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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'88 OCT -4 P4:06

BEFORE THE COMMISSION

In the Matter of

TEXAS UTILITIES ELECTRIC
COMPANY, ET AL.

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

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Docket Nos. 50-445-0L
50-446-0L

Docket No. 50-445-CPA

NRC STAFF'S RESPONSE TO CFUR'S
FIRST SUPPLEMENT TO ITS REQUEST FOR
HEARING AND PETITION FOR LEAVE TO INTERVENE

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October 3, 1988

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NUCLEAR REGULATORY COMMISSION

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TEXAS UTILITIES ELECTRIC)	Docket Nos. 50-445-OL
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(Comanche Peak Steam Electric)	Docket No. 50-445-CPA
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NRC STAFF'S RESPONSE TO CFUR'S
FIRST SUPPLEMENT TO ITS REQUEST FOR
HEARING AND PETITION FOR LEAVE TO INTERVENE

I. INTRODUCTION

On September 12, 1988, Petitioner Citizens for Fair Utility Regulation (CFUR) filed a supplement to the request for hearing and petition for leave to intervene which CFUR had filed on August 11, 1988. "CFUR's First Supplement to its August 11, 1988 Request for Hearing and Petition for Leave to Intervene" (September 12, 1988) [hereinafter Supplement]. For the reasons set forth below, the Staff of the Nuclear Regulatory Commission (Staff) submits that the information in the Supplement does not cause the balancing of the five factors governing the granting of late intervention to weigh in favor of Petitioner's intervention in the above-captioned proceedings. ^{1/}

^{1/} Like the request for the hearing and petition for leave to intervene filed by CFUR, this supplemental petition is not filed before the Commission. However, as the staff noted in its response to the original petition, the matter should be before the Commission since the Licensing Board had dismissed the proceedings pursuant to a settlement among all the parties. Since this matter was terminated before the Licensing Board through agreement, the time frame contemplated for the transfer of jurisdiction from the Licensing Board by the regulations

II. BACKGROUND

On July 13, 1988, the Atomic Safety and Licensing Board (Licensing Board) designated to preside over the Comanche Peak Operating License and Construction Permit Amendment proceedings dismissed those proceedings on the basis of a stipulation signed by all of the parties to the proceedings. Texas Utilities Electric Company, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), Memorandum and Order (Dismissing Proceedings), (slip op.) (July 13, 1988). CFUR, an organization which had filed and then withdrawn a petition for late intervention at the time of the prehearing conference held before the dismissal of the proceedings, filed a late petition for intervention and a request for hearing on August 11, 1988. "Request for Hearing and Petition for Leave to Intervene by Citizens for Fair Utility Regulation" (August 11, 1988). Both the Staff and Applicants opposed CFUR's petition on the ground that CFUR had not satisfied the requirements for the granting of late-filed intervention petitions. "NRC Staff's Response in Opposition to Request for Hearing and Petition for Leave to Intervene by Citizens for Fair Utility Regulation", (August 31, 1988) [hereinafter Staff Response]; "Applicants' Answer to the Request for Hearing and Petition for Leave to Intervene by Citizens for Fair Utility Regulation", (August 25, 1988).

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

and case law should not be controlling. See, e.g. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983). This is true since no party would be expected to file either a notice of appeal or a motion for reconsideration. In this case CFUR, a non-party, is in effect requesting the commencing of a new proceeding in this already protracted litigation. Accordingly, it is appropriate for the Commission to determine in the first instance whether a new proceeding should commence.

On September 12, 1988, CFUR filed a supplement to its August 11, 1988 petition. CFUR argues that, in light of the allegations of Mr. Joseph Macktal, Jr., its petition for leave to intervene is strengthened. Supplement at 5. CFUR asserts that all of these allegations are within the scope of contentions formerly raised by CASE. ^{2/} Id. at 6. CFUR requests that hearings be held with respect to Mr. Macktal's allegations. Id. at 7. CFUR also requests that the Licensing Board look into the terms of all settlements which have been made with whistleblowers. Id. at 6-9.

The Staff has reviewed the information presented in CFUR's latest filing. For the reasons set forth below, the Staff submits that CFUR's arguments supporting the requests made in its Supplement are without merit, and the Supplement does not provide any support for granting CFUR's petition for late intervention.

III. ARGUMENT

A. Legal Standards For Late Intervention

The Staff in its response to CFUR's original petition set forth the legal standards governing the granting of late-filed petitions for leave to intervene. Staff Response at 4-6. The Staff hereby incorporates by reference the discussion and information presented in that response into this response. In response to CFUR's supplemental information, the Staff will address the first, third, and fifth factors of 10 C.F.R. § 2.714(a). Since the Staff previously determined that all of those factors weighed against CFUR's intervention, it is necessary to determine whether the

^{2/} CFUR fails to identify which allegations relate to a given former CASE contention.

Staff's conclusions are affected by CFUR's supplemental information. As discussed below, the Staff's conclusions with respect to these three factors remain unaffected by CFUR's supplemental filing.

B. Good Cause, If Any, For Failure To File On Time

CFUR argues that since it just learned of Mr. Macktal's Department of Labor issues, there is good cause for its late filing of his allegations. Supplement at 5. CFUR reiterates that it is attempting to assume the role previously occupied by CASE in the Comanche Peak proceeding. Id. at 6. As the Staff stated in its response to CFUR's original petition, an attempt to substitute for another party does not constitute good cause for late filing of an intervention petition. Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 795-798 (1977). The information in this Supplement does not provide CFUR with good cause for its extremely late filing. Therefore, this Supplement does not change the conclusion that this factor weighs heavily against granting CFUR intervenor status.

C. Ability To Contribute To The Development Of A Sound Record

With respect to Mr. Macktal's allegations, the Commission must determine whether the information in CFUR's supplemental filing is sufficient to demonstrate that CFUR is capable of contributing to the development of a sound record concerning these allegations. See, Washington Public Power Supply System, et al. (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1181 (1983); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 399-400 (1983); Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). The allegations presented by CFUR as being raised by

Mr. Macktal are, for the most part, general in nature. Mr. Macktal's affidavit does not provide any further detail about the allegations. See Macktal Affidavit, §§ 3-5.

The first category of allegations mentioned by CFUR and Mr. Macktal are allegations Mr. Macktal raised to the NRC Staff in 1986, after requesting and executing a confidentiality agreement. Macktal Affidavit at ¶ 4. Since Mr. Macktal had already publicly stated that he had concerns about the Comanche Peak facility, the March 11, 1986 confidentiality agreement executed by the Staff and Mr. Macktal covers only the information relating to his specific allegations. The agreement does not extend to a prohibition against the Staff's acknowledging that Mr. Macktal has made allegations to the Staff.

In his affidavit, Mr. Macktal claims that he was not satisfied with the Staff's resolution of his allegations. Macktal Affidavit at ¶ 4. However, he does not state in what respects the resolution was inadequate. The Staff has addressed all of the concerns included in ¶ 3 of Mr. Macktal's affidavit, as well as other concerns which Mr. Macktal raised to the Staff. The Staff has attempted to provide Mr. Macktal with a written report of the Staff's investigation of his concerns. Our records indicate that the Staff's attempt to reach Mr. Macktal was unsuccessful. The Staff is unaware of whether Mr. Macktal received this report by other means. Mr. Macktal does not mention the report in his affidavit. Since the Staff is bound by the terms of its confidentiality agreement with Mr. Macktal at this time, we are unable to attach the report as an exhibit to this response. However, should the Commission wish to examine the Staff's report, the Staff will, of course, provide the report to the Commission in a manner which would provide protection of Mr. Macktal's confidentiality.

Unless CFUR explains the specific nature of each of Mr. Macktal's past allegations, and why the manner in which they have been addressed is not adequate to resolve them, CFUR cannot demonstrate that it could contribute to the development of a sound record concerning these allegations. The Staff concludes that, with respect to the allegations previously presented to the NRC Staff, CFUR has not demonstrated any ability to contribute to the development of a sound record with respect to these allegations. Since CFUR has made no attempt to provide such information, this supplementary information does not cause the Staff to change its conclusion concerning the Petitioner's ability to contribute to the development of a sound record.

The next category of allegations discussed by CFUR in its Supplement consists of allegations which CFUR alleges Mr. Macktal would have presented to the NRC but for the existence of a restrictive settlement agreement imposed upon him on behalf of Applicants. ^{3/} Supplement at 2. CFUR alleges that the settlement agreement precluded Mr. Macktal from raising safety concerns to the NRC. Id. While the settlement agreement does prohibit Mr. Macktal from appearing voluntarily as a witness or a party in NRC proceedings involving the Comanche Peak facility, it does not prohibit him from bringing concerns to the NRC Staff. Supplement, Exhibit 2, "Settlement Agreement", at ¶ 3.

Once again, Mr. Macktal's allegations in this category are very general in nature. They include: the ultravulnerability of safety systems, design problems related to backup safety systems, improper attempts to silence

^{3/} CFUR's claim that the utility "imposed" this agreement upon Mr. Macktal is not supported by Mr. Macktal's affidavit. His claims concern pressure exerted upon him by his attorneys, not by Applicants or their contractors.

witnesses and suppress information, the Safeteam's identification of confidential sources to management, and coverup of safety concerns by Safeteam. Macktal Affidavit at ¶ 5. ^{4/} These allegations are so general that it is difficult to state exactly where they have been addressed. CFUR in describing these allegations has not provided enough information either in its pleading or in Mr. Macktal's affidavit for the Commission to reach a reasoned conclusion as to the worth of Mr. Macktal's testimony with respect to these allegations. ALAB-747, supra, 18 NRC at 1181. It must be remembered, however, that the Applicants have been involved in a major Corrective Action Program which Mr. Macktal does not mention in his affidavit. There is no indication that Mr. Macktal has any idea how the Corrective Action Program has dealt with his concerns. In addition, the Staff has been engaged in inspections of all aspects of the Corrective Action Program. The Staff has generated numerous inspection reports, as well as three supplements to the Staff's Safety Evaluation Report dealing with specific areas of the Corrective Action Program. Safety Evaluation Report related to the operation of Comanche Peak Steam Electric Station, Units 1 and 2, Supplement No. 14 (March 1988); Supplement No. 15 (July 1988); Supplement No. 16 (July 1988). Mr. Macktal has not demonstrated any familiarity with the Staff's efforts. For example, the Staff reviewed the Safeteam program and reported the results of its review in Inspection Report 50-445/88-23 and 50-446/88-20 dated May 9, 1988. This report specifically addresses the Safeteam's program to protect the identity of an individual raising concerns

^{4/} In its original petition CFUR also raised a concern about the use of Kapton at Comanche Peak. As the Staff indicated in its response, this is not a new issue, and it is being followed both generically and with respect to Comanche Peak. Staff Response at 19, n.11.

(confidential sources). Id. at ¶ 4.c. Mr. Macktal has not even indicated that he is aware of this document. Therefore, neither CFUR's Supplement, nor Mr. Macktal's supporting affidavit demonstrates any ability for CFUR to contribute to the development of a sound record with respect to these allegations. Thus, CFUR's Supplement, as it relates to these allegations, does not cause the Staff to change its conclusion that the third factor should weigh heavily against the granting of CFUR's late-filed petition.

Mr. Macktal's third category of allegations, according to CFUR, concerns DOL issues. Supplement at 2. CFUR alleges that Mr. Macktal's "secret" settlement agreement with Brown and Root of his DOL complaint reflects adversely upon the character of Applicants because it provided payments under terms designed to preclude the raising of safety concerns. Supplement at 2-3, 8-9. A reading of this agreement does not support CFUR's allegations. The agreement does not, as discussed above, preclude Mr. Macktal from bringing safety concerns to the NRC Staff, or from raising his concerns publicly. It does restrict Mr. Macktal's ability to appear voluntarily as a witness or a party in NRC proceedings related to Comanche Peak. While it does require him to take reasonable steps to resist compulsory process, it does not require him to disobey a subpoena were such a subpoena to be issued. The Staff does not believe the agreement would have precluded Mr. Macktal from providing information to the NRC in the form of letters to the Staff or meetings with Commission employees or in any manner other than appearing as a voluntary witness. ^{5/}

^{5/} The Staff does not condone the use of settlement agreements to preclude the bringing of safety concerns to the NRC. The Staff does not believe this agreement achieves the results alleged by CFUR.

The settlement of disputes among parties is a common practice. CFUR's claim that an attempt by a party to settle a dispute somehow reflects adversely on that party's character is unfounded. CFUR does not indicate how such an allegation relates to the contention proposed by CFUR in its original petition. Since, as discussed above, the Staff does not agree that the agreement signed by Mr. Macktal precludes him from bringing safety concerns to the NRC, the Staff submits that this allegation does not, as CFUR alleges, strengthen its petition. See, Supplement at 5.

This Supplement does not demonstrate that Petitioner could contribute to a sound record on any of the allegations raised in the supplement. In fact, CFUR fails to indicate whether Mr. Macktal would even be CFUR's witness. CFUR fails to present enough details regarding the testimony it proposes to offer to allow the Commission to reach a reasoned conclusion about the worth of the testimony CFUR would present. Therefore, this Supplement does not provide a basis for finding that the third factor weighs in favor of CFUR. The Staff concludes that this factor should, in fact, weigh against CFUR.

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

Petitioner contends that hearings must be held on Mr. Macktal's allegations, and that the Board must examine all "such settlements". Supplement at 8-9. Petitioner claims that such hearings would not delay the proceeding, and would not affect the settlement which resulted in the dismissal of the Comanche Peak proceedings. Supplement at 6-8. This argument is without merit. It appears to the Staff that CFUR is attempting to raise some contention other than the one mentioned in its original

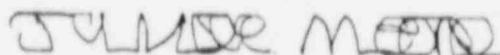
petition. This new contention would challenge the legality of settlements reached between Applicants or their contractors and other unnamed persons. These settlements were not reached in NRC proceedings. The remedy for getting such settlements overturned would lie with the Department of Labor. If such settlements could be examined at all by a licensing board, such examination would broaden the issues to be heard in the proceeding. Any attempt to hold such hearings would cause delay, since if CFUR is not granted intervention, there would be no hearings.

In sum, the information provided in this Supplement does not demonstrate that CFUR had good cause for the late filing of its petition. The information does not demonstrate that CFUR would be able to contribute to the development of a sound record with respect to the contentions it seeks to litigate. Finally, delay and a broadening of the issues would result if CFUR's requests for various types of hearings were to be granted. For these reasons, the five factors governing late filing of petitions for leave to intervene weigh heavily against granting CFUR's petition.

IV. CONCLUSION

For the reasons discussed above, CFUR's petition as supplemented for leave to intervene and requests for hearings should be denied.

Respectfully submitted,



Janice E. Moore
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of October, 1988

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

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DOCKETING & SERVICE
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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
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO CFUR'S FIRST SUPPLEMENT TO ITS REQUEST FOR HEARING AND PETITION FOR LEAVE TO INTERVENE" 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 3rd day of October, 1988:

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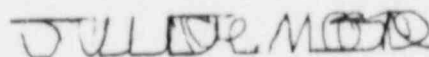
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