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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

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In the Matter of

TEXAS UTILITIES ELECTRIC
COMPANY, ET AL.

(Comanche Peak Steam Electric
Station, Units 1 and 2)

}
} Docket Nos. 50-445-OL
} 50-446-OL

} Docket No. 50-445-CPA

NRC STAFF'S RESPONSE IN OPPOSITION TO REQUEST
FOR HEARING AND PETITION FOR LEAVE TO INTERVENE
BY CITIZENS FOR FAIR UTILITY REGULATION

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August 31, 1988

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BY CITIZENS FOR FAIR UTILITY REGULATION

I. INTRODUCTION

On August 11, 1988, Petitioner, Citizens for Fair Utility Regulation (CFUR) filed a request for a hearing and a petition for leave to intervene with the Atomic Safety and Licensing Board Panel. ^{1/} "Request for Hearing and Petition for Leave to Intervene by Citizens for Fair Utility Regulation" (August 11, 1988) [hereinafter Petition]. ^{2/} The Staff of the Nuclear Regulatory Commission, (Staff) opposes CFUR's request on the

^{1/} The Staff was not served with CFUR's filing. The Staff has obtained a copy of the filing from the Secretary of the Commission and is responding to it as though it had been properly served upon Staff counsel.

^{2/} Although the Petition is captioned with the docket numbers for both the Operating License (OL) and the Construction Permit Amendment (CPA) proceedings, the Petition makes no attempt to address the Construction Permit Amendment proceeding in any way. It is unclear whether Petitioner is even aware that two separate proceedings were in progress with respect to Comanche Peak. For purposes of this response, the Staff will treat the Petition as having been filed in both proceedings.

ground that the balancing of the factors governing late intervention set forth in 10 C.F.R. § 2.714 of the Commission's regulations weighs heavily in favor of denial of the petition. ^{3/}

II. BACKGROUND

The notice of hearing with respect to the issuance of the Comanche Peak operating license was published in 1979. "Availability of Applicant's Environmental Report, Consideration of Issuance of Facility Operating Licenses, and Opportunity for Hearing," 44 Fed. Reg. 6995 (February 5, 1979). The Licensing Board designated to preside over the proceeding granted the petitions for leave to intervene of 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). CASE has actively participated in the Operating License proceeding.

In 1986, CASE, along with Meddie Gregory, filed petitions to intervene with respect to an amendment extending the construction permit

^{3/} The Atomic Safety and Licensing Board (Licensing Board) designated to preside over the above-captioned proceedings has dismissed both of the Comanche Peak proceedings pending before it, thus making it appropriate for the Petition to have been filed before the Commission rather than before the Licensing Board. Therefore, the Staff is directing this response to the Commission.

for Comanche Peak Unit 1. "Petition to Intervene of Citizens Association for Sound Energy," (April 7, 1986); "Petition to Intervene of Meddie Gregory," (April 7, 1986). Meddie Gregory's participation ended with her death. See, "Notice of Withdrawal of Intervention," (September 14, 1987). CASE has continued its active participation in the CPA proceeding.

On July 1, 1988, CASE, Texas Utilities Electric Company (TU or Applicants), and the NRC Staff filed a motion to dismiss both 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). See also, "Joint Stipulation," (July 1, 1988). 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). 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 2.

On the morning of the prehearing conference, CFUR and the Fort Worth Chapter of the Sierra Club, through CFUR's current counsel, filed a petition for leave to intervene in both proceedings, and a request that the Licensing Board stay its actions. "Request to Continue Proceedings and Petition to Intervene by Citizens for Fair Utility Regulation and the Greater Fort Worth Group of the Lone Star Chapter of the Sierra Club," (July 13, 1988). During CFUR's oral argument in support of its petition, the Licensing Board Chairman gave CFUR's counsel guidance concerning what the showing should be in order for the Licensing Board to consider granting the petition. "Prehearing Conference," (July 13, 1988), Tr. 25,198-208. The Board Chairman noted that the Petitioners must show familiarity

with the corrective action programs currently being pursued at Comanche Peak and why these programs are not adequate to resolve Petitioners' issues. Id. at 25,202, 25,205, 25,207. The Licensing Board Chairman gave CFUR and the Sierra Club the opportunity either to attempt to make this showing at the prehearing conference, or to withdraw their petition without prejudice. Id. at 25,202, 25,207. CFUR's counsel requested that the petition be withdrawn, and the Licensing Board granted the request without prejudice. Id. at 25,208. The Licensing Board Chairman clearly indicated that should CFUR wish to file a petition after the dismissal of the proceeding, CFUR would do so with the Commission, and it would be for the Commission to decide whether another Licensing Board should be appointed to rule on the petition. Id. at 25,203. At the end of the prehearing conference, the Licensing Board signed an order dismissing both the OL and CPA proceedings. "Memorandum and Order (Dismissing Proceedings)," (July 13, 1988).

On August 11, 1988 CFUR filed its Petition. The Sierra Club has not filed a petition. For the reasons set forth below, the Staff submits that the Petition should be denied.

III. ARGUMENT

A. Standards for Intervention.

A party seeking intervention in a Commission proceeding must satisfy the requirements of 10 C.F.R. § 2.714. Any petition for leave to intervene must set forth with particularity petitioner's interest in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons the petitioner should be allowed to intervene, and the specific aspects of the subject matter of the proceeding as

to which petitioner wishes to intervene. 10 C.F.R. § 2.714(a)(2). The burden is on the petitioner to satisfy these requirements. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 (1983). The petition must address the criteria of 10 C.F.R. § 2.714(d). These criteria are:

- (1) The nature of the petitioner's right under the Act to be made a party to the proceeding.
- (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
- (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interests.

In addition, petitioner must set forth at least one valid contention. 10 C.F.R. § 2.714(b). While this requirement does not have to be satisfied by the petition itself, it must be satisfied before a petition will be granted.

Since the Petition in question here is a late petition for leave to intervene, the Petitioner must satisfy the late filing requirements of 10 C.F.R. § 2.714(a)(1) in addition to showing that the organization has standing to intervene, and setting forth the aspects of the proceeding about which the organization seeks to intervene. For the petitioner to be successful, the factors of 10 C.F.R. § 2.714(a)(1) must weigh in petitioner's favor. These factors are: i) Good cause, if any, for failure to file on time; ii) the extent to which Petitioner's interests can be represented elsewhere; iii) the extent to which Petitioner's participation will contribute to the development of a sound record; iv) the extent to which Petitioner's interests are represented by those of another party; and v) whether Petitioner's participation will broaden the issues or delay the proceeding. 10 C.F.R. § 2.714(a)(1)(i-v). There is a large body of

Commission case law interpreting the various intervention requirements. The precedents which apply to the circumstances presented by the Petition in question here are discussed below.

B. Interest and Standing.

The Commission has previously held that judicial concepts of standing will be used to determine whether a petitioner has standing to intervene in Commission proceedings. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 612 (1976). Judicial concepts of standing require a showing that the action sought in the proceeding will cause injury in fact, and that injury is arguably within the zone of interest protected by the statutes governing the proceeding. CLI-83-25, supra, 18 NRC at 332. In Commission proceedings the injury must be arguably within the zone of interest protected by the Atomic Energy Act of 1954 or the National Environmental Policy Act. Niagara Mohawk Power Company (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983).

For an organization to gain standing in a proceeding the organization must show either that there is an injury in fact which affects the organization, or there is injury in fact to a member or members of the organization. Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646 (1979). In order to establish standing through its members, an organization must provide the name and address of at least one affected member who wishes to be represented by the organization. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 583 (1978).

Petitioner has established its standing to intervene through its members. Petitioner has provided the affidavits of three of its members, one of whom is an official of the organization. See, Petition, Attachments A, B and C. One of the members states that he and his wife live within three miles of the Comanche Peak site, grow their own food, and have farm animals which would be affected by releases of radiation from the Comanche Peak facility. Id., Attachment A, McCook Affidavit at 1. The other members of the organization state that they use the area within 50 miles of the Comanche Peak site for recreational purposes. They claim that they visit areas within close proximity to the site, such as Dinosaur Park, and Granbury, Texas. Id., Attachments B and C, Resnikof Affidavit at 1; Brink Affidavit at 1. The statements of the affiants have alleged injury in fact, and have demonstrated that the members of the organization have interests which could be affected by the outcome of the proceeding, which are arguably within the zone of interests protected by the Atomic Energy Act. Therefore, Petitioner has established the requisite standing to intervene in this proceeding, had the petition been timely. ^{4/}

Petitioner has also identified an aspect of the proceeding upon which it wishes to intervene. Petitioner has proposed the adoption of Contention 5 from the previously dismissed Operating License proceeding. Petition at 6. Petitioner has also enumerated certain concerns about quality assurance at the Comanche Peak site. The Staff believes that the

^{4/} The Staff did not oppose CFUR's original standing to intervene and does not do so now. See, "NRC Staff Answer to Petition for Leave to Intervene by CFUR," (March 23, 1979).

Petition satisfies the aspect requirements of 10 C.F.R. § 2.714. While Petitioner has met the interest and standing requirements of 10 C.F.R. § 2.714(a), Petitioner must still show that a balancing of the 5 factors, which must be addressed in the case of late-filed petitions, weighs in favor of the granting of this Petition and must submit a valid contention.

C. Good Cause, if any, for Failure to File on Time.

The first, and most important of the factors governing late intervention is the showing of good cause, if any, for Petitioner's failure to file on time. If Petitioner fails to demonstrate good cause for the late filing, then Petitioner must make a compelling showing with respect to the remaining four factors. Washington Power Supply System, et al. (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983); Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982). The weight of the burden with respect to the remaining factors will depend, as well, on the posture of the proceeding at the time of the filing of the petition. ALAB-747, supra, at 1173. The Staff submits that where, as here, there would be no further proceedings without this late-filed petition, the burden should be a very heavy one if Petitioner cannot demonstrate good cause for its late filing.

Petitioner alleges as good cause that it withdrew from the Operating License proceeding originally due to a lack of resources, and because the intervenors in the proceeding were competing for the same resources. Petition at 9-10. Petitioner also alleges that it has good cause for this late filing because the settlement agreement under which CASE withdrew from the proceedings just recently came to its attention. Id. at 7-9.

Petitioner alleges that it relied on CASE to continue the proceeding. Id. Finally, Petitioner alleges that doubts as to CASE's willingness to implement the Joint Stipulation somehow constitute good cause for its late filing. Id. These allegations are insufficient to establish good cause for Petitioner's attempt to regain admission to this proceeding some six years after Petitioner's withdrawal.

Petitioner is actually attempting to substitute itself for CASE. Petitioner's proposed contention is nothing more than a reiteration of Contention 5, which CASE was pursuing in the Operating License proceeding. Petitioner argues that all of the issues it raises in the Petition fall under Contention 5. Petition at 5-6. Commission precedent holds that one party may not demonstrate good cause for late filing by attempting to substitute for a party who has withdrawn from the proceeding. Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 795-798 (1977). The Appeal Board in River Bend adopted the language of the Court of Appeals for the District of Columbia Circuit in stating:

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 is passed on successively from one legally exhausted contestant to a newly arriving legal stranger. Id. at 797; citing, Easton Utilities Commission v. Atomic Energy Commission, 424 F.2d 847, 852 (D.C. Cir. 1970).

That is exactly what Petitioner is attempting to do here. Petitioner finds that it is dissatisfied by actions taken by the sole intervenor in the proceeding and now wishes to reenter the proceeding and pick up where that intervenor has left off. Petitioner tries to justify its actions by saying that it will take the proceeding as it finds it. This statement

was not sufficient to provide the Petitioner in River Bend with the necessary good cause, and it should not do so here. See, ALAB-444, supra, 6 NRC at 796.

Petitioner is also similar to the petitioner in the River Bend proceeding in that it claims that it relied on CASE to pursue the proceeding. See, Petition at 9. Even assuming that it relied upon CASE to pursue this matter, Petitioner points to no information on this record, however, which shows that CASE specifically undertook to act as CFUR's representative in this proceeding to represent the interests of the intervenors who withdrew from the Operating License proceeding in 1981 and 1982. Thus, as was the case in River Bend, Petitioner assumed the risk that the sole intervenor's involvement in the Operating License proceeding would not live up to Petitioner's expectations. The Appeal Board in River Bend did not find that such a situation constituted good cause for the late petition for leave to intervene. ALAB-444, supra, 6 NRC at 797. ^{5/} Petitioner made a deliberate choice to withdraw from this proceeding for whatever reason. As the Commission has held before, parties to NRC proceedings must live with the choices they make.

Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1

^{5/} In support of its claim that the Petitioner has good cause for late intervention, Petitioner points to some disagreement among CASE board members which Petitioner alleges casts doubt on CASE's willingness to implement the settlement agreement. Petition at 8-9. These allegations bear no relevance to a good cause showing. In addition, they are factually incorrect. An examination of the inspection reports issued by the Staff for the July-August inspection period demonstrates that CASE, as was set forth in the agreement, attended the exit meetings for that inspection period. See, e.g., Inspection Reports 50-445/88-49 and 50-446/88-45; 50-445/88-50 and 50-446/88-46; 50-445/88-51 and 50-446/88-47; 50-445/88-52 and 50-446/88-48.

and 2), CLI-86-8, 23 NRC 241, 245 (1986). While Braidwood relates to the admission of a late-filed contention, the principle is the same. When parties make deliberate choices in a proceeding, they assume the risks that go along with those choices. Therefore, as stated above, when Petitioner withdrew from this proceeding, it assumed the risk that CASE would not conduct the proceeding as Petitioner would have liked.

Finally, previous Commission cases have pointed out that Intervenors may not dart in and out of proceedings on their own terms and at their own convenience. Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB 761, 19 NRC 487 (1984); Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 907 (1982). These cases also stand for the proposition that a party assumes the risk that certain of its rights may be waived upon its choice to withdraw. Id. The Appeal Board specifically stated in Midland that a party may not expect to enjoy the benefits of participation in Commission proceedings without the responsibilities. ALAB-691, supra, 16 NRC at 907. That is precisely what Petitioner is attempting to do here. This proceeding has continued for six years since Petitioner originally withdrew. There is no indication, beyond a mere allegation, that Petitioner is familiar enough with the events which have occurred in those six years to be able to walk in and start what would be tantamount to a new proceeding with all the knowledge to effectively pursue its issues. Petitioner claims that one of its members gave engineering support to CASE. Petition at 18. It must be noted, however, that the person who apparently provided this support is no longer living. Id. Therefore, as will be discussed in more detail in relation to Factor 3 below, there is no indication that even if Petitioner

were allowed to intervene at this extremely late date, it would have the ability to meet its responsibilities.

In sum, Petitioner has shown no reasons why this extremely late petition to intervene should be entertained. The Petitioner has given no good reasons for sitting on the sidelines for six years. It has given no good reasons why it should be allowed to jump in and commence another proceeding at this late date. Therefore, Petitioner has failed to show any good cause for late filing, and this factor should weigh heavily against the granting of the petition for leave to intervene with respect to either the Operating License or the Construction Permit Amendment proceedings.

D. Availability of Other Means to Protect Petitioner's Interests and the Extent to Which That Interest Will be Represented by Existing Parties.

Factor (ii) concerns whether there is another forum for a party to have its interests represented. Factor (iv) concerns whether there is another party to represent petitioner's interests. 10 C.F.R. § 2.714(a). These factors are generally given less weight than the others. See, CLI-86-8, supra, 23 NRC at 245; citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981). In light of previous precedents, the Staff believes that these two factors weigh in favor of the Petitioner. However, in the circumstances of this case, these factors do not tip the overall balance in Petitioner's favor.

Petitioner argues there is no other means by which its interest may be protected. Petition at 11-12. It claims that the right to comment on

the Staff's safety evaluations does not give it the right to cross-examination. Id. at 11. The Staff agrees. Petitioner also claims that a § 2.206 petition would not protect its interest, apparently because such petitions relate to enforcement and not licensing matters. Id. at 12. While the Staff is aware that the Appeal Board has expressed its doubts as to whether a § 2.206 petition is an adequate substitute for participation in an adjudicatory proceeding,^{6/} and thus does not put forward a § 2.206 petition as a means of satisfying this factor, Petitioner has expressed a misconception which the Staff must correct. Petitioner argues that § 2.206 petitions relate solely to enforcement matters. This is incorrect. As the Appeal Board has pointed out, such a petition can be used to address health, safety and environmental issues. In fact, in at least one instance an Appeal Board has referred issues raised in a late petition to Intervene to the Staff as a § 2.206 petition. Detroit Edison Company, et al. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1768 (1982). As the Appeal Board pointed out, while this remedy did not guarantee the petitioner a hearing, it did insure that the issues would be addressed. Id. at 1768. Thus, while this factor weighs in favor of Petitioner, this factor should not weigh heavily in the overall balancing of the factors. If in fact Petitioner has issues of significance which the Commission believes should be addressed, the

6/ See, Washington Public Power Supply System (WPPS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-76 (1983).

issues could be referred to the Staff pursuant to 10 C.F.R. § 2.206. ^{7/} Such an action would be particularly appropriate in this case, since the issues raised in the Petition either have been or are already being considered by the Staff.

With respect to the fourth factor Petitioner argues that there is no other party to represent its interest. Petition at 19. While the Staff agrees with this statement, once again the Staff submits that this factor should not weigh heavily in balancing all the factors. It should be noted that a number of the issues raised by Petitioner have been gleaned from inspection reports issued by the Staff. Petition at 14-15. Petitioner has not indicated that it has any witnesses with respect to these issues. Therefore, it is unclear what position different from the Staff's position would be taken by the Petitioner were it allowed to intervene. Therefore, this factor should not weigh heavily in favor of Petitioner in the overall balancing.

E. Ability to Contribute to the Development of a Sound Record.

The third factor set forth in 10 C.F.R. § 2.714(a)(1) concerns the ability of Petitioner to contribute to the development of a sound record. Petitioner argues that it has the ability because it has experience participating before this and other administrative agencies, and it has spoken with people who have pointed Petitioner to issues to be raised.

^{7/} In its argument on this factor Petitioner refers to a license amendment. See, Petition at 11. The Staff is unclear what Petitioner is referring to. The reference leads the Staff to believe that Petitioner does not understand the posture of either the OL or CPA proceedings.

Petition at 12-18. For the reasons discussed below, this factor weighs heavily against Petitioner.

Petitioner uses its participation before this agency as a basis for saying it could contribute to the development of a sound record. Petition at 17-18. Petitioner points out that it participated in all of the early prehearing conferences and in the first round of hearings in 1982. Id. at 17. Such allegations of previous participation are not sufficient to demonstrate that Petitioner can contribute to a sound record at this time. Previous cases have held that Boards will not attach weight to previous participation where the issues were not the same, and there was no indication that Petitioner had contributed to the development of a sound record in the earlier proceeding. ALAB-747, supra, 18 NRC at 1178.

Petitioner alleges it participated in conferences on Contention 5, which is the contention it now seeks to adopt from the previously dismissed proceeding. However, it does not explain exactly what type of conferences it participated in nor what its role was at these conferences as far as Contention 5 is concerned. Petition at 17. Petitioner also claims to have made a contribution to the record with respect to batch releases of radiation and ground water. Id. at 17-18. No details are provided as to what that contribution might have been. With respect to Contention 5, Petitioner did not, to the Staff's knowledge, participate in the hearings on the subject of Contention 5 which took place in 1983. To the Staff's knowledge, Petitioner has not actively participated in any of the meetings or other discussions which have taken place since 1983 with

respect to the Applicants' Comanche Peak Response Team (CPRT) or Corrective Action programs. Therefore, there is no demonstration in this petition that Petitioner would be able to contribute to the development of a sound record on either quality assurance or corrective action adequacy issues. With respect to the other issues on which Petitioner claims to have contributed to the record, they do not appear similar to the issues Petitioner is attempting to raise at this time. Therefore, Petitioner's participation with respect to those issues should be given no weight in determining whether Petitioner can contribute to the development of a sound record at this time.

In determining whether a given petitioner will be able to contribute to the development of a sound record, it must be determined whether a petitioner has any special expertise on the subject it wishes to raise. See, ALAB-704, supra, 16 NRC at 1730. It was incumbent upon Petitioner to set out with as much particularity as possible the precise issues it wishes to cover, to identify its proposed witnesses and to summarize their testimony. Id.; Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 399-400 (1983). Petitioner should have provided the names of the witnesses it intends to call and provided sufficient detail regarding its witness's testimony so that the Commission could reach a reasoned conclusion as to the worth of the testimony on the contention covered by that testimony. ALAB-747, supra, 18 NRC at 1181. Petitioner has failed to meet any of these requirements. Petitioner alleges that it is raising only one contention and that is Contention 5, which was the sole remaining contention in the OL proceeding when the

Licensing Board dismissed that proceeding. ^{8/} Apparently as basis for this contention, Petitioner alleges that there are still QA/QC deficiencies at Comanche Peak, as shown by various NRC inspection reports. Petition at 5-6.

Petitioner's first attempt to show that it could contribute to the development of a sound record on Contention 5 centers around a person that Petitioner calls John Doe. Mr. Doe's resume was not presented by Petitioner. Petitioner merely alleges that this witness has experience in the nuclear industry and that he was formerly employed at the Comanche Peak site. Petition at 13. Petitioner gives no time frame for that employment. Petitioner then goes on to state that John Doe has made allegations of perjury on the part of Applicants' employees, that Applicant has falsified some unspecified documents and engineering calculations, and that there are "life-threatening safety flaws" at the Comanche Peak site. Id. at 12. While Petitioner is very free with allegations, it provides no substantiation at all for such allegations. Petitioner merely states it will produce some sort of affidavit in 30 to 60 days with

^{8/} Contention 5 states:

The applicant's 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, 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 the issuance of an operating license for Comanche Peak.

Mr. Doe's allegations. If Petitioner is willing to make allegations at this time, it should be willing to provide the support for these allegations now rather than at some future date. This Petition should be decided on the pleadings filed, and not on promises of filings to come. The Petitioner has not provided enough of a summary of Mr. Doe's testimony to make any sort of conclusion, let alone a reasoned conclusion, about the worth of Mr. Doe's testimony. ^{9/}

Petitioner alleges that this unidentified person was to have been used as a CASE witness at the hearings which were to recommence in the Fall, apparently to testify about a previous breakdown in QA/QC. While this person may have believed this to be the case, to the Staff's knowledge no party had finalized its list of witnesses, since the issues with respect to each of the areas of the corrective action activities had not yet been specified. In addition, none of the parties had yet made it clear what, if any, witnesses would be presented on historical QA/QC

^{9/} Petitioner claims, again without any support, that Mr. Doe refused a settlement offer because he would have had to sign an agreement which would have prohibited him from appearing before the Licensing Board. Petition at 13. Petitioner seems to believe that this unsupported statement should give this proposed witness some credibility with the body ruling on this petition. It should not. It is easy for Petitioner to make such assertions without having to produce this unidentified person or any details about this alleged agreement. At the prehearing conference counsel both for CASE and the Applicants made it quite clear that none of the people involved in the settlement of their individual claims were precluded from bringing concerns to the NRC. See, Prehearing Conference, Tr. 25,257, 25,268. Petitioner has not demonstrated why Mr. Doe should have been treated differently. In addition, it would have been absurd for anyone to propose such an agreement in connection with the proposed settlement, since the proceedings were to be dismissed and there would be no Licensing Board hearing testimony. Petitioner's statement on this matter should be totally disregarded.

issues. Therefore, the mere belief on the part of this person that he was to have been a witness on some issue does not in any way demonstrate that his testimony would have been used or, if used, would have had credibility before the Licensing Board. ^{10/} To support its argument that Petitioner will be able to contribute to a sound record, Petitioner next alleges that it was approached by an unidentified Brown & Root employee with allegations of mismanagement. Petition at 13. Once again, no particular allegation in that area is set forth. Petitioner also does not indicate how such an allegation relates to what it says is its only contention. Petitioner next alleges that this person indicated that Kapton insulation was used throughout the Comanche Peak plant and that it can cause fire around electrical wiring. Id. Petitioner does not give any information concerning the qualification of this person to address this issue. Nor does Petitioner even indicate that this person will be a witness for Petitioner on this issue. Therefore, Petitioner has not demonstrated the special expertise in this area to aid it in satisfying Factor (iii). ^{11/}

Petitioner next alleges that allegations of two whistleblowers made in 1988 have never been made public and that they must be made public for

^{10/} Like other statements in this petition, Petitioner's statement that Mr. Doe's allegations have in some part been validated by the NRC must be disregarded. Petitioner has not indicated which of Mr. Doe's purported allegations have been validated. The Staff was not, until recently, aware of an alieger called John Doe. Since the Petition does not set forth Mr. Doe's specific allegations, this statement should not be considered in determining whether Petitioner has made the requisite showing under 10 C.F.R. § 2.714(a)(1)(iii).

^{11/} It should be noted that this issue is already being followed by the Staff both generically and at Comanche Peak. See, IE Information Notice 87-08, "Degraded Motor Leads in Limitorque DC Motor Operators," (February 4, 1987); Inspection Report 50-445/88-52 and 50-446/88-48 at 6 (Item 4.a).

the community to be informed. Id. at 13-14. Neither the names of the whistleblowers nor the time frame of the allegations are specified nor the relevance of their concerns to the proposed contention. Id. This vague statement provides no basis on which the conclusion could be drawn as to whether Petitioner could contribute to the development of a sound record.

Petitioner next focuses its attention on the issue of hydrostatic testing and claims that this testing must be redone. Petition at 14. Petitioner claims that this issue shows a continuing lack of quality control at Comanche Peak. Petitioner bases its statements on verbal contacts it has had with a Mr. James Sutton, a former NRC employee. Petition at 15. Petitioner does not indicate that Mr. Sutton will be Petitioner's witness in the event Petitioner's request to intervene is granted. Petitioner has not set forth any testimony that Mr. Sutton proposes to give. As Petitioner notes, an allegation concerning the validity of the hydrostatic testing has been made to the NRC. Petition at 14. The Staff is in the process of addressing this allegation. See, Inspection Report 50-445/88-24 and 50-446/88-21. Petitioner has failed to indicate why the manner in which the Staff is addressing the hydrostatic testing concerns is inadequate. Petitioner has failed to show any special expertise in this area, and thus has not shown how it will be able to contribute to the development of a sound record on the issue of the validity of hydrostatic testing.

Petitioner also points to some unresolved items and open items in NRC Inspection Report 50-445/88-34 and 50-446/88-30 as basis for saying a pattern of QA deficiencies still exists at Comanche Peak. Petition at 15.

Petitioner has not made any attempt to show any special expertise on this issue. It merely cites to the inspection report. Indeed, Petitioner does not explain in what way the issues raised in this inspection report demonstrate a pattern of QA deficiencies. Since Petitioner has no witnesses in these areas to present, nor has it shown any other special expertise in this area, it has not shown any ability to contribute to the development of a sound record on this issue.

Finally, Petitioner alleges as an issue that information long known about the integrity of the welds in the spent fuel pool liner has not been adequately addressed. Petition at 16. Petitioner bases this allegation apparently upon some information it received at some time from an unidentified welder and a former QA/QC inspector. Id. Petitioner does not state that it intends to call these people as witnesses. Petitioner does not summarize what their testimony would be or tell anything about their qualifications to present such testimony. Both the Staff and the Applicants have addressed this issue. See, "Safety Evaluation Report Related to the Operation of Comanche Peak Steam Electric Station, Units 1 and 2," NUREG-0797, Supp. No. 11 (May 1985); "Safety Evaluation Report Related to the Operation of Comanche Peak Steam Electric Station, Units 1 and 2," NUREG-0797, Supp. No. 10 (April 1985); Results Report, Issue Specific Action Plan (ISAP) VII.c, "Construction Reinspection/Documentation Review Plan," Rev. 1 (December 17, 1987), Appendix 24, "Fuel Pool Liner"; Results Report ISAP VII.a.8, "Fuel Pool Liner Documentation," Rev 1 (November 4, 1986). Petitioner has not indicated in what respects the way the Applicants and Staff have addressed this issue is inadequate.

Petitioner also seems to raise a concern, although exactly what it is talking about is somewhat unclear, about spent fuel remaining on site for

longer than seven years. Petition at 17. Petitioner refers to the Brookhaven report as a basis for this concern. id. To the Staff's knowledge, there is nothing in the license application that would restrict the time for which fuel could be stored on site to seven years. Petitioner has not indicated what in the Brookhaven report supports its assertion that storage of spent fuel for the life of the plant would result in increased accident consequences. Therefore, if Petitioner is raising this as an issue, it has failed to demonstrate any special expertise in this area which would show that it has an ability to contribute to the development of a sound record on this issue.

If Petitioner is implying that somehow Applicants will be able to store more than seven years worth of spent fuel in the spent fuel pools at Comanche Peak, there is no basis for this claim in the license application. Applicants have not, at this time, amended their application to allow for more fuel to be stored in the spent fuel pool. Therefore, Petitioner has no basis for such a concern, and has not demonstrated any ability to contribute to a sound record on this issue. In addition, Petitioner has not indicated how this issue relates to quality assurance at Comanche Peak. Therefore, Petitioner has failed to demonstrate the special expertise necessary in this area to contribute to the development of a sound record on this issue.

In sum, though Petitioner has raised a number of general issues it would like to have aired in a new proceeding, it has not demonstrated any special expertise with respect to any of them. Therefore, this factor should weigh heavily against granting Petitioner intervenor status. Petitioner has not provided enough detail about any proposed witness's testimony to allow the Commission to make a reasoned conclusion about the

worth of the testimony with respect to any of the issues raised by Petitioner.

F. Whether Petitioner's Participation Would Broaden the Issues or Delay the Proceeding.

Petitioner contends that its participation would not broaden the issues because it is willing to take the proceeding as it finds it. Petitioner also argues that the only delay its participation would cause would be the time necessary for it to obtain the affidavit of John Doe. Petition at 19-20. These arguments are without merit.

As far as broadening the issues is concerned, since the Licensing Board has dismissed the proceeding, granting intervention to Petitioner would be tantamount to starting a whole new proceeding. The mere fact that there would be a new proceeding where there is now no proceeding serves to broaden the issues to be heard. It is not clear to the Staff that Petitioner is sufficiently familiar with the posture of the proceeding before its dismissal to know what is meant by taking it as it finds it. Some of the issues Petitioner wishes to raise, such as increased spent fuel storage or the use of Kapton insulation, would result in a broadening of the issues. It is not clear that the issues Petitioner wishes to raise would, in fact, fall within the ambit of Contention 5. Therefore, Petitioner's participation would cause a broadening of the issues to be heard.

As far as delay is concerned, the question to be decided is whether by filing late Petitioner has occasioned a delay in the proceeding that would not have been present had the filing been on time. ALAB-747, supra, 18 NRC at 1180. Had Petitioner remained in this proceeding it would have,

the Staff must suppose, been involved in the events which have taken place since 1982, and would have followed the development of the Applicants' CPRT and corrective action programs. Petitioner's primary reference to the CPRT and CAP programs is to quote from a CASE newsletter issued in 1987. See, Petition, Attachment G. Petitioners failed to refer to the numerous meetings which have taken place since then, or to the numerous documents which have been issued since that time. Had Petitioner been in the proceeding the whole time, it would now be ready to specify the issues under Contention 5 which relate to the Project Status Reports that have been issued, and to the recently issued supplements to the Staff Safety Evaluation Reports. If Petitioner were granted leave to intervene at this time and is permitted to adopt Contention 5, there would be a significant delay before litigation of specific issues under Contention 5 could begin. Therefore, the untimely filing of this Petition would indeed cause delay if the dismissed proceeding were reinstated.

In sum, had Petitioner fulfilled its intervention responsibilities by remaining in this proceeding, it could have had a voice in whether the proceeding should have been dismissed and what issues should be heard. However, it chose not to do so. To allow Petitioner to come in after six years and attempt to start a new proceeding once the Licensing Board has dismissed the longstanding proceeding would certainly result in a broadening of the issues and a delay of the proceeding. Therefore, this factor weighs heavily against the granting of Petitioner's request to intervene.

A balancing of the five factors weighs heavily in favor of the denial of this Petition. There is no good cause for the extremely late filing of

the Petition. Petitioner has not demonstrated an ability to contribute to the development of a sound record. Petitioner's participation would serve to broaden the issues to be heard and to delay the proceeding. The other two factors weigh in Petitioner's favor, but in the circumstances of this case should be given far less weight than the other three. Based on the above discussion, Petitioner's request for intervention and request for hearing should be denied.

G. Intervention in the CPA Proceeding Should Also be Denied.

CFUR's Petition appears to be directed solely at the Operating License proceeding, although the caption of the case refers to both the Operating License and Construction Permit Amendment proceedings. As stated above, this is another indication that Petitioner does not understand what proceedings were being held with respect to the Comanche Peak facility.

Petitioner has not attempted to address the five factors of 10 C.F.R. § 2.714(a) with respect to intervention in the Construction Permit Amendment proceeding. Therefore, the Petition is defective on its face and should be denied out of hand with respect to the CPA proceeding.

Even if one were to assume that Petitioner's discussion of the factors applied to both the CPA and the OL proceedings, it must be concluded that the first, third and fifth factors would weigh heavily against petitioner. Petitioner has utterly failed to demonstrate good cause for its late filing in the CPA proceeding. Petitioner has not made any mention of the contention that would be admitted in the CPA proceeding and has failed to demonstrate any ability to contribute to a sound record

concerning the construction permit extension. Though no issues have been identified, it is reasonable to assume that issues would be broadened since without intervention there would be no issues to be heard. In addition, there would be delay, since Petitioner has failed to show any familiarity at all with the status of the CPA proceeding or even what that proceeding is all about. Even assuming that the other two factors weigh in Petitioner's favor, they should not be given sufficient weight to tilt the overwhelming balance of the other three factors, especially since Petitioner did not even attempt to address them with respect to the CPA proceeding.

IV. CONCLUSION

For the reasons set forth above, Petitioner's request for permission to intervene late in either the Comanche Peak Operating License or the Construction Permit Amendment proceeding should be denied.

Respectfully submitted,



Janice E. Moore
Counsel for NRC Staff

Dated at Rockville, Maryland
this 31st day of August, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNPC

'88 AUG 31 P2:45

BEFORE THE COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)

TEXAS UTILITIES ELECTRIC)
COMPANY, ET AL.)

(Comanche Peak Steam Electric)
Station, Units 1 and 2))

Docket Nos. 50-445-OL
50-446-OL

Docket No. 50-445-CPA

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE IN OPPOSITION TO REQUEST FOR HEARING AND PETITION FOR LEAVE TO INTERVENE BY CITIZENS FOR FAIR UTILITY REGULATION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 31st day of August, 1988:

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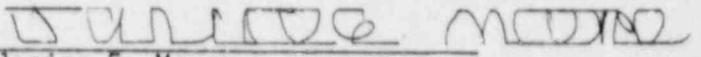
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