

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'93 MAR 12 P4:24

In the Matter of
TEXAS UTILITIES ELECTRIC COMPANY
(Comanche Peak Steam Electric
Station, Unit 2)

Docket No 50-446-CPA

ORIGINAL

RESPONSE TO ORDER TO SHOW CAUSE
BY PETITIONER R. MICKY DOW

Comes now, R. Micky Dow, himself, and by. and on behalf of the Disposable Workers of Comanche Peak Steam Electric Station, as an officer thereof, and does hereby file a response to an order served, by telephone facsimile, March 5, 1993, wherein he was to show cause why the Commission should not: "(1) dismiss the proceeding and the pending appeals as moot; (2) vacate the Licensing Board's order in accordance with United States v. munsingwear, Inc. 340 U S 36 (1950); (3) and deny any further extension as unnecessary, thereby treating the construction permit as having expired as of the date of a Commission order dismissing the proceeding as moot.", and will, accordingly, show that:

I.

PROCEEDING AND PENDING APPEALS NOT MOOT

1. Proceeding Is To Determine If Extension Applicable.

The "proceeding" referred to in the order, the subject of this response, is certainly not moot, by any stretch of the imagination. Some very serious due process concerns have already arisen in the fact that the Commission granted the construction permit extension, in the first place, without affording the interested public an opportunity to make objection/input to that process, the subject of which has already been

RESPONSE TO ORDER TO SHOW CAUSE BY PETITIONER R. MICKY DOW -1-

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taken to the U.S. Court of Appeals for the District of Columbia Circuit, by these petitioners, then withdrawn, due to clerical error, and an appeal refiled, directly with the Commission. The Commission GRANTED that appeal on or about January 14, 1993. If that appeal was viable then, as the ruling indicates, it is viable now; and, to usurp the appellate process is, in effect, to deny these petitioners their rights of Due Process, which would have a staying effect on these proceedings, if taken to the U.S. Court of Appeals; but, to force petitioners; into such a position could easily be viewed as abuse of discretion by the Commission.

The Commission cannot, simply, make the arbitrary decision that the appeals are moot, merely because they have failed to rule upon them in a timely fashion. To do so, to allow the clock to toll against the petitioners, while they allow the clock to toll in favor of the license holder, is to show preferential treatment to the license holder, and is, certainly, subject matter for review by the courts.

While, it may be true, that a portion of the function of this Commission is to promote the use of nuclear energy; its stated function, in the law, is that of serving the best interests of the public at large; and, in that role, it cannot ignore the voice of the public when it raises objection, without Due Process.

There is more at stake, here, than a/the single appeal filed by these petitioners; there are, at least, two other interlocutory matters, raised by the other petitioners, a large portion of which involves the discovery of new, and most relevant evidence, evidence, which, after review, will, in all probability, have a destructive influence upon the viability of the license, itself. Anytime there is the discovery and/or revelation of new

RESPONSE TO ORDER TO SHOW CAUSE BY PETITIONER R. MICKY DOW -2-

evidence, the courts have, consistantly, opted for some manner of pause, stay, or hearings process whereby the importance, and/or impact the new material might have, influence, or alter the matter at bar. If a party is litigating, and becomes involved in a situation whereby the hearings process is needed, or compulsory, that party is entitled to a hearing, and, as the courts of appeal have consistantly ruled, MUST, be afforded that hearing. It is an issue which is a matter of right, and the Commission lacks, nor ever had, the discretionary power to deny that right.

The basic, and obvious, summation, of the hereinabove, is that if the intervening parties had prevailed, the construction permit would not have been amended, and, consequently, the Unit 2 of CPSES would not be in the present stage of completion, and the license holder would not be in the present position of trying to diagonally slice through law to obtain a license for full-power operation, thereby arriving at the predominate conclusion that a hearings process must be had.

2. No Basis In Law To Support Vacation.

There is no viable basis, in law, by which the Commission can vacate the subject order. The single cite, which is used to support point #2, in the order, the subject of this response, refers to a case which was adjudicated, fully FOUR YEARS before, even, the Atomic Energy Act, itself. The courts, the judiciary, the public at large, in 1950, had any idea that the future, and, in particular, the immediate future, would contain, or present, a set of circumstances, such as this, requiring adjudication; thus, there is no way to determine, if, had the Munsingwear court been one with the same information as a court of the present day, would they rule as they did in 1950? No susbstantive cites are noted, no nexis can possibly

be drawn, and here are three cases which clearly dissent from the Munsingwear case, and would, therefore, defeat its purpose, which defeats the argument. Boston Police Patrolmans' Association, Inc. v. Castro, 468 U.S. 1209; U.S. v. Sharpe, 470 U.S. 725; Mintzes, Warden v. Buchanan, 471 U.S. 155.

3. No Adequate Argument Available, Issue Exists By Presumption.

It would be ludicrous to attempt any manner of argument, and/or objection, to the third point raised in the order, the subject of this response. The statement, point 3. identified as (3) clearly would have the reader PRESUME, that point one has already prevailed. While the Constitution of the United States clearly establishes the presumption of innocence, there is no other place in law where a presumption can, or does, exist; rather the law requires a preponderance in order to support any matter to a conclusion, lacking default.

CONCLUSION

The language of the order, the subject of this response, clearly indicates that the general public, or any portion thereof, have NO due process availability with regard to this present issue. It is apparent, in the language, that the Commission has decided to issue the full-power license, and the order, the subject of this response, was issued in order to "sweep away" any debris of argument. What is moot is the subject of argument/objection itself, as is evidenced by the "after-the-fact" attitude of this order.

WHEREFORE, PREMISES CONSIDERED, this intervenor would state and aver that there is no justifiable basis for dismissing any proceedings which have any connection to the construction permit extension, and there is no
RESPONSE TO ORDER TO SHOW CAUSE BY PETITIONER R. MICKY DOW -4-

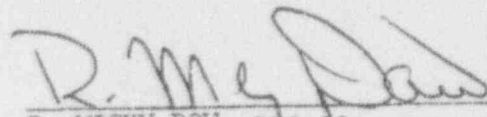
mootness to a matter which has not been fully adjudicated, particularly when those points and issues being adjudicated are of sufficient weight and merit to drastically alter, and/or reverse the present direction of these proceedings.

There is no basis in law for dismissing these proceedings, but, rather, a substantial basis in law for their continuation.

There is no basis in logic for addressing the third point of order, for it presumes merit where there is none.

The Commission is attempting to suggest to the intervenors that further objection is useless, for a decision has been made to issue a license for full-power operation of Unit 2 at CPSES, and would further suggest that all parties simply "drop-it", for it is moot. These intervenors would strongly oppose such a theory and/or presumption, and would restate their position that, given an objective hearing format, sufficient evidence can and will be placed on the record of such sufficient merit that the extension to the construction permit will be denied. In closing, these intervenors request the proceedings not be dismissed, but, rather, brought to a full public inquiry status.

Respectfully submitted,



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Petitioner

CERTIFICATE OF SERVICE

LIMITED
USNR

This is to certify that a true and correct copy of the foregoing
Response To Order To Show Cause By Petitioner R. Micky Dow was sent by
telephonic transmission to the Secretary of the Commission at 301-504-1672;
George Edgar, counsel for license holder at 202-872-0581; and Michael Kohn,
counsel for intervenor at 202-462-4145, on this the 12th day of March,
1993.

R. Micky Dow
Affiant