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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

93 APR -1 P3:18

BEFORE THE COMMISSION

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)

PETITIONERS' MOTION TO STAY ISSUANCE OF FULL POWER LICENSE  
AND TO STAY MEMORANDUM AND ORDER CLI-93-10  
PENDING REVIEW OF CLI-93-10 IN THE U.S. COURT OF APPEALS

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.788 and Federal Rule of Appellate Procedure 18, Petitioners B. Irene Orr and D. I Orr, hereby seek a stay in further construction, testing and the issuance of a full power license for Unit 2 of the Comanche Peak Steam Electric Station ("CPSES").

II. THE COMMISSION SHOULD STAY CLI-93-10 BECAUSE THE DECISION IS  
NOT IN ACCORDANCE WITH LAW

On March 31, 1993 petitioners obtained, through the mail, a copy of CLI-93-10, issued on March 30, 1993.<sup>1</sup> In this decision the NRC ruled that petitioners intervention petition in the CPA hearing was moot. The Commission based this ruling on the ground that the construction permit "is no longer of legal interest now

<sup>1</sup> It has been the recent practice of the Commission to serve copies of orders relating to the issuance of an operating license for the CPSES Unit 2 via facsimile. Nonetheless, it appears that CLI-93-10 was not served via facsimile upon Petitioners' counsel.

that TU lawfully completed construction under the permit..." M&O p. 19.

This finding of the Commission begs the critical contention of the CPA hearing. Petitioners' contention in the CPA hearing was based upon the allegation that TUEC had failed to construction Comanche Peak Unit 2 in accordance with NRC regulations and that the privileges associated with construction must be forfeited by TUEC until such time as TUEC can demonstrate "good cause" for the delay. The Commission erroneously assumes that petitioners somehow lost their right to contest whether TUEC "lawfully complete construction." The Commission erred as Petitioners continue to maintain a right to a hearing and that, pursuant to Section 189(a) of the Atomic Energy Act ("AEA"), Petitioners are entitled to a hearing on the issue of TUEC's character, competence and integrity before the Commission can, pursuant to 10 C.F.R. §50.23, lawfully convert the construction permit into a full power license.

The NRC, in CLI-93-10, incorrectly characterizes the relationship between the construction permit and the operating license. The NRC cannot grant TUEC an operating license (OL) for Unit 2 unless it converts the construction permit into the OL in accordance with 10 C.F.R. § 50.23. The NRC cannot convert the construction permit into the OL until the NRC determines that the "construction" of Unit 2 occurred in "compliance with the terms and conditions of the construction permit." 10 C.F.R. § 50.56. A factual determination on this issue demands that the

construction was completed by a date certain. Without the amendment, TUEC did not complete construction within the dates specified in the pre-amended construction permit, and the Commission cannot render a determination that TUEC complied with the "terms and conditions of the construction permit" until it is determined whether TUEC had "good cause" to amend the dates specified in the Construction Permit. The remaining obstacle standing in the way of the conversion is Petitioners' right to a hearing on the issue of TUEC's character, integrity and competence. Until such time as Petitioners are afforded the right to a hearing, the Commission is barred, pursuant to Section 189(a) of the AEA, from reaching the ultimate conclusion that TUEC has complied with the terms of the construction permit.<sup>2</sup>

### III. PETITIONERS MEET THE REQUIREMENTS FOR A STAY

10 C.F.R. §2.788 requires Petitioners to set forth the grounds for the stay, which should address "(1) [w]hether the moving party has made a strong showing that it is likely to

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<sup>2</sup> In addition to failing to adhere to the time requirement set out in the pre-amended construction permit, Petitioners' have also alleged that TUEC did not comply with the terms of their construction permit because they engaged in intentional misconduct and constructed Unit 2 "in violation of NRC requirements." See, e.g. Supplement to Petition to Intervene, p. 2 (October 5, 1992). If this contention is true, TUEC did not comply with the requirements of 10 C.F.R. § 50.56 which required that TUEC comply with the "terms and conditions of the construction permit." Consequently, the NRC cannot issue the OL until a determination is made that TUEC complied with the "terms and conditions of the construction permit." Petitioners' are entitled to a hearing on this issue prior to the Commission's granting an OL. For this reason, a stay should be granted and the Commission should grant all of the relief petitioners' have previously requested.

prevail on the merits; (2) [w]hether the party will be irreparably injured unless the stay is granted; (3) [w]hether the granting of a stay would harm other parties; and (4) where the public interest lies." 10 C.F.R. §2.788(e)(1)-(4).

A. Grounds for requesting the stay.

Petitioners seek a stay on the following grounds: 1) pursuant to section 189(a) of the AEA, the conversion of the construction permit would constitute ultra vires action on the part of the Commission until such time as Petitioners' right to a hearing on the character and competence contention is exhausted; 2) Petitioners' claim that TUEC does not currently possess the necessary character and competence to convert the construction permit into an operating license requires the Commission to resolve the issued raised in the instant proceeding before the Commission because, if Petitioners are correct, then TUEC must forfeit its right to convert the construction permit and until such time as a meaningful remedy may be fashioned; 3) TUEC's laps of character has resulted in unsafe operating conditions and it would be improper to convert the construction permit until such time as the underlying and root cause for the delay in construction is remedied.

B. Petitioners are likely to prevail on the merits.

First, Petitioners have a legal right to a hearing on whether TUEC constructed Unit 2 "lawfully." Until such time as Petitioners exhaust their right to a hearing, the Commission's

action of converting the construction permit would be ultra vires.<sup>3</sup>

Based on Petitioners' legal challenge to the issuance of the full power license, the Commission must grant a stay until such time as it determines whether Petitioners were improperly denied a right to a hearing on the issue of "good cause" for the delay in construction.<sup>4</sup>

Second, Petitioners are entitled to a stay because it is inherently unjust for the Commission to delay ruling on Petitioners' right to a hearing while authorizing TUEC to continue to construct and operate Unit 2.

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<sup>3</sup> In support of this contention, Petitioners herein rely on, and incorporate by reference, the briefs Petitioners have filed with the Commission, including the March 12, 1993 brief entitled "Petitioners' Response to the Commission's Order Dated March 5, 1993."

<sup>4</sup> The assertion that the issuance of a low power license negates Petitioners' right to a hearing is completely misplaced. As the Commission pointed out in CLI-93-02, "the risk of low power operation are minimal." CLI-93-02 at p. 5, Fn. 3. Because, as the Court of Appeals for the District of Columbia Circuit has found, it "would serve no practical purpose" for a petitioner to seek relief from the harm stemming from the Commission's denial of a right to a hearing in matters concerning the issuance of a "low power" license. See San Louis Obispo Mothers for Peach v. NRC, 751 F.2d 1287, 1317 (D.C. Cir. 1984). As such, Petitioners' request for a stay is ripe. Moreover, Petitioners relied upon the fact that the low power license was, at the insistence of the Commission, issued "without prejudice to future consideration by the Commission with respect to operation at power levels in excess of 5 percent." The fact that the Commission effectively counseled Petitioners against pursuing their request for a stay by assuring Petitioners that the risk was minimal, together with the incorporation of explicit language in the license indicated that there would be no "prejudice" stemming from the issuance of the low power license, leads to the conclusion that Petitioners' request for a stay remains ripe.

Third, new factual evidence demonstrates that TUEC's past cover-up of safety related information imperils the health and safety of the public. A review of the briefs Petitioners have filed with the Commission in the instant case allege that TUEC entered into money-for-silence contractual agreements to conceal safety-significant information (and information concerning the character and competence of TUEC) from the Commission. The evidence Petitioners present is irrefutable. Specifically, Petitioners have documented that: TUEC had first hand knowledge that they were required, by way of a standing order, to turn over all newly obtained information that came into the hands of TUEC which pertained to the then on-going operating licensing hearings for CPSES Units 1 and 2 operating license and the Unit 1 construction permit amendment proceeding. See Exhibits 8 & 9 to October 5, 1992 Supplement to Petition. Additionally, Petitioners have presented irrefutable evidence that TUEC entered into restrictive settlement agreements with its co-owners, the terms of which required the co-owners to turn over evidence documenting a pattern and practice employed by TUEC to intentionally submit material false information to the ASLB, as well as a pattern of threatening its former co-owners.<sup>5</sup> To

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<sup>5</sup> Indeed, Petitioners rely on a legal pleading filed by one of the co-owners before entering into an illegal money-for-silence restrictive settlement. Therein, it asserts, inter alia, that the minority owner had amassed documentation demonstrating that: 1) TUEC failed to disclose material information about the adequacy of the design of the CPSES to the NRC; 2) TUEC misrepresented and failed to disclose information about inadequate construction practices employed during the

(continued...)

date the illegally secreted documentation has never seen the light of day,<sup>6</sup> and NRC Staff has yet to require TUEC to release this information.<sup>7</sup>

<sup>5</sup>(...continued)

construction of the CPSES; 3) TUEC misrepresented and failed to disclose violations of NRC requirements to the NRC; 4) TUEC failed to disclose information documenting incompetence on the part of TUEC management, TUEC's contractors, subcontractors and the architect/engineers responsible for the design and construction of the CPSES; 5) TUEC failed to disclose material information necessary to correct inaccurate statements TUEC made to the NRC. See Exhibit 1 to October 5, 1992 Supplement to Petition.

<sup>6</sup> It appears that TUEC's counsel engaged in unethical conduct through the intentional and blatant disregard of a standing ASLB order. Secreting information from an ASLB knowing that to do so would directly violate a standing judicial order is outrageous conduct. The Commission cannot ignore blatant unethical conduct on the part of TUEC's counsel. Indeed, Petitioners note that the attorney responsible for the drafting of the minority owner agreements, Mr. Robert Wooldridge, continues to appear as counsel to TUEC in the instant proceeding and, upon information and belief, is TUEC chief counsel on licensing matters.

<sup>7</sup> In CLI-93-02, the Commission acknowledged that the settlement agreements could have resulted in the secreting of safety-related information from NRC Staff, but asserted that "there is no showing that any actions that the NRC directed TU Electric to take [with respect to the release of the secreted documentation] will have any impact on low power operation." Id., at p. 4. The Commission has identified a major problem. The fact that NRC Staff has not taken any action that could impact on TUEC's ability to operate Unit 2 is outrageous. NRC Staff cannot take an ostrich approach to the licensing of a nuclear power plant. The Commission must grant Petitioners' request for a stay until the illegally secreted documents are publicly released and reviewed. To do otherwise ratifies illegal and unethical conduct taken by TUEC and its counsel.

Petitioners have presented sufficient evidence to shift the burden to TUEC to demonstrate that it did not secret safety related information from the Commission. As such, Petitioners are entitled to an adverse inference that the documentation TUEC intentionally and illegally secreted from the ASLB includes information demonstrating that TUEC is aware of the existence of uncorrected safety problems incorporated into the design and  
(continued...)

In addition to the above, Petitioners' counsel has uncovered information indicating that TUEC managed to secret material information from the ASLB through the practice of paying "hush money" -- a practice which almost resulted in a catastrophic accident at the CPSES in 1992. In this respect, on the evening of March 14, 1993, Petitioners' counsel spoke with a former inspector employed at the CPSES, Mr. Ronald J. Jones. During the course of this conversation, Mr. Jones recounted events in 1992 which almost resulted in a serious accident at the CPSES. He further asserted that the underlying deficiency resulting in the near accident had initially been identified in a non-conformance report he drafted while at the CPSES site. According to Mr. Jones, the non-conformance report was given to his then legal counsel, Billie P. Garde, who had assured Mr. Jones that this and some nearly 300 other such non-conformance reports that were not reported to the NRC by TUEC would be released during the course of the ASLB proceedings. Mr. Jones alleges that TUEC, through the payment of a large sum of money to other clients represented by Garde (including a former citizen intervenor group, Citizens

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<sup>7</sup>(...continued)

construction of the CPSES, and an adverse inference that the withheld documentation constitutes sufficient support to admit the underlying contention Petitioners seek admission in the instant matter. It is simply inconceivable to Petitioners that the Commission would grant a full power license without addressing and correcting blatant illegal and unethical conduct engaged in by TUEC's counsel, particularly in light of the fact that the secreted information reflects on the licensee's character and competence and may pose a significant threat to the health and safety of the public.

Associated for Sound Energy, or "CASE") has resulted in the secreting of this information from the Commission.

According to Mr. Jones's statement,<sup>8</sup> he was employed at the CPSES between 1983 and 1984 as a Nuclear Electrical Inspector. Statement of Ronald J. Jones ("SRJ") at ¶ 1. As an inspector, Mr. Jones identified over 300 non-conforming conditions, *id.*, at ¶ 2, that were never corrected by TUEC and, to this day, present a significant risk to the public's health and safety.

Mr. Jones specifically alleges that Ms. Billie P. Garde was given this and numerous other non-conformance reports prepared by Mr. Jones and that she personally advised Mr. Jones that when this information was presented to the ASLB, "TU would never receive their operating license." SRJ at ¶ 5.<sup>9</sup> Nonetheless, before Mr. Jones' information was presented to the ASLB, TUEC's counsel, Mr. Robert Wooldridge, met with Ms. Garde to negotiate an agreement to disband the licensing proceedings before Mr. Jones' information could be presented to the ASLB. Notably, these negotiations overlap in time with TUEC's negotiating and secreting information from the ASLB that TUEC received under the terms of the restrictive settlement agreements TUEC forced upon

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<sup>8</sup> A copy of Mr. Jones' hand-written statement is attached as Exhibit 1.

<sup>9</sup> As the Commission is aware, Petitioners contend that the July 13, 1988 settlement between a citizens intervenor was based on an understanding that TUEC was buying silence and that, as such, Ms. Garde would not volunteer information from Mr. Jones and others that related to the safety of the CPSES.

its co-owners and which are the subject of dispute in Petitioners' intervention in the CPA proceeding.

While Garde (and TUEC's counsel Robert Wooldridge) were reaching agreements with TUEC's counsel to pay over \$10,000,000 to her various clients, Ms. Garde actively misled Mr. Jones and other whistleblowers to believe that their safety concerns would be "put before the licensing board to be corrected before the operating license would be issued." SRJ at ¶ 6. The fact remains that once TUEC had arranged to pay some \$10,000,000 to Garde's clients, none of Mr. Jones' allegations, to this date, have been identified to the NRC. SRJ at ¶ 7.

Mr. Jones' allegations indicate that TUEC has managed to secret through the payment of hush money significant safety-related information. The underlying allegation of Petitioners is that TUEC's lack of character and competence resulted in delays in construction, and that this same lack of character has not been corrected to date. Because this lack of character has direct safety significance, the Commission cannot allow TUEC to convert its construction permit to an operating license until such time as Petitioners are granted the right to a hearing on this issue.

C. Petitioners will be irreparably injured

For the reasons set forth above, Petitioners will be irreparably injured if TUEC is allowed to convert its construction permit to an operating license. In matters pertaining to the licensing of a nuclear power plant, irreparable

injury includes increased risk to the health and safety of Petitioners and the public. In light of TUEC's history of secreting safety information from the ASLB and NRC through contractual agreements with witnesses and other parties, and in light of the allegation from Mr. Jones that some 300 non-conformance reports were secreted from the ASLB and that the deficiencies identified therein have never been corrected, Petitioners will suffer irreparable harm if an operating license is granted.

Petitioners will also be irreparably injured if an operating license is issued before their petition to intervene in the CPA proceeding is fully litigated and resolved by the Commission. The issuance of a full power license prior to resolution of Petitioners' CPA appeal, which has been pending before the Commission since December of 1992, will deprive Petitioners of their right to due process and, by so doing, turning the public's right to a hearing pursuant to section 189(a) of the AEA into a charade. Such an undertaking by the Commission would be illegal. Petitioners will be irreparably harmed by the granting of a full power operating license if, as alleged, TUEC currently lacks the requisite character, integrity and competence necessary to convert the construction permit into an operating license.

D. The granting of a stay does not constitute a cognizable harm to TUEC

Petitioners' request for a stay is based on their legal right to a hearing. Petitioners' due process does not constitute a cognizable harm to TUEC. Indeed, at the time TUEC sought a

license to operate a nuclear power facility it fully realized that interested persons are entitled to hearings on matters pertaining to TUEC's seeking an amendment of its construction permit. TUEC cannot claim that Petitioners' right to a hearing constitutes a cognizable harm.

Moreover, the licensee presumably has an interest, if not a duty, to make sure that its nuclear facility is constructed in compliance with NRC regulations. Rather than a cognizable harm, the requested stay, if granted, would constitute a benefit to TUEC by affording it an opportunity to assure the NRC and the public that it possesses the character and competence to construct and operate the CPSES.

E. The public interest lies in the Granting of a Stay

The public's interest is served by ensuring that the hearing rights of citizen intervenors are scrupulously maintained. Moreover, because the issues related to TUEC's character and competence include allegations that TUEC has intentionally constructed Unit 2 in violation of NRC requirements and continues to engage in a pattern of covering up safety significant information which poses a serious risk to the health and safety of the public, it is in the public's interest to grant a stay until such time as the hearing process is concluded.

TUEC will not be prejudiced by the delay which might result in permitting Petitioners to litigate their contentions in the CPA proceeding (i.e., that the licensee lacks the character and competence to construct CPSES Unit 2). The public's interest in

assuring that CPSES is safe outweighs TUEC's economic interest that would be derived from the licensing and operation of Unit 2. The Public interest overwhelmingly weighs in favor of granting a stay to ensure that Petitioners are not deprived of their right to due process and that the public's health and safety is not placed at risk by TUEC's insidious practice of paying hush money to suppress safety concerns at the CPSES.

Conclusion

For the reasons set forth above, the Commission should grant a stay of the Unit 2 full power license.

Respectfully submitted,



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Dated: April 1, 1993

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING APPEAL BOARD '93 APR -1 P3:18

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 the attached pleading 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:

Office of Commission Appellate Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

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Dated: April 1, 1993

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Michael D. Kohn

\*Also by Facsimile