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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SERVED MAR 13 1986

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal
Lando W. Zech, Jr.

In the Matter of

TEXAS UTILITIES ELECTRIC COMPANY, et al.

(Comanche Peak Steam Electric Station, Unit 1)

Docket No. 50-445 OL

MEMORANDUM AND ORDER
(CLI-86-04)

I. Background

This case arises from a regrettable and wholly avoidable omission by the Texas Utilities Electric Company (TUEC), which in 1974 received a construction permit (CPPR-126) for the Comanche Peak Steam Electric Station (CPSES) Unit 1 facility, to be built near Glen Rose, Texas. As extended, that construction permit was due to expire on August 1, 1985.

Under 10 CFR § 2.109 of the Commission's regulations, the filing of a timely request for an extension keeps a construction permit in force. TUEC failed to make such a request. The omission was detected by the NRC on January 28, 1986, during a routine document review. This represents the first time in the history of the civilian nuclear power program that the holder of a construction permit allowed its permit to expire without making a timely request for an extension. The result has been the needless expenditure of

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time and resources by the Commission. We note with approval, therefore, that the NRC staff has advised us, in its filing of February 13, 1986, that it is considering whether to take enforcement action against TUEC for conducting construction activities at Comanche Peak Unit 1 after the expiration date of its construction permit.

On January 29, 1986, TUEC applied to the NRC Staff for an extension of CPPR-126. TUEC advised the Staff that while physical construction of the plant was essentially complete, some on-site work remained to be completed, including an effort to reinspect portions of the plant and to identify and replace any defective or non-conforming materials or systems, and that it had ceased most construction activities at Unit 1 pending NRC action on its application.[1] On January 31, 1986, the Citizens Association for Sound Energy (CASE), an intervenor in the Comanche Peak operating licensing proceeding, filed a pleading with the Commission itself seeking (1) the imposition of a civil penalty against TUEC for construction activities at CPSES Unit 1 between August 1 and January 29, (2) a definitive order directing TUEC to file an application for a new construction permit and to cease all construction activities at CPSES Unit 1, (3) a determination that significant hazards considerations existed in any extension of the construction permit, and (4) a hearing before the Atomic Safety and Licensing Board Panel (ASLBP) on the request to extend the construction permit. TUEC responded to CASE's

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[1] TUEC continued activities which were related to (1) maintenance of systems already in operation, (2) design activities, (3) ongoing inspection and planning activities which responded to NRC staff criticisms, exclusive of actual physical corrective action, and (4) corrective maintenance of systems which were undergoing repairs at the time of discovery, if TUEC judged such activities necessary to preserve the intergrity of the installed system.

pleading on February 4, 1986, asking that the Commission reject CASE's argument that a new construction permit was required, refer the remainder of the first three items in CASE's pleading to the NRC Staff for appropriate action, and deny the request for a hearing.

While this matter was still pending before the Commission, the staff issued a NEPA finding of no significant environmental impact relating to the extension of CPPR-126 and published this finding in the Federal Register. See 51 Fed. Reg. 4834 (Feb. 7, 1986). Subsequently, on February 10, 1986, the Staff issued the requested extension of CPPR-126 after making a finding that the extension involved no significant hazards considerations. CASE has responded with a request that the Commission stay the effectiveness of the construction permit extension while granting the relief previously requested in CASE's January 31st pleading. The Staff and TUEC have responded in opposition to that request, and CASE has moved to file a reply memorandum, which we have accepted and considered.

After due consideration, we: (1) deny both CASE's request for a halt to construction and its request for the institution of a new construction permit proceeding; (2) deny CASE's request for a stay of staff's extension of CPPR-126; (3) reject CASE's view that significant hazards considerations are involved in the extension of CPPR-126; (4) refer CASE's request for enforcement action to the staff for consideration under 10 CFR 2.206; and (5) refer CASE's request for a hearing to the Chairman of the Atomic Safety and Licensing Board Panel for appointment of a hearing board to rule on the hearing request and to conduct any necessary hearings in accordance with Subpart G of 10 CFR Part 2.

II. Renewal Of The Construction Permit

The first legal issue before the Commission for decision is whether TUEC's failure to make a timely application for an extension prior to the expiration date of its construction permit had the effect of causing a complete forfeiture of the permit, such as to preclude the issuance of an extension and to require the initiation of an entirely new construction permit proceeding. To answer this question, which we resolve in the negative, we begin by looking at the statute.

Section 185 of the Atomic Energy Act (AEA) provides in pertinent part:

> The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date.

The legislative history of the Atomic Energy Act does not explicitly state the purpose underlying this provision. It is noteworthy, however, that the quoted language was modeled on the provision of the Communications Act of 1934 which governs the issuance of radio station construction permits by the Federal Communications Commission.[2] At the time that the Atomic Energy Act of 1954 was passed, all nuclear fuel was owned by the United States Government, and it was envisioned that recipients of construction permits would, once their facilities were completed, receive some of that publicly owned fuel for

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[2] See Proposed Amendments to the Atomic Energy Act of 1946: Hearings on S. 3323 and H.R. 8862 Before the Joint Committee on Atomic Energy, 83rd Cong., 2d Sess. 116 (1954) (Representative Hinshaw), reprinted in II Legislative History of the Atomic Energy Act of 1954, 1635, 1751-56.

use in the reactor.[3] Thus in 1954, there were significant analogies between the issuance of construction permits for radio stations and nuclear reactors: both involved the allocation of a scarce resource in the sole possession of the Federal Government. In both cases, moreover, it could be presumed that if a permittee failed to make use of its allocation, some other applicant would be in a position to use it.

The regulations promulgated by the Atomic Energy Commission for the implementation of the Atomic Energy Act demonstrate the significance which attached to allocations of nuclear fuel. Under 10 CFR § 50.60, "Allocation of Special Nuclear Material," the Commission was authorized to include in each construction permit a statement of the amounts and scheduling of transfers of special nuclear material from the Commission to the permittee. 21 Fed. Reg. 355 (Jan. 19, 1956). Significantly, 10 CFR § 50.55(a), which now provides simply that "[t]hat the permit shall state the earliest and latest dates for completion of the construction or modification," then included a second sentence: "If the construction or modification is completed before the earliest date specified, the holder of the permit shall promptly notify the Commission for the purpose of accelerating final inspection and any scheduled delivery of materials from the Commission." (Emphasis added.) Likewise, the regulations foresaw the possibility of competition for scarce nuclear fuel, and therefore provided, in 10 CFR § 70.23(f), that "[i]n the event that applications for special nuclear material exceed the amount available for distribution, the Commission will give preference to those activities which

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[3]Section 52 of the Atomic Energy Act, which provided for sole Commission ownership of all special nuclear material, was repealed in 1964. Public Law 88-489 (78 Stat. 602), sec. 4.

are most likely, in the opinion of the Commission, to contribute to basic research, to the development of peacetime uses of atomic energy, ... to the economic and military strength of the Nation ... [or] to major advances in the application of atomic energy for industrial or commercial purposes." 21 Fed. Reg. 764 (Feb. 3, 1956).

Taken as a whole, these regulatory provisions indicate that at the time the Atomic Energy Act was passed, the allocation of scarce fuel was of major concern to the agency charged with implementation of the Atomic Energy Act. Ten years later, the development of the nuclear power and uranium mining industries made Government ownership and allocation of nuclear materials no longer a necessity, and Section 52 of the Atomic Energy Act was repealed. See "Private Ownership of Special Nuclear Materials, 1964," Hearings Before the Subcommittee on Legislation of the Joint Committee on Atomic Energy, 88th Cong., 2d Sess. (1964). It thus appears that though the requirement that construction permits include termination dates remained in the statute, the policy reasons underlying that requirement had ceased to exist.

As we have said earlier, TUEC's failure to file a timely renewal request is unique in the Commission's experience. There is thus no case law which interprets Section 185 of the Atomic Energy Act as it applies to this situation. There is, however, case law interpreting the parallel provision of the Communications Act of 1934 which holds that the expiration of the original construction permit did not preclude the Commission from renewing that permit. The decision is all the more significant in that it involved -- as present conditions before the NRC do not -- expiration of a permit in a context of competition for a scarce Federally-owned resource.

In Mass Communicators, Inc. v. Federal Communications Commission, 266 F.2d 681 (D.C. Cir. 1959), cert. denied, 361 U.S. 828 (1959), the D.C. Circuit

reviewed an FCC decision involving an untimely application for the renewal of a construction permit under Section 319(b) of the Communications Act of 1934, 47 U.S.C. 319(b), which is almost identical to Section 185 of the AEA, 42 U.S.C. 2235. Section 319(b) of the Communications Act required that the permit for construction of a radio station specify the earliest and latest construction deadlines and that "said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under control of the [holder of the permit]." 266 F.2d at 683. One such holder of a radio station construction permit failed to file a timely application for extension. Mass Communicators, a rival enterprise, filed a challenge to the FCC's extension of the permit, alleging that the FCC had to begin new proceedings in which it would have an opportunity to compete for the license.

The FCC refused to require automatic forfeiture of the construction permit, even though the extension application was untimely under regulations which, like the NRC's current regulations, provided for continuation of the permit pending a final determination if a filing was made 30 days prior to expiration of the permit. See Bremer Broadcasting Corp., 3 Fed. Reg. (P&F) 1579 (1947). Compare 10 CFR 2.109 (1985) with FCC Rule 3.215(b), 10 Fed. Reg. 2006 (1945) [now 47 CFR 75.3534 (1984)]. The D.C. Circuit found that the automatic forfeiture provision in the statute did not leave the FCC powerless to extend the permit, even though the application for extension was untimely filed. 266 F.2d at 684. With respect to Mass Communicators' claim that the radio frequency had become available to other applicants, the court found that "the frequencies are not 'available' ... until there occurs an actual forfeiture, either by abandonment of the permit by the original permittee or by

adverse -- and valid -- administrative action by the Federal Communications Commission." 266 F.2d at 685.

In essence, Mass Communicators stands for the principle that the automatic forfeiture provision of Section 319(b) does not apply until FCC either (1) makes a finding that the cause of the failure to complete construction was "not under the control of the grantee" or (2) affirmatively chooses not to exercise its discretion to extend the construction permit, regardless of the timeliness of the renewal application. In sum, even after expiration of the permit, the FCC had to act affirmatively in order to complete the forfeiture. See, e.g., MG-TV Broadcasting Company v. FCC, 408 F.2d 1257, 1261 (D.C. Cir. 1968) ("[I]t is well settled that a construction permit does not "lapse," notwithstanding a failure to abide by its own terms, until the Commission declares it forfeited") (citations omitted) (Footnote omitted).

Section 185 of the AEA, like Section 319(b), provides that the construction permit for a nuclear facility shall include the earliest and latest dates for the completion of a facility and that unless construction of the facility is completed by the latest date shown on the permit, "the construction permit shall expire, and all rights thereunder shall be forfeited, unless upon good cause shown, the Commission extends the completion date." 42 U.S.C. 2235. We read section 185 of the AEA to be similar enough to Section 319(a) of the Communications Act to apply Mass Communicators to this case. First, the requirement of both earliest and latest construction dates is identical. Second, the forfeiture provisions are essentially identical. Third, neither statute by its terms limits either administrative agency to accepting only applications which are timely filed. E.g., Mass Communicators, 266 F.2d at 684-85. Therefore, we hold today that the expiration of the construction permit did not automatically effect the forfeiture of CPPR-126, and that the

Commission was not then barred from considering TUEC's application for extension of the latest construction date. As a result, a complete de novo construction permit proceeding is not warranted.[4]

III. CASE's January 31st Pleading

We now turn to the issues raised by CASE in its January 31st pleading. First, CASE requests that the Commission assess a civil penalty for unauthorized construction between August 1, 1985, when the latest completion date in the construction permit passed, and February 10, 1986, when the staff renewed CPPR-126. This request is best handled by the staff under 10 CFR 2.206 after final agency action on TUEC's extension request.[5]

Second, CASE seeks a definitive order directing the initiation of a new construction permit proceeding and the cessation of all construction at CPSES Unit 1. We deny the request for a new construction permit proceeding for the reasons discussed in Section II, above. We deny the request for an order to halt construction for the reasons discussed in Section IV in connection with CASE's stay request.[6]

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[4]This holding is no way absolves the permittee in this case, TUEC, from its burden of showing "good cause" as the statute and NRC regulations require. We will not prejudge the merits of TUEC's case.

[5]Although the D.C. Circuit has held that the license does not "lapse" until the Commission takes some affirmative action to complete the forfeiture, we do not read this to mean that TUEC was free to continue construction after August 1, 1985, until told to stop. Such an interpretation would render meaningless the requirements that construction permits be obtained and extensions applied for. 10 CFR §§ 2.109, 50.10.

[6]CASE's pleadings ask for a construction halt as a necessary legal

[Footnote Continued]

Third, we dismiss CASE's request for a finding that extension of the construction permit necessarily involves significant hazards considerations. The Commission has delegated the responsibility for making this finding to the discretion of the staff. See, e.g., 48 Fed. Reg. 14864, 14867 (April 6, 1983). We have reviewed and agree with the staff's finding in the circumstances of this proceeding. The term "no significant hazards consideration" is directed to consideration of radioactive hazards that are involved in the amendment extending the construction permit. Here, the grant of the extension results in no substantive change: the design and construction methods will be the same as provided in the original Comanche Peak construction permit. The amendment granting the extension merely gives TUEC more time to complete construction in accordance with the previously approved construction permit, and thus it involves no significant hazards consideration. The safety issues that CASE seeks to raise in its attack on the staff's finding that the amendment extending the construction permit involves no significant hazards consideration are more appropriately raised in the ongoing operating license proceeding.[7]

Finally, CASE correctly notes that it is entitled to a hearing on the construction permit extension. Brooks v. Atomic Energy Commission, 476 F.2d

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[Footnote Continued]

consequence to TUEC's untimely extension request and Staff's allegedly illegal issuance of the extension. Thus, this Memorandum and Order addresses this request only from that perspective. If CASE has substantive safety reasons for a construction halt, it should submit those reasons in a 10 CFR 2.206 petition addressed to the staff. This Memorandum and Order does not prejudge the submission of any petition based upon safety considerations.

[7] Indeed, we read the record before the Licensing Board to indicate that many, if not all, of the allegations CASE seeks to litigate in this proceeding are in fact included in that proceeding.

924 (D.C. Cir. 1973) (per curiam). Therefore, we refer CASE's request for a hearing to the Chairman of the ASLBP for designation of a hearing board and further proceedings in accordance with 10 CFR Part 2, Subpart G. However, the scope of the proceeding is limited to challenges to TUEC's effort to show "good cause" for the extension. Washington Public Power Supply System (WPPSS Nuclear Projects Nos. I and 2), CLI-82-29; 16 NRC 1221, 1229 (1982).

IV. CASE's Stay Request

We turn now to CASE's application for a stay of the immediate effectiveness of the Staff's extension of CPPR-126. Our regulations require that CASE meet the traditional stay requirements set forth in Virginia Petroleum Jobbers Association v. FPC, 259 921, 925 (D.C. Cir. 1958) and Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). Those four standards are (1) likelihood of success on the merits, (2) irreparable injury to the moving party if the stay is not granted, (3) any harm to other parties, and (4) the public interest. See 10 CFR 2.788(e) (1985).

Significantly, CASE does not allege that the resumption of construction activities at CPSES Unit 1, in and of itself, would constitute irreparable harm to CASE or anyone else. Instead CASE argues that the irreparable harm results from the NRC's failure to grant CASE a pre-extension hearing on TUEC's request. We disagree. CASE has made no showing that failure to grant it a pre-extension hearing will cause it any harm which cannot (and will not) be remedied in a post-extension hearing or that by such a decision the Commission is depriving CASE of a "due process" right. The Supreme Court has consistently held that unless "fundamental rights" are involved, a prompt post-

hearing on an administrative action complies with requirements of "due process." See, e.g., Barry v. Barchi, 443 U.S. 55 (1979); Mathews v. Eldridge, 424 U.S. 319 (1976). We find no such "fundamental right" in the circumstances of this proceeding.

We agree that CASE has an interest in the safe construction of CPSES. However, in this instance, immediate effectiveness of the construction permit extension has no effect on CASE's interest in safe construction because (1) the plant is essentially complete, and TUEC proceeds with the remainder of construction work entirely at its own risk, (2) what little new construction work remains can be halted at any time if evidence warranting that action becomes available to the NRC, and (3) CASE is assured of a prompt post-extension hearing to the extent that its request raises proper issues for consideration.

Brooks v. AEC, supra, supports the proposition that allowing construction to proceed does not violate any fundamental due process rights. In Brooks, the Commission extended a construction permit without making a "no significant hazards considerations" finding. The reviewing court held that this action was contrary to Section 189a of the AEA. However, the Brooks Court allowed construction to continue, concluding that "[t]he continuing validity of the construction permit is made subject to the outcome of a hearing on this issue." 476 F.2d at 928. If continued construction pending a hearing may be allowed in the absence of a formal finding of no significant hazards considerations, a fortiori continued construction should be allowed when the Staff has made a finding of no significant hazards considerations. Furthermore, here, as in Brooks, continued construction is subject to the outcome of the extension proceeding.

CASE argues that it has a statutory entitlement to a pre-extension hearing under Sholly v. NRC, 651 F.2d 780 (D.C. Cir.), rehearing en banc denied, 651 F.2d 792 (1980), cert. granted, 451 U.S. 1016 (1981) vacated and remanded, 459 U.S. 1194, vacated and remanded to the NRC as moot, 706 F.2d 1229 (D.C. Cir. 1983), and San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), vacated in part and rehearing granted in part, 760 F.2d 1320 (D.C. Cir. 1985). We disagree. We read Section 189a(1) to allow the Commission to amend a construction permit prior to the completion of any requested hearing, if we find the amendment involves no significant hazards considerations.[8]

In sum, CASE has neither a fundamental "due process" right nor a statutory entitlement to a pre-extension hearing. Moreover, CASE has failed to show that a post-extension hearing will not cure any harm it may suffer. Thus, CASE has filed to show any irreparable harm, the key factor in any stay analysis. See, e.g., Wisconsin Gas Company v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985).

Furthermore, CASE has failed to show the probability of success on the merits. We have rejected CASE's arguments that a new construction permit proceeding or a pre-extension hearing is required. Moreover, CASE's pleadings

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[8]The San Luis Obispo case dealt with a situation in which the NRC refused to grant any hearing to the petitioners. In Sholly, the question before the court was whether the NRC, presented with a request that it hold a hearing prior to issuing a particular amendment to an operating license, could issue that amendment and make it immediately effective upon a finding that it involved no significant hazards consideration. (The amendment in question had the effect of permitting irreversible releases of radioactivity into the environment.) Sholly was vacated as moot after Section 189 was amended to include an explicit authorization for the NRC to continue issuing such amendments on an immediately effective basis.

to this point have failed to demonstrate a high probability of success in challenging TUEC's claim of good cause for the extension. Under Washington Public Power Supply System, supra, CASE's substantive safety concerns about continued construction are inadmissible in a construction permit extension hearing.[9] As we noted earlier, these concerns are more appropriately raised either in the operating license proceeding or in a 10 CFR 2.206 petition for enforcement action by the NRC Staff against TUEC.

Finally, CASE does not demonstrate that the other two factors weigh in its favor. A cessation of construction at CPSES Unit 1 may cause significant harm both to TUEC in the form of delay and a possible loss of its trained construction force and to the construction workers at the plant themselves in the form of lost wages and lost jobs. We see no benefit accruing to CASE from a stay and a pre-extension hearing which would counterbalance this harm to TUEC and its construction workers which a post-extension hearing avoids. Likewise, any public interest in a pre-extension hearing does not outweigh the public's interest in continued construction efforts on CPSES Unit 1 while that hearing is progressing. If the NRC ultimately finds "good cause" for the extension of the construction permit, TUEC will have been needlessly delayed in its efforts to complete the plant.

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[9] Except insofar as we direct the Licensing Board to follow WPPPS, supra, on the scope of the construction permit extension proceeding, our decision today is without prejudice to the Licensing Board's ruling on the admissibility or the merits of any contentions CASE may present to it.

In sum, the four factors required for a stay of the staff's action are do not justify that action. Therefore, we decline to grant CASE's request for a stay.

Commissioner Asselstine disapproved this order and provided separate views.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
this 13th day of March, 1986.

SEPARATE VIEWS OF COMMISSIONER ASSELSTINE

I agree in part and disagree in part with the Commission's order. I agree with the Commission's conclusion that we need not grant intervenors a new full-scale construction permit proceeding, but I do not subscribe to all of the Commission's reasoning in reaching that conclusion. Further, I would have stayed the staff's extension of the construction permit pending the outcome of the renewal hearing.