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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'89 APR 20 P3:39

COMMISSIONERS:

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SERVED APR 20 1989

In the Matter of	
TEXAS UTILITIES ELECTRIC COMPANY, ET. AL.	Docket Nos. 50-445-OL 50-446-OL
(Comanche Peak Steam Electric Station, Units 1 and 2)	Docket No. 50-445-CPA

MEMORANDUM AND ORDER

CLI-89-06

I. Introduction.

This case is before the Commission on two motions by Mr. Joseph Macktal, an individual petitioner. Mr. Macktal asks the Commission for (1) "limited intervention" in the Comanche Peak proceedings and (2) reconsideration of its recent order denying a petition by the Citizens for Fair Utility Regulation ("CFUR") to intervene late in the Comanche Peak proceedings. See Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605 (1988) ("CLI-88-12"). The applicant, Texas Utilities Electric Company ("TUEC") and the NRC staff have responded in opposition to both motions. After due consideration, we have decided to deny both motions for the reasons which follow.

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II. Background.

In order to understand how Mr. Macktal's motions fit into the tortured history of the Comanche Peak proceedings, a brief review of history - both ancient and recent - will be necessary. The Commission published receipt of TUEC's application for an operating license in the Federal Register on May 12, 1978. See 43 Fed. Reg. 20583. Following publication of the Notice of Opportunity for Hearing, 44 Fed. Reg. 6995 (Feb 5, 1979), three organizations filed timely petitions to intervene and requests for hearing: Citizens Association for Sound Energy ("CASE"), Citizens for Fair Utility Regulation ("CFUR"), and Texas Association of Community Organizations for Reform Now/West Texas Legal Services ("ACORN"). The State of Texas filed a timely petition to participate as an interested state, pursuant to 10 C.F.R. § 2.715(c). Therefore, the Commission established a Licensing Board, 44 Fed. Reg. 15813 (March 15, 1979), which subsequently admitted CASE, CFUR, and ACORN as intervenors and Texas as an interested state. Order Relative to Standing of Petitioners to Intervene (June 27, 1979). On June 16, 1980, the Board issued an order admitting 25 contentions and three Board questions for litigation.

On July 21, 1981, the Board accepted ACORN's voluntary motion for dismissal from the proceeding. Likewise, on March 5, 1982, the Board accepted CFUR's voluntary withdrawal from the proceeding. The proceeding then continued unabated with CASE as the sole intervenor. By 1984, the proceeding had resolved all contentions except contention No. 5, relating to Quality Control/Quality Assurance ("QA/QC"). In 1986, a second proceeding

commenced relating to TUEC's request for an amendment to its Construction Permit for Unit 1 seeking additional time to complete construction.

On July 1, 1988, CASE and TUEC reached a settlement agreement resolving all matters at issue between them. Essentially, CASE agreed to withdraw from the proceedings and TUEC agreed to reimburse CASE for certain expenses incurred during the litigation, to install a CASE representative in an oversight position at Comanche Peak, and to provide that representative with expenses and technical assistance. CASE and TUEC submitted a joint motion to dismiss the proceedings as settled and the Licensing Board granted the motion on July 13, 1988.

Shortly thereafter, on August 11, 1988, CFUR filed a petition before the Licensing Board to "re-intervene" in the proceedings. CFUR also filed two "Supplements" to its initial petition. The NRC staff and TUEC responded to the initial petition and the "First Supplement." Initially, there was some confusion over which Commission tribunal had jurisdiction over CFUR's petition. In order to avoid any confusion and to spare the parties needless expense and delay, the Commission itself took jurisdiction of the matter.

On December 16, 1988, while the CFUR petition was still pending, Mr. Macktal filed a motion before the Licensing Board, seeking "leave to proceed as an intervenor limited to questions of the scope, impact and interpretation" of this settlement agreement. Mr. Macktal's motion states that he reviewed the Staff's response in early November and TUEC's response in early December, Motion for Limited Intervention at 1, and that he filed

this attempt to intervene in order to rebut the interpretations assigned the disputed agreement by the staff and TUEC.[1] The NRC Staff has responded in opposition, arguing that Mr. Macktal does not meet the criteria for a late-filed petition for intervention. See 10 C.F.R. § 2.714(a)(1)(i)-(v). TUEC did not respond.

On December 21, 1988, the Commission issued CLI-88-12, denying the CFUR petition to intervene, based upon an application of the five-factor test contained in 10 C.F.R. § 2.714(a)(1)(i)-(v). See CLI-88-12, supra. However, the Commission did not rule on Mr. Macktal's motion for limited intervention because the NRC Staff and TUEC had not yet had a chance to respond to it. Mr. Macktal then filed the second motion before us today seeking reconsideration of CLI-88-12, alleging that he was "prejudiced" by that decision.

Specifically, Mr. Macktal requests that the Commission vacate Section IV of CLI-88-12 (in which we discussed the disputed settlement agreement) or, in the alternative, stay the entire order and grant him the relief requested in his earlier motion, i.e., limited intervention status for the purpose of explaining his views on the disputed settlement agreement. Mr. Macktal

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[1]We infer from Mr. Macktal's motion that he believes that he was prejudiced because neither he nor his counsel was served with the responses by Staff or TUEC to CFUR's petition to intervene or to the "First Supplement." We find no indication in the record that either he or his counsel had filed a notice of appearance or had sought to be served by any party to the proceeding. Our last communication from Mr. Macktal's counsel indicated that they were withdrawing from any participation in the case. See Notice of Withdrawal (July 15, 1988). Therefore, we know of no obligation

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alleges that the Commission misconstrued or misinterpreted the settlement agreement in reaching its decision in CLI-88-12 and that the decision contains a number of "serious errors of law." Mr. Macktal does not allege any errors in the Commission's determination that CFUR's petition does not meet the five-factor test found in 10 C.F.R. § 2.714(a)(1)(i)-(v).

In response, the NRC Staff argues that Mr. Macktal does not have standing to seek reconsideration because he had not been admitted as a party to the proceeding at the time CLI-88-12 was issued. In its response, TUEC argues that Mr. Macktal has not attempted to demonstrate that his motion meets the Commission's criteria for granting a stay of a final order.[2]

III. The Motion for "Limited Intervention"

The first matter before us is Mr. Macktal's motion for limited intervention.[3] In the motion, Mr. Macktal "requests leave to proceed as an intervenor limited to questions of the scope, impact and interpretation of

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for counsel for the NRC staff, TUEC, or even CFUR to serve Mr. Macktal with copies of their pleadings.

[2]Mr. Macktal has also filed a pleading which he has styled as a "Reply" to the responses filed by Texas Utilities and the NRC staff. NRC regulations specifically reject such pleadings. "The moving party shall have no right to reply [to an answer in response to a motion], except as permitted by the presiding officer or the Secretary or the Assistant Secretary." 10 C.F.R. § 2.730(c). Nevertheless, in this situation, the Commission has reviewed this pleading in an effort to afford Mr. Macktal every opportunity to present his case. Texas Utilities has responded with an additional pleading of its own.

[3]Mr. Macktal styled his motion as being "[b]efore the Nuclear Regulatory Commission Atomic Safety and Licensing Board." The Staff likewise styled its opposition to the motion for limited intervention as "[b]efore the Atomic

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the January 2, 1987 illegal settlement agreement." Motion for Limited Intervention at 2. Mr. Macktal claims that he "may be prejudiced in his 'reopened' Department of Labor proceeding as well as other litigation which may occur regarding the correct interpretation of the January 2 1987 'Settlement Agreement[,]'" and that "no party now before this tribunal shares [his] interest regarding the Settlement Agreement." Id.

The motion explicitly states that it seeks only "limited intervention" for a specific purpose, i.e., to brief the Commission on Mr. Macktal's views on the disputed settlement agreement. But the motion makes no attempt to demonstrate compliance with the required criteria for filing an untimely petition to intervene in an ongoing proceeding found in 10 C.F.R. § 2.714(a)(1)(i)-(v). For example, the motion does not discuss the standing and interest criteria, much less show that they are satisfied. Likewise, the motion includes no discussion of the five factors that a late-filed petition for intervention must address.[4] Therefore, we cannot grant the motion for limited intervention to gain party status under 10 C.F.R. § 2.714(a)(1)(i)-(v). However, we have considered Mr. Macktal's submission

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Safety and Licensing Board." (TUEC did not file an opposition.) Over a month after the last pleading directed to the matter, the presiding officer of the Licensing Board panel which had been hearing the original Comanche Peak proceedings notified the Office of the Secretary that it was his belief that no panel of the Licensing Board existed which could review the motion and that therefore, the Licensing Board did not intend to take any action on the motion whatsoever. Therefore, the Commission has taken jurisdiction to rule on this question.

[4]We contrast this approach with that of CFUR which, while not persuading us that they satisfied the five factors, still attempted to address them - at

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in our review of the disputed settlement agreement. See 10 C.F.R. § 2.715(d).

IV. The Motion for Reconsideration and Stay of CLI-88-12

Initially, we find that Mr. Macktal does not have standing to seek a stay or reconsideration of the Commission's decision in CLI-88-12 because he was not a party to the proceeding when the decision was issued.[5] Commission regulations specifically provide that "[a] petition for reconsideration may be filed by a party within ten (10) days after the date of decision." 10 C.F.R. § 2.771(a) (emphasis added). Similarly, "[w]ithin ten (10) days after service of a decision or action any party to the proceeding may file an application for a stay of the effectiveness of the decision or action ...." 10 C.F.R. § 2.788(a) (emphasis added).

Furthermore, Mr. Macktal does not have the requisite interest to seek reconsideration of this decision, i.e., he has not demonstrated an interest which might be affected by the proceeding. In fact, in his pleadings he argues that only the Secretary of Labor has jurisdiction to interpret the scope and meaning of his settlement agreement with Brown & Root. Accordingly, we find no basis for Mr. Macktal to argue that the NRC's

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least in the context of the Operating License ("OL") proceeding. See 28 NRC at 608-12 and n.7.

[5] In his "reply, "Mr. Macktal argues that the filing of his motion for limited intervention made him a party to the proceeding, citing Seacoast Anti-Polution League Of New Hampshire v. NRC, 690 F.2d 1025, 1028 (D.C. Cir. 1982). We have reviewed this case and it does not stand for the proposition

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comments on the settlement agreement in CLI-88-12 could have caused him legal harm. Nothing in CLI-88-12 hinders Mr. Macktal from presenting his objections to the settlement agreement to the Secretary of Labor or prevents the Department of Labor from invalidating that Agreement if it so chooses. Furthermore, we do not believe that our statements in CLI-88-12 preclude his litigation of the agreement before the DOL under the principles of res judicata or collateral estoppel because neither Mr. Macktal nor Brown & Root were parties to CLI-88-12.

Moreover, Mr. Macktal has not even attempted to demonstrate that he meets the Commission's stay criteria. Under Commission regulations and long-standing Commission precedent, a party seeking a stay must show that it meets a balancing of the traditional four factors which would cause a court to grant a preliminary injunction including (1) the moving party's likelihood of success on the merits, (2) irreparable harm to the moving party absent a stay, (3) harm to any other party in the event of a stay, and (4) the public interest. 10 C.F.R. § 2.788(e)(1-4). See, e.g., Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 803 n.3 (1984); Boston Edison Company (Pilgrim Nuclear Power Station), ALAB-81, 5 AEC 348 (1972). See generally Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C.Cir. 1958).

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for which it is cited. In fact, the issue of standing is never discussed in that case, either as a part of the merits of the case or in dicta.

V. Conclusion

We have determined that Mr. Macktal is not entitled to intervene as a party and does not have standing to seek reconsideration of the Commission's findings in CLI-88-12. Nevertheless, we take note of Mr. Macktal's concerns regarding his perception that our statements in CLI-88-12 constituted a possible endorsement of the settlement agreement. We emphasize that in CLI-88-12, we examined the agreement solely to determine if it prohibited Mr. Macktal from bringing his concerns to the NRC staff and found that it did not. Our decision in CLI-88-12 was not intended as a Commission "stamp of approval" on the disputed agreement. We did state that "we do not see a violation of federal law or NRC regulation." CLI-88-12, 28 NRC at 613. But our decision denying CFUR's petition should not have depended on anything in the agreement at all. Assuming arguendo that the agreement violated some law or regulation, neither Mr. Macktal nor CFUR has demonstrated that the disputed agreement constitutes "good cause" for CFUR's late intervention in the operating license and construction permit amendment proceedings under 10 C.F.R. § 2.714.[6] The essential basis for denying CFUR's late intervention - that a party may not rely upon another party to represent its position and interest without assuming the risk that it will not do so - is independent of the validity of the agreement.

We are also aware that Mr. Macktal has challenged the settlement agreement before the DOL, which is at this point the appropriate forum for

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[6]The most that can be said for the agreement regarding the test for late intervention is that Mr. Macktal's presence might support CFUR's ability to

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such action. See Memorandum of Understanding, 47 Fed. Reg. 54585 (Dec. 3, 1982). Therefore, we withdraw any comment on the agreement's acceptability or legality we made in CLI-88-12 and we decline at this point to comment further on the disputed settlement agreement because it is the subject of a pending DOL case.

Finally, we note that Mr. Macktal admits that he withheld information from the NRC staff during discussions in 1986. See Second Macktal Affidavit at 1. That withholding of information is regrettable. We request Mr. Macktal to promptly bring any concerns he has to the NRC Staff for their resolution.[7] The staff will review Mr. Macktal's technical concerns about Comanche Peak. Such review is a normal staff practice.

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contribute to the development of a sound record. 10 C.F.R. § 2.714(a)(1)(iii). However, such support is not sufficient to overcome CFUR's lack of "good cause" under the required balancing of these five factors.

[7]Mr. Macktal signed a confidentiality agreement with the NRC staff which protected the nature of his concerns but not the fact that he brought concerns to the NRC or his identity. See NRC Staff Response to CFUR's First Supplement at 5. Under that agreement, he provided allegations to the NRC staff which were addressed in regular inspection reports at the Comanche Peak facility. Id. The staff has attempted to provide Mr. Macktal with copies of those reports and Mr. Macktal has never explained or expressed any disagreement with resolution of any specific allegation. Id. If Mr. Macktal is dissatisfied with the resolution of those items or if he has other items of concern, including any which he may have deliberately withheld from the NRC staff during interviews in 1986, see Second Macktal Affidavit at 1, he should bring those matters to the attention of the Comanche Peak Division of the Office of Nuclear Reactor Regulation ("NRR") - formerly the Office of Special Projects - or address them directly to the Director of NRR under 10 C.F.R. § 2.206. While we have in essence "vacated" Part IV of CLI-88-12, we still adhere to our statement in that order that the disputed agreement does not prevent Mr. Macktal from bringing any of his safety concerns directly to the NRC staff.

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It is so ORDERED.[8]

For the Commission[9]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland
this 20th day of April, 1989.

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[8]Mr. Macktal's motion for oral argument on the motion for reconsideration is denied. Mr. Macktal has also filed a "Motion to Be Served With Notice of Commission Proceedings," apparently seeking specific notice of the date of issuance of this order. Normally, the Commission publishes weekly in the Federal Register a notice of all Commission meetings for the next four weeks, including affirmation sessions and the matters to be affirmed. When matters before the Commission are expedited, the Commission attempts to provide at least one week's notice of the subject of affirmation sessions to all interested parties. In this case, the Commission has attempted to expedite the issuance of this order. Accordingly, the Office of the General Counsel has notified Mr. Macktal's counsel of the date and time of this session. Therefore, we have in essence served Mr. Macktal with the requested notice of the proceedings in this matter.

[9]Commissioner Carr was not present for the affirmation of this order; if he had been present he would have approved it. Commissioner Curtiss was unavailable to participate in this decision.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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TEXAS UTILITIES ELECTRIC COMPANY, ET AL. (Comanche Peak Steam Electric Station, Units 1 and 2)	Docket No.(s) 50-445/446-OL

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM M&O (CLI-89-06) 4/20/89 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
20 day of April 1989

Patty Henderson
Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	
TEXAS UTILITIES ELECTRIC COMPANY, ET AL. (Comanche Peak Steam Electric Station, Unit 1)	Docket No.(s) 50-445-CPA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM m&O (CLI-89-06) 4/20/89 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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