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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of

TEXAS UTILITIES ELECTRIC
COMPANY

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

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

Docket No. 50-445-CPA

TU ELECTRIC'S RESPONSE TO
CITIZENS FOR FAIR UTILITY REGULATION'S
REQUEST FOR HEARING AND LEAVE TO INTERVENE

On February 19, 1993, Citizens for Fair Utility Regulation (CFUR) filed a "Request for Hearing and Leave to Intervene" (Request) seeking late intervention in the operating license and construction permit amendment proceedings for Texas Utilities Electric Company's (TU Electric or Licensee) Comanche Peak Steam Electric Station (CPSES) Unit 1, and in the CPSES Unit 2 operating license proceeding. CFUR requests the admission of a contention concerning alleged safety problems with Thermo-Lag fire barrier materials currently installed at CPSES Unit 1 and Unit 2.

In accordance with the Nuclear Regulatory Commission's (NRC or Commission) Order dated February 22, 1993, TU Electric hereby submits its response in opposition to CFUR's untimely request, and urges that the Commission promptly reject it. For

the reasons set forth in greater detail below, CFUR's Request suffers from a number of procedural and substantive deficiencies, any one of which warrants its dismissal.

BACKGROUND

On February 5, 1979, the NRC published a Federal Register notice of TU Electric's request for an operating license for both CPSES Units 1 and 2. See 44 Fed. Reg. 6995 (Feb. 5, 1979). In response to this notice, a number of groups, including CFUR and Citizens Association for Sound Energy (CASE), filed timely petitions to intervene and requests for a hearing on the requested licenses. On June 27, 1979, the Licensing Board issued an order granting CFUR's petition to intervene in the proceeding. See Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-79-18, 9 NRC 728 (1979). The order also granted the petition to intervene from CASE and another organization and granted a request from the State of Texas to participate as an "interested state." Subsequently, the other organization withdrew, and the Licensing Board issued an unpublished order on April 2, 1982, granting CFUR's request to withdraw from the proceeding.

The proceeding continued with CASE as the sole intervenor. Years of hearings were held on the license application until the parties reached a settlement agreement dismissing both the construction permit amendment proceeding -- Docket No. 50-445-CPA -- and the Unit 1 and Unit 2 operating license proceedings -- Dockets No. 50-445-OL and 50-446-OL. See

Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18A, 28 NRC 101 (1988); LBP-88-18B, 28 NRC 103 (1988). After the dismissal of both the operating license and construction permit amendment proceedings, CFUR attempted to re-intervene. The Commission, however, found that CFUR had failed to demonstrate that its petition met the criteria for late intervention in 10 C.F.R. § 2.714 (a)(1)(i)-(v) and dismissed the request. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 609 (1988), as modified, Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348 (1989). CFUR filed a petition for judicial review of that denial, which was subsequently rejected by the courts. Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir.), cert. denied, 111 S. Ct. 246 (1990).

On February 8, 1990, the NRC issued a low power operating license to TU Electric for CPSES Unit 1. Thereafter, the NRC issued a full power operating license for CPSES Unit 1 on April 17, 1990.

On July 21, 1992, as supplemented by an August 12, 1992 addendum, the Nuclear Information and Resource Service (NIRS) filed a petition pursuant to 10 C.F.R. § 2.206. NIRS filed the addendum to the petition on behalf of a number of organizations, including CFUR. The petition presented concerns, among other things, over the use of Thermo-Lag 330-1 fire barrier material for protecting against fires in nuclear plants, and requested

immediate actions on numerous plants, including CPSES. The NRC Director of Nuclear Reactor Regulation (NRR), in a "Partial Director's Decision," denied NIRS' petition on February 1, 1993. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), DD-93-03, slip op. (Feb. 1, 1993). 1/

Prior to this decision, on January 13, 1993, CFUR submitted a "request for action" asking the Commission to issue a notice of hearing on whether an operating license should be issued for CPSES Unit 2. As a basis for its request, CFUR raised allegations related to Borg-Warner check valves and Thermo-Lag. The Commission treated CFUR's request as a petition for late intervention and motion to reopen the record and rejected it for failure to address the standards set out in 10 C.F.R. Part 2. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-93-01, 37 NRC ___, slip op. (Jan. 29, 1993). The Commission, however, stated that its decision did "not preclude CFUR from filing a renewed request for a hearing that addresses the relevant statutory standards." Id. at 4. The Commission explicitly limited potential late intervention and reopening to the Unit 2 proceeding. Id. at 4 n.1. Following this decision, on February 2, 1993, the Commission issued a low power operating license for CPSES Unit 2.

1/ On December 15, 1992, NIRS filed another 2.206 petition raising additional issues regarding Thermo-Lag fire barrier material. This petition is currently under consideration by NRR as a supplement to NIRS' July 21, 1992 petition.

ARGUMENT

I. NO PROCEEDING EXISTS FOR WHICH THE COMMISSION CAN GRANT A HEARING

CFUR requests a hearing and intervention in the Unit 1 operating license and construction permit amendment proceedings and in the Unit 2 operating license proceeding. CFUR seeks to raise a late filed contention concerning the adequacy of Thermo-Lag fire barrier materials. CFUR's Request should be rejected out of hand since no proceeding currently exists for which a hearing on a late filed contention can be granted.

The NRC has issued the full power operating license for Unit 1. That action forecloses any opportunity for a hearing on the Unit 1 operating license and the Unit 1 construction permit amendment. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC ___, slip op. at 3 (Aug. 12, 1992); see also Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-01, 37 NRC ___, slip op. at 3 (Jan. 29, 1993); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station), CLI-92-1, 35 NRC 1, 3 n.2 (1992). Any challenge to the Unit 1 license must, therefore, take the form of a petition pursuant to 10 C.F.R. § 2.206 for an order under 10 C.F.R. § 2.202.

Similarly, the NRC's recent issuance of the low power operating license for Unit 2 forecloses any opportunity for a hearing on issues resolved by the NRC Staff, as the delegate of the Commission, as part of the issuance of the low power license. In the Supplemental Safety Evaluation Report (SSER) issued by the

NRC in conjunction with issuance of the low power license, the NRC explicitly determined that TU Electric's Thermo-Lag fire barrier program (with deviations and compensatory measures) meets applicable fire protection guidelines and is, therefore, acceptable. See CPSES Unit 2 SSER 26 at 9-26. Consequently, CFUR cannot now seek a hearing on an issue already disposed of by the NRC as part of issuance of the low power operating license for CPSES Unit 2. 2/

II. CFUR'S REQUEST FOR LEAVE TO INTERVENE FAILS TO SATISFY ANY OF THE REQUIREMENTS FOR LATE FILED INTERVENTION AND, THEREFORE, SHOULD BE REJECTED

A. CFUR Has Not Made The Requisite Showing To Establish Standing

Section 2.714(a)(1) of the NRC's regulations provides that "any person whose interest may be affected by a proceeding . . . shall file a written petition for leave to intervene."

Further, a petitioner must:

set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene,

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- 2/ The Commission's January 29, 1993 order stated that CFUR is not "entirely foreclosed" from seeking to reopen the hearing concerning the Unit 2 operating license until the full power operating license has been issued. However, this order is of no avail to CFUR under the present circumstances. As a result of issuance of the low power operating license for CPSES Unit 2, CFUR's right to request reopening has been severely restricted. Prior to issuance of a low power operating license the NRC must resolve the issues related to the activities authorized by that license; therefore, after issuance of the low power license, the scope of any hearings are limited to those matters that were not resolved in connection with issuance of the low power operating license.

with particular reference to the factors in paragraph (d)(1) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

10 C.F.R. § 2.714(a)(2) (1992). 3/ The Commission normally applies judicial concepts of standing in determining whether a party has sufficient interest in the proceedings. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). Judicial concepts of standing require a showing that: (1) the action sought in a proceeding will cause "injury-in-fact;" and (2) that the injury is arguably within the zone of interests protected by the statutes governing the proceeding. See, e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). In order to establish standing, a petitioner must show that he has personally suffered a distinct palpable harm that constitutes injury-in-fact, that the injury is fairly traceable

3/ The factors in section 2.714(d)(1) include:

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

CFUR makes no "particular reference" to those factors in its Request, or even attempts to address them.

to the challenged action, and that the injury is likely to be addressed by a favorable decision. See, e.g., Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988). Petitioners may demonstrate their interest by showing that their residence is within the geographical zone which could be affected by a nuclear accident. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 n.6 (1973). The NRC has held that distances up to 50 miles from a nuclear power plant are within the geographical zone of interest. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-79-18, 9 NRC 728, 730 (1979).

An organization has standing if it can show an effect upon its organizational interest or if it can show that one of its members is suffering immediate or threatened injury as a result of the challenged action. See, e.g., Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646 (1979). Further, although "an organization may establish its standing through the interests of its members," it must do so by "identify[ing] specifically the name and address of at least one affected member who wishes to be represented by the organization." See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 583 (1978) (citations omitted).

Finally, as held in Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-75-22, 1 NRC 451, 454-55 (1975), participation in a prior licensing proceeding

involving the same facility is not sufficient to establish standing. Instead, the interest of the petitioner and how that interest might be affected by the proceeding must be specifically pleaded in the petition to intervene in order to meet the requirements of section 2.714.

CFUR fails to meet the requirements of section 2.714(a)(2) or otherwise demonstrate that it has organizational standing. CFUR presents no evidence that it has or will suffer injury-in-fact to its organizational interests. In addition, CFUR has not identified at least one member who will be injured, described the nature of that injury, or provided an authorization for the organization to represent that individual in the proceeding. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-92-43A, 15 NRC 1423, 1437 (1982). 4/ CFUR's only attempt to demonstrate standing is its request that the Commission "incorporate by reference CFUR's previous filings establishing its background and standing" and its bald statement that "the Commission and the NRC staff in previous orders and responses have recognized and established in fact that CFUR has standing through its member to intervene in this docket, if it can show cause for late filing." Request at 2. These assertions that it had standing in some unidentified prior proceeding simply do not establish standing now. CFUR must

4/ Moreover, CFUR presents no evidence that any of its members reside within 50 miles of CPSES. CFUR's statement, unsupported by affidavits, that its members "live and work and play in the vicinity of the Comanche Peak plant" does not satisfy CFUR's burden.

show standing on this record and not by referencing prior proceedings. See Peach Bottom, *supra*; see also Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC ___, slip op. at 44 (Dec. 15, 1992). Not having established the requisite interest for standing, CFUR's request for hearing and leave to intervene cannot be considered by the Commission.

B. CFUR's Request For Leave To Intervene Fails To Satisfy The Requirements For Late Filed Petitions To Intervene

Even assuming, *arguendo*, that CFUR has standing, CFUR has not and cannot make the requisite showing that it should be permitted to intervene out of time. Pursuant to 10 C.F.R.

§ 2.714(a)(1), an untimely petition to intervene may be granted only upon a balancing of the following factors:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

In moving to intervene out of time, the burden of persuasion on those factors is clearly upon the petitioner and the factors must be addressed in the petition itself. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 (1985). CFUR's

Request is patently deficient as it fails to adequately address any of the five factors.

1. CFUR Has Not Shown Good Cause For Late Intervention

CFUR fails to meet its burden of showing good cause under 10 C.F.R. § 2.714(a)(1)(i). CFUR alleges that it has good cause for the lateness of its filing because:

the issue of safety regarding the installation of Thermolag in Unit 2 has become a licensing issue for the NRC since the closing of the hearings in July of 1988 and that since that time the full extent of the Thermolag failures at Comanche Peak have only recently become known to this petitioner.

Request at 4. Essentially, CFUR alleges it has shown "good cause" because it has only recently become aware of the "full extent" of the alleged problems with Thermo-Lag, which it believes would have an impact on the Unit 2 licensing proceeding.

It is well settled NRC law that such an allegation alone does not satisfy the "good cause" requirement. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC ___, slip op. at 7-8 (Aug. 12, 1992). The NRC has consistently held that good cause for an untimely petition to intervene cannot be established based on previously available public information. See, e.g., Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 21 (1986). As the Commission stated in CLI-92-12:

The test for "good cause" is not simply when the petitioners became aware of the material

they seek to introduce into evidence. Instead, the test is when the information became available and when petitioners reasonably should have become aware of that information. In essence, not only must the petitioner have acted promptly after learning of the new information, but the information itself must be new information, not information already in the public domain.

Id. at 7 (emphasis in original); see also Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764-65 (1982) (the discovery of information publicly available six months prior to the date of the petition held insufficient to establish "good cause" for late intervention).

Moreover, as a matter of policy, allowing late intervention to a petitioner who discovers information already publicly available simply "provides an incentive for remaining uninformed and creates the prospect of collateral factual contests aimed at ascertaining the state of mind of the prospective intervenor." ALAB-707, 16 NRC at 1764-65; see also Eastern Utilities Comm'n v. AEC, 424 F.2d 847, 851 (D.C. Cir. 1970) ("a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome . . . and then permit the whole matter to be reopened in his behalf, would create an impossible situation." (quotation and citation omitted)). As the Appeal Board further stated:

[w]e would not allow a party to the proceeding to press a newly recognized contention . . . unless the party could satisfy an objective test of good cause.

Among other things, . . . the party seeking to reopen must show that the issue it now seeks to raise could not have been raised earlier. . . . We see no reason to employ a different and more lenient good cause standard for the late petitioner for intervention than for a party who is already in the proceeding and seeks to raise new issues.

ALAB-707, 16 NRC at 1765 (emphasis in original) (citation and footnote omitted).

In the present case, CFUR itself admits that issues related to Thermo-Lag have existed for some time. Specifically, CFUR explicitly admits that alleged safety concerns regarding the installation of Thermo-Lag in Unit 2 have been an issue since 1988. See Request at 4. CFUR further acknowledges that there were alleged Thermo-Lag test failures and "known deficiencies since the early 1980's" Id. In fact, since June 1991 the NRC has issued seven Information Notices (IN) and Bulletins concerning Thermo-Lag fire barrier materials, all of which were made publicly available in the NRC Public Document Room. ^{5/} Furthermore, six months ago CFUR joined a 2.206 petition unsuccessfully challenging the use of Thermo-Lag at, among other plants, CPSES. CFUR, therefore, has not demonstrated, nor can it seriously argue, that its issues related to Thermo-Lag are "new." Consequently, CFUR cannot show "good cause" for late intervention.

^{5/} See IN 91-47, IN 91-79, IN 92-46, IN 92-55, IN 92-82, Bulletin 92-01, and Bulletin 92-01, Supplement 1.

2. The Remaining Four Factors

Although all of the five factors in section 2.714(a)(1) must be considered, a failure to demonstrate good cause for failure to file on time requires a compelling showing on the remaining four factors. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 274-75 (1975); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 279 (1986). Of the remaining factors, the third and fifth are the most important. 6/ CFUR has failed to even to attempt to satisfy the remaining four factors, let alone make a "compelling" showing.

Under the third factor, CFUR must show that its participation may reasonably be expected to assist in developing a sound record. 10 C.F.R. § 2.714(a)(1)(iii) (1992). Further, CFUR must "set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); see also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC

6/ The factors set forth in 10 C.F.R. § 2.714(a)(1)(ii) and (iv), the availability of other means to protect the petitioner's interests and the extent to which the petitioner's interests are protected by other parties, are of "relatively minor importance." Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit No. 1), LBP 84-17, 19 NRC 878, 887 (1984); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767 (1982). In light of the fact that CFUR does not have any personal interest in this proceeding to justify standing, its interests will be adequately protected by a 2.206 petition.

387, 399 (1983). Vague assertions regarding petitioner's ability or resources are insufficient. ALAB-704, 16 NRC at 1730. The ability of the petitioner to contribute to the development of a sound record becomes a more important factor in cases where the grant or denial of the petition also decides whether there will be any adjudicatory hearing. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1157, 1180 (1983). There is no reason to grant an inexcusably late intervention petition and trigger a hearing unless there is cause to believe the petitioner not only proposes a "substantial safety or environmental issue" but is also well "equipped to make a substantial contribution on it." Id. at 1181. Indeed, the Commission has held that in order to prevail on this factor, the moving party must "demonstrate that it has special expertise on the subjects which it seeks to raise." Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986) (citation omitted).

Here, CFUR makes no serious attempt to explain with specificity the matters it proposes to raise, to identify the witnesses it intends to call, to summarize the evidence those witnesses might give, or to show how it is equipped to make a "substantial" contribution on the issues. Instead, CFUR simply states that it "will rely on the NRC's own documents and those of TU as well as documentation developed independently by outside groups such as the Nuclear Information and Resource Service, and CFUR's own experts" to develop its contention that Thermo-Lag

fire barrier material fails to meet NRC regulatory requirements and is unsafe. Request at 6. These vague statements are plainly insufficient to establish any ability to contribute to the development of a sound record. See Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

Moreover, CFUR makes no reference to the NRC's recent denial of a 2.206 petition filed by NIRS, on behalf of CFUR and others, challenging the adequacy of Thermo-Lag fire barrier material. 1/ Based on the NRC Staff's review, the Director of NRR concluded that the petitioners, including CFUR, failed to raise any "substantial health and safety issues." 2/ Nor does CFUR mention a recent letter from NRC Chairman Ivan Selin to Representative John Dingell, Chairman of the House Subcommittee on Oversight and Investigations, in which the Chairman stated that:

Thermo-Lag fire barrier systems, when properly configured and upgraded as necessary, should be able to successfully pass fire endurance tests using the proposed NRC position. Recent testing conducted by TU has demonstrated that Thermo-Lag fire barrier systems did pass fire endurance testing consistent with the proposed NRC position. 2/

1/ See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), DD-93-03, slip op. (Feb. 1, 1993).

2/ Id. at 32.

2/ Letter from NRC Chairman Ivan Selin to Representative John Dingell, dated Feb. 10, 1993, enclosure, p. 9.

CFUR also fails to mention NRC's SSER 26 for Unit 2 which explicitly states that "the applicant's Thermo-Lag fire barrier program for CPSES Unit 2, with approved deviations, compensatory measures, and confirmatory resolution of the 36-inch wide cable tray configuration meets the staff fire protection guidelines of BTP CMEB 9.5-1 and is, therefore, acceptable." CPSES Unit 2 SSER 26 at 9-26. The NRC's review of Thermo-Lag at CPSES and elsewhere demonstrates that CFUR has failed to raise a "substantial safety or environmental issue." Washington Public Power Supply System, ALAB-747, 18 NRC at 1181.

Thus, based on CFUR's vague pleading, its apparent lack of factual knowledge regarding the adequacy of Thermo-Lag at CPSES, and its complete failure to put forward specific evidence why any of these matters raise a serious safety concern, it is clear that CFUR would not contribute to the development of a record on the issue it seeks to raise. See, e.g., South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 891-94 (1981), aff'd sub nom., Fairfield United Action v. NRC, 679 F.2d 261 (D.C. Cir. 1982).

The fifth factor -- the possibility of delay in the proceeding and expansion of the issues -- also weighs heavily against granting CFUR's Request. When ruling on a late filed petition to intervene, the Commission must consider "[t]he extent to which the petitioner's participation will broaden the issues or delay the proceeding." 10 C.F.R. § 2.714(a)(1)(v) (1992). Although this factor is not conclusive, it is a particularly

significant one in striking the balance under 10 C.F.R.

§ 2.714(a). Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 394-95 (1976); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983). In considering the issue of delay, the relevant inquiry is "whether the proceeding -- not license issuance or plant operation -- will be delayed." Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 23 (1986); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1766 (1982). In the case of a very late petition, there is a substantial likelihood that the grant of the petition will lead to delay. Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-476, 7 NRC 759, 762 (1978). Moreover, where there is no ongoing proceeding, a late filed petition will inevitably result in delay. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC ___, slip op. at 15-16 (Aug. 12, 1992) (citing CLI-88-12, 28 NRC at 611).

In Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-559, 10 NRC 162 (1979), vacated on other grounds, CLI-80-54, 12 NRC 407 (1980), the Appeal Board rejected a petition to intervene filed three and a half years after the deadline for intervention petitions were due. After noting the "high potential for delay which would attend upon a grant of intervention at this very late stage of an already

protracted proceeding," the Appeal Board made the following statement which is particularly applicable here:

In this regard, we once again must record our belief that the promiscuous grant of intervention petitions inexcusably filed long after the prescribed deadline would pose a clear and unacceptable threat to the integrity of the entire adjudicatory process. See ALAB-552, supra, 10 NRC at 6-7, quoting from Duke Power Company (Cherokee Nuclear Station, Units 1, 2, and 3), ALAB-440, 6 NRC 642, 644 (1977). More specifically, persons potentially affected by the licensing action under scrutiny would be encouraged simply to sit back and observe the course of the proceeding from the sidelines unless and until they became persuaded that their interest was not being adequately represented by the existing parties and thus that their own active (if belated) involvement was required. No judicial tribunal would or could sanction such an approach and it is equally plain to us that it is wholly foreign to the contemplation of the hearing provisions of both the Atomic Energy Act and the Commission's regulations.

ALAB-559, 10 NRC at 172-73 (footnote omitted).

Similarly here, CFUR has sat on the sidelines for the past eleven years while the licensing process for CPSES has continued apace. Now, on the eve of the issuance of the full power license, CFUR has filed an eleventh hour request to intervene raising no significant safety or other issue and with no credible excuse for its extremely late filed petition. Under these circumstances, the grant of CFUR's request can only result in unnecessary delay and threaten the "integrity of the entire adjudicatory process." It should, therefore, be denied.

C. CFUR Has Not Satisfied The Requirements In 10 C.F.R. § 2.714(b) For An Admissible Contention

CFUR completely ignores the requirements set forth in 10 C.F.R. § 2.714(b) for an admissible contention. Section 2.714(b)(2) establishes a high threshold for the admissibility of a contention. In particular, "[e]ach contention must consist of a specific statement of the issue of law or fact to be raised." 10 C.F.R. § 2.714(b)(2) (1992). Moreover, with respect to each contention, the petitioner must provide:

- (i) A brief explanation of the bases of the contention.
- (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely . . . together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
- (iii) Sufficient information . . . to show that a genuine dispute exists This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute

10 C.F.R. § 2.714(b)(2)(i)-(iii) (1992). If any one of these factors is not met, a contention must be rejected. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149 (1991).

In the present case, CFUR fails to meet any of these requirements. First, there is no explanation of the bases for the contention. Second, CFUR does not provide a concise statement of the alleged facts or expert opinion it intends to rely on, nor does it refer to the "specific sources and documents" on which it will rely. CFUR simply states it will rely on unidentified NRC and TU Electric documents as well similarly unidentified "documentation" developed by "outside groups such as [NIRS], and CFUR's own experts" Request at 6. And finally, CFUR fails to provide any information demonstrating that a genuine issue exists with regard to any portion of its contention. Indeed, the actual, uncontroverted facts established by the various reviews undertaken by the NRC Staff and others demonstrate that no such dispute exists. In summary, CFUR's contention lacks the specificity required by section 2.714(b)(2) and should be rejected. See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 422-24 (1991).

III. CFUR HAS NOT FILED A MOTION TO REOPEN THE RECORD

In order to reopen the record, a petitioner must submit a petition to intervene and motion to reopen. See, e.g., Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-1, 35 NRC 1, 6-7 (1992). CFUR's Request did not include a motion to reopen the record in the CPSES operating license proceedings for Units 1 and 2 or for the Unit 1

construction permit amendment proceeding. Consequently, the Commission should reject CFUR's Request on these grounds alone. 10/

In any event, CFUR has utterly failed to meet the requirements of 10 C.F.R. § 2.734. In order to meet the requirements of section 2.734(a), the moving party shoulders a heavy burden to demonstrate that its motion: (1) is timely; (2) involves a significant safety issue; and (3) offers evidence that would lead to a materially different result. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1

10/ According to the Commission, "a motion to reopen under 10 C.F.R. § 2.734 goes to the need for further hearings in a formal matter which is pending before the Commission." Houston Lighting & Power Co. (South Texas Nuclear Plant) Docket Nos. 50-498-OL and 50-499-OL, slip op. at 1, (June 24, 1987) (the Commission declined to entertain the intervenor's motion to reopen because the Board had already concluded hearings on the application for operating licenses for the South Texas Plant when the motion was submitted). Once a proceeding is fully litigated and becomes final, consideration of a motion to reopen is no longer appropriate. Id. (citing Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261 (1979)). A good policy reason exists for this principle -- if parties were allowed to reopen records after they had been closed, there would be little hope that the administrative process could ever be consummated. See, e.g., City of Angels Broadcasting, Inc. v. FCC, 745 F.2d 656, 675 (D.C. Cir. 1984). For similar reasons, it is inappropriate to consider CFUR's Request as a motion to reopen. As set forth above, the Licensing Board concluded hearings in the construction permit amendment and operating license proceedings for CPSES in July 1988. The Commission issued the Unit 1 operating license in 1990 and the low power operating license for Unit 2 on February 2, 1992. Thus, there is no longer a "pending" proceeding which is subject to reopening under 10 C.F.R. § 2.734.

(1986). CFUR cannot, nor does it even attempt to, meet any of these requirements. As discussed in Section II.B.1 supra, the issues CFUR seeks to raise and its supporting information are not new and thus its Request is not timely. Similarly, as discussed in Section II.B.2 supra, the Request does not involve a significant safety issue. In fact, the NRC has already concluded directly to the contrary. See CPSES Unit 2 SSER 26 at 9-26; Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), DD-93-03, 37 NRC ___, slip op. at 32 (Feb. 1, 1993). In light of the NRC's conclusion that the use of Thermo-Lag does not involve any significant safety issues, it clearly follows that the information CFUR seeks to introduce into the record would not cause a different result in the full power operating license proceeding for CPSES Unit 2.

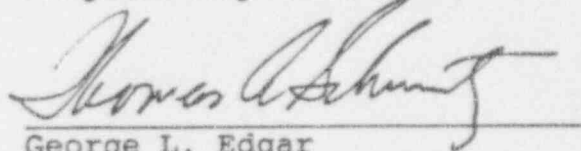
Finally, any such motion "must be accompanied by one or more affidavits which set forth the factual and/or technical basis for the movant's claim that the [reopening] criteria have been satisfied." 10 C.F.R. § 2.734(b) (1992). CFUR presents no such affidavits with its Request. Accordingly, this defect alone requires rejection of the request. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-01, 29 NRC 89, 93-94 (1989).

CONCLUSION

As a threshold matter, CFUR's Request should be rejected since no proceeding currently exists for which a hearing on a late filed contention can be granted. Moreover, to the

extent a proceeding is pending. CFUR fails to satisfy any of the specific requirements for late filed intervention. Finally, CFUR's Request does not address or satisfy the requirements governing motions to reopen the record. Consequently, CFUR's Request should be denied.

Respectfully submitted,



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February 25, 1993

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

DOCKETED
USNRC

'93 FEB 25 P12:11

In the Matter of)

TEXAS UTILITIES ELECTRIC)
COMPANY)

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

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

Docket No. 50-445-CPA

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

NOTICE OF APPEARANCE OF COUNSEL

Notice is hereby given that R. Alexander Glenn enters
an appearance as counsel for Texas Utilities Electric Company in
the above-captioned proceeding.

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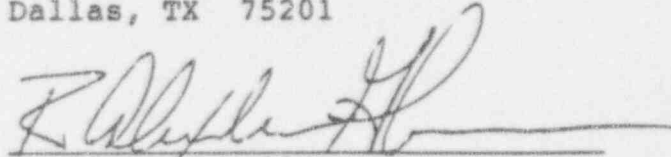
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Date: February 25, 1993

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

93 FEB 25 12:11

OFFICE OF SECRETARY
DOCKETING & SERVICE
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In the Matter of)
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TEXAS UTILITIES ELECTRIC)
COMPANY)
)
)

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

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

Docket No. 50-445-CPA

CERTIFICATE OF SERVICE

I hereby certify that copies of "TU Electric's Response To Citizens For Fair Utility Regulation's Request For Hearing And Leave To Intervene" and the attached "Notice of Appearance of Counsel" were served upon the following persons by hand (except as indicated below), on the date shown below:

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Chief, Docketing
and Service Section
(Original Plus Two Copies)

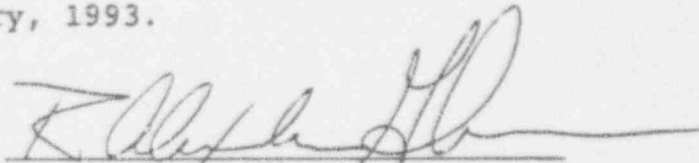
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