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BEFORE THE  
UNITED STATES  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
DOCKETING & SERVICE

Before the Atomic Safety and Licensing Appeal Board

In the matter of

TEXAS UTILITIES GENERATING COMPANY,  
et al.

(Comanche Peak Steam Electric  
Station, Unit 1)

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Dkt. Nos. 50-445-CPA

MOTION TO ADMIT AMENDED CONTENTIONS  
OR, IN THE ALTERNATIVE, FOR RECONSIDERATION  
OF CERTAIN PREVIOUSLY DENIED CONTENTIONS

Pursuant to 10 CFR §2.714(a)(3), and for the reasons expressed below, petitioners CASE and Meddie Gregory (Consolidated Intervenors) request the Board's permission to amend the contention that was admitted into this proceeding by the Board's order of May 2, 1986, or, alternatively, to admit certain previously denied contentions. The amended contention is attached.<sup>1</sup>

<sup>1</sup> By filing this pleading Consolidated Intervenors do not waive their basic claim that the proper interpretation of the one admitted contention makes it fully appropriate under the Commission's most recent order and that under it all issues Consolidated Intervenors seek to raise could be raised. However, that argument will be made, if necessary, in response to the pleading to be filed by Staff and Applicants before the Appeal Board.

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### Introduction

The purpose of this motion is to modify our contention in light of the Commission's Order of September 19, 1985 (CLI-86-15). In this order the Commission has dealt explicitly for the first time with what happens when it is alleged that construction of a plant was delayed because the permittee deliberately violated NRC regulations and the permittee seeks an extension of its construction permit without attempting to show good cause for the delay. Because the Order broadens the focus of a construction permit proceeding to include the Applicants' present, as well as past, behavior and policies, we believe that, if this order had been in force when the Board ruled on our original contentions, CASE's contentions Nos. 3-5 and 7, and Gregory contention No. 2, or at least portions of them, would have been admitted. Intervenors believe that the issues raised in these contentions can best be litigated through an amended version of the already admitted contention framed to address the precise issues raised by the Commission in its recent Order. In the alternative, however, Intervenors move that the Board reconsider its denial of the contentions listed above.

Contentions in a licensing proceeding serve to define the issues to be litigated and the petitioners' basis for asserting them. Where contentions raise important issues but are not worded in a technically correct manner the NRC's regulations provide for amending them rather than ruling out consideration of those issues. Under 10 CFR 32.714(a)(3), a party may amend its original petition at any time up until 15 days before the first

prehearing conference. Subsequent to that date, the Board has discretion to allow a party to amend its contentions and may also reformulate them itself, although it is not required to do so.

Pennsylvania Power & Light Co., et al. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 295-196 (1979); Virginia Electric & Power Co. (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631 (1973).

In deciding whether to allow contentions to be amended after the deadline in §2.714(a)(3), the Board's discretion is broad. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1183, 1190 (1985). It is, however, required to base its decision on the factors specified in 10 CFR §2.714(a)(1), which also governs the filing of late-filed petitions. Consolidated Intervenor's believe that in the instant case all of these factors weigh in favor of allowing them to amend their admitted contention. These factors will be analyzed one by one.

1. Good cause for failure to file on time.

Good cause generally consists of "a convincing and reasonable explanation" of why a submission was not submitted earlier. Commonwealth Edison Company (Braidwood Nuclear Power Station, units 1 and 2), LBP-85-11, 21 NRC 609, 626 (1985). Where an amended contention is involved, the question becomes why the contention was not originally submitted in its amended form.

In the instant case, the answer to that question is that Consolidated Intervenor's original contention was worded to

respond to the Commission's decision of March 13, 1984 (CLI-86-04), which limited the scope of the CPA proceeding to whether TUEC had "good cause" for an extension as defined in Washington Public Power Supply System (WPPSS Nuclear Project Nos. 1 and 2), CLI-82-29, 16 NRC 1221, 1229 (1982).<sup>2</sup> The Commission added in a footnote:

Except insofar as we direct the Licensing Board to follow WPPSS, 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.

CLI-86-04 at 14, n. 8.

Thus it appeared that Consolidated intervenors should rely on the WPPSS decisions' analysis of what does and does not constitute good cause for construction permit extension.

The cited WPPSS opinion states that to show good cause a permit holder must show good cause for the delay that necessitated an extension request. Even when delay resulted from the actions of the permit holder, it may still be able to show good cause unless these actions were "dilatatory." Id. at 1229, 1231. The Appeal Board subsequently interpreted this opinion further in ALAB-722 by holding that dilatatory conduct is conduct which intentionally delays construction without a valid purpose. 17 NRC 546, 552 (1983).

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<sup>2</sup> Slip Opinion, CLI-86-04, at 6-9.

In CLI-82-29, the Commission also analyzed and rejected as insufficient one of the contentions submitted by the intervenor in the case, which alleged that the permittee lacked good cause because delays were caused by violations of NRC regulations. The Commission decided that where delay was caused by the need to correct such violations good cause for the delay existed. CLI-82-29, supra, at 1230-31. On the surface, this part of the decision might appear to conflict with the rest, but the apparent conflict is reconciled if one realizes that the intervenors in WPPSS had not alleged that the violations were caused by dilatory conduct on the part of the permittee. Consolidated Intervenors in the instant case read WPPSS as a whole to hold that to show a lack of good cause it was not sufficient to show that delay was caused by violations on the part of the permittee and that, instead, they must prove that the permittees' past conduct had been dilatory.

Applicants, however, urged a different reading of the case. They maintained that when a permittee requests an extension in order to detect and correct violations it has good cause for an extension regardless of how those violations came about. As the Appeal Board suggested in its Memorandum and Order of July 2, 1980, such an interpretation would have meant that Applicants would prevail in the instant case as a matter of law. Order of July 2 at 9, n. 13. Moreover, if the Commission had intended this interpretation, it seems as if CLI-86-04 would have referred the Board and the parties to pp. 1230-31 of the WPPSS opinion,

rather than to p. 1229, which focusses on the need to address the reasons for delay and whether the real reason was dilatory conduct on the part of the permittee.

Intervenors therefore focussed CASE Contention 6 and Gregory Contention 1 on the dilatory nature of Applicants' conduct. But because ALAB-722 implies that even when a permittee has acted in a dilatory manner the Board must still make a judgment as to whether to grant an extension (ALAB-722 at 553), Consolidated intervenors included other contentions focussed on Applicants' present conduct and why the extension should not be granted. Because CASE disagreed with the narrow limits of the WPPSS decision, CASE included still other contentions that also included allegations about Applicants' present conduct.<sup>3</sup>

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<sup>3</sup> The contention that was admitted into the instant proceeding contains two separate allegations: first, that Applicants have not shown that they had good cause for the delay in completing construction of their plant; and, second, that the delay was caused by their deliberate refusal to correct deficiencies in QA/QC and design. Intervenors' other contentions, in particular Gregory No. 4 and CASE Nos. 3-5 and 7, alleged, inter alia, that Applicants still did not intend to comply with NRC requirements and thus did not have good cause for the extension. These contentions, taken as a whole, allege that there has been no change in policies and essentially no change in management personnel on Applicants' part. Consolidated Intervenors believe, however, that their amended contention addresses these issues in a more succinct manner which more carefully tracks the Commission's recent Order. Thus the better alternative would be for the Board to admit the amended contentions rather than those that were denied earlier.

The Licensing Board turned to p. 1229 of the WPPSS decision as directed by the Commission (see Licensing Board Prehearing Conference Order of May 2, 1986, pp. 3-4, hereafter Order 5/2/86) and have adopted the same interpretation of it as did Consolidated Intervenors. It rejected all the contentions concerning Applicants' present conduct, stating that it did so "because of our interpretation of the law concerning contentions that are admissible in construction permit extension proceedings."<sup>4</sup> Order 5/2/86 at 11. In the Board's general discussion of the law concerning admissibility of contentions, it focused on the WPPSS issues of good cause for delay and the definition of dilatory. Although the Board also noted the statement in ALAB-722 that even if a permittee is dilatory the Board may still decide to grant an extension, it did not interpret that statement to allow the admission of contentions concerning Applicants' present policies or conduct, such as those

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<sup>4</sup> The Board also referred in a footnote to the whole of Applicants' Answer of April 17, 1986, without explaining what it found convincing in that answer. Order 5/2/86 at 11, n. 8.

described above.

It is important to note that Consolidated Intervenors could not appeal the denial of the contentions that dealt with Applicants' continued misconduct because of the limitations imposed by 10 CFR §2.714a. Under §2.714a(b) an intervenor may only appeal an order wholly denying a petition to intervene. Where a contention is admitted and others are denied, those that have been denied cannot be appealed. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-329, 3 NRC 607 (1976).

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3 The Board explicitly considered the passage on p. 1230 of the WPPSS opinion, which provides that good cause for an extension can be found even if the permittee has violated NRC regulations. The Board interpreted this as follows:

This passage places the following gloss on CLI-82-29: that it is not sufficient to allege that a delay has been caused by violations of applicable regulations. The allegation must show more than a mere violation. In those circumstances, it must allege as well that applicants were dilatory in the conduct of the construction work and that this factor was the principal factor for the need for an extension of the completion deadlines.

Order 5/4/86 at 3-4.

Nor would a motion for reconsideration have been appropriate at this time. As discussed above, the Board's view of the legitimate scope of issues in the extension proceeding represented a logical application of the language of the WPPSS decision, which it had been directed to obey. At no time did the Commission suggest, as it does in its most recent Order, that the focus of this construction permit appeal proceeding should not be on the cause for the delay but rather on the Applicants' discarding and repudiating the policies that caused that delay. Consolidated Intervenor reasonably relied on that Commission focus and had no reason to seek from this Board reconsideration of its May 2 Order.

The Commission's opinion of September 19, however, puts the situation in an entirely different light. The main holding of the opinion states:

We believe that the appropriate balance is struck by holding that if there was a corporate policy to speed construction by violating NRC requirements and that policy was discarded and repudiated by the permittee, any delays arising from the need to take corrective action would be delays for good cause.

CLI-86-05 at 9 (emphasis added).

Thus the opinion focusses on Applicants' present conduct and policies where, as here, Applicants do not seek to prove good cause for the delay. This is the thrust of the original Gregory Contention #2 and CASE Contention #7.

Although the September 19 opinion in a sense broadens the focus of construction permit extension proceedings to focus on

present as well as past conduct of the permittee, it also of course, narrows the circumstances under which intervenors can successfully allege that a permit should not be extended. Even if the permittee caused the delay by deliberately violating NRC regulations, it still has good cause for an extension for the purpose of correcting those violations as long as it has "discarded and repudiated" the unacceptable policy. Memorandum and Order of September 19, 1986 (CL1-86-15) at 9. But the Commission did not intend that an extension should be granted when the Applicant had not had such a change of heart and certainly not where it does not even allege such a change of heart. The Commission stated clearly that:

to grant a CP extension request in the face of a finding that the past delays were caused by a past and still ongoing policy of deliberate violations would be to reward such wrongdoing. Surely the drafters of the Atomic Energy Act cannot have had this in mind when they allowed CP extensions for good cause.

Id. at 8.

Intervenors' allegations as laid out in their contentions as a whole describe precisely the situation to which the Commission refers here. But Intervenors did not combine their allegations into contentions covering past dilatory conduct as well as present policies, since it appeared in light of the Commission's earlier orders that it was not appropriate to do so.

Licensing Boards have often allowed contentions to be amended or new contentions to be introduced when new materials come to light which a party could not have known about when its

original contentions were framed. See, e.g., Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 630; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-800, 21 NRC 1103 (1985); Cincinnati Gas & Electric Co., et al. (William H. Zimmer Nuclear Station), LBP-79-22, 10 NRC 213, 214 (1979). The new materials have generally consisted of new evidence or new issues raised by developments in the construction process, but the same reasoning can be applied to what has occurred in the instant case, i.e., a modification of the law. Consolidated Intervenors did not file their contention in its amended form before because no one, including the Licensing Board, considered it appropriate to do so.

Consolidated Intervenors also note that the Commission's Order of September 19 seems to allow for the possibility of amending the contention by pointing out that, "as currently worded, it focusses only on the permittee's past conduct. CLI-86-05 at 7 (emphasis added). Consolidated Intervenors now file this amended version within a reasonable time following their receipt of the Commission's September 19, 1986, Order. Thus they have good cause for filing at this time.

4. Availability of other means by which petitioners' interest will be protected
4. Representation of petitioners' interest by existing parties

These two factors are appropriately considered together, since they are so closely related. To dispose of the latter first, no other party to the proceeding will represent

Consolidated Intervenor's interests, since both parties oppose the admission of any of Consolidated Intervenor's contentions.

There are no other means available by which Consolidated Intervenor's interest will be protected, since there is no other forum in which to pursue the issue of whether good cause exists for the extension. It will be ironic if Applicants argue otherwise, considering that they have maintained with increasing vehemence that the issues here are not even related to those being litigated in the OL proceeding. See, e.g., Applicants' Response of August 1, 1980, to CASE Request for Production of Documents (June 27, 1980) and Motion for Protective Order, at 3. ("The issues in the two proceedings are distinctly different, albeit involving the same plant.") The Staff's review of the good cause issue does not constitute adequate protection of a private party's rights. Philadelphia Electric Company, supra at 1191, fn 27, citing Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 n. 108 (1985). In the present case the Staff also maintains that the CPA proceeding is the appropriate forum in which to litigate good cause. NRC brief filed in the Court of Appeals for the District of Columbia Circuit in Citizens Association for Sound Energy v. NRC (NO. 80-1109), filed June 9, 1980, at 50-51.

3. Extent to which petitioner may be expected to assist in developing a sound record

In evaluating factor 3, Boards have taken into consideration the previous experience of parties and their counsel in litigating licensing cases as well as their conduct in the

proceeding up to the point when a late or amended contention was filed. See, e.g., Philadelphia Electric Co., supra at 1191; Commonwealth Edison Co. (LBP-65-11), supra at 629. Consolidated intervenors and their counsel have years of experience in litigating licensing cases and in working with the Board on the related operating license proceeding. The Board can judge for itself whether they have the desire and expertise to contribute to developing the record here.

Since the issue here is not whether to admit Consolidated intervenors but whether to admit the amended contention, it is also pertinent to ask whether the amended contentions will develop a better or worse record than the contention as presently worded. The amended contentions allow for the development of a record that includes evidence on whether Applicants' policies have or have not changed. In light of the September 19 Order, only this kind of record will provide the Board with the facts it will need to decide whether Applicants have good cause for their requested extension.

3. The extent to which the petitioners' participation will broaden the issues or delay the proceeding

Here again, since Consolidated intervenors are already participating, the real issue is whether the introduction of the amended contentions will broaden the issues or delay the proceeding.

The issues have already been broadened by the Commission's Order of September 19 inasmuch as it shifted the focus of a good

cause determination to include present as well as past conduct. The amended version of the contention merely rewords it to respond to this shift in emphasis.

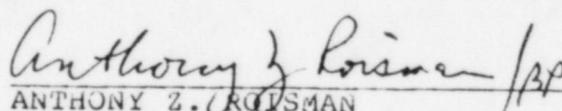
If this shift in emphasis delays the proceeding, Consolidated Intervenors rather than Applicants will suffer because the longer it is delayed the more likely it is that the case will become moot.

#### Conclusion

All five of the factors specified in 10 CFR §2.714(a)(i) weigh in favor of amending the admitted contention.

In the alternative, Consolidated Intervenors move that the Board reconsider its denial of CASE Contentions 3-5 and 7, and Gregory Contention 2. Consolidated Intervenors are aware that under 10 CFR §2.751a(d) objections to a ruling of the Board must ordinarily be made within 5 days after service of the Order. Intervenors believe, however, that the same situation that creates good cause for amending the contentions also makes it appropriate for the Board to consider this alternative means of seeing that justice is done.

Respectfully submitted,

  
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