terms of that Settlement Agreement (as publicly disclosed by Applicants and CASE) are as follows:

1. Applicants have agreed to the continuation of their corrective action programs in accordance with the Joint Stipulation;

2. A CASE representative will be appointed as a member of the Operations Review Committee for CPSES and will be permitted to hire technical consultants at TU Electric's expense;

3. The parties agreed to the Joint Dismissal of the licensing proceedings;

4. Applicants agreed to reimburse CASE in the amount of $4.5 million for its expenses, debts, attorneys fees and other

costs incurred by CASE in the past and for any additional expenses CASE might incur in the future in closing out its participation in the NRC licensing proceedings and establishing its oversight role; and

5. Applicants agreed to enter into good faith negotiations with workers who had discrimination claims against TU Electric or its contractors in various forums. Subsequently, TU Electric agreed to settle various claims as well as compensate workers assisting CASE in the total amount of $5.3 million.

Neither the Settlement Agreement nor any other agreement precluded either CASE or any present or former worker at CPSES from bringing any safety-related or other matter to the attention of the NRC. 7/

On July 1, 1988, the parties to the proceedings filed with the Board a Joint Stipulation and Joint Motion For Dismissal. On July 5, 1988, the Board issued a "Memorandum and Order (Terminating Proceedings Subject to Condition)." That 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.

7/ CFUR makes the unsupported allegation that a former employee refused to sign an agreement because it "would have prohibited his right to go before the ASLB." Petition at 13. Such characterization of the agreements tendered to former employees is in error. As is evident from reading the General Release (which is attached as Exhibit D to the Petition), a former employee was simply asked to release his claims against all parties, including Applicants. He was not precluded in any fashion from providing information to NRC or testifying before NRC. CFUR repeats this allegation even though the General Release is clear and Chairman Bloch emphasized the meaning of the General Release at the prehearing conference on July 13, 1988. Tr. 25,268.

On July 7, 9, and 11, 1988, a number of petitions to intervene were filed with the Board, including a petition filed by CFUR. With the exception of the petition filed by CFUR, all of the petitions to intervene were withdrawn prior to the prehearing conference on July 13, 1988.

During the prehearing conference held on July 13, 1988, CFUR was given the opportunity to be heard regarding its petition. After reviewing CFUR's petition and after considering CFUR's argument at the hearing, the Board advised CFUR that its petition failed to meet the standards of 10 C.F.R. § 2.714(a). Tr. 25,204. In particular, the Board explained to CFUR that it had failed to demonstrate that it could make any contribution to the record as required by 10 C.F.R. § 2.714(a)(iii). Tr. 25,200-02, 25,207-08. The Board informed CFUR that in order to meet its burden it would have to show that it "[understood] the programs that are underway and that this is not enough for addressing these concerns. It also would have to show enough of a mastery of the technical matters to show that what's being done is not adequate." Tr. 25,202. Thus, the Board suggested that it would deny the petition and allowed CFUR the alternative to withdraw its petition without prejudice to its refiling before the Commission. Tr. 25,207. CFUR chose to withdraw its petition. Tr. 25,208.

At the prehearing conference the Board also considered extensive statements by Applicants, CASE and the NRC Staff in support of dismissal of the proceedings. In addition, Applicants

provided a summary of the terms of the Settlement Agreement and the Joint Stipulation and agreed to make the Settlement Agreement publicly available upon dismissal of the proceedings. On the basis of the pleadings and the argument of the parties, the Board issued an order dismissing the proceedings.

On August 11, 1988, CFUR filed with the Commission its Request for Hearing and Petition for Leave to Intervene. 8/

ARGUMENT

Petitioner's Request For A Hearing And For Leave To Intervene Fails To Satisfy the Requirements Of 10 CFR § 2.714(a) And Should Be Denied

CFUR has not and cannot make the requisite showing that it 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.

8/ CFUR's Petition lists both Operating License (OL) dockets and the Construction Permit Amendment (CPA) docket. Based on CFUR's Petition, however, Applicants assume that CFUR is not attempting to intervene in the CPA docket. CFUR's Petition, by its terms, addresses issues which, if litigable at all, could be heard only in the OL dockets. Moreover, CFUR fails to discuss the requirements for participating in a construction permit amendment proceeding as set forth in the Commission's decision in Texas Utilities Elec. Co. et al. (Comanche Peak Steam Electric Station, Unit 1) CLI-86-15, 24 NRC 397, 403 (1986). If CFUR intended to attempt to intervene in the CPA docket its Petition is plainly insufficient and must be denied.

(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 petitioner and the factors must be addressed in the petition itself. Boston Edison Co. (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. et al. (West Valley Reprocessing Plant) CLI-75-4, 1 NRC 273, 274-75 (1975); Philadelphia Elec. Co. (Limerick Generating Station, Unit 1) LBP-86-9, 23 NRC 273, 279 (1986).

A. Petitioner Has Not And Cannot Show Good Cause

In this case, CFUR's pleading fails to meet its burden of showing good cause under 10 C.F.R. § 2.714(a)(1)(i). Indeed, its pleading demonstrates that it could never meet this burden. CFUR's sole excuse for failing to intervene in a timely fashion is that it only recently learned of the settlement between CASE and Applicants and its alleged expectation that CASE would litigate Contention 5 before the Board. In fact, CASE has actively litigated Contention 5 for more than six 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 concluded that the wisest course was

to settle those proceedings and to pursue its technical concerns through the mechanisms provided in the Joint Stipulation. Now, after having left the burden and responsibility of participating in those proceedings solely to CASE, and having wholly failed to participate itself, CFUR seeks to reenter those proceedings after years of absence and after the proceedings have been terminated.

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 party who subsequently withdraws 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, 644-5 (1977); Consolidated Edison Co. of New York (Indian Point, Unit No. 2) LBP-82-1, 15 NRC 37, 39-40 (1982). 9/

Such tactics are at odds with the concepts of 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:

9/ 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 was made of any expectation that CASE would pursue these contentions for CFUR.

> [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 Comm'n v. Atomic Energy Comm'n, 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 (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.

CFUR's petition is more than nine years late. CFUR was previously a party in the proceeding and could have remained a party to protect its interests, but it chose to withdraw voluntarily in 1982 and stood on the sidelines quietly for six years. It now seeks to resurrect exactly the same contention that it could have been litigating during that six year period. The showing of good cause that it should have to make under these circumstances should be not only be compelling but overwhelming. Instead, it has made no showing at all, and its Petition should be denied on this ground alone.

B. Petitioner Will Not Contribute To Developing A Sound Record

As to the remaining four factors under 10 C.F.R. § 2.714(a)(1), Petitioner has failed to make any showing, much less a compelling showing, that it should be permitted to intervene. 10/ Under the third factor, the extent to which the Petitioner's participation may reasonably be expected to assist in developing a sound record (§ 2.714(a)(1)(iii)), CFUR was 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." Mississipri 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 Co. (Shoreham Nuclear Power Station, Unit 1) ALAB-743,

10/ As to the factors set forth in 10 C.F.R. § 2.714(a)(1)(ii) and (iv), the availability of other means to protect petitioner's interests and the extent to which petitioner's interests are protected by other parties, they are of "relatively minor importance" (Kansas Gas & Electric Co. et al. (Wolf Creek Generating Station, Unit No. 1) LBP 84-17, 19 NRC 878, 887 (1984); Detroit Edison Co. et al. (Enrico Fermi Atomic Power Plant, Unit 2) ALAB-707, 10 NRC 1760, 1767 (1982)) and require only brief discussion. In light of the issues raised by CFUR, its interests will be adequately protected by a § 2.206 petition. CFUR concerns are largely premised on two NRC inspection reports, an Inspection and Enforcement (IE) notice, and a review by the Office of Special Projects of allegations previously provided by the NRC staff. A party's right to seek a more formal NRC staff review under § 2.206 provides a better method for protecting its interests than initiating formal adjudication before a licensing board on the scores of detailed licensing reports that are routinely generated by a licensee. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 and 2) ALAB-828, 23 NRC 13, 22 (1986). Moreover, even if these factors are found to be in CFUR's favor, they cannot outweigh the other factors which weigh heavily against the grant of CFUR's Petition.

18 NRC 387, 399 (1983). The ability of the petitioner to contribute to the development of a sound record becomes a more important factor in cases where tne grant or denial of the petition also decides whether there will be any adjudicatory hearing. Washington Public Power Supply Syst. et al. (WPPSS Nuclear Project No. 3) ALAB-747, 18 NRC 1167, 1180 (1983). There is no reason to grant an inexcusably late intervention petition and trigger a hearing unless there is cause to believe the petitioner not only proposes a "substantial safety or environmental issue" but is also well "equipped to make a substantial contribution on it." Id. at 1181. Indeed, the Commission has recently held that in order to prevail on this factor, the moving party must "demonstrate that it has special expertise on the subjects which it seeks to raise." Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2) CLI-86-8, 23 NRC 241, 246 (1986). This standard is never met simply by the citation of NRC inspection reports that identify a few discrete deficiencies in order to litigate a broad QA/QC contention such as Contention 5. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 and 2) ALAB-819, 22 NRC 681, 725 (1985), aff'd in part, CLI-86-65, 23 NRC 125 (1986).

In this case, CFUR makes no serious attempt to explain the matters it proposes to raise, to identify the witnesses it might call or to summarize the evidence they might give. Instead, CFUR raises several vague allegations, 11/ and fails to

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11/ In addition to the technical issues raised in its Petition, (footnote continued)

identify witnesses who are willing to testify or the testimony that might be given. Indeed, in many cases it is virtually impossible to determine the precise technical or other issue raised by CFUR. In a number of instances for example, CFUR simply claims that unidentified workers or former workers at CPSES know of outstanding safety issues without ever specifying the issues or explaining why the existing programs at CPSES are not adequate to deal with them. In other cases, CFUR attempts to raise matters which have long been known to Applicants and the NRC Staff and have been resolved or are in the process of being resolved. Based on CFUR's vague pleading and its lack of understanding of the technical programs underway at CPSES, it is clear that CFUR could not contribute to the development of a record on the matters that it raises. See, e.g., South Carolina Elec. and Gas Co. et al. (Virgil C. Summer Nuclear Station, Unit 1) ALAB-642, 13 NRC 881, 891-94 (1981), aff'd sub nom. Fairfield United Action v. NRC, 679 F.2d 261 (D.C. Cir. 1982).

(footnote continued from previous page)
CFUR also repeats alleged statements by an anonymous informant, John Doe, charging Applicants with having engaged in criminal conduct including perjury and the falsification of documents and engineering calculations without reference to any underlying evidence. Petition at 12. These accusations are particularly egregious in light of statements made by Judge Bloch at the prehearing conference on July 13, 1988, attended by CFUR and its present counsel, that the Board would not tolerate precisely these kinds of vague and unsubstantiated accusations of misconduct. Tr. 25,230-32. In this regard, Applicants note that parties and their counsel appearing before the Commission are "expected to conduct themselves with honor, dignity, and decorum" and are subject to censure for failing to adhere to those standards. 10 C.F.R. § 2.713(a).

In order for an untimely petitioner to contribute to a protracted licensing proceeding that includes extensive investigatory and corrective action programs, such as the CPRT program and the Corrective Action Program (CAP), a petitioner must first master the prior record and programs that are in place. As CFUR's counsel was clearly instructed by the Board at the July 13, 1988 prehearing conference, a petitioner must be able to demonstrate why the actions and programs taken to address technical matters are not adequate to resolve the petitioner's allegations. Tr. 25,201-02, 25,207-08.

Notwithstanding its explicit knowledge of these requirements, CFUR's Petition does little beyond raising a number of allegations and claiming that it "has important contributions to make to the record." Petition at 12. As discussed in detail below, not only does CFUR fail to show why these unrelated allegations are significant, but many of them have no relevance to Contention 5, the QA/QC contention which CFUR seeks to resurrect. Moreover, CFUR fails to acknowledge any of the actions already taken by Applicants to address these issues or to identify why Applicants' programs are not adequate.

1. The Concerns Raised by John Doe Have Long Been Addressed

For example, CFUR claims in its Petition, that a Mr. "John Doe" has numerous allegations, "many of which have been validated by the NRC, [and] were to have been heard by the ASLB when the now dismissed hearings were scheduled to reopen in the

late fall of 1988." Petition at 12-13. Obviously, the NRC cannot accept a vague allusion to unspecified allegations of an unidentified individual as an indication that the Petitioner will be able to contribute to the record. 12/

However, Petitioner's inability to contribute to the record and the lack of any merit to an argument that a late petition could be founded on "John Doe's" allegations are even more evident because John Doe has been publicly identified as Mr. S.M.A. Hasan. See Whiteley, Old Opponents seeking delay of reactor pact, Fort Worth Star-Telegram, July 9, 1988, at 22, col. 2. Mr. Hasan first brought his concerns to the NRC, with CASE's assistance, in January 1986 on a confidential basis. See Letter from Phillip F. McKee (NRC, Office of Special Projects) to S.M.A. Hasan (Jan. 6, 1988). His technical concerns were similar to the pipe support design ("Walsh-Doyle") issues raised by CASE in the operating license proceeding. Those issues played a major role in the development of both the CPRT Program Plan and the Corrective Action Program, which directly addressed most of the Hasan concerns. The NRC prepared a list of Mr. Hasan's 65 allegations, asked him to review them for accuracy, and then, on May 28, 1987, requested that TU Electric review these allegations from a confidential alleger. TU Electric responded on July 2,

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12/ Petitioner states that Mr. Doe's affidavit will be provided "within the next 30-60 days." Petition at 13. But this fails to meet Petitioner's obligation to set forth such information in its petition requesting late intervention, see Boston Edison Co., 22 NRC 461 (1985), and Petitioner has made no showing justifying such additional delay in submitting required information.

1987. On January 6, 1988, the NRC provided to Mr. Hasan not only TU Electric's response but also the Staff's Evaluation of Mr. Hason's pipe support allegations. The Staff found that "the allegations, both individually and collectively, have been adequately addressed." Subsequently, on May 17, 1988, with the authorization of Mr. Hasan and his attorney, CASE provided the January 6, 1988, letter and its enclosures to the Board and TU Electric, thereby identifying the source of the 65 "confidential" allegations.

CFUR is apparently unaware of all of this history. There is no indication that CFUR is even aware of the extensive programs instituted by Applicants to address allegations concerning the design of piping and pipe supports. 13/ Moreover, CFUR is entirely wrong when it claims that hearings were scheduled on these matters when the Board dismissed the operating license hearings. To the contrary, at the June 1, 1988 prehearing conference, the parties announced that they had reached a stipulation that piping and pipe support design issues had been resolved by the Applicants' programs and would not be heard. Tr. 25,160-170.

13/ See, e.g., CPSES, Project Status Report "Large Bore Piping and Pipe Supports" - Rev. 0 (Nov. 3, 1987); CPSES, Project Status Report "Small Bore Piping and Pipe Support" - Rev. 0 (Nov. 3, 1987); NUREG 0797, Supplement No. 10 (April 1985) (Safety Evaluation Report).

Thus, not only do the John Doe allegations fail to show that CFUR could contribute to the record, but they represent an attempt to resurrect at this late date concerns which were raised many years ago and have been addressed at length by both the Applicants and the NRC Staff.

2. Applicants Have Addressed All The Known Problems Concerning Kapton

CFUR's Petition next makes vague statements about an unidentified individual who knows about a "dangerous material" called Kapton. Petition at 13. In addition to failing to identify a potential witness or to detail specific testimony, CFUR fails to state the details surrounding its concern about this material used throughout the nuclear industry. The only problem that has been identified by the NRC with respect to the use of Kapton at nuclear plants is the failure of electrical leads in certain d.c. motors supplied by Limitorque. See IE Information Notice 87-08: Degraded Motor Leads in Limitorque DC Motor Operators (Feb. 4, 1987). None of these motors are in use at CPSES. 14/

Moreover, even if the NRC were to identify additional generic concerns with respect to the use of Kapton at nuclear plants, CFUR has failed to allege that such concerns could have any relationship to the functioning of the QA/QC program at

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14/ Kapton wire with insulation is used in limited applications at CPSES. TU Electric has developed specific, special handling, installation and inspection criteria for wire with Kapton insulation. Based on these criteria, TU Electric does not believe there are any safety problems associated with the use of Kapton at CPSES.

CPSES. Thus, CFUR's allegations concerning Kapton neither provide any support for Contention 5 (relating to QA/QC) which it is seeking to have readmitted nor demonstrate that CFUR sufficiently understands these subjects to be able to contribute to the record. 15/

3. There was No Breakdown of QA/QC In Performing or Documenting the Cold Hydrostatic Test

CFUR then alleges that there is current documented evidence of a "continuing breakdown" in the Applicants' QA/QC program at CPSES, by first referring to notices of violation concerning the 1982 cold hydrostatic pressure test issued by the NRC on the basis of Inspection Report 50-445/88-24, 50-446/88-21 (June 23, 1988) (Report 88-24/88-21). Petition at 14-16.

Although CFUR may be suggesting that it is raising an allegation concerning the hydrostatic testing in timely fashion because it heard it "on or about July 10, 1988," Petition at 14,

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15/ In the same paragraph pertaining to Kapton, CFUR also refers to other alleged concerns of "at least two 1988 whistleblowers." Petition at 13. Since CFUR identifies neither the individuals nor their concerns, they provide no support for CFUR's Petition and should be ignored in ruling thereon. Moreover, CFUR is simply wrong when it implies that a public hearing must be held in order for the Commission "to be fully informed" regarding any allegations of safety problems raised by whistleblowers. Petition at 14. Any confidential allegations received by Applicants are investigated under existing programs (such as SAFETEAM and Hotline), any reportable concerns are reported to the NRC and files of all investigations are available for NRC review and inspection. If the alleged whistleblower raises his concerns in a Department of Labor (DOL) proceeding under Section 210 of the Energy Reorganization Act, the information is provided to the NRC pursuant to the Memorandum of Understanding executed by NRC and DOL in 1982. 47 Fed. Reg. 54,585 (Dec. 3, 1982).

such claim only evidences that CFUR is not fully informed concerning the CPSES docket and has not reviewed it prior to filing its Petition. The basic questions concerning the hydrostatic test were first raised several years ago, as open items resulting from an NRC inspection conducted in 1985. See NRC Inspection Report 50-445/85-07, 50-446/85-05 (Feb. 3, 1986).

The two Level IV notices of violation (NOV) ultimately issued by the NRC in conjunction with Report 88-24/88-21 can hardly be characterized as evincing a "breakdown" in QA/QC. The first NOV alleged some procedural deficiencies in the methodology for converting data packages into field examination packages and in formatting the field packages. The second NOV alleged a documentation deficiency in not retaining a Document Status Form. In its July 15, 1988 response to the notices of violation, TU Electric relied upon a comprehensive review it had performed of existing documentation that demonstrates that the hydrostatic test was performed in compliance with regulatory requirements. Letter from W.G. Counsil (Executive Vice President, TU Electric) to NRC (July 15, 1988) (TXX-88575 re: Response to Inspection Report 88-24/88-21). 16/ This review also determined that, although methodologies were not proceduralized in detail, they were acceptable. As to the "Document Status Forms," these were not quality-related and were not required to be maintained as permanent plant records. The Document Status Form was used as an

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16/ See also "Reactor Coolant System Cold Hydrostatic Test Report" (ER-ME-01) (June 16, 1988) (transmitted to the NRC via TU Electric letter TXX-88529 (June 17, 1988)).

administrative mechanism for statusing reviews; and the review demonstrated that alternate existing documentation showed test compliance.

Thus, this subject area neither provides support for CFUR's Contention 5 nor shows that CFUR might be able to contribute to the record. 17/

4. Unresolved or Open Items in NRC Inspection Report 88-34/88-30 Do Not Support Allegations of a Continuing QA/QC Breakdown

CFUR refers to a number of unresolved or open items in NRC Inspection Report 50-445/88-34, 50-446/88-30 (June 17, 1988) (Report 88-34/88-30) as support for its accusations of a "continuing breakdown in QA/QC still being found in critical safety areas by NRC inspections" and a "pattern of QA/QC deficiencies... dating from the early 1970s to the present." Petition at 15-16. The subject areas cited by CFUR consist of defective service water piping coating, masonry wall design, defective diesel generator push rods and "incomplete reports dating from 1977 through 1986." Petition at 15.

17/ In particular, CFUR's petition identifies only one individual, Mr. James Sutton, who allegedly has knowledge of these events. CFUR does not even indicate whether he is willing to be a witness. Mr. Sutton was an NRC inspector, however, prior to working as a contractor at CPSES he had never been on site. Sworn Statement of Mr. James Sutton, at 2-3 (Mar. 20, 1986) (attached to NRC report, "Allegations of Misconduct By Region IV Management With Respect To The Comanche Peak Steam Electric Station" (Nov. 26, 1986)). As a contractor for Applicants, he performed a review of QA/QC inspector qualifications.

Although CFUR may not understand the NRC reporting system, unresolved or open items are not determinations of QA/QC deficiencies or violations but simply indicate that additional information or action is required prior to NRC resolution of an item. Thus, the presence of such items in an NRC Inspection Report proves nothing regarding a licensee's QA/QC program. Moreover, the subject areas cited by CFUR are wholly unrelated to each other. Thus, even if the ultimate disposition of the items in one of these areas were to result in the issuance of a notice of violation, it is difficult to conceive these disparate areas as collectively constituting a continuing QA/QC breakdown or a pattern of QA/QC deficiencies.

Problems regarding service water piping coating were identified by the Applicants in 1985. See Letter from W.G. Counsil (TU Electric) to E.H. Johnson (NRC) (Apr. 11, 1986) (TXX-4762 re: Service Water System Leakage). Considerable resources were brought to bear to determine the cause and extent of the problems including those of Stone & Webster Engineering Corporation ("SWEC"). The results of those efforts were documented in a November 1987 Report, SWEC Corrosion Control Report, SWTU-7749, Rev. O (November 1987) (subsequently revised in April 1988). Letter from W.G. Counsil (TU Electric) to NRC (June 22, 1988) (TXX-88476 Re: Service Water System Leakage). SWEC recommended removal of the coating. Since that time, Applicants have proceeded to implement the recommendations in the SWEC Report. In addition, Applicants have conducted an extensive

evaluation of the coating issues including those discussed in Report 88-34/88-30 and have concluded that the significance of performance deficiencies in the QA/QC area related to the piping coating and its removal are limited in scope and well defined, and that appropriate corrective actions are in progress.

It is evident from the NRC Inspection Report itself that none of the other areas cited by CFUR involve QA/QC deficiencies identified in Report 88-34/88-30. With respect to masonry wall design a notice of violation had previously been issued, but Report 88-34/88-30 documented a favorable review by the NRC inspector that determined such previous instance was "an isolated case." Report 88-34/88-30 at 3-4. With respect to defective diesel generator push rods, CFUR obviously fails to understand that the deficiency had been identified and reported by TU Electric, that the item had been closed out for Unit 1 and that it remained open for Unit 2 only because the rework had not been completed. Id. at 5-6. Finally, the reference to "incomplete reports" does not refer to QA/QC documentation but alludes to a previous deficiency in meeting corrective action dates in 10 C.F.R. § 50.55(e) reports, or omitting corrective action and tracking to completion for Unit 2 in § 50.55(e) reports. Id. at 5. The current inspection documented that TU Electric had reviewed all of its § 50.55(e) files for such deficiencies and commented favorably that a new licensing commitment form developed by TU Electric "represents a tracking improvement." Id.

CFUR's reference to these items fails to show how it can assist in developing a record thereon. It details no witness, specifies no testimony, reflects no understanding of the items and does not even set forth any specific concerns about these items that should be addressed. Thus, CFUR's indiscriminate citation to disparate unresolved and open items in Report 88-34/88-30 provides support neither for the resurrection of Contention 5 nor for CFUR's claimed ability to contribute to the record.

5. The Allegations Concerning the Spent Fuel Pool Liner Plates Were Addressed by Applicants' Program

CFUR's claims regarding the integrity of the welds in the spent fuel pool liner, Petition at 16, simply represent another attempt to resurrect allegations which have been treated at length in the CPSES proceeding.

Concerns about the documentation of fit up and cleanliness inspections for such welds were raised in March 1983 by Ms. Sue Ann Neumeyer, a former Brown & Root Quality Control (QC) document reviewer. Tr. 59,540-41 (Neumeyer). She testified at an evidentiary deposition in August 1984, Tr. 59,500-827, and her concerns were litigated as part of the special docket that was created to hear allegations concerning harassment and intimidation of QC inspectors at CPSES (Docket Nos. 50-445/OL-2 and 50-446/OL-2). The NRC's Technical Review Team reviewed Ms. Neumeyer's allegation and concluded that the welds in question are not safety-related and that the liners serve no structural

purpose and are only used to provide a smooth and impermeable surface that is easy to decontaminate. See NUREG 0797, Supplement No. 11, at 0-199, 0-203 to 0-206 (May 1985) (Safety Evaluation Report). The CPRT also reviewed Ms. Neumeyer's concerns about the spent fuel pool liner plates and reached similar conclusions. Results Report, ISAP VII.a.8 "Fuel Pool Liner Documentation," at 18 (Nov. 4, 1986) Rev. 1; Results Report, ISAP VII.C., Appendix 24 "Fuel Pool Liner", at 1-3 (Dec. 17, 1987) Rev. 1. The Applicants and the NRC have taken substantial efforts to demonstrate that these allegations have no significance, and CFUR remains unaware or chooses to ignore the role these allegations played in the Applicants' corrective programs and the NRC review.

CFUR has not shown that any of the information it claims to possess differs in any fashion from the ample information previously developed in the record or would lead to any different conclusions. It cannot be permitted at this late date to tread once more through an area that has been so thoroughly explored.

6. The Potential Expanded Capacity of The Spent Fuel Pool Is Not A Litigable Concern

CFUR's final allegation involves unspecified concerns about "risks" associated with the possible storage of larger inventories of spent fuel on site for the lifetime of the reactor if a high level repository does not become available. Petition at 17. The Petition identifies no concerns regarding the design

or operation of the spent fuel pool as contained in Applicants' license application. 18/ See Final Safety Analysis Report, Section 9.1. Moreover, the allegations regarding spent fuel pool storage capacity raises no question concerning Applicants' QA/QC program and provides no support for CFUR's proposed Contention 5, and CFUR has identified no witness and specified no testimony. Thus, CFUR's allegation simply shows CFUR's lack of understanding and inability to contribute to a sound record.

In summary, CFUR's vague pleading fails to explain the matters CFUR proposes to raise, to identify the witnesses CFUR might call, or to summarize the evidence CFUR would present. In a futile attempt to set forth substantive concerns, it contains a number of disparate allegations, most of which are either retreads of matters long considered in the proceeding or unrelated to the contention on QA/QC that CFUR seeks to resurrect. The pleading also demonstrates that CFUR does not understand how

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18/ It should also be noted that CFUR's concerns about the spent fuel pool capacity are premised on NUREG/CR-4982 "Severe Accidents in Spent Fuel Pools in Support of Generic Safety Issue 82" (July 1987). This report focuses on a number of "Beyond-Design Basis" accidents. These very remote possibility accident scenarios need not be considered in design of a reactor facility or a licensing proceeding. Pacific Gas and Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2) ALAB-880, 26 NRC 449 (1987); see generally "Policy Statement on Severe Reactor Accidents Regarding Future Designs and Existing Plants," 50 Fed. Reg. 32,138 (Aug. 8, 1985). Furthermore, the Commission has concluded that spent fuel can be safely stored in a reactor's spent fuel pool for at least thirty years beyond the expiration of a reactor's license and that there is a reasonable assurance that a disposal facility will be available at that time. Rulemaking on the Storage and Disposal of Nuclear Waste (Waste Confidence Rulemaking) CLI-84-15, 20 NRC 288, 293 (1984).

Applicants' extensive corrective action programs have addressed CFUR's concerns. CFUR's Petition clearly demonstrates that it will not be able to contribute to the development of the allegations that it raises.

C. CFUR's Intervention will Broaden the Issues and Delay the Proceedings

CFUR also fails to make the requisite compelling showing on the last of the factors to be balanced under 10 C.F.R. § 2.714. When ruling on a late filed petition to intervene, the Commission must consider "[t]he extent to which the petitioner's participation will broaden the issues or delay the proceeding." 10 C.F.R. § 2.714(a)(1)(v) (1988). Although this factor is not conclusive, it is a particularly significant one in striking the balance under 10 C.F.R. § 2.714(a). Project Management Corp. et al. (Clinch River Breeder Reactor Plant) ALAB-354, 4 NRC 383, 394-95 (1976); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1) ALAB-743, 18 NRC 387, 402 (1983). In considering the issue of delay, the relevant inquiry is "whether the proceeding -- not license issuance or plant operation -- will be delayed." Philadelphia Elec. Co.(Limerick Generating Station, Units 1 and 2) ALAB-828, 23 NRC 13, 23 (1986); Detroit Edison Co. et al. (Enrico Fermi Atomic Power Plant, Unit 2) ALAB-707, 16 NRC 1760, 1766 (1982). Moreover, in the case of a very late petition, there is a substantial likelihood that the grant of the petition will lead to delay. Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3) ALAB-476, 7 NRC 759, 762 (1978).

In this case, it can hardly be doubted that permitting CFUR to intervene nine years late and after the proceedings have been dismissed would result in substantial delay and a broadening of the issues. Through its Petition, CFUR attempts to disrupt the parties' settlement, to relitigate a contention already resolved by the parties after protracted and complex litigation over a period of nine years, and to interject new issues (such as spent fuel pool capacity) which were never in controversy in the now-dismissed proceeding.

In Puget Sound Power and Light Co., et al. (Skagit Nuclear Power Project, Units 1 and 2) ALAB-559, 10 NRC 162 (1979), vacated on other grounds, CLI-80-34, 12 NRC 407 (1980), the Appeal Board rejected a petition to intervene filed three and a half years after the deadline for intervention petitions were due. After noting the "high potential for delay which would attend upon a grant of intervention at this very late stage of an already protracted proceeding," the Appeal Board made the following statement which is particularly applicable here:

> In this regard, we once again must record our belief that the promiscuous grant of intervention petitions inexcusably filed long after the prescribed deadline would pose a clear and unacceptable threat to the integrity of the entire adjudicatory process. See ALAB-552, supra, 10 NRC at 6-7, quoting from Duke Power Company. (Cherokee Nuclear Station, Units 1, 2, and 3), ALAB-440, 6 NRC 642, 644 (1977). More specifically, persons potentially affected by the licensing action under scrutiny would be encouraged simply to sit back and observe the course of the proceeding from the sidelines unless and until they became persuaded that their interest was not being adequately represented by the existing parties and thus that their

> own active (if belated) involvement was required. No judicial tribunal would or could sanction such an approach and it is equally plain to us that it is wholly foreign to the contemplation of the hearing provisions of both the Atomic Energy Act and the Commission's regulations.

10 NRC at 172-73 (footnote omitted).

Similarly here, the grant of CFUR's "inexcusably" late petition will inevitably delay the proceedings and threaten the "integrity of the entire adjudicatory process." It should be summarily denied. 19/

19/ CFUR disingenuously states that it "is fully prepared to take the proceedings as they currently exist." Petition at 19. There are no existing proceedings. When a petitioner seeks to intervene in a proceeding in which the record has been closed it must satisfy both the requirements for a late filed petition as well as that for a motion to reopen the record. Arizona Public Service Co. et al. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3) LBP 82-117B, 16 NRC 2024, 2031 (1982) review declined ALAB-713, 17 NRC 83,84 n.1 (1983). Without concerning whether a nonparty could file a motion to reopen or whether such a motion is ever reasonable in a terminated proceeding, it is clear that the Petition does not satisfy the requirements of 10 C.F.R. § 2.734(a). For a motion to reopen the record to prevail, the movant must shown that: (1) the motion is timely, although an exceptionally grave issue may be considered in the discretion of the presiding officer even if not timely presented; (2) the motion addresses a significant safety or environmental issue; and (3) a materially different result would be or would be likely had the newly proffered evidence been considered. CFUR has not and cannot make any such showing. A motion to reopen is an extraordinary action and CFUR has failed to satisfy the heavy burden placed on proponents of such a motion. See 51 Fed. Reg. 19535, 19538 (May 30, 1986); Kansas Gas and Elec. Co. et al. (Wolf Creek Generating Station, Unit No. 1) ALAB-462, 7 NRC 320, 338 (1978); San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1316 (D.C. Cir. 1984), cert. denied, 107 S. Ct. 330 (1986). Nor does this petition present any "extraordinary and rare circumstances" that might warrant a finding that CFUR's untimely motion should be granted. See 51 Fed. Reg. at 19536.

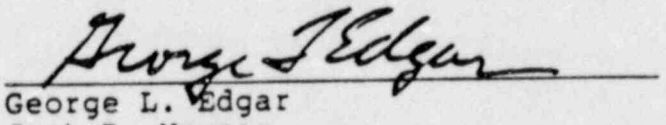
CONCLUSION

As is detailed above, the late petition filed by CFUR is without good cause for delay, shows CFUR's inability to develop the allegations that it has raised, and will delay the proceeding and broaden the issues if the intervention is granted. 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 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 Elec. and Gas Co. et al. (Virgil C. Summer Nuclear Station, Unit 1) ALAB-643, 13 NRC 898, 900 (1981). This situation is exactly what is presented here. Petitioner has not and cannot justify its belated attempt to participate in these proceedings. Nor can there be any doubt that Petitioner's intervention would broaden the issues and delay these proceedings and would severely prejudice Applicants in light of the advanced status of completion of CPSES. Moreover, there is no indication that CFUR could contribute to the development of a record. In short, Petitioner has not and cannot demonstrate any entitlement to participate as a party. Accordingly, for the foregoing reasons Applicants respectfully request that CFUR's Request for Hearing and Petition for Leave to Intervene be denied.

Texas Utilities Electric Company
for the Owners of the CPSES



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
before the
ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I, Thomas A. Schmutz, hereby certify that the foregoing Applicants' Answer to the Request for Hearing and Petition for Leave to Intervene by Citizens for Fair Utility Regulation was served this 26th day of August, 1988, by mailing copies thereof (unless otherwise indicated), first class mail, postage prepaid to:

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