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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of

TEXAS UTILITIES ELECTRIC CO.,
et al.,

(Comanche Peak Steam Electric
Station, Unit 2)

)
)
) Docket No. 50-446-CPA
) (Construction Permit Amendment)
)
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)

PETITIONERS' RESPONSE TO THE COMMISSION'S
ORDER DATED MARCH 5, 1993

INTRODUCTION

Petitioners B. Irene Orr and D. I Orr, hereby file their response to the Nuclear Regulatory Commission ("Commission") Order, dated March 5, 1993. As demonstrated below, a decision on the merits of the issues relevant to the instant matter must go forward. More importantly, Petitioners will show that the Commission may not issue a full power license to Texas Utilities Electric Company ("TUEC") until such time as the issues presented in the instant case are resolved.

ARGUMENT

- A. The Commission May not Issue a Full Power License Until Petitioners Exhaust their Right to a Hearing.

On March 5, 1993, the Commission asked the parties to address the issue of whether the status of construction of CPSES Unit 2 mooted the need for the Commission to rule in the instant matter. In essence, the Commission seeks to determine whether the CPA proceedings may be dismissed as moot regardless of whether Petitioners have exhausted their right to challenge

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whether TUEC's asserted "good cause" for the delay in construction of the CPSES Unit 2.

1. The Commission Cannot Issue an Operating License Until Petitioners Challenge of TUEC's "Good Cause" for the Amendment to the Construction Permit are Adjudicated

Pursuant to 10 C.F.R. §§ 50.23 and 50.56, in order for TUEC to obtain a valid operating permit, the Commission must convert the very construction permit challenged by Petitioners into the operating license. But, before the conversion of the construction permit may occur, TUEC must demonstrate that it did not forfeit its right to construct and, as such, its right to obtain an operating license for CPSES Unit 2.

Under Commission regulations TUEC forfeited its construction permit if it cannot establish good cause for the delay in construction:

If the proposed construction or modification of the facility is not completed by the last completion date, the permit shall expire and all rights thereunder shall be forfeited: provided, however, That upon good cause shown the Commission will extend the completion date for a reasonable period of time...

10 C.F.R. §50.55(b) (emphasis in original).

In this respect, in Brooks v. Atomic Energy Commission, 476 F.2d 924, 925, fn. 1 (D.C. Cir. 1973), the Court stated: "The Commission's own regulations provide that all rights under the construction permit shall be forfeited if the facility is not completed by the latest completion date unless the Commission extends the completion date 'upon good cause shown.'" (quoting 10 C.F.R. § 50.55).

Thus, pursuant to 10 C.F.R. §50.55(b), unless TUEC can establish "good cause," it forfeited the right to convert its construction permit. As such, the controlling issue is not whether TUEC has completed construction. Rather, the issue which must be confronted is whether Petitioners' timely request for a hearing forecloses the Commission's ability to issue a valid operating license before Petitioners' have exhausted their right to a hearing. This issue turns on the rights granted Petitions pursuant to Section 189(a)(1) of the Atomic Energy Act ("AEA").¹

The rights afforded Petitioners under Section 189(a)(1) of the AEA to challenge a utilities ability to amend the construction completion date contained in a construction permit were considered in Brooks. There the court determined that § 189(a)(1) "require[d] that the Commission grant a hearing upon the request of any interested person in a proceeding amending a

¹ Section 189(a)(1) of the AEA provides, in relevant part, that:

In any proceeding under this Act, for the . . . amending of any . . . construction permit, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit such person as a party to such proceeding . . . In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an . . . amendment to a construction permit...

AEA Section 189(a)(1), 42 U.S.C. §2239(a)(1) (emphasis added)

construction permit." Brooks v. Atomic Energy Commission, 476 F.2d 924, 926 (D.C. Cir. 1973).

As the petitioner in Brooks was entitled to a hearing to challenge the asserted "good cause" for the amendment to a construction permit, so too Petitioners here maintain a statutory right to a hearing on the issue of "good cause." If TUEC cannot establish "good cause," then, pursuant to 10 C.F.R. § 50.55(b), it must forfeit its right to convert the construction permit to an operating license.

As the Brooks Court determined, the underlying "validity" of a construction permit remains "subject to the outcome" of the hearing on the issue of "good cause" for the delay in construction. Brooks, supra, at p. 928. Because the it is the underlying validity of TUEC's Unit 2 construction permit which is challenged, the instant matter is not moot. To the contrary, the Commission should have prohibited TUEC from completing construction on Unit 2 once Petitioners' filed a timely request for hearing.

2. The Commission Improperly Allowed TUEC to Continue Constructing Unit 2 and the Commission is Prohibited from Granting a Full Power License until such Time as Petitioners Exhaust their Right to a Hearing

The underlying facts of the instant case are that on July 27, 1992, Petitioners filed a timely request for a hearing on the issue of whether TUEC can establish good cause for the delay in construction of Unit 2. After Petitioners sought a hearing, NRC Staff, on July 28, 1992, determined that TUEC had "good cause" for the delay in construction and granted TUEC's request for an

extension of the construction completion date of Unit 2. The apparent basis for Staff's action was a no significant environmental impact finding Staff issued on June 23, 1992.

This procedural history presents two significant questions of law. First, whether Staff's "no significant hazards" determination provides sufficient justification for the granting of the amendment to the construction permit when a timely request for a hearing challenging "good cause" is pending with the Commission. Second, whether Petitioners remain entitled to a hearing on the issue of "good cause" before TUEC can receive a full power license. As demonstrated below, once Petitioners filed a timely request for a hearing, the AEA prohibits the granting of the amendment request regardless of a no significant hazards determination, and the amendment may not be acted upon by the Commission until Petitioners' right to a hearing is exhausted.

In the Brooks case, the Court considered whether, when enacting §189(a)(1), Congress intended to "dispense with hearings in construction permit amendment proceedings" where the Commission issues a "no significant hazards" determination. Brooks, supra, at p. 926. The Brooks Court held that "the legislative history of the 1962 amendments to §189(a)(1) indicates that a "no significant hazards" determination does not control whether a party is entitled to a hearing on a request to amend a construction permit. Rather, once an interested party makes a timely "request for a hearing," that party is entitled

to a hearing irrespective of whether a "no significant hazards" determination by the Commission has been issued. Brooks, supra, at 927.²

More importantly, the Brooks Court determined that "[t]he continuing validity of the amendment of the construction permit" was "subject to the outcome of a hearing on this issue." Id., at p. 928.

As such, the Commission improperly granted TUEC's construction permit amendment without deciding the issue of whether Petitioners were entitled to a hearing.³

² The Brooks holding was reaffirmed in San Luis Obispo Mothers for Peace v. N.R.C., 751 F.2d 1287, 1314 (D.C. Cir. 1984).

³ The holding in Brooks is further supported by the reasoning articulated in Sholly v. NRC, 651 F.2d 780, 787 (D.C. Cir. 1980), rehearing en banc denied, 651 F.2d 792 (1981), cert. granted, 451 U.S. 1016 (1981), vacated and remanded, 459 U.S. 1194, vacated and remanded as moot, 706 F.2d 1229 (D.C. Cir. 1983).

In Sholly, the Court determined that under the pre-amended Section 189(a) provision, the NRC could not make an operating license amendment effective where there was a hearing request pending regardless of a no significance hazards determination. The Sholly case was vacated as moot in response to the "Sholly amendment" to Section 189(a), which authorized the Commission to make an amendment to an operating licenses "immediately effective" upon a "no significant hazards" determination while at the same time preserving the right to a hearing regardless of whether the issue had essentially been rendered moot. See Section 189(a)(2)(A). Nonetheless, Congress continued to exempt construction permit amendment proceedings from the post-implementation hearing process governing operating license proceedings. Indeed, there is nothing in the legislative history to suggest that Congress intended to allow the Commission to make a construction permits amendment immediately effective until after the hearing process is complete. But, even if the Commission construed the "Sholly Amendment" to pertain to construction permit amendment proceedings, the Commission could not dismiss the instant case as moot because the legislative

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In sum, TUEC's ability to obtain an operating license for Unit 2 requires that the construction permit for that unit may legally be converted in accordance with to 10 C.F.R. §§ 50.23, 50.56 and 50.57. Because Petitioners have challenged the underlying validity of the construction permit, and pursuant to 10 C.F.R. §50.55(b), assert that TUEC is required to forfeit all rights derived from its construction permit, it would be an abuse of discretion and a denial of Petitioners' due process rights for the Commission to dismiss the instant matter as moot.

B. The Reasoning Articulated in Sholly v. NRC Controls the Issue of Mootness.

In Sholly v. NRC, 651 F.2d 780 (D.C. Cir. 1980), the Court was faced with the situation where the Commission's granting of an amendment foreclosed a petitioner's right to a hearing. Although the Sholly decision was vacated in response to Congress' amendment to the AEA, the reasoning of Sholly with respect to the issue of mootness controls here. As the Sholly Court determined, the Commission's action of making an amendment to a license effective immediately will often deny a petitioner judicial review of the Commission's action. The Sholly Court noted that it is unreasonable for the Government to take the position that,

³(...continued)
history governing the Sholly Amendment makes clear that "Congress intended that hearings be held if properly requested, even after irreversible actions had been taken upon a finding of no significant hazards consideration." Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Unit 1) LBP 84-23, 19 NRC 1412 (1984). Thus, if the Sholly Amendment related to construction permit amendment proceedings, then, under no circumstance, could the instant proceedings be construed as moot.

in order to seek judicial review of a license amendment, a petition must race to the courthouse before the NRC takes irreversible action. Sholly, at p. 784, fn.14. The Court concluded that "because a petitioner will not receive complete judicial review of a claim that very well may be meritorious, the claim could still evade review. Id. As in Sholly, the issue at stake is "whether the NRC will continue its policy of making immediately effective license amendment without holding a hearing, even though petitioners request one, whenever the NRC finds that the amendment involves 'no significant hazards consideration,'" and as such, the conditions for avoiding dismissal on grounds of mootness "are met." Id., at p. 785.

C. The Underlying Reason Petitioners Seek to Challenge TUEC's Good Cause for the Delay in Construction Demonstrate that the Instant Case is Not Moot.

The essence of the instant case boils down to a legal question, whether Petitioners have sufficiently pled facts to support the admission of a contention in the construction permit amendment proceeding. The contention Petitioners seek to admit is whether:

The delay of construction of Unit 2 was caused by Applicant's intentional conduct, which had no valid purpose and was the result of corporate policies which have not been discarded or repudiated by Applicant.

To demonstrate a sufficient basis for the admission of this contention, Petitioners, inter alia, documented TUEC's practice of paying "hush money" to third parties in order to secret information from the Commission and Petitioners and documented that TUEC had orchestrated and carried out a plan to secret from

an ASLB all information obtained by its former minority owners which demonstrated that TUEC repeatedly misled the ASLB and engaged in improper conduct that resulted in the delay in construction of the entire CPSES.

All said and done, the allegations translate into a direct challenge of TUEC character, competence, integrity and commitment to licensing requirements. In this respect, Petitioners assert that TUEC did and does not have the requisite character and competence to construction Unit 2 and that as a result of this deficiency, it was unable to complete construction in accordance with the terms of its construction permit, and that because TUEC still suffers from this deficiency, it cannot establish good cause to amend its construction permit completion date.

10 C.F.R. §50.57(1) requires that before a construction permit may be converted, TUEC must demonstrate that it completed construction in accordance with the provisions contained in the AEA and in accordance with the rules and regulations of the Commission.⁴ If, as Petitioners contend, TUEC does not

⁴ In order to convert the construction permit, TUEC is legally required to have the requisite character and competence to operate a nuclear power plant. Petitioners' challenge to TUEC's character and competence is a legal impediment to the Commission's ability to convert the operating license. The Commission has addressed the issue of character and competence in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1136-37 (1985); Houston Lighting and Power (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 291 (1980). In South Texas, 12 NRC 291, the Commission stated:

In large part, decisions about licenses are predictive in nature, and the Commission

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currently have the character, competence, integrity, and ability to operate Unit 2, that defect could disqualify TUEC from converting its construction permit to a full power license.

Because the underlying claim in the instant case is determinative on TUEC's ability to convert its construction permit, the instant matter is anything but moot. The Commission must consider Petitioners right to a hearing before it may grant TUEC a full power license.

Moreover, the concept of due process makes it inconsistent for TUEC and NRC Staff to reach a final factual determination on the issue of "good cause" for the delay in construction without affording Petitioners a right to a hearing on this issue. Indeed, Petitioner's appeal has been pending since December of 1992. The Commission cannot close its eyes to the issues raised by Petitioners and take unilateral action, the consequence of which will fundamentally deny Petitioners' statutory right to a hearing.

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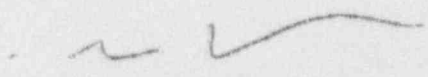
cannot ignore abdication of knowledge by a license applicant when it is called upon to decide if a license for a nuclear facility should be granted.

We believe that the above issues relating to technical competence and to character permeate the pleadings filed by Citizens. They do deserve a full adjudicatory hearing, as they will no doubt get in the operating license proceedings, and they do deserve expeditious treatment because they could prove disqualifying.

Conclusion

For the reasons set forth above, the instant matter is not moot and the Commission should expeditiously render a decision on the merits of this proceeding.

Respectfully submitted,



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Dated: March 12, 1993

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING APPEAL BOARD

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In the Matter of)	
)	Docket No. 50-446-CPA
TEXAS UTILITIES ELECTRIC COMPANY,)	ASLBP NO. 92-668-01-CPA
)	(Construction Permit
(Comanche Peak Steam Electric)	Amendment)
Station, Unit 2))	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of PETITIONERS' RESPONSE TO THE COMMISSION'S ORDER DATED MARCH 5, 1993 was served upon the following persons by deposit in the United States mail (and also as indicated below), postage prepaid and properly addressed, on the date shown below:

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Dated: March 12, 1993

By:


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*Also by Facsimile