

August 6, 1992

'92 AUG -7 P3:16

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)

TEXAS UTILITIES ELECTRIC)
COMPANY)

(Comanche Peak Steam Electric)
Station, Unit 2))

Docket No. 50-446 - CPA
Construction Permit
Amendment

TU ELECTRIC'S ANSWER TO THE PETITION
TO INTERVENE AND REQUEST FOR HEARING OF
B. IRENE ORR, D.I. ORR, JOSEPH J. MACKTAL, JR.,
AND S.M.A. HASAN

On February 3, 1992, Texas Utilities Electric Company ("TU Electric") requested that the U.S. Nuclear Regulatory Commission ("NRC") amend Construction Permit No. CPPR-127 such that the latest date for completing construction of the Comanche Peak Steam Electric Station ("CPSES") Unit 2 would be extended from August 1, 1992 to August 1, 1995. The NRC Staff completed an Environmental Assessment of the request and issued a Finding of No Significant Impact on June 23, 1992. 57 Fed. Reg. 28,885 (1992). On July 28, 1992, the NRC issued an "Order Extending the Latest Construction Completion Date" for Comanche Peak Steam Electric Station, Unit 2. B. Irene Orr, D.I. Orr, Joseph J. Macktal, Jr. and S.M.A. Hasan (the "Orrs," "Macktal" and "Hasan," respectively, or "Petitioners," collectively) filed a "Petition to Intervene and Request for Hearing" ("Petition") regarding TU

Electric's request on July 27, 1992. TU Electric hereby files its response in opposition to the Petition and asks that the request for leave to intervene be summarily denied. As is fully discussed below, the Petition does not establish standing for either Macktal or Hasan. Furthermore, the Petition does not specifically identify the aspects of the subject matter of the proceeding as to which Petitioners wish to intervene, and to the extent that they are identified at all, those aspects of subject matter are outside the scope of this proceeding.

I. Background

Although this response will proceed to demonstrate that the Petition fails to meet the Commission's longstanding procedural requirements governing opportunities for hearings on a construction permit extension, far more is at stake than the predictability and order of the Commission's adjudicatory process. In essence, Petitioners are seeking to litigate issues pertaining to TU Electric management based upon allegations by workers who were last employed at CPSES in 1985-1986. In this regard, these issues have been before the Commission and the NRC Staff on a number of occasions and they have been appropriately resolved.

The predecessor to TU Electric filed an application for operating licenses (OL) for CPSES Units 1 and 2 in 1978. This application was duly noticed, petitions to intervene were filed by Citizens Association for Sound Energy (CASE) and others.

Thereafter, extensive hearings were held in which CASE appeared as the sole remaining party opposing issuance of the OL. During the course of these hearings the Licensing Board issued a series of decisions dismissing or resolving the admitted contentions and the Board's questions.¹ By 1983, the only contention remaining for litigation by CASE was Contention 5, which challenged the quality assurance and quality control ("QA/QC") associated with the construction of CPSES. The Licensing Board construed the Contention to encompass design as well as construction issues.² The contested hearings on Contention 5 involved more than 60 days of hearings, over 80 witnesses and 20,000 pages of transcripts.

During the years in which Contention 5 was pending before the Board, TU Electric instituted the Independent Assessment Program by Cygna Engineering Services, the Comanche Peak Response Team (CPRT) Program, and a comprehensive design and hardware validation process under the Corrective Action Program which addressed CASE and Licensing Board concerns and provided substantial additional assurance that CPSES met all regulatory requirements and could be operated safely.³ In early 1987, TU

¹ Rulings on Objections to Board's Order of June 16, 1980 and on Miscellaneous Motions, slip op. (Oct. 31, 1980); LBP-81-22, 14 NRC 150 (1981); Order Subsequent to Prehearing Conference of December 1, 1981, slip op. (Dec. 18, 1981); Order, slip op. (Jan. 12, 1982); Order Dismissing Contentions 1, 4 and 6, slip op. (Jan. 25, 1982); LBP-82-17, 15 NRC 593 (1982); Order (Following Conference Call), slip op. (Apr. 2, 1982); LBP-83-43, 18 NRC 122 (1983); LBP-83-69, 18 NRC 1084 (1983).

² LPB-83-81, 18 NRC 1410 (1983).

³ Joint Stipulation, LBP-88-18B, 28 NRC at 108-111.

Electric and CASE began an extensive information exchange process, including a number of technical meetings during which TU Electric explained their various corrective action programs and responded to any questions or concerns on the part of CASE and its technical consultants. This led to negotiations, and on June 28, 1988, TU Electric, the NRC Staff, CASE, and CASE's President, Mrs. Juanita Ellis, entered into an agreement to settle and dismiss the proceedings.⁴ On July 1, 1988, the three parties to the proceedings (CASE, TU Electric, and the NRC Staff) filed with the Board a Joint Stipulation and Joint Motion For Dismissal Of Proceedings. See LBP-88-18A, 28 NRC 101 (1988).

On July 13, 1988 the Licensing Board dismissed the proceeding (LBP-88-18B, 28 NRC 103). This settlement and dismissal also covered an associated construction permit amendment (CPA) proceeding involving a request by TU Electric in 1986 to extend the latest date of construction completion for CPSES Unit 1. Thus, after more than nine years of protracted litigation, the proceedings were properly and amicably resolved.

The settlement and dismissal of the OL and CPA proceedings was immediately attacked by a number of individuals and groups who had sat on the sidelines and did not seek or maintain status as parties to the proceedings. For example, Petitioners' attorneys filed petitions to intervene on behalf of a number of

⁴ The terms of that settlement are contained in a "Joint Stipulation" and "Settlement Agreement" which were presented to the Board on July 13, 1988. See LBP-88-18B, 28 NRC 103 (Exhibits A and B).

groups and individuals.⁵ Many of those petitions were eventually withdrawn. However, one group (Citizens for Fair Utility Regulation (CFUR)) continued to pursue its petition, and Macktal also submitted a petition to intervene. The Commission eventually denied the petitions by CFUR and Macktal, and the Commission's decision was upheld on appeal to the courts. See CLI-88-12, 28 NRC 605 (1988), modified CLI-89-06, 29 NRC 348 (1989), aff'd Citizens Association for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir. 1989), cert. denied, 111 S. Ct. 246 (1990); see also Macktal v. NRC, Docket No. 89-1034, Order dismissing appeal dated June 11, 1990 (D.C. Cir. 1990). In reality, the instant Petition is nothing more than a back-door attempt to relitigate issues that were settled in 1988 and to resurrect late petitions to intervene that were either withdrawn or denied by the Commission in 1988 and 1989.

Furthermore, the individual concerns of Hasan and Macktal have been investigated and resolved by the NRC. For example, in early 1986, Hasan brought a number of concerns to the NRC, with

⁵ See "Notice of Intent to File a Motion Requesting a substitution of Parties or in the Alternative Notice of Intent to File a Motion for Intervention" (July 6, 1988); "Individual Residents Motion to Intervene and for Sua Sponte Relief" (Jul 8, 1988); "Citizens For Fair Utility Regulation's Motion To Intervene and For Sua Sponte Relief" (July 8, 1988); "Comanche Peak Citizens Audit's Motion for Stay and Motion for Sua Sponte Relief" (July 11, 1988); "Second Group of Individual Residents' Motion for Leave to Intervene and Motion for Sua Sponte Relief" (July 11, 1988); "Greater Fort Worth Sierra Club's Motion for Leave to Intervene and Motion for Sua Sponte Relief" (July 11, 1988)

CASE's assistance. On May 28, 1987, the NRC requested that TU Electric review these allegations.⁶ TU Electric responded on July 2, 1987.⁷ On January 6, 1988, the NRC provided to Hasan not only TU Electric's response but also the NRC's technical evaluation of each of his allegations. The NRC concluded that:

The technical concerns you raised were similar to the pipe support design issues raised in the Atomic Safety Licensing Board proceedings by CASE, and in the Independent Assessment Program conducted by Cygna Engineering Services. These issues, in part, played a major role in the development of the Comanche Peak Response Team Program and in the subsequent establishment of the Corrective Action Program for piping and pipe supports as conducted by Stone and Webster Engineering Corporation (SWEC). As discussed in our evaluation, this program has directly addressed most of the concerns you raised and, to a large extent, has substantiated your allegations.⁸

In various letters in 1987 and 1988, CASE provided the Licensing Board in the CPSES OL and CPA proceedings with copies of Hasan's allegations, TU Electric's response to the allegations, and the NRC's disposition of the allegations.⁹ Therefore, the Licensing Board was fully aware of Hasan's allegations and their

⁶ Letter from C.I. Grimes (NRC Office of Special Projects) to W.G. Council (TU Electric) (May 28, 1987).

⁷ Letter from W.G. Council (TU Electric) to U.S. Nuclear Regulatory Commission (July 2, 1987) (No. TXX-6535).

⁸ Letter from Phillip F. McKee (NRC Office of Special Projects) to Mr. S.M.A. Hasan (Jan. 6, 1988).

⁹ CASE letters to the Licensing Board dated July 8, 1987, and May 17, 1988.

resolutions when it decided to approve the settlement of the CPSES proceedings.¹⁰

Similarly, Macktal also submitted his concerns to the NRC in 1986. These concerns were investigated and resolved by the NRC.

¹¹ In 1988, Macktal claimed that he had additional concerns that were not presented to the NRC in 1986. However, other than vague generalities, he did not identify his specific concerns, despite a request by the Commission itself that he do so. See CLI-89-6, 29 NRC 348, 355-56 (1989). Additionally, Macktal resisted an NRC subpoena to obtain this information, and NRC was forced to go to court to enforce the subpoena.¹² Eventually, NRC resolved Macktal's additional allegations.¹³

In summary, the matters sought to be raised by the Petitioners were subject to years of litigation and have been previously resolved by the Commission and NRC Staff. Moreover,

¹⁰ Hasan also filed a Section 210 complaint with the Department of Labor (DOL) in 1986. In October 1987, the Administrative Law Judge in the DOL proceeding issued a recommended decision and order dismissing the proceeding, finding that Hasan's "version of events is simply not believable." Hasan v. Nuclear Power Services, Inc., Case No. 86-ERA-24 (Oct. 21, 1987).

¹¹ See CLI-89-6, 29 NRC 348, 355 n. 7 (1989).

¹² United States of America v. Macktal, Docket No. 4-335K, Judgement dated Sept. 11, 1989 (N.D. Tex. 1989)

¹³ See NRC Office of Investigation Report on Case No. 4-89-008 (April 25, 1990). It is our understanding that the NRC was already aware from other sources of the substance of Macktal's other allegations, and that these matters had already been resolved or were being resolved.

the individual concerns of Hasan and Macktal have been investigated and were dispositioned by the NRC more than a year ago. The Commission should view the Petition in this context, and given the failure of the Petition to meet the requirements of the Commission's regulations, it should be summarily dismissed.

II. Macktal and Hasan Do Not Have Standing to Intervene

In the context of a request for extension of an existing construction permit, standing to intervene is determined by the same principles as would be used to evaluate standing to intervene in proceedings related to a new construction permit or operating license. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), LBP-80-22, 12 NRC 191, 196, affirmed, ALAB-619, 12 NRC 558, 563-565 (1980) (holding that the Board would grant standing to "those petitioners who are in a position to allege injury from the operation of the facility if they otherwise qualify for intervention, including raising at least one contention within the scope of this proceeding"). Section 2.714(a) of the NRC's regulations addresses these principles, requiring that petitions for intervention set forth the interest of the petitioner in the proceeding, how that interest might be affected by the result of the proceeding, the reasons why they should be permitted to intervene, and the specific aspects of the subject matter as to which intervention is sought. 10 C.F.R. § 2.714(a)(2) (1992). The NRC has held that geographic proximity of a petitioner's residence to a

nuclear plant is enough to comply with the interest requirements of 10 C.F.R. § 2.714 for construction permit and operating license proceedings. Virginia Electric Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-522, 9 NRC 54, 56 (1979). Distances of up to 50 miles from a nuclear power plant have been found to be within the geographical zone of interest. Tennessee Valley Auth. (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977).¹⁴

In the absence of a showing of residence within 50 miles, the Commission applies judicial concepts of standing in determining whether a party has sufficient interest in the proceedings. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 613-614 (1976). A two pronged test applies: (1) whether the action being challenged has caused or will probably cause some injury-in-fact to the person seeking to establish standing; and (2) whether such injury is arguably within the zone of interests protected by the statute governing the proceedings. Id. at 613; see also Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992).¹⁵

¹⁴ The petition alleges that the Orrs' residences are within a distance of 50 miles from CPSES Unit 2. Consequently, TU Electric does not contest their intervention on the basis of standing.

¹⁵ In the event that a petitioner lacks standing to intervene as of right under judicial standing concepts, he may nevertheless be admitted to a proceeding as a matter of discretion. Pebble Springs, *supra*, 4 NRC at 614-615. While discretionary intervention will depend on an assessment of all the facts and circumstances of the particular case, petitioners who show significant

Since the Petition does not even allege that either Macktal's or Hasan's residences are located within 50 miles of CPSES, they have not established standing on the basis of geographic proximity. It remains then to consider whether they have satisfied both the injury-in-fact and zone of interest tests.

The Petition asserts that Macktal and Hasan are former employees at the CPSES site. Macktal is said to be a "former employee of CPSES" who is "currently seeking reinstatement" in a proceeding which is "pending before the Secretary of Labor." Petition at 3. Hasan is described as "a former engineer employed at the CPSL" who "continues to seek reinstatement at CPSES" and who "has a financial interest in the granting of TUEC's amendment request." Petition at 3. These assertions do not show that the extension of the CPSES Unit 2 construction permit expiration date has caused or will cause an injury to either Macktal or Hasan, and no order in this proceeding could remedy the harm that they are alleged to have suffered. Thus, both Macktal and Hasan fail

ability to contribute on substantial issues of law or fact and set forth these matters with suitable specificity to allow their evaluation will be more readily granted permission. *Id.* at 617. The burden of demonstrating that he/she could make a valuable contribution lies with the petitioner, and "[i]n this regard, broad, generalized averments will not suffice." Nuclear Engineering Co. (Sheffield, Ill., Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 745 (1978). The Petition provides no basis whatsoever for granting discretionary intervention.

to show that the construction permit extension will cause them an injury-in-fact.

Assuming, for the sake of argument, that the above assertions were intended to demonstrate that loss of employment caused both Macktal and Hasan financial harm, such an economic or employment interest is not protected by the Atomic Energy Act in the context of this proceeding. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980) (stating that it is well settled that an interest which is purely economic in character does not confer standing to intervene under the Atomic Energy Act); Consumers Power Co. (Palisades Nuclear Power Facility) LBP-81-26, 14 NRC 247, 250-51 (1981) (protection of contract employment rights is not within the zone of interests of the Atomic Energy Act). Hence, the assertions of loss of employment also fail the second prong of the standing test, which requires that any injury fall within the zone of interests protected by the Atomic Energy Act.

In summary, Macktal and Hasan are not entitled to standing on the basis of their assertions that they are former employees at the CPSES site. Such assertions fail both prongs of the test used by the Commission to determine standing to intervene in NRC proceedings.¹⁶

¹⁶ The fact that Macktal is a party to pending litigation regarding the termination of his employment also does not qualify him as an intervenor in this proceeding. A petitioner's standing in a non-NRC proceeding is insufficient to establish standing in an NRC proceeding, at least in the absence of a showing of the

The Petition also states that Macktal was "personally harmed due to management misconduct," and that "this misconduct directly contributed to the delay in the construction of Unit 2."

Petition at 3. The Petition also indicates that Macktal was "to be a direct fact witness in the construction permit amendment proceedings on Unit 1," and that he "has information which is relevant to the determination of TUEC's request to amend."

Petition at 3. Similarly, the Petition indicates that Hasan "was to be a fact witness before the ASLB panel convened to adjudicate the merits of TUEC's request to amend the construction completion date of CPSES, Unit 1," and that he "maintains an interest in exposing the management misconduct at CPSES which resulted in his removal from the CPSES site and which directly contributed to the delay in the construction of Units 1 and 2." Petition at 3. The Petition presents absolutely no evidence to support these broad, generalized allegations of "management misconduct."

Nevertheless, even if taken as true, such generalized allegations do not establish that either Macktal or Hasan has been or will be injured by the current extension of the CPSES Unit 2 construction permit. Additionally, the allegations that Macktal and Hasan were to be witnesses in an earlier hearing regarding CPSES Unit 1 have absolutely no bearing on injury in fact or their standing to intervene in this proceeding.

equivalence of applicable standards and an overlap of relevant issues. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 & 2), LBP-90-29, 32 NRC 89, 91 (1990). The Petition makes no such showing here.

In conclusion, Macktal and Hasan have not demonstrated any interest under judicial concepts of standing which would qualify either of them for standing in this proceeding.

III. The Petition Does Not Specifically Identify Any Aspects of the Subject Matter For Intervention

Section 189a of the Atomic Energy Act does not provide an unqualified right to a hearing to persons whose interests may be affected by a proceeding. Rather, prospective intervenors must establish their right to a hearing by complying with the NRC's procedural regulations. Business and Professional People for the Public Interest v. Atomic Energy Commission, 502 F.2d 424, 428 (D.C. Cir. 1974). The NRC's procedural regulations require that a person whose interest may be affected by a proceeding and who desires to participate as a party must file a written petition to intervene which sets forth "the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(2) (1992).

The Petitioners have not identified the specific aspects of the subject matter of the proceeding as to which they wish to intervene (nor have they identified any contentions). Instead, the Petition filed by the Orrs, Macktal and Hasan merely asserts that "the Commission is required [by Section 189a of the Atomic Energy Act] to 'grant a hearing upon the request of any person whose interest may be affected by the proceeding.'" Petition at 4. As indicated above, Petitioners are incorrect. Because they

have not complied with the NRC's procedural requirements for intervention (i.e., they have not identified the specific aspects of subject matter in the proceeding as to which they wish to intervene), they are not entitled to a hearing. Thus, the Petition fails the threshold requirements of 10 C.F.R. § 2.714(a)(2) and should be denied.

IV. To the Extent That They Are Identified At All, Petitioners' Aspects of Subject Matter Are Outside the Scope of This Proceeding

The Petitioners advance broad, non-specific allegations related to construction activities at CPSES during the mid-1980s. First, they have alleged that they are "similarly situated to that of CASE and Ms. Gregory in 1986 with respect to TUEC's request to amend the construction permit of CPSES, Unit 1." Petition at 4. Second, they have alleged that "management misconduct" harmed Macktal and Hasan, who were prevented from testifying in the construction permit amendment proceeding for CPSES Unit 1, and that this alleged misconduct contributed to the delay in construction of CPSES. Petition at 3. As discussed below, the types of construction allegations that were the subject of the CPSES Unit 1 construction permit amendment proceeding are unrelated to the construction permit extension for CPSES Unit 2 and therefore are outside the scope of this proceeding.

As a result of a number of factors, including allegations similar to those raised by the Petitioners, TU Electric decided

to conduct extensive design and construction validation programs. Since these programs were not accounted for in the original schedule for CPSES, TU Electric needed to apply for a construction permit extension for CPSES Unit 1 in 1986 and a construction permit extension for CPSES Unit 2 in 1987. Because the types of allegations raised by the Petitioners related to the cause of the extension, the allegations might have been admissible in the previous construction permit extension proceedings if they satisfied the conditions defined by the Commission in Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-15, 24 NRC 397 (1986).

Although such allegations may have been admissible in the previous construction permit extension proceedings, such allegations clearly are outside the scope of the current construction permit extension proceeding. On November 11, 1988, the NRC granted an extension of the construction permit for CPSES Unit 2 for a sufficient period of time to enable TU Electric to conduct the validation programs. Thus, the current extension for CPSES Unit 2 was not necessitated by the decision to conduct the validation programs, because the previous extension accounted for the need to conduct these programs. Instead, as discussed in TU Electric's application dated February 3, 1992, and the NRC's Safety Evaluation dated July 28, 1992, the current extension is needed because TU Electric suspended significant design and construction activities for CPSES Unit 2 for a number of years to allow TU Electric to concentrate its resources on completion of

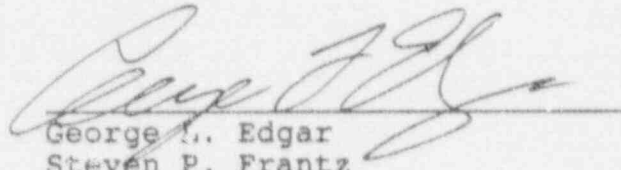
construction and startup activities and the validation programs for CPSES Unit 1. In short, Petitioners' concerns appear to relate to the previous construction permit extension for CPSES Unit 2 and not to the suspension of significant design and construction activities that gave rise to the need for the current extension for CPSES Unit 2. Accordingly, Petitioners' aspects of subject matter are clearly outside the scope of the current proceeding.

V. CONCLUSION

For the reasons stated above, the petition to intervene should be summarily denied with respect to Macktal and Hasan since neither has demonstrated his standing to intervene. Further, the request for hearing should be denied with respect to all Petitioners since they have not specifically identified aspects of subject matter of the proceeding which they desire to litigate, and those aspects are outside the scope of this proceeding.

Respectfully submitted,

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August 6, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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COMPANY)

(Comanche Peak Steam Electric)
Station, Unit 2))

Docket No. 50-446

Construction Permit
Amendment

NOTICE OF APPEARANCE OF COUNSEL

In accordance with 10 C.F.R. §2.713(b), notice is hereby given that the following person will appear in the above captioned matter as attorney for the Licensee, Texas Utilities Electric Company.

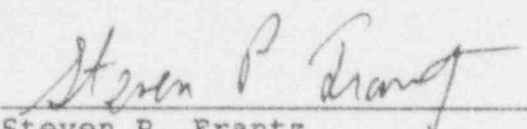
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NOTICE OF APPEARANCE OF COUNSEL

In accordance with 10 C.F.R. §2.713(b), notice is hereby given that the following person will appear in the above captioned matter as attorney for the Licensee, Texas Utilities Electric Company.

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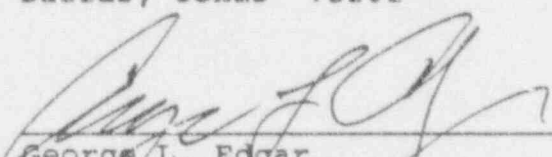
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CERTIFICATE OF SERVICE

I hereby certify that copies of "TU Electric's Answer to the Petition to Intervene and Request for Hearing of B. Irene Orr, D.I. Orr, Joseph J. Macktal, Jr., and S.M.A. Hasan" and "Notice of Appearance of Counsel" for George L. Edgar, Steven P. Frantz, and Nancy L. Ranek, together with a cover letter to the Secretary of the Commission, were served upon the following persons by deposit in the United States mail, postage prepaid and properly addressed, on the date shown below:

Chairman Ivan Selin
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Washington, D.C. 20555

Commissioner Kenneth C. Rogers
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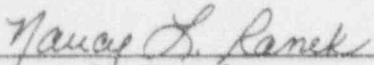
Secretary
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Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dated this 6th day of August, 1992.



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