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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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USNRC

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OFFICE OF SECRETARY
DOCKETING & SERVICE
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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

TU ELECTRIC'S ANSWER TO THE PETITION
TO INTERVENE AND MOTION AND SUPPLEMENTAL MOTION
TO REOPEN BY MICKY DOW AND SANDRA LONG DOW AND
TU ELECTRIC'S REQUEST FOR ADMONITION OF THE DOWS

On February 20, 1992, Mr. Micky Dow and Mrs. Sandra Long Dow (the "Dows") filed a "Petition For Leave to Intervene" ("Petition") in the Comanche Peak Steam Electric Station ("CPSES") operating license proceedings. On February 21, 1992, the Dows filed a "Motion to Reopen the Record" ("Motion"). In an Order dated February 28, 1992, the Commission stated that the Licensee should file a consolidated response to the Petition and Motion on March 16, 1992. On March 13, 1992, the Dows filed a "Supplement to Motion to Reopen the Record" ("Supplemental Motion"). Texas Utilities Electric Company ("Licensee" or "TU Electric") hereby files its response in opposition to the Dows' untimely petition to intervene, the motion to reopen, and the supplemental motion to reopen and requests that they be summarily denied. The Licensee also requests that the Commission issue an admonition to the Dows.

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The Dows' Petition, Motion, and Supplemental Motion represent their latest attempt to circumvent and undermine the Licensing Board's dismissal of the licensing proceedings in 1988. On November 20, 1991, the Dows filed a patently deficient motion to reopen the Comanche Peak licensing proceedings. Following extensive responses by TU Electric and the NRC staff, the Commission issued a Memorandum and Order (CLI-92-01) on January 17, 1992 which denied the Dows' motion because, inter alia, the Dows did not address the Commission's requirements in 10 C.F.R. § 2.714 and were not parties to the licensing proceedings.

The Dows' most recent petition is 13 years out of time and was filed more than two years after issuance of the low power operating license for Comanche Peak Unit 1. Through this patently untimely and meritless pleading and the accompanying motion and supplemental motion to reopen, the Dows now request the NRC to reinstitute adjudicatory proceedings and permit them to participate in those proceedings as a party. Moreover, the Dows make this extraordinary request without even addressing some of the requirements set forth in 10 C.F.R. § 2.714 governing petitions to intervene. Therefore, as discussed below, the Commission should summarily dismiss the Dows' petition to intervene and their accompanying motion and supplemental motion to reopen. Additionally, given their consistent failure to minimally observe the Commission's requirements, the Commission should admonish the Dows that the Commission will not entertain future pleadings that reflect similar failures.

ARGUMENT

I.

The Dows' Request For Leave to Intervene Fails to Satisfy The Requirements of 10 C.F.R. § 2.714 And Should Be Denied

A. The Dows Do Not Proffer One Valid Contention

A petitioner must advance at least one valid contention to be permitted to intervene in a proceeding. See Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424 (1973); 10 C.F.R. § 2.714(a)(2) and (b) (1991). The Dows' petition does not contain any proposed contentions. For this reason alone, the Dows should not be allowed to intervene.

B. The Dows Do Not Have Standing To Intervene

Section 2.714(a)(1) of the NRC's regulations states that "any person whose interest may be affected by a proceeding . . . shall file a written petition for leave to intervene." The Commission normally applies judicial concepts of standing in determining whether a party has sufficient interest in the proceedings. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-599, 10 NRC 162 (1979), vacated on other grounds, CLI-80-34, 12 NRC 407 (1980). Such standards require a showing that: (1) the action being challenged could cause injury-in-fact to the person seeking to establish standing; and (2) such injury is arguably within the zone of interests protected by the statute governing the proceedings. 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 of 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).

The Dows fail to demonstrate how their interest may be adversely affected by these proceedings and provide no information regarding their residence. The Dows reside in Pennsylvania, which is hundreds of miles from Comanche Peak. Clearly, they are not within the geographical zone that would be affected by an accidental release of radiation from CPSES. See e.g., Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 443 (1979). Indeed, the Dows admit that "petitioners' interest in this proceeding is not personal in any manner." (Petition at 4). 1/

1/ Furthermore, to the extent that the Dows are requesting intervention on behalf of the Disposable Workers of Comanche Peak Steam Electric Station ("DWCPSES"), they have not addressed the requirements for organizational standing set forth in Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-94 (1979). In particular, the Dows' Petition does not allege any organizational injury nor identify any members of DWCPSES who have authorized DWCPSES to represent them in this proceeding and who have individual standing. (See Petition at 4).

C. The Dows' Request For Leave To Intervene Fails To Satisfy The Requirements For Late Filed Interventions.

The Dows have not and cannot make the requisite showing that they 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).

Although all of the factors 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, 274-7. (1975); Philadelphia Electric Co. (Limerick

Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 279
(1986). 2/

1. The Dows Have Not And Cannot Show Good Cause

In this case, the Dows fail to meet their burden of showing good cause under 10 C.F.R. § 2.714(a)(1)(i). The Dows filed their Petition 13 years after the notice of application for the operating licenses was issued (44 Fed. Reg. 6995 (Feb. 5, 1979)), and two years after the operating license for CPSES Unit 1 was issued. The Dows' excuse for failing to intervene in a timely fashion is that they only recently learned of allegations which, if brought to the attention of the original Licensing Board, would purportedly have prevented licensing. However, the Petition itself (at 1-2) does not specifically identify what, if any, of the Dows' information is new. Furthermore, most of the Dows' allegations appear to relate to design and construction activities that took place about 1984, and the few remainder allegations appear to relate to matters that are one year old, if

2/ 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 the Dows do not have any personal interest in this proceeding, their interests will be adequately protected by a § 2.206 petition.

not older. (See Section II.A, *infra*). Thus, the Dows are not raising their allegations in a timely manner. 3/

The Dows' tactics are also at odds with the concepts of fair and orderly conduct of administrative proceedings. As the Court of Appeals for the District of Columbia has stated in a case affirming a Commission order denying a late intervention:

[A] person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then 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.

Easton Utilities Commission v. AEC, 424 F.2d 847, 851 (D.C. Cir. 1970) (quoting Red River Broadcasting Co. v. FCC, 98 F.2d 282, 286-87, cert. denied, 305 U.S. 625 (1938)). The court further stated:

We do not find in statute or case law any ground for accepting the premise that proceedings before administrative agencies are to be constituted as endurance contests modeled after relay races in which the baton of proceeding is passed on from one legally

3/ The Dows also claim that they "were not involved in the issue when it first came to light, and/or when the original licensing hearings were in session." (Petition at 1-2). However, Boards have consistently held that previously available information newly acquired by a petitioner and newly-acquired organizational existence do not constitute good cause for delay in seeking intervention. See, e.g., Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 79-81 (1990), aff'd, ALAB-950, 33 NRC 492 (1991). See also Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), LBP-79-16, 9 NRC 711, 714 (1979) (preoccupation with other matters is not good cause for late filing).

exhausted contestant to a newly arriving legal stranger.

424 F.2d at 852.

The Commission need not look any further than the CPSES proceedings for a rationale for rejecting the Dows' untimely Petition. Specifically, the U.S. Court of Appeals upheld the Commission's rejection of the Citizens for Fair Utility Regulation's ("CFUR") untimely petition to intervene. After noting that CFUR's petition was filed nine years out-of-time, six years after CFUR's voluntary withdrawal, and a month after the hearing had been dismissed, the Court concurred with the Commission's denial of CFUR's late petition. See Citizens For Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir.), cert. denied, 111 S.Ct. 246 (1990).

These principles are clearly applicable to the Dows' Petition, which should accordingly be rejected. The Dows should not be allowed to intervene into this proceeding at such a late date. To allow the Dows to intervene in these proceedings after nine years of litigation, a settlement between the parties, and two years of operation of CPSES Unit 1 would make a mockery of the administrative process and would encourage potential intervenors to sit back and wait until a plant is operating to intervene. If for no other reason, the Dows' Petition should be denied in order to preserve the integrity of the adjudicatory process.

2. The Dows Will Not Contribute To Developing
A Sound Record

Under the third factor, the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record (§ 2.714(a)(1)(iii)), the Dows were required to "set out with as much particularity as possible the precise issues [they plan] to cover, identify [their] 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 381, 399 (1983). 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 1167, 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 recently held that in order to prevail on this factor, the moving party must "demonstrate that it has special expertise on the subject to which it seeks to raise." Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 261 (1986).

In this case, the Dows make no serious attempt to explain the matters they propose to raise, or to summarize the evidence their witnesses might give. Instead, the Dows raise several vague allegations about "material false statements made by the applicants," and unspecified evidence that "was deliberately kept from the Board." (Petition at 2). The Dows claim that their proposed witnesses know of design and construction issues related to the 1984 time frame. However, the Dows never even refer to TU Electric's subsequent Corrective Action Program ("CAP"), which included a comprehensive validation of design and construction at CPSES. 4/ Moreover, the Dows fail to indicate why any of these matters raise a serious safety or environmental concern. Based on the Dows' vague pleading, and their lack of appreciation of the corrective action programs at CPSES, it is clear that the Dows would not contribute to the development of a record on the matters that they seek 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).

Furthermore, as discussed in Section III below, the Dows have a pattern of filing frivolous, scurrilous, and

4/ One of the attachments to the Petition, "Affidavit of Thayron E. Hatley, Jr.," pertains to an enforcement action related to operation of Unit 1, and therefore is outside of the scope of this proceeding. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-940, 32 NRC 225, 238 (1990).

materially deficient pleadings. Therefore, not only would the Dows not contribute to the proceedings, any participation by them would likely be disruptive.

3. The Dows' Intervention will Broaden the Issues and Delay the Proceedings

The Dows appear to concede that their participation will broaden the issues. (Petition at 3). 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) (1991). 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). Moreover, 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).

In this case, it can hardly be doubted that permitting the Dows to intervene 13 years out of time and after the

Licensing Board dismissed the proceeding would result in substantial delay and a broadening of the issues.

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-80-34, 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.

10 NRC at 172-73 (footnote omitted).

Similarly here, the grant of the Dows' "inexcusably" late Petition will inevitably delay the proceedings and threaten

the "integrity of the entire adjudicatory process." It should be summarily denied.

II.

The Motion To Reopen The Record Does
Not Satisfy The Commission's
Requirements in 10 C.F.R. § 2.734(a)

When a petitioner seeks to intervene in a proceeding in which the record has been closed, it must satisfy both the requirements for a late filed petition as well as that for a motion to reopen the record. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024, 2031 (1982), review declined, ALAB-713, 17 NRC 83, 84 n.1 (1983).

Even if the infirmities indicated above did not exist, the Dows' belated Motion and Supplemental Motion would still not support a decision by the Commission to reopen the record in the Comanche Peak Proceedings. The Commission's regulations state that "[a] motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied":

- (1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
- (2) The motion must address a significant safety or environmental issue.

- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

10 C.F.R. § 2.734(a)(1991) (emphasis added).

As demonstrated below, the Dows' motion and supplemental motion to reopen do not indicate why any of the materials that they seek to introduce into the record: (1) are timely raised; (2) have safety significance; or (3) would have led the Licensing Board in 1988 to deny the joint motion for dismissal. Therefore, the Motion and Supplemental Motion must be denied for failure to satisfy the requirements of 10 C.F.R. § 2.734(a).

A. The Motion and Supplemental Motion Are Not Timely Filed.

To be timely, the moving party must show that the issue sought to be raised could not have been raised earlier. 5/
Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366, aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), vacated in part on other grounds, 760 F.2d 1320 (1985), aff'd on reh'g en banc, 789 F.2d 26 (1986). Motions to reopen which are based on information which has been available to a party for one year or more are generally rejected by the Board. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit

5/ The Dows' understanding of "timeliness" is flawed. The Dows claim that "this Motion is timely, as it is being filed 24 hours after the Petition for Late Intervention." (Motion at 2). However, this is clearly not the time period in question under 10 C.F.R. § 2.734(a)(1).

No 1), ALAB-815, 22 NRC 198 (1988). An untimely motion to reopen the record will not be granted unless the motion raises an "exceptionally grave" issue rather than just a significant issue. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 76, 78 (1988) (citing 10 C.F.R § 2.734(a)(1)(1988)).

In the instant case, the motion and supplemental motion to reopen have not been timely filed. The Dows themselves admit that their "information, for some part, is quite old. . . ." (Supplemental Motion, at 2). As previously discussed, the Dows' Motion and Supplemental Motion contain allegations (including allegations by Dobie Hatley, Ron Jones, and Charles Atchison, and nine CPSES nonconformance reports ("NCRs")) that primarily relate to design and construction activities that took place about 1984. Such allegations clearly are not timely.

The remainder of the issues raised by the Dows have been on the public record for a year, if not longer. For example:

- ° The Dows allege (Motion at 4) that they are in possession of TU Electric property (i.e., audiotapes) which show violations of NRC regulations. However, these tapes have been in the Dows' possession or known to the Dows for approximately one year.

- ° The Dows allege (Motion at 4) that the fire-watch logs were falsified and covered up. However, the incident occurred more than one year ago and the NRC has been fully aware of the facts regarding these matters. 6/

- ° The Dows allege (Motion at 6 and Supplemental Motion at 2) that there was a conspiracy to preclude submission of evidence in the CPSES OL proceedings, as indicated by the treatment of Joseph Macktal. However, this same claim has been raised on several occasions within the last four years by other persons as a basis for late intervention in the CPSES licensing proceedings. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-42, 28 NRC 605, 612 (1988), aff'd sub nom. Citizen for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1990), cert. denied, 111 S.Ct. 246 (1990). See also Texas Utilities Electric Co. (Comanche Peak Station, Units 1 and 2), CLI-89-6, 29 NRC 348 (1989); Macktal v. NRC, Docket No. 89-1034 (D.C. Cir. June 11, 1990).

- ° The Dows allege (Motion at 7) that there are missing or incorrect labels at CPSES. However, this matter was raised years ago in NRC's Operational Readiness

6/ In any event, this matter is not within the scope of this proceeding. See fn. 4, supra.

Inspection Report 89-200 and is being addressed through TU Electric's labeling program.

- ° The Dows allege (Motion at 4-5 and Supplemental Motion at 3) that there are toxic waste landfills at CPSES. However, the NRC has known about these landfills for years. See DD-91-04, 34 NRC 201 (1991).

In summary, none of the issues identified by the Dows has been raised in a timely manner.

B. The Dows Have Not Raised A Significant Safety or Environmental Concern

The Commission's regulations mandate that a motion to reopen the record raise a serious safety or environmental issue. 10 C.F.R. § 2.734(a)(2) (1991). The Dows' Motion and Supplemental Motion fail to indicate how any of the matters that they propose to introduce could raise a serious safety or environmental concern.

Indeed, most of the Dows' allegations pertain to design and construction activities that occurred around 1984 (e.g., Atchison's documentation of 900 alleged safety concerns (Motion at 4), the errors documented in nine NCRs (Motion at 3 and Supplemental Motion at 4), the alleged falsification of engineering and design changes (Motion at 2-3), and the alleged discovery of wiring violations and drugs (Motion at 3)). These issues ceased to have any importance once TU Electric implemented

its Corrective Action Program, which validated the design and construction at CPSES. 2/ Therefore, these allegations have no present safety significance.

Furthermore, many of the Dows' concerns have already been examined by the NRC and determined not to have any safety significance. For example:

- ° The NRC has considered the Dows' claims regarding the audiotapes (Motion at 5) and has concluded that "there [is] no reasonable basis to believe that [the Dows] are in possession of information indicative of safety concerns regarding the Comanche Peak facility." See Letter from Ivan Selin, NRC Chairman, to Mr. Dow (Nov. 20, 1991); Letter from Robert Martin, NRC Region IV Administrator, to Mr. Dow (Oct. 3, 1991).
- ° With respect to the Dows' claims regarding fire-watches (Motion at 4), the NRC has concluded that TU Electric

2/ With respect to the nine NCRs that were resolved in 1984, the Dows allege that these NCRs were "physically altered" by one of the Dows' proposed witnesses, Dobie Hatley. (Supplemental Motion at 4). Even if true (and the Dows provide no information to support their allegation), the allegation would have no safety significance given the subsequent design and hardware validation programs. Furthermore, as discussed in TU Electric letter TXX-88495 (June 9, 1988), Enclosure at 20-21, TU Electric performed a self-initiated review of NCRs dispositioned prior to December 22, 1986, to ensure that the dispositions are technically adequate and in compliance with licensing commitments.

took appropriate actions with respect to the falsification of fire-watch logs. 8/

- ° With respect to the Dows' allegations on labeling (Motion at 7), the NRC has determined that TU Electric has established an "excellent labeling program." 9/
- ° With respect to the Dows' claims regarding "toxic waste dumps" (Motion at 4-5 and Supplemental Motion at 3), the Commission has determined that the CPSES landfills do not pose a threat to the safety of the plant and do not warrant an environmental impact statement. See DD-91-04, 34 NRC 201 (1991). 10/
- ° Finally, with respect to the Dows' claims that Mr. Macktal and others were precluded from presenting evidence to the Licensing Board (Motion at 6 and

8/ See, e.g., NRC letter to TU Electric dated March 27, 1991, proposing imposition of a \$50,000 civil penalty related to falsification of fire-watch logs, but also finding that "TU Electric, through its pursuit of an identified concern, discovered this situation, promptly informed NRC, thoroughly investigated the matter and took prompt and extensive corrective actions." Additionally, as discussed in fn. 4 supra, this issue is outside of this proceeding.

9/ See NRC Inspection Report 50-445/91-70 (p.4).

10/ The Dows also refer to "off-site waste dumps" that allegedly contain radioactivity. (Motion at 4-5 and Supplemental Motion at 3). However, the Dows never make any connection between the off-site dumps and CPSES, nor do they explain why NRC would have jurisdiction over these dumps in connection with this proceeding.

Supplemental Motion at 2), the Commission has refused to reopen the CPSES hearings for other individuals (including Mr. Macktal) who have made similar claims that there was a conspiracy to preclude submission of evidence in the CPSES OL proceedings. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 612 (1988), aff'd sub nom. Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1990), cert. denied, 111 S. Ct. 246 (1990). See also Texas Utilities Electric Co. (Comanche Peak Station electric Stations, Units 1 and 2), CLI-89-6, 29 NRC 348 (1989). Macktal v. NRC, Docket No. 89-1034 (D.C. Cir. June 11, 1990) (dismissing Macktal's appeal on grounds of mootness).

Finally, the Dows have raised other allegations that have absolutely nothing to do with safety or are not within the jurisdiction of NRC. For example, the Dows allege (Motion at 4) that Marie Yvonne Wilkinson was subject to sexual and racial discrimination. Clearly, such claims are not within the jurisdiction of the NRC.

Consequently, the Dows have failed to meet the second prong of 10 C.F.R. § 2.734 and the Commission should deny their motion and supplemental motion to reopen the record in the Comanche Peak proceedings.

C. The Dows Have Not Demonstrated That The Matters
 Would Have Caused The Board Not To Dismiss The
 Proceedings

In order to reopen the record, the Dows must also demonstrate that "a different result would be or would have been likely had the newly proffered evidence been considered initially." 10 C.F.R. § 2.734(s)(3) (1991). When the motion to reopen the record is not related to a litigated issue, the effect of the proffered evidence cannot be measured against the Board's decision on a particular issue, but must be viewed against the effect on the outcome of the proceeding. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1142 (1983) (citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973)).

The matters that the Dows seek to introduce into the record would not have caused the Board to reject the settlement of the proceedings. As previously discussed, the Dows do not raise any significant safety or environmental concerns. Moreover, many of the Dows' allegations have been submitted to this Commission by the Dows and others in earlier petitions to intervene and motions to reopen. See, e.g., Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605 (1988); CLI-89-06, 29 NRC 348 (1989); CLI-92-01 (Jan. 17, 1992). These allegations were not a sufficient basis for reopening the hearings then, and they are

not a sufficient basis now. Clearly, the Dows' allegations would not have caused the Licensing Board to reach a different result.

III.

The Commission Should Admonish the Dows

10 C.F.R. § 2.708(c) states in pertinent part that:

The signature of a person signing in a representative capacity is a representation that the document has been subscribed in the capacity specified with full authority, that he has read it and knows the contents, that to the best of his knowledge, information and belief the statements made in it are true, and that it is not interposed for delay. If a document is not signed, or is signed with intent to defeat the purpose of this section, it may be stricken.

This section is similar to Rule 11 of the Federal Rules of Civil Procedure ("FRCP"). 11/ While Rule 11 of the FRCP is not

11/ Rule 11 of the Federal Rules of Civil Procedure states in pertinent part that:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . If a pleading, motion or other paper is signed in violation of this Rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including

(continued...)

directly applicable to practice before the Commission, judicial interpretations of Rule 11 should serve as guidance for interpreting § 2.708(c). 12/

Federal caselaw interprets Rule 11 to impose the following affirmative duties on a party who signs a pleading, motion or other document:

(1) that the [party] has conducted a reasonable inquiry into the facts which support the document.

(2) that the [party] has conducted a reasonable inquiry into the law such that the document embodies existing legal principles or a good faith argument "for the extension, modification or reversal of existing law;" and

(3) that the motion is not interposed for purposes of delay, harassment, or increasing costs of litigation.

11/(...continued)

a reasonable attorney's fee.

Fed. R. Civ. P., Rule 11, 28 U.S.C.A.

12/ The NRC has acknowledged that the provisions contained in 10 C.F.R. Part 2 are based on the FRCP. Statement of Considerations, 27 Fed. Reg. 377 (1962). Moreover, the NRC has often relied on judicial interpretations of the FRCP as guidance for interpreting similar or analogous NRC rules. See, e.g., Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 581 (1988); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 15 NRC 1538, 1542 (1982); Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 760 (1975); Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 461 (1975). See also Rex v. Ebasco Services, Nos. 87-ERA-6 and 87-ERA-40 (May 12, 1989) (Rule 11 of the FRCP was applied in a Department of Labor case).

Thomas v. Capital Security Services, Inc., 836 F.2d 866, 873 (5th Cir. 1985). The Commission should interpret § 2.708 to impose similar duties on a party to an NRC proceeding. 13/

As discussed below, the Dows have failed to conduct a reasonable inquiry into the factual and legal bases which allegedly support their pleadings. If the Dows had conducted a minimal search of the NRC record, they would have discovered that their allegations are meritless, incorrect, or omit material facts. Moreover, it is apparent that the Dows are making their claims in bad faith and for the purpose of harassing TU Electric and the NRC. The Dows' pleadings in this matter represent the latest in a continuing pattern of conduct that is clearly unacceptable in NRC proceedings. As a result, the time has now come for the Commission to admonish the Dows for the repeated defects in their pleadings.

The Dows' pattern of conduct is obvious from a recitation of their actions in this and other proceedings. In particular:

13/ This same result would also be justified under 10 C.F.R. § 2.713(a) ("parties and their representatives in proceedings subject to this subpart are expected to conduct themselves with honor, dignity, and decorum as they should before a court of law"); 10 C.F.R. § 2.713(c) (the Commission may "reprimand, censure or suspend from participation in the particular proceeding pending before it any party or representative of a party who shall refuse to comply with its directions, or who shall be guilty of disorderly, disruptive, or contemptuous conduct"); or 10 C.F.R. § 2.718(e) (the Commission has the power to "[r]egulate the course of the hearing and the conduct of the parties"). See also Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453-54 (1981).

- A. The Dows have repeatedly submitted pleadings that omit material information of which the Dows are aware or should have been aware if they had performed a reasonable inquiry. For example:
- ° The "Motion to Reopen the Record" (Nov. 20, 1991) at 3, is based in part upon a settlement agreement involving Joseph Macktal. However, with even a modest amount of inquiry, the Dows would have been aware that the Commission previously rejected the Macktal settlement agreement as a basis for reopening the record, and that the Commission's decision was upheld by the courts. 14/
 - ° In any event, the Dows were certainly aware of these precedents following the response of TU Electric and the NRC Staff to their motion and the Commission's order denying the motion. 15/ Nevertheless, the Dows' most recent Motion to Reopen at 6, again relies upon the Macktal settlement agreement without mentioning these precedents.

14/ See CLI-88-12, 28 NRC 605 (1988); CLI-89-06, 29 NRC 348 (1989); Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir.), cert. denied, 111 S. Ct. 246 (1990); Macktal v. NRC, Docket No. 89-1034 (D.C. Cir. June 11, 1990).

15/ See "Licensee's Answer To The Motion To Reopen The Record By Micky Dow and Sandra Long Dow" (Dec. 2, 1991) at 12-13, 32-33; "NRC Staff's Reply to Motion of R. Micky and Sandra Dow to Reopen the Record" (Dec. 9, 1991) at 3-4, 13-14; CLI-92-01, slip op. at 10-11.

- ° The Motion at 4, refers to "mismanagement, violations, and related coverup" involving CPSES fire-watches. However, the Dows were aware, but neglected to mention, that the NRC issued a civil penalty involving the fire-watches. They also were aware or should have been aware, but did not mention, that the NRC concluded that "TU Electric through its pursuit of an identified concern, discovered this situation, promptly informed the NRC, thoroughly investigated the matter and took prompt and extensive corrective actions," 16/ and that the NRC closed this violation. 17/

- ° The "Motion to Reopen the Record" (Nov. 20, 1991) at 8, alleges that there was a "Secret Settlement Agreement" between CASE and TU Electric. However, the Dows were almost certainly aware, and in any case easily could have learned, that this settlement agreement was made public at the time of dismissal of the CPSES licensing proceedings in 1988 and was published in full in the Licensing Board's dismissal order. 18/

16/ See EA 91-015, letter dated Mar. 27, 1991, from NRC Region IV Administrator Robert D. Martin to TU Electric at 2.

17/ See NRC Inspection Report 50-445/91-28 (July 11, 1991).

18/ See LBP-88-18B, 28 NRC 103, 126-135 (1988).

° In their "Motion to Reopen the Record" (Nov. 20, 1991) at 5, the Dows claim, based upon allegations by S.M.A. Hasan, that TU Electric employed a "fraudulent scheme to certify the pipe support system at Comanche Peak with multiple sets of design criteria" prior to 1984. However, they were aware or should have been aware, but did not mention, that the NRC had previously investigated this allegation and had determined in 1988 "that the collective allegation associated with the use of inconsistent pipe support design criteria by the previous design groups has been adequately resolved." 19/

° In the Motion at 7, the Dows claim that CPSES components have not been labelled or have been mislabelled. However, the Dows did not mention, and easily could have learned, that TU Electric and the NRC have both been aware of discrepancies involving component labels, that TU Electric has developed a label program to address this concern, and that the NRC Staff has recently closed this concern, finding that

19/ Letter from Phillip E. McKee, NRC Office of Special Projects, to Mr. S.M.A. Hasan, Enclosure 1 at 3 (Jan. 6, 1988).

"[t]he licensee has implemented an excellent labeling program." 20/

- ° The Motion at 4, alleges that the Dows plan to introduce 16 reels of audiotape that identify safety concerns. However, the Dows were aware, but did not mention, that the NRC had previously determined that there is "no reasonable basis to believe" that these tapes contain information indicative of safety concerns at CPSES. 21/
- ° The Motion at 4-5 and Supplemental Motion at 3, make allegations regarding "waste dumps" at CPSES. However, the Dows were aware or should have been aware, but did not mention, that the NRC has previously determined that these landfills do not pose a threat to the safety of the plant, do not warrant an environmental impact statement, and are under the primary jurisdiction of other agencies. 22/

20/ See NRC Inspection Reports 50-445/89-200 (at 39-40), 90-020 (at 6-7), and 91-70 (at 4).

21/ See Letter from Ivan Selin, NRC Chairman, to Richard E. Dow, Jr. (Nov. 20, 1991); Letter from Robert D. Martin, NRC Region IV Administrator, to Richard E. Dow, Jr. (Oct. 3, 1991).

22/ See DD-91-04, 34 NRC 201 (1991).

- ° The Motion at 2-4 and Supplemental Motion at 2, allege, based upon sources that were at CPSES in the 1984-time frame, that there are uncorrected construction and design deficiencies at CPSES. However, the Dows are aware, 23/ but did not mention, that TU Electric established and successfully implemented a comprehensive Corrective Action Program after 1984 to validate the design and construction at CPSES.
- ° The Supplemental Motion at 3, alleges that "fuel has been onsite since 1982, without public knowledge." This statement is incorrect on two counts: First, TU Electric was issued a license to receive fuel in February 1983, and this license is a matter of public record; second, TU Electric began to receive fuel shortly after issuance of the license, not in 1982 as alleged by the Dows.

In summary, the statements made by the Dows in their pleadings to the NRC consistently contain omissions of material fact. In some cases, the Dows were clearly aware of the material facts; in other cases, the Dows easily could have discovered the

23/ See, e.g. "Licensee's Answer to the Motion to Reopen the Record by Micky Dow and Sandra Long Dow" (Dec. 2, 1991) at 8. In particular, the Dows raise claims regarding Charles Atchison. Mr. Atchison's employment claims were resolved in Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984). The Circuit Court commented on the credibility of Mr. Atchison at 1031.

material facts by performing a reasonable inquiry. In any event, it is apparent that the Dows have engaged in a pattern of making inaccurate and unreliable statements to the NRC.

B. The Dows have engaged in a pattern of making frivolous claims. For example:

- ° In support of their "Motion to Reopen the Record" (Nov. 20, 1991) at 3-4, the Dows claim that they had new evidence and information that "has only come to light within the last thirty (30) days." However, upon reviewing the Motion, the Commission found that "the information supporting their motion has been before us on previous occasions," and that their information "is simply not timely in any sense of the word." 24/
- ° In support of their "Motion to Reopen the Record" (Nov. 20, 1991) at 6-7, the Dows claim that, had the licensing board in the CPSES licensing proceeding known of the Dows' allegations, the Dows would have been allowed to intervene. However, the Commission concluded that allegations similar to those identified by the Dows had been raised previously before the licensing and the Commission, and that the "allegations are insubstantial and unsupported and do not constitute

a basis for voiding the settlement agreement or reopening the proceedings." 25/

- ° The Petition at 1-2, claims that the Dows have good cause for filing 13 years out-of-time because they "were not involved in this issue when it first came to light." Similarly, the Motion at 2, claims that the filing is timely because "it is being filed 24 hours after the petition for late intervention." The frivolous nature of these claims is evident on their face.

In summary, the Dows continue to make frivolous arguments.

- C. The Dows have engaged in a pattern of making scandalous claims without any substantiation. For example:

- ° In a letter dated September 1, 1991, to NRC Chairman Selin, the Dows alleged that TU Electric engaged in "perjury," citing a § 2.206 petition filed by a third person. In a letter dated October 3, 1991, the NRC concluded that the Dows' letter "provide[d] no substantive support related to that petition." 26/

25/ CLI-92-01, slip op. at 11.

26/ Letter from Ronald D. Martin, NRC Region IV Administrator, to Mr. Dow (Oct. 3, 1991) at 2.

- ° Despite the NRC's conclusion quoted above, the Dows repeated their allegations regarding "perjury" and "material false statements" the very next month throughout their November 20, 1991, "Motion to Reopen the Record." In response, the Commission found that the Dows "cite absolutely no documentation for that allegation. [The Dows] do not even support the allegation with their own affidavit; instead we have only their own ipse dixit in the Motion." 27/
- ° Despite the Commission's conclusions quoted above, the Dows have now repeated their allegation regarding "material false statements" in the Petition at 2 and their allegations of "criminal intent," "material false statements," and "perjury" in the Supplemental Motion at 2. Once again, the Dows offer absolutely no support for their allegation.

In summary, the Dows have a history of making scandalous claims without any independent corroborating evidence.

D. The Dows are harassing TU Electric and the NRC. For example:

- ° During the last year, the Dows have initiated five proceedings against the NRC and TU Electric in the courts, three of which were dismissed. 28/
- ° In the last four months, the Dows have twice tried to reopen the CPSES licensing proceedings.
- ° The Dows have made scurrilous and baseless charges against the NRC and TU Electric. For example, in addition to their claims discussed above, the Dows have made claims of "duplicity between the license holder and members of Region IV of the NRC, to bypass, and cover-up and/or overlook various safety concerns, including the fire-watch violations of 1990 and

28/ See, Dow v. NRC, No. 92-1069 (D.C. Cir.) (petition for review of Commission's denial of motion to reopen and petition for injunction to prohibit operation of CPSES); No. 91-1238 (W. D. Pa) (complaint for damages); Dow v. NRC, Nos. 91-1461 and 1462 (D.C. Cir.) (petitions for review of the issuance of the CPSES OL; dismissed by Orders dated Jan. 30, 1992); Dow v. Comanche Peak Steam Electric Station, No. CA4-91-255-E (N.D. Tex.) (petition for injunction against operation and construction of CPSES; dismissed by Order dated Apr 11, 1991); In Re: Dow, Nos. 91-1451 and 1444 (5th Cir.) (petitions for injunction and writ of mandamus; dismissed by Orders dated May 7 and 9, 1991).

1991;" 29/ failure of the NRC Staff and TU Electric to inform the Licensing Board of perjury; 30/ and, implications that unnamed persons murdered or attempted to murder whistleblowers. 31/

In summary, through their numerous actions and baseless charges against the NRC and TU Electric, it is apparent that the Dows are attempting to harass both the NRC and TU Electric.

E. The Dows have engaged in a pattern of not complying with the Commission's rules. For example: _____

- ° Mr. Dow did not comply with an NRC subpoena for documents, audiotapes, and other information which, accordingly to Mr. Dow, contain evidence of safety concerns related to CPSES. The NRC decided not to pursue this subpoena after it concluded that there was no reasonable basis to believe that Mr. Dow was in possession of information of safety concerns regarding CPSES. 32/

29/ See Motion at 4. See also, "Motion to Reopen the Record" (Nov. 20, 1991) at 3.

30/ See "Motion to Reopen the Record" (Nov. 20, 1991) at 6-7.

31/ See Letter from the Dows to Ivan Selin, NRC Chairman (Sept. 1, 1991) at 3, 6.

32/ See Letter from Ivan Selin, NRC Chairman, to Mr. Dow (Nov. 20, 1991); Letter from Robert D. Martin, NRC Region IV Administrator, to Mr. Dow (Oct. 3, 1991).

- ° The Commission rejected the Dows' "Motion to Reopen the Record" (Nov. 20, 1991) in the CPSES licensing proceeding, finding that the Dows had no right to file such a motion because they were not parties and that the Dows did not address the five factors governing late intervention in 10 C.F.R. § 2.714(a)(1). 33/
- ° As discussed above, the Dows' Petition does not address the Commission's regulations related to contentions, the standing of the Dows, or organizational standing.

In summary, the Dows have repeatedly refused to follow the Commission's requirements.

* * *

As demonstrated above, the Dows have engaged in a pattern of not complying with the Commission's requirements, of making frivolous and scurrilous claims, of making statements which the Dows knew or should have known omit material facts, and of harassing TU Electric and the NRC. Therefore, TU Electric requests that the Commission admonish the Dows and issue an order stating that the Commission will not accept, and will not require the parties to respond to, any further pleading by the Dows unless the Commission affirmatively determines that the pleading facially complies the Commission's procedural requirements, reflects a good faith effort to confirm the validity of the

33/ CLI-92-01, slip op. at 5-7.

factual and legal allegations contained therein, and otherwise appears to be free of the types of defects discussed above.

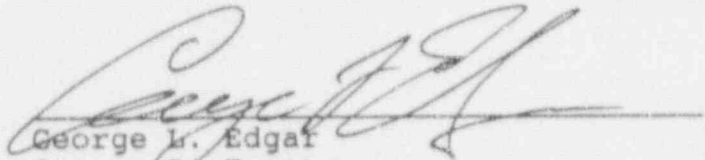
TU Electric realizes that such an order would be unusual. However, TU Electric submits that the nature and pattern of the Dows' conduct are unique. Given these circumstances, an admonition and an order are necessary to protect TU Electric and the NRC Staff from further abuse of the NRC process. Such a protection order would also enable TU Electric and the NRC Staff to maintain the focus of their attention and resources where they properly belong -- on ensuring the safety of CPSES.

IV.

CONCLUSION

For the reasons discussed above, the Dows' petition to intervene and the accompanying motion to reopen and supplemental motion to reopen are patently deficient and should be summarily dismissed. Furthermore, the Commission should admonish the Dows that it will not accept further pleadings from the Dows that contain similar defects.

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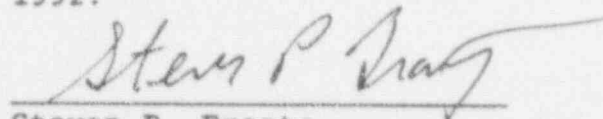
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Dated this 16th day of March, 1992.



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