ADJUDICATORY ISSUE

(Information)

December 31, 1992

SECY-92-434

MEMORANDUM FOR: The Commissioners

FROM: John F. Cordes
Solicitor

SUBJECT: LITIGATION REPORT 1992 - 22

Critical Mass Energy Project v. NRC, No. 92-1043 (S. Ct., filed December 18, 1992)

As reported in Litigation Report 1992-16, SECY-92-295, this is a long-running Freedom of Information Act lawsuit seeking access to confidential "SEE IN" documents prepared by a nuclear industry organization, INPO, and shared with the NRC on condition that the NRC not disclose them outside the agency. To protect the documents from disclosure the NRC invoked FOIA exemption 4 (protecting confidential commercial information received from private parties). The case has been pending since 1984, and has generated several published opinions.

In September 1992 a 7-4 majority of the en banc D.C. Circuit upheld NRC's FOIA decision not to disclose the INPO reports. The majority concluded "that where, as here, the information sought is given to the government voluntarily, it will be treated as confidential under [FOIA] Exemption 4 if it is of a kind that the provider would not customarily make available to the public." (Slip op. at 2-3).

NOTE: TO BE MADE PUBLICLY AVAILABLE IN 10 WORKING DAYS FROM THE DATE OF THIS PAPER.

In reaching this conclusion the en banc majority limited the reach of a longstanding D.C. Circuit precedent, National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, (D.C. Cir. 1974), where the court had required government agencies invoking Exemption 4 to demonstrate how disclosure would harm a government interest. The dissenters argued for upholding National Parks. In their view "[t]he National Parks formulation fits the congressional design better than the virtual abandonment of federal court scrutiny approved by the court today for Government withholding of commercial or financial materials submitted voluntarily" (Dissent, at 8).

Plaintiff now has sought Supreme Court review, on the ground that the new Exemption 4 test crafted by the court of appeals is unworkable and unlawful. We will work with the Civil Division and with the Solicitor General's office at the Justice Department in responding to the certiorari petition.

Attachment: Certiorari Petition

Contact:
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504-1600

Dow v. NRC, Nos. 92-____ & 92- ____ (D.C. Cir., filed Dec. 29, 1992)

Petitioners have filed two more lawsuits seeking judicial review of NRC decisions on the Comanche Peak nuclear power plant. One of the new petitions for review attacks the NRC Staff's November 19 denial of a section 2.206 petition demanding revocation of the Comanche Peak license. The other petition for review attacks a December 15 Licensing Board decision rejecting petitioners' request for a hearing on the amendment of Comanche Peak's construction

permit for Unit 2. Both new lawsuits may be subject to motions to dismiss on jurisdictional-typoe grounds.

Attachments: Petitions for Review

Contact:
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In re El Paso Electric Co., Adversary Proceeding No. 92-1285FM (W. D. Tex.)

The El Paso Electric Company, a partial owner of the Palo Verde nuclear power plant, is attempting to reorganize its financial affairs under the protection of Chapter 11 of the Bankruptcy Act. As part of the bankruptcy proceeding El Paso has tried to "reject" leases it entered with a bank that led to what El Paso views as onerous payment. However, under bankruptcy law, rejection of the leases also amounts to a loss of a right to possession.

On October 16, 1992, the United States, on behalf of the NRC, moved to intervene in the proceeding to protect the NRC's statutory prerogative to approve transfers of operating licenses. The bankruptcy court has granted the motion to intervene, and has indicated its intent to defer to the NRC's regulatory authority over license transfers.

Attachment: Motion

Contact:
Edwin J. Reis
504-1578

John F. Cordes
Solicitor

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Attachment -

Critical Mass Energy Project v. NRC, No. 92-1043
(S. Ct., filed December 18, 1992)

No. 92-1043

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CRITICAL MASS ENERGY PROJECT,

Petitioner,

v.

NUCLEAR REGULATORY COMMISSION

and

INSTITUTE OF NUCLEAR POWER OPERATIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 18, 1992

QUESTION PRESENTED

Did the Court of Appeals err in concluding that analytical reports about the safety of nuclear power plants, distributed widely throughout the nuclear industry and submitted to the Nuclear Regulatory Commission by an industry consortium, may be withheld from the public under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), which exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential"?

PARTIES TO THE CASE

All parties to the case appear in the caption. The Business Roundtable, an association of chief executive officers of corporations, filed a brief as *amicus curiae* on rehearing *en banc* supporting respondents. Petitioner Critical Mass Energy Project is an unincorporated division of Public Citizen, Inc., a non-profit District of Columbia corporation.

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Supreme Court of the United States

October Term, 1992

No. 92-

CRITICAL MASS ENERGY PROJECT,

Petitioner,

v.

NUCLEAR REGULATORY COMMISSION and
INSTITUTE OF NUCLEAR POWER OPERATIONS,

Respondents.

PETITON FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The first opinion of the District Court, granting summary judgment for the Nuclear Regulatory Commission, is reported at 644 F. Supp. 344 (D.D.C. 1986) and appears in the appendix to this petition ("Pet. App.") at 36a-41a. The first opinion of the Court of Appeals, vacating and remanding for further proceedings, is reported at 830 F.2d 278 (D.C. Cir. 1987) and appears at Pet. App. 42a-64a. The opinion of the District Court on remand, granting summary judgment for respondents, is reported at 731 F. Supp. 554 (D.D.C. 1990) and appears at Pet. App. 66a-72a. The second opinion of the Court of Appeals, reversing and remanding, is reported at 931 F.2d 939 (D.C. Cir. 1991) and appears at Pet. App. 73a-90a. The order of the Court of Appeals vacating the panel opinion and granting rehearing *en banc* is reported at 942

F.2d 799 (D.C. Cir. 1991) and appears at Pet. App. 91a-92a. The opinion of the *en banc* Court of Appeals affirming the District Court, which is the subject of this petition, is reported at 975 F.2d 871 (D.C. Cir. 1992) and appears at Pet. App. 1a-33a.

JURISDICTION

The judgment of the Court of Appeals on rehearing *en banc* was entered on August 21, 1992. On October 7, 1992, the Chief Justice entered an order extending the time to file a petition for a writ of *certiorari* to and including December 19, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTE

Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), provides that the FOIA does not apply to "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

STATEMENT OF THE CASE

1. *The FOIA Request.* This case arises out of petitioner's FOIA request for a series of reports about the safety of nuclear power plants submitted to respondent Nuclear Regulatory Commission ("NRC") by respondent Institute of Nuclear Power Operations ("INPO"). Petitioner is a non-profit research and advocacy group concerned with nuclear power issues. INPO is a non-profit organization created by the nuclear power industry after the 1979 incident at the Three Mile Island plant. All the utility companies that operate nuclear plants in this country are members of INPO. INPO does not generate nuclear power itself, nor does it have competitors. INPO's stated mission is to promote the safety and reliability of nuclear plants, which it does by analyzing operating

experiences at nuclear plants and disseminating information to its members.

After Three Mile Island, the NRC developed an "Action Plan" which required nuclear utilities to make sure that their personnel were made aware of new information about the safety of nuclear power on a regular basis. Because it would be prohibitively expensive for every nuclear plant to develop its own procedures for monitoring all safety information in the industry, INPO established a clearinghouse to perform that function, known as the Significant Event Evaluation and Information Network ("SEE-IN"). Under SEE-IN, INPO engineers analyze safety-related "events" at nuclear plants, using a broad range of sources, including technical literature, publicly available NRC records, and interviews with plant employees. INPO engineers then summarize their analyses and make recommendations for corrective actions in SEE-IN reports, which are the records at issue in this case.

INPO distributes the SEE-IN reports to all operators of nuclear power plants in this country, and also to engineering and construction firms, to an insurer for the industry, and to consultants and contractors. This wide distribution is central to the SEE-IN program, which is intended to inform employees in the nuclear industry of safety experiences at every nuclear plant, and thus to satisfy the requirements of the NRC's Three Mile Island Action Plan. In 1982, the NRC endorsed SEE-IN as a way for nuclear licensees to satisfy their obligations under the Action Plan.

The NRC also entered into an agreement with INPO, under which INPO agreed to provide the SEE-IN reports to the NRC, and the NRC agreed not to release the SEE-IN reports to the public. The NRC uses the SEE-IN reports to make sure that licensees are in fact making their employees aware of new safety information, as

required by the Action Plan. The NRC also uses the SEE-IN reports to check the completeness and accuracy of other, similar reports that nuclear licensees are required to submit to the NRC within thirty days of any safety-related event, known as Licensee Event Reports ("LERs"). LERs are supposed to give the NRC a full understanding of the underlying causes of safety events, and also to explain corrective actions planned by the licensee. *See generally* 10 C.F.R. § 50.73; 48 Fed. Reg. 33,850 (1983). The NRC routinely discloses LERs to the public.

In 1984, petitioner submitted a FOIA request to the NRC for the SEE-IN reports. The NRC withheld the reports under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The NRC did not argue that the reports contained trade secrets or privileged information, but maintained that they contained "commercial . . . confidential" information, even though the reports include no competitively sensitive sales or marketing data and are shared with everyone in the nuclear industry.

Under the test then governing Exemption 4, information could be withheld as "confidential" only upon a showing that "disclosure of the information is likely . . . to impair the Government's ability to obtain necessary information in the future; or . . . to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted). The NRC did not argue that disclosure would cause competitive harm to either INPO or its members, but rather that the SEE-IN reports were exempt under the governmental "impairment" prong of the *National Parks* test. According to the NRC, INPO had

threatened to withhold the reports from the NRC in the future if the NRC released them, and even if the NRC could obtain the reports, the possibility of disclosure might impair the quality of those reports in the future.

2. *First District Court and Appellate Proceedings.* Petitioner filed suit against the NRC, and both parties moved for summary judgment. Petitioner argued that, even if INPO refused to provide the reports to the NRC in the future, that could not impair the NRC's ability to obtain the reports, because INPO would continue to provide the reports to its licensee members, and the NRC had ample power to obtain the reports directly from the licensees. The District Court acknowledged petitioner's argument but concluded that disclosure of the reports would impair the NRC's ability to obtain them in the future, because the reports were currently provided "voluntarily" to the NRC by INPO. Pet. App. 40a.[1]

The Court of Appeals vacated and remanded. Pet. App. 42a-64a. The Court rejected the District Court's conclusion that the voluntary character of the submission, by itself, could determine whether the reports were exempt from disclosure. According to the Court of Appeals, a rule of decision resting solely on the voluntary-involuntary distinction would be inconsistent with the requirement established in the case law of Exemption 4, including *National Parks*, that an agency must provide a "detailed justification" of the reason why disclosure would impair its

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[1] Petitioner also argued that the SEE-IN reports did not contain "commercial" information because INPO was a not-for-profit entity, and because the information bore no relation to sales, purchases, or exchanges of goods or services. The District Court rejected this argument, relying on Circuit precedent. Pet. App. 38a (citing *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)). The Court of Appeals affirmed this conclusion in the first panel opinion, Pet. App. 47a, and on rehearing *en banc*, Pet. App. 19a.

ability to obtain the information in the future. Pet. App. 52a. In particular, the Court observed that, under its prior decisions, the agency's ability to compel disclosure of information that it receives voluntarily may be sufficient to ensure that its access to the information would not be impaired in the future. Pet. App. 53a, n. 26. Indeed, as the Court noted, the NRC admitted that it would be able to obtain the reports by requiring their submission directly from the licensees. Pet. App. 52a.

However, the Court of Appeals found plausible the NRC's argument that, even if it could obtain the reports by compulsory means, the usefulness of the reports might decline, because nuclear plant employees, knowing the reports would be disclosed, might be less candid in their discussions with INPO analysts about the possible causes of events at their plants. Pet. App. 56a-57a. Because there was no evidence in the record that the quality of the SEE-IN reports would decline as a result of disclosure, the Court remanded for further proceedings on that issue. The Court also ruled that the NRC could prevail if it showed that disclosure would impair the efficiency of its operations, for example, if the process of compelling submission of the SEE-IN reports directly from the licensees would be too burdensome. Pet. App. 59a-61a.

Circuit Judge Buckley dissented from the remand, and would have ruled that the SEE-IN reports were exempt from disclosure solely because they were submitted to the NRC voluntarily. He concluded that Exemption 4 was intended to encourage cooperation by parties who are not to obliged to provide information to the Government, and that the "impairment" prong of the *National Parks* test should be deemed satisfied whenever disclosure would interfere with the agency's ability to obtain information on a voluntary basis. Pet. App. 62a-63a.

3. *Remand and Second Appeal*. On remand, INPO intervened as a defendant, and all parties moved for

summary judgment. The NRC and INPO argued principally that nuclear plant employees would no longer be forthright with INPO analysts if they knew that the SEE-IN reports would be disclosed to the public, and this lack of candor would impair the quality of those analysts' reports and their usefulness to the NRC. At oral argument, the District Court characterized the respondents' affidavits as conclusory on this point, and suggested that respondents should submit evidence that INPO analysts give express or implied promises of confidentiality to nuclear plant employees, or that employees rely on the limited disclosure of the reports.

Respondents never submitted this evidence. Nevertheless, the District Court again granted summary judgment, under the separate theory that the NRC's efficiency of operations would be impaired by disclosure. The District Court reasoned that disclosure might damage the friendly "symbiosis in the relationship between NRC and INPO" and would make the NRC and INPO "[i]f not outright antagonists, . . . at best . . . wary allies." Pet. App. 72a.

The Court of Appeals again reversed and remanded because of the lack of evidence supporting respondents' impairment argument. Pet. App. 73a-90a. The panel first rejected the District Court's reasoning that the disruption of the friendly relationship between the NRC and INPO warranted an exemption on the theory that acrimony would impair the NRC's efficiency of operations. The panel noted that, if that theory were correct, a submitter could essentially dictate whether information was confidential for purposes of the FOIA by threatening non-cooperation in the future, which would conflict with the accepted principle that " 'the test for confidentiality is an objective one.' " Pet. App. 83a (quoting *National Parks*, 498 F.2d at 766).

As for the argument that disclosure would inhibit nuclear plant employees from speaking candidly with INPO analysts, the panel found nothing in the record to support such a finding. In particular, the panel noted the complete absence of any evidence that INPO analysts give promises of confidentiality to plant employees. The panel also found no evidence that the SEE-IN reports could reveal the identity of any nuclear plant employees if the reports were released to the public, as the reports do not identify the sources of information on which they are based. Pet. App. 86a-87a & n. 8.

In a concurring opinion, Judge Randolph, joined by Judge Williams, agreed that the record could not support the District Court's grant of summary judgment under the "impairment" prong of the *National Parks* test, but expressed doubt that *National Parks* had been correctly decided. Pet. App. 89a-90a. Judge Randolph stated that, if the matter were one of first impression, he would reject the *National Parks* test and would conclude that information was "confidential," and therefore exempt from disclosure, as long as it was not "publicly disseminated," whether or not disclosure would cause any identifiable harm to the Government or to the submitter of the information. Judge Randolph observed, however, that the D.C. Circuit had endorsed *National Parks* many times, even in a prior decision in the same case, and that he was barred by both the law of the circuit and the law of the case from following either what he considered to be the plain language of the statute or Judge Buckley's dissent in the prior decision.

4. *Proceedings En Banc*. Respondents filed petitions for rehearing and suggestions for rehearing *en banc*, urging the Court of Appeals to overrule *National Parks* and to adopt a broader construction of Exemption 4. Respondents argued that information should be exempt from disclosure as "confidential" whenever it would not

"customarily" be disclosed to the public, whether or not disclosure would cause any identifiable harm to the Government or the submitter. Neither respondent suggested that the Court of Appeals should adopt the construction proposed in Judge Buckley's earlier dissent, *viz.*, that information is confidential if it is submitted voluntarily to the Government.

The Court of Appeals vacated the panel decision and granted rehearing *en banc* to reconsider *National Parks*.[2] Pet. App. 91a. In their *en banc* briefs, both respondents argued again that the Court should overrule *National Parks* and hold that information is always confidential if it is not customarily disclosed to the public by the submitter. Again, neither respondent argued in favor of the position taken in Judge Buckley's dissenting opinion on the first appeal.

On rehearing, a divided *en banc* Court, per Judge Buckley, affirmed the District Court. Pet. App. 1a-20a. The Court first rejected respondents' suggestion that *National Parks* be entirely overruled. Applying the principles of *stare decisis* outlined by this Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Court concluded that respondents had failed to demonstrate any of the considerations that could justify overturning *National Parks*. Observing that seven other Circuits had adopted the *National Parks* test for Exemption 4 cases, the Court of Appeals concluded that "[f]ar from being overtaken by the tide of recent judicial developments, *National Parks*, it seems, has ridden its crest." Pet. App. 12a. The Court also noted that Congress had adopted the *National Parks* test when it enacted a similar business-records exemption to the

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[2] Then-Circuit Judge Thomas participated in the decision to grant rehearing *en banc* but was elevated to this Court before oral argument.

Government in the Sunshine Act, 5 U.S.C. § 552b(c)(4), which is closely related to the FOIA. Pet. App. 12a. The Court further rejected respondents' contention that *National Parks* had proven unworkable in application, and it dismissed cases cited by the respondents as merely illustrating difficulties that arise "wherever judicial lines are drawn." Pet. App. 13a.

Nevertheless, the Court dramatically "confined" the *National Parks* test by limiting its application to information that submitters are *required* to give to the Government. Pet. App. 2a, 13a-20a. For information that submitters supply "voluntarily" to the Government but do not "customarily" disclose to the public, the Court adopted a new categorical rule that all such information is "confidential," and therefore exempt from disclosure under Exemption 4, whether or not its disclosure would cause any demonstrable harm to either the Government or the submitter. Indeed, the Court observed that, in such cases, the courts should respect the private interest in withholding information from the public "for whatever reason." Pet. App. 16a.

The Court did not, however, provide any guidance as to when information should be deemed to have been provided "voluntarily" to the Government, except to conclude that the test for voluntariness was met in this case because submission of the SEE-IN reports had not been legally compelled, even though the NRC had the statutory authority to compel the licensees to submit the reports, should it wish to exercise that authority. The Court also rejected petitioner's argument that a categorical rule exempting voluntary submissions would encourage agency behavior in conflict with the FOIA's mandate for disclosure, by allowing agencies to agree to accept information on a "voluntary" basis on condition that it be withheld from the public, even when the agencies could,

and would, compel submission of the information without difficulty. Pet. App. 19a.

For information that is required to be submitted, the Court also reformulated the "impairment" prong of its prior test. Although the Court recognized that the Government's access to information cannot be impaired if production of the information is compelled, it speculated that, in some circumstances, disclosure could affect the reliability of the compelled data. Therefore, the Court ruled that, when dealing with a FOIA request for information that a submitter is required to provide, the impairment inquiry should focus on the possible effect of disclosure on the quality of the information. Pet. App. 15a-16a.

Judge Randolph, joined by Judges Silberman and Sentelle, filed a concurring opinion, in which they concluded that *National Parks* had been wrongly decided, but that respondents had not made the showing necessary to overrule it, given its near-universal adoption in the other Circuits. Pet. App. 23a. They also concluded that, although *National Parks* should not be overruled, it should not be applied to cases involving information submitted voluntarily to the Government. *See* Pet. App. 23a-24a.

Judge Ruth Ginsburg, joined by Chief Judge Mikva and Judges Wald and Edwards, filed a dissenting opinion. Pet. App. 25a-33a. The dissent observed that, by removing all voluntary submissions from the *National Parks* test, the majority had "substantially revise[d]" the law of the Circuit and "diminishe[d] as well sister circuit case law patterned on [the] *National Parks* decision." Pet. App. 25a. The dissent pointed out that no other court had concluded that voluntarily submitted information was governed by a different test than *National Parks*, and that the First Circuit and District Courts in the D.C. Circuit had applied *National Parks* to information furnished to the Government voluntarily. Pet. App. 28a-29a.

The dissent also criticized the majority opinion as unfaithful to both *National Parks* and the Congress' "unmistakably clear direction" in favor of disclosure in the FOIA. Pet. App. 30a. After reviewing the *National Parks* decision, the dissent pointed out that the *National Parks* panel had concluded that the "impairment" prong was not applicable to information required to be submitted to the Government, and therefore, that panel must have intended the "impairment" prong to have "its principal utility in cases of information voluntarily submitted." Pet. App. 28a. The dissent also argued that the majority's new test was not objective, because it provides for no judicial check on the reasonableness of the submitter's claim that the information was confidential, and bears no relation to the Congress' particular purpose in enacting Exemption 4, the protection of competitively sensitive information. Pet. App. 26a-27a. According to the dissent, the majority's rule encourages agencies to follow the path of least resistance and accede to submitters' requests for confidentiality, in sharp conflict with the FOIA's mandate for disclosure. Pet. App. 30a-31a.

REASONS FOR GRANTING THE WRIT

The Decision Below Raises Important Questions of Interpretation of the Freedom of Information Act That Should be Settled by This Court, It Conflicts With Other Appellate Decisions, and It Creates Serious Problems in the Adminstration of the Act.

This Court has never construed Exemption 4 of the FOIA, but with impressive unanimity, all the Circuits that have done so before this case have adopted the *National*

Parks test first enunciated by the D.C. Circuit in 1974.[3] Congress has also embraced *National Parks* by adopting that test for at least four other statutes that incorporate, or are worded similarly to, Exemption 4 of the FOIA: the Government in the Sunshine Act, 5 U.S.C. § 552b(c)(4), *see* 122 Cong. Rec. 24,181 (1976), S. Conf. Rep. No. 1178, 94th Cong., 2d Sess. 15 (1976), H.R. Rep. No. 880, pt. I, 94th Cong., 2d Sess. 10 (1976); the Federal Advisory Committee Act, 5 U.S.C. App. § 10; the Federal Trade Commission Act, 15 U.S.C. § 46(f), *see* H.R. Conf. Rep. No. 917, 96th Cong., 2d Sess. 28 (1980), S. Rep. No. 500, 96th Cong., 1st Sess. 10-12 (1979); and the Consumer Product Safety Act, 15 U.S.C. § 2055(a)(2), *see* H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 877 (1981). For eighteen years, *National Parks* has worked well in the agencies and the courts, and the Government has never sought *certiorari* to have it overruled.

The decision below destroys the uniformity of this settled construction of Exemption 4 and introduces an arbitrary and unworkable distinction between voluntary and mandatory submissions. This distinction was not

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[3] *See 9 to 5 Org. for Women Office Workers v. Bd. of Governors*, 721 F.2d 1, 8 (1st Cir. 1983); *Orion Research, Inc. v. EPA*, 615 F.2d 551, 553 (1st Cir.), *cert. denied*, 449 U.S. 833 (1980); *American Airlines v. National Mediation Bd.*, 588 F.2d 863, 871 (2d Cir. 1978); *Continental Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 375 (2d Cir. 1977); *Acumenics Research & Technology v. Department of Justice*, 843 F.2d 800, 807 (4th Cir. 1988); *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1207 n.55 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 421 U.S. 1137 (1985); *Shermco Indus. v. Secretary of Air Force*, 613 F.2d 1314, 1317 (5th Cir. 1980); *Continental Oil Co. v. FPC*, 519 F.2d 31, 35 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *General Elec. Co. v. NRC*, 750 F.2d 1394, 1402-03 (7th Cir. 1984); *Pacific Architects & Eng'rs v. Department of State*, 906 F.2d 1345, 1347 (9th Cir. 1990); *Anderson v. HHS*, 907 F.2d 936, 946 (10th Cir. 1990).

advanced by any of the parties, has never been thought to be dispositive before, has never been mentioned in decisions of the other Courts of Appeals adopting or applying *National Parks*, and is contrary to the decision of the First Circuit in *9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1 (1983). Moreover, the Court of Appeals' rule is fundamentally inconsistent with the FOIA's overarching goal of disclosing important information about the operations of the Government, unless one of Congress' objective criteria for withholding records is satisfied.

1. *The Ill-Defined Nature of the Voluntary/Mandatory Distinction.* A major defect in the Court of Appeals' decision is that it draws an arbitrary line between mandatory and voluntary submissions of information to the Government, while providing no guidance for distinguishing between the two. The Court incorrectly assumed that all submissions could be neatly divided into two categories. Its rigid formulation does not reflect the reality of the many means by which governmental agencies obtain information; in fact, it is often unclear whether information obtained by the Government from private parties is submitted under compulsion or voluntarily. The agency may believe that regulated entities are legally required to provide certain information, but those entities may disagree.

Thus, in one common scenario, an agency sends a subpoena *duces tecum* to a company, which threatens to contest the subpoena on the grounds that it is overbroad and beyond the agency's statutory authority, but ultimately agrees to provide the information, on condition that the agency withdraw the subpoena. *See, e.g., General Electric Co. v. NRC*, 750 F.2d 1394, 1396 (7th Cir. 1984) (NRC subpoena during licensing proceeding); *see also* 15 U.S.C. § 1401(b),(c) (Secretary of Transportation may require

inspection and production of documents, but only reasonably, and as relevant to certain purposes). Even the agency's regulations may reflect ambivalence on whether submission of information is mandatory. For example, EPA regulations implementing the Toxic Substances Control Act state that "EPA may, by letter, request a person to submit" certain information, but that "[i]f the requested submissions are not made, EPA may subpoena them." 40 C.F.R. § 716.40. Whether information obtained in any of these circumstances is submitted "voluntarily" is far from clear, and courts hearing FOIA cases seeking such information will now routinely have to decide that issue.

The Court of Appeals' mandatory/voluntary distinction fails to provide any guidance in many circumstances. For example, the Government requires information to be submitted with many different kinds of applications, *e.g.*, for approval to place new drugs on the market, for permission to transport toxic substances and pesticides, for federal grant funds or loan guarantees, and for procurement contracts. *E.g.*, 7 U.S.C. § 136a(c) (pesticides); 15 U.S.C. § 2604 (toxic substances); 21 U.S.C. § 355 (new drugs). Since nothing compels any person to submit any of these applications, or to construct a nuclear power plant, or to make a public offering of securities, or to seek federal employment, all information submitted on such occasions is provided "voluntarily," in one sense, even if regulations require submission of information whenever these benefits are sought. *See also Washington Post Co. v. HHS*, 865 F.2d 320 (D.C. Cir. 1989) (financial interest forms required of consultants to federal government); *Teich v. FDA*, 751 F. Supp. 243, 246 (D.D.C. 1990) (animal studies submitted to FDA in support of application for approval of injectable silicone). Moreover, applicants often provide information beyond that strictly required to increase the chances of their applications being granted, and the Government often asks applicants to submit information

to make their applications more complete. *See, e.g.*, 21 C.F.R. §§ 314.60, 314.102 (discussing amendments and supplementations to new drug applications submitted to FDA); 7 U.S.C. § 136a(c)(2), 40 C.F.R. § 152.105 (EPA may ask for more information on pesticide registration applications). Whether such additional information is being provided voluntarily within the meaning of the D.C. Circuit's new test is also unclear.

The Court of Appeals' rule may create the greatest confusion in the area of government contracts, especially negotiated contracts. Under the Federal Acquisition Regulations System ("FARS"), agencies procuring materials through negotiated contracts may specify requirements for initial offers in their solicitations for proposals. But by the very nature of negotiated contracts, offerors are likely to supplement their initial proposals with further information, and the FARS recognizes that offerors should have the opportunity to submit revised technical and price information. *See* 48 C.F.R. 15.610. Yet the Court of Appeals' decision provides no method for determining which information obtained in the contracting process is submitted voluntarily and which is not, and, more significantly, there may never be a predictable or realistic basis for making such a determination.

In this area, the effect of the decision below can already be seen. In a "reverse-FOIA" lawsuit filed by a Government contractor to enjoin the Government from disclosing information, one court has ordered the Air Force not to release option price information in a procurement contract.[4] The Court concluded that the

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[4] "Reverse-FOIA" suits are actions brought by companies who submit information to the Government to prevent the disclosure of that information by the Government. Reverse-FOIA suits usually allege that disclosure of the information would be "not in accordance

(continued...)

price information was exempt from disclosure under the D.C. Circuit's new test because the contractor had submitted the bid to the Air Force of its own volition, and thus the price information in the accepted contract was submitted voluntarily by the bidder. Transcript of Motions Hearing at 35, *McDonnell Douglas Corp. v. Rice*, No. 92-2211-JHG (D.D.C.) (hearing held Sept. 30, 1992, transcript filed Oct. 1, 1992).

Furthermore, any information that the Government requires its contractors to provide even after formation of a contract, as a condition of contracting, might also be considered "voluntary," under the reasoning that contracting with the Government is voluntary, and private parties could avoid the obligation by declining to do business with the Government. The Government obtains extensive reports on matters of significant public interest from its contractors, all of which could be withdrawn from the public. *See, e.g.*, 41 C.F.R. § 60-1.7 (equal employment opportunity reports required from all federal contractors); *Miami Herald Pub. Co. v. Small Business Admin.*, 670 F.2d 610 (5th Cir. Unit B 1982) (reports on federally guaranteed loans); *Indian Law Resource Ctr. v. Department of Interior*, 477 F. Supp. 144, 146 (D.D.C. 1979) (Indian tribe's law firm's billing statements required for disbursement of funds to tribe); *Comstock Int'l (U.S.A.) v. Export-Import Bank of the United States*, 464 F. Supp. 804, 809 (D.D.C. 1979) (progress reports for subsidized construction contract).

For these reasons, courts following *National Parks* eschewed a formalistic line between voluntary and mandatory submissions and applied a straightforward

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[4](...continued)
with law," 5 U.S.C. § 706(2)(a), because disclosure would violate the Trade Secrets Act, 18 U.S.C. § 1905, and is not required under the FOIA. *See generally Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

"impairment" test to all information obtained by the Government that was not competitively sensitive. Thus, in *9 to 5*, *supra*, the First Circuit ordered a remand under *National Parks* to determine whether any specific governmental interest protected by Exemption 4, including the Government's access to necessary information, would be impaired by disclosure of regional salary information which private businesses shared with the Federal Reserve Bank of Boston, and with each other. Although the submission of that information was plainly voluntary (there was no suggestion that the Federal Reserve Bank had the power to compel it), the Court apparently did not regard that point significant enough to mention. Yet if the First Circuit had applied the new test announced by the D.C. Circuit in the decision below, a remand would have been unnecessary because the voluntary nature of the submission would have been sufficient to make the information exempt from disclosure.

Previously, courts in the D.C. Circuit agreed that, even if information was obtained "voluntarily," that information might not be exempt from the FOIA if the agency could compel its submission. *See* Pet. App. 53a, 85a; *Teich*, *supra*, at 251 (ordering disclosure, because it was "inconceivable" that FDA could not, and would not, compel submission of evidence showing that silicone gel implants should be removed from market); *Comstock*, *supra*, at 809 (pointing out that agencies can always make reporting requirements more specific). Applying the "impairment" prong of *National Parks*, those courts reasoned that the Government's ability to obtain information would not be impaired if the Government could compel submission of the information without undue difficulty. Pet. App. 53a n.26.

This is not to say that the voluntary character of the submission was deemed completely irrelevant. Under the *National Parks* test, it was well established that if the

Government had no ability to compel submission of necessary information, or if the process of compelling it would be overly burdensome, then the information would be exempt from disclosure. *See* Pet. App. 61a; *Bowen v. FDA*, 925 F.2d 1225, 1228 (9th Cir. 1991); *Timken Co. v. United States Customs Service*, 531 F. Supp. 194, 198 (D.D.C. 1981). In addition, courts applying *National Parks* concluded that, even if disclosure would not completely preclude the Government from obtaining necessary information in the future, when disclosure would seriously diminish the quality or completeness of the information, that information could be exempt. *See* Pet. App. 53a-57a, 85a; *Washington Post Co. v. HHS*, 690 F.2d 252, 268-69 (D.C. Cir. 1982); *Indian Law Resource Center*, *supra*, at 148.

Under *National Parks*, therefore, the courts focused on whether disclosure would cause an identifiable harm to the Government's information-gathering abilities. This unitary but fact-sensitive inquiry under the "impairment" prong of *National Parks* has worked well in practice, yet the D.C. Circuit has chosen to replace it with a new test that will assuredly be a ground for frequent litigation by both requesters and submitters. This significant departure from prior case law, and the problems that the new test will create, warrant this Court's review.

2. *The Incentive for Agencies To Evade the FOIA by Accepting Information Voluntarily.* The decision below should also be reviewed because it will lead to results that are fundamentally inconsistent with this Court's often-repeated admonitions that "'[t]he mandate of the FOIA calls for broad disclosure of Government records,'" and that "FOIA exemptions are to be narrowly construed." *Department of Justice v. Julian*, 486 U.S. 1, 8 (1988) (citations omitted); *accord Department of Air Force v. Rose*, 425 U.S. 352, 360-62 (1976). Far from ensuring broad access to agency records, the Court of Appeals' new rule

encourages agencies to act in conflict with the objectives of the FOIA by enabling them to withhold important records about the regulation of public health and safety under a claim that the information was submitted "voluntarily." Agencies may be tempted to undermine the effectiveness of the FOIA by agreeing to accept information on a "voluntary" basis, even when they could, and would, compel disclosure of the same information if necessary. The decision below effectively permits agencies to contract for exemptions from the FOIA.[5]

The question is not whether agencies and submitters would "conspire" to keep information from the public, as the Court of Appeals suggested, Pet. App. 19a. No such nefarious purpose need be attributed to the agencies. Rather, a realistic understanding of human nature compels the recognition that no agency has any incentive to open its files to the public and subject itself to scrutiny and possible criticism or embarrassment. This common-sense insight was fundamental to Congress' decision to enact the FOIA. *See* S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Congress' overarching objective was to limit agency discretion to withhold records, not expand it, as the Court of Appeals has done. Thus, Congress substituted legislative judgment for administrative discretion by confining the agencies' authority to withhold records to

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[5] This danger is not speculative, but is borne out in the record and the history of the NRC. In 1980-81, the NRC considered instituting a greatly expanded mandatory reporting system that would have required licensees to file reports about component failures at their plants. *See* 46 Fed. Reg. 3541 (1981); 45 Fed. Reg. 6793 (1980). The NRC dropped plans for such a system when INPO volunteered to manage a similar system privately and assured the NRC that it would have access to the system. *See* 46 Fed. Reg. 49,134 (1981). Although the public would have been able to obtain any reports that the NRC required to be submitted, it cannot see the identical data on the INPO-operated system, because the information on the INPO system is submitted voluntarily.

narrow and clearly delineated statutory exemptions. *See Rose*, 425 U.S. at 360-61.[6]

The decision below also threatens to reduce the quality of information about Government regulation that remains available to the public, because it encourages regulated entities to provide Government agencies with only minimal data that will be made public, while submitting far more significant information in secret. This case, in fact, illustrates that very danger. As mentioned *supra*, p. 4, the NRC uses the SEE-IN reports to verify the completeness and accuracy of the descriptions of safety-related "events" at nuclear power plants in the publicly disclosed LERs, which licensees are required to submit to the NRC. But if licensees realize that they can tell the NRC the "real story" about events at their plants in the secret SEE-IN reports, their public LERs will inevitably become more and more sketchy, revealing less to the public about the important issue of safety at nuclear power plants. Under the Court of Appeals' new test, agencies' regulatory decisions will be based increasingly on secret information rather than public information, and citizens will have a diminished understanding of agency actions. Thus, the Court of Appeals' decision creates a mechanism by which agencies can insulate their decision-making from public monitoring and accountability.

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[6] To reinforce this point, Congress amended Exemption 3 in 1976 to overrule this Court's conclusion in *Administrator, FAA v. Robertson*, 422 U.S. 255, 266 (1975), that the FOIA did not supersede earlier statutes affording agencies "a broad degree of discretion on what information is to be [withheld]." Congress overruled *Robertson* because it was perceived as giving agencies "*carte blanche* to withhold any information [they please]." H.R. Rep. No. 880, pt. 1, 94th Cong., 2d Sess. 23 (1976). The thrust of the FOIA as a whole, including revised Exemption 3, "is to assure that basic policy decisions on governmental secrecy be made by the Legislative rather than the Executive Branch." *American Jewish Congress v. Kreps*, 574 F.2d 624, 628 & n.34 (D.C. Cir. 1978).

In this regard, the importance of the decision below can hardly be overstated. Government agencies may have evidence that firms have distributed unsafe medical devices to the public, *see Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983); *Teich*, *supra*, participated in illegal boycotts, *see Green v. Department of Commerce*, 468 F. Supp. 691 (D.D.C. 1979), charged entertainment and lobbying expenses to the public under Government contracts, *see Common Cause v. Department of Air Force*, 1 GDS ¶ 80,162 (D.D.C. 198), or engaged in price fixing, *cf. 9 to 5*, *supra*, at 13 (Breyer, J., dissenting). The Government's regulatory response to these matters is of the highest public interest, but without access to the factual basis for the Government's regulatory action or inaction, the public cannot reach an informed conclusion as to whether the Government has taken the proper course. Yet the decision below invites agencies to keep this material secret, by choosing to accept crucial information about public health and safety "voluntarily" and withhold it from the public. This *carte blanche* to the agencies, to close their files as they deem appropriate, is antithetical to the principles that led to the enactment of the FOIA and requires review by this Court.

3. *The Deviation From the Purpose of Exemption 4.* The decision below also warrants review because, in exempting safety-related data that is shared with an entire industry and has no bearing on any company's competitive position, it has adopted a construction entirely unrelated to the purpose of Exemption 4, *viz.*, the protection of competitively sensitive business informatio... At heart, Exemption 4 "protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication." *National Parks*, 498 F.2d at 768. There is no suggestion, in either the text or the legislative history of the exemption, that Congress intended the word "confidential" to include a situation in which an industry

consortium distributes safety data to all participants in the industry, some of whom may be in potential competition with each other.

Part of the problem with the decision below is its expansion of Circuit precedent which, in turn, construed the statutory term "commercial" too broadly. *See* Pet. App. 19a, 47a; *Public Citizen Health Research Group v. FDA*, 704 F.2d at 1290. The Court of Appeals read the term "commercial" to include information that does not relate to the sale, purchase, or exchange of goods or services, or to the financial or marketing position of a company. In combination with its overbroad interpretation of the word "confidential," the Court of Appeals has expanded the scope of the exemption far beyond Congress' design for protection of business secrets, to include information circulating widely through an entire industry, even to competitors. This Court should adopt a construction of Exemption 4 more consonant with Congress' objective, either by construing the word "commercial" narrowly, or by limiting the exemption as a whole to competitively sensitive information.

4. *The Reverse-FOIA Problem.* Finally, the Court of Appeals' decision warrants review because it has opened up the possibility that the Government might be *prohibited* from disclosing information that is submitted voluntarily, even if the Government concludes that disclosure of the information promotes the public interest, and even if the information is not competitively sensitive. This possibility could deal a devastating blow to the public's ability to monitor agency operations.

Although it has long been settled that submitters of information can maintain "reverse-FOIA" actions to prevent the disclosure of competitively sensitive information, *see Chrysler Corp. v. Brown*, *supra*, under *National Parks* the prevailing view was that submitters could not successfully prevent the disclosure of information that was

not competitively sensitive by arguing that the Government's access to the information would be impaired as a result of disclosure. As Judge Posner pointed out, the Government is always likely to "lend[] a sympathetic ear to claims that disclosing a document will make it harder to get information in the future," *General Electric Co.*, *supra*, at 1402; thus, when an agency concludes that disclosure will not prevent it from obtaining necessary information in the future, its conclusion can not be challenged under the "impairment" prong of *National Parks*.

But in the decision below, the Court of Appeals explicitly recognized "a *private interest* in preserving the confidentiality of information that is provided the Government on a voluntary basis." Pet. App. 17a (emphasis added). This suggests that, in the future, a submitter that voluntarily provides information to the Government may successfully prevent disclosure of the information in a reverse-FOIA action, even if the information is not competitively sensitive. If so, then the Court of Appeals has effected a revolution in the law, for until now it has been the universal understanding that agencies have wide discretion to release information that is not competitively sensitive. *See CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1155-56 (D.C. Cir. 1987); *National Org. for Women v. Social Security Admin.*, 736 F.2d 727, 745 (D.C. Cir. 1984); *General Electric Co.*, *supra*.

From at least one recent case, it appears that this is precisely the effect of the decision below. In *McDonnell Douglas Corp. v. Rice*, *supra*, a District Court enjoined the Air Force from disclosing the option price paid to a military contractor for equipment. Because the military contractors had entered into the contracting process voluntarily, the District Court reasoned that the option price was also submitted "voluntarily." Transcript of Motions Hearing at 35. Accordingly, the District Court concluded that the option price was exempt from

disclosure under the Court of Appeals' new construction of Exemption 4 and that the contractor could prevent disclosure of the price by the Government.

The District Court arrived at this conclusion notwithstanding the federal Government's long-standing practice, codified in regulations and heretofore ratified by the lower courts, of releasing the maximum possible information about Government contracts to the public, in recognition of the important public interest in monitoring Government contracting procedures. *See* 48 C.F.R. 5.401(b), 14.408-1, 205.303 (disclosure of contract information); *see also Pacific Architects & Eng'rs v. Department of State*, 906 F.2d 1345 (9th Cir. 1990); *Acumenics Research & Technology v. Department of Justice*, 843 F.2d 800 (4th Cir. 1988) (unsuccessful reverse-FOIA suits). Indeed, the District Court in *McDonnell Douglas* observed that the probable effect of the Court of Appeals' new test is to render invalid many of the Government's regulations that encourage disclosure of information about Government contracting. Transcript of Motions Hearing at 38. This decision demonstrates the far-reaching and deleterious effects of the decision below on the public's ability to hold agencies accountable for their actions.

* * * *

For eighteen years, the *National Parks* test governed all commercial and financial information submitted to the Government by outside persons. Its universal adoption by other courts and its incorporation by Congress into other statutes demonstrate that the test has worked tolerably well. The Court of Appeals mistakenly believed that it was simplifying matters by confining the reach of *National Parks*, but in fact it has greatly complicated the law of the FOIA, and it has left agencies, requesters, and submitters with a test that is much more complicated and difficult to apply. Moreover, the Court of Appeals significantly

reduced the amount of vital information about public health and safety available to the public, and it may even have prohibited agencies from disclosing important information when they conclude that the public interest warrants such disclosure. Because of the significance of the decision below for the administration of the FOIA, and for public access to information generally, the writ of *certiorari* should be granted.

CONCLUSION

The writ of *certiorari* should be granted.

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December 18, 1992

No. 92-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CRITICAL MASS ENERGY PROJECT,
Petitioner,

v.

NUCLEAR REGULATORY COMMISSION
and
INSTITUTE OF NUCLEAR POWER OPERATIONS,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX TABLE OF CONTENTS

Attachment -

Dow v. NRC, Nos. 92-____ & 92- ____ (D.C. Cir., filed Dec. 29, 1992)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

'92 DEC 29 P 12:20

SANDRA LONG DOW dba DISPOSABLE WORKERS OF COMANCHE PEAK STEAM ELECTRIC STATION, and R. MICKY DOW,

Petitioners,

vs.

THE UNITED STATES NUCLEAR REGULATORY COMMISSION,

Respondents.

No. _____

COPY

PETITION FOR REVIEW
OF ADMINISTRATIVE ORDER

Sandra Long Dow dba Disposable Workers of Comanche Peak Steam Electric Station, and R. Micky Dow, hereby petition the Court for review of the order, issued by the United States Nuclear Regulatory Commission, December 15, 1992, in action numbers 50-446-CPA and 92-668-01-CPA, which denied petitioners' Motion For Rehearing, petitioners' Motion For Intervention, and petitioners' Request For Public Hearings on Construction Permit Extension, which terminated the proceedings of the Atomic Safety and Licensing Board.

Respectfully submitted,

Sandra Long Dow

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was sent to the parties listed below, by regular first class mail, on this the 28 th day of December, 1992.

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LBP-92-37

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulies, Chairman
Dr. James H. Carpenter
Dr. Peter S. Lam

'92 DEC 15 P4:11

SERVED DEC 16 1992

In the Matter of Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2)	Docket No. 50-446-CPA ASLBP No. 92-668-01-CPA (Construction Permit Amendment) December 15, 1992

MEMORANDUM AND ORDER
(Ruling On Intervention Petitions and Terminating Proceeding)

I. INTRODUCTION

We have before us for consideration two joint petitions for leave to intervene and to hold a hearing in the matter of the February 3, 1992 request by Texas Utilities Electric Company (Texas Utilities) to amend Construction Permit CPPR-127 for the Comanche Peak Steam Electric Station, Unit 2, by extending the construction completion date from August 1, 1992 to August 1, 1995. In this Memorandum and Order we decide to deny the petitions and terminate the proceeding.

The petitions were filed in response to a June 23, 1992 NRC Staff (Staff) "Environmental Assessment and Finding of No Significant Impact" for the requested extension, which was published in the *Federal Register* on June 29, 1992. 57 Fed. Reg. 28,885. The Commission, on July 28, 1992, granted the amendment on a finding by Staff that good cause has been shown for the delay and that the amendment involves no significant hazards consideration. 57 Fed. Reg. 34,323 (Aug. 4, 1992). In accordance with Commission practice, if a hearing is ordered a final decision on the extension will await the outcome of the hearing.

The first joint petition for intervention and hearing, dated July 27, 1992, was filed by B. Irene Orr, D.I. Orr, Joseph J. Macktal, Jr. and S.M.A. Hasan. They filed a supplement to the petition on October 5, 1992 containing a contention. Texas Utilities and Staff filed responses seeking denial of the petition and contending that the Petitioners have failed to provide any supporting basis for the contention. Petitioners filed additional pleadings dated November 15 and 17, 1992 which Texas Utilities and Staff oppose. We rule on those pleadings in this Memorandum and Order.

The other joint petition, dated July 28, 1992, was filed in behalf of Sandra Dow Long, R. Micky Dow and

Disposable Workers of Comanche Peak Steam Electric Station. The request for intervention and hearing was opposed by Texas Utilities and Staff in responses dated August 14 and August 18, 1992, respectively.

In response to our order setting October 5, 1992 as the date for filing amended or supplemental petitions, the Dows filed a motion for an extension of time and for a further filing schedule. By Memorandum and Order, dated October 9, 1992, (unpublished) we denied the request for lack of a credible reason and good cause. R. Micky Dow filed a motion for rehearing, dated November 10, 1992, which is opposed by Texas Utilities and Staff. In this Memorandum and Order we rule on the motion.

II. THE APPLICATION

By letter dated February 3, 1992, as supplemented on March 16, 1992, Texas Utilities requests, pursuant to 10 C.F.R. § 50.55(b), the extension of the construction completion date of CPPR-127 from August 1, 1992 to August 1, 1995. As good cause justification Texas Utilities states it was anticipated that there would be a one year suspension in construction beginning in April 1988. The purpose was to allow the permit holder to concentrate its resources on completion of Unit 1. However, Unit 1 was not licensed

until February 1990 and Texas Utilities did not resume significant design activities for Unit 2 until June 1990. The delay was needed to complete construction and startup of Unit 1.

Texas Utilities also relied on the NRC's previous finding of good cause for the suspension of construction of Unit 2 based on allowing concentration of resources for the completion of Unit 1. Staff found good cause for the extension of the construction permit completion date to August 1, 1992 premised on Texas Utilities' justification that suspension of Unit 2 for one year, beginning in April 1988, would allow it time to make modifications that may be required for Unit 2, based upon knowledge gained from the reinspection and corrective action program applied to Unit 1. 53 Fed. Reg. 47,888.

III. PETITIONS FOR INTERVENTION

A. The Orr Petition To Intervene

1. Requisite Interest for Standing.

The Commission's Rules of Practice provide that any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written

petition for leave to intervene. 10 C.F.R. § 2.714(a)(1). Section 2.714(a)(2) requires that the petition set fourth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding, including the reasons it should be permitted to intervene.

B. Irene Orr, D.I. Orr, Joseph J. Macktal, Jr. and S.M.A. Hasan each claim the requisite interest for standing to intervene in the proceeding under the provisions of 10 C.F.R. § 2.714.

The Orrs state that they reside at separate locations, within a 50-mile radius of Unit 2, that they eat food produced in an area that would be adversely affected by normal and accidental releases of radioactive materials from the construction of Unit 2 and that they came within Texas Utilities' rate base.

Joseph J. Macktal, Jr. states that he is a former employee of the Comanche Peak Steam Electric Station (CPSES) and is currently seeking reinstatement of his job. He asserts that he has been personally harmed due to management misconduct which has also contributed to the delay in the construction of Unit 2. Petitioner claims he was to be a direct fact witness in a construction permit amendment

proceeding to extend the completion date for Unit 1. The proceeding, Docket No. 50-445-CPA (CPA-1) was settled and dismissed in July 1988. He asserts that he has information which is relevant to the determination of Texas Utilities' request to extend the Unit 2 completion date.

S.M.A. Hasan, a former engineer employed at the CPSES, states he was to be a fact witness in CPA-1, but because of the payment of hush money by counsel for the utility to the intervenor he was precluded from testifying. He claims an interest in exposing the alleged management misconduct at CPSES which he says resulted in his removal from the CPSES site and directly contributed to the delay in constructing Units 1 and 2. He asserts a financial interest in the granting of the amendment request.

All Petitioners, without further explanation, claim to be similarly situated as the petitioners who were permitted to intervene in CPA-1 and request intervenor status on that basis.

Neither Texas Utilities nor Staff contest the Orrs' claim of having the requisite interest for standing. It is clear that their claim of residing within 50 miles of Unit 2 provides them with the status required for standing.

The same principles apply to establishing standing for a requested extension of an existing construction permit completion date as do to an application for a new construction permit or operating license. *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 563-565 (1980).

In the foregoing type of case a petitioner may base standing on a claim that he or she resides within the geographic zone that might be affected by an accidental release of fission products. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 443 (1979). Close proximity under those circumstances has been deemed to establish the requisite interest for intervention. In such a case, the petitioner need not show that the concerns are well founded in fact. Distances of as much as 50 miles have been held to fall within the zone. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979).

The Orrs' claim that they are part of Texas Utilities' rate base does not provide them with an additional ground for standing. Economic concerns of this kind are best directed to the state regulatory body that has charge of rate setting and similar matters. *Public Service Co. of New*

Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984).

Texas Utilities and Staff argue that Macktal and Hasan do not have the requisite interest for standing on the basis of their assertions that they are former employees who have suffered personal harm caused by management misconduct. They assert that Petitioners fail to meet the two pronged test used by the Commission to establish standing to intervene in NRC proceedings. The test requires a petitioner to show that (1) the action proposed will cause some injury-in-fact to the person seeking to establish standing and (2) that such injury is within the zone of interest protected by the statutes governing the proceeding. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976); *Metropolitan Edison Company, et al.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). They also claim that Petitioners failed to show that the injury-in-fact is concrete and particularized, actual or imminent and is likely to be redressed by a favorable decision in the proceeding, citing *Lujan v. Defenders of Wildlife*, __ U.S. ___, 112 S.Ct 2130, 2136 (1992).

We agree that Macktal and Hasan have not demonstrated that they have the requisite interest for standing. Not

having shown that they reside or work within close proximity to the plant they cannot claim, as the Orrs have successfully done, that they are presumed to have the requisite interest for standing. Under these circumstances a licensing board will apply judicial concepts of standing. *Pebble Springs, supra*. A petitioner should allege in an NRC proceeding an injury-in-fact that is within the zone of interest protected by the Atomic Energy Act of 1956, as amended (AEA), or the National Environmental Policy Act of 1969, as amended (NEPA). This, Petitioners have failed to do.

The claim of personal injury that allegedly resulted from mismanagement was not shown to result from the proposed extension of the construction permit completion date. Neither was it established that the alleged injury was protected against under the AEA or NEPA. Petitioners' grievances are in the area of employment rights and would not be redressed by a decision favorable to them on the issue of the extension of the construction date. A desire to expose the alleged mismanagement is not an injury-in-fact and does not enhance their position for standing.

Similarly, Petitioners' claim that they were denied the right to appear as witnesses in another proceeding to extend the construction completion date of Unit 1 does nothing to

provide the requisite interest for standing in this proceeding. Were Petitioners to prevail in the subject proceeding, it would not redress any alleged harm that was said to result from denying the Petitioners' right to testify in the Unit 1 proceeding. *Lujan v. Defenders of Wildlife, supra; Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988).

Hasan's claim of a financial interest in the application proceeding does not confer standing under the aegis of the AEA and in the absence of an environmental connection, as here, under NEPA. *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980).

No factual or legal justification was provided to grant Petitioners' standing request on the unsupported claim that they were similarly situated as the petitioners who were permitted to intervene in the Unit 1 extension proceeding.

We find that Macktal and Hasan have not demonstrated that they have the requisite interest for standing, as provided in 10 C.F.R. § 2.714, and that their petition for intervention and to hold a hearing should be denied.

2. Aspects.

The NRC's Rules of Practice provide that a petition for leave to intervene should set 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). Texas Utilities and Staff in their responses to the Orr petition asserted that Petitioners were not entitled to a hearing because they had not addressed the aspect requirements of the regulations.

The issue has been rendered moot by the filing by the Orrs of a supplement to the petition to intervene which contains a contention they propose to litigate. The contention sets forth with particularity aspects of the subject matter of the proceeding as to which Petitioners seek to intervene. Their pleadings are not now deficient in that respect. The Orrs have met the aspect requirement of 10 C.F.R. § 2.714(a)(2).

3. The Orrs' Contention.

a. Standards For Contentions In Construction Permit Extension Proceedings.

All contentions must meet the requirements of 10 C.F.R. § 2.714(b)(2), amended August 11, 1989, which provides:

> (2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:
>
> (i) A brief explanation of the bases of the contention.
>
> (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
>
> (iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute. . .

Further, 10 C.F.R. § 2.714(d) provides that contentions shall not be admitted (i) if the contention and supporting material fail to meet the requirements of section 2.714(b), or (ii) should the contention be proven it would be of no consequence in the proceeding because it would not entitle petitioner to relief.

In its comments on the amendments to section 2.714 the Commission explained that 2.714(b)(2) does not call upon the petitioner to make its case at this stage of the proceeding. The petitioner is required to read the pertinent portion of the license application and to state the applicant's position and its opposing view. 54 Fed. Reg. 33,170 (1989). The Commission cited with approval *Connecticut Bankers Ass'n v. Board of Governors*, 627 F.2d, 245, 251 (1980), wherein the court stated that "a protestant does not become entitled to an evidentiary hearing merely on request or on a bald or conclusory allegation that such a dispute exists. The protestant must make a minimal showing that facts are in dispute thereby demonstrating that an 'inquiry in depth' is appropriate."

The Commission looks to petitioners to specifically fulfill the requirements of 10 C.F.R. 2.714(b)(2). A licensing board cannot infer a basis for a contention. *Arizona Public Service Co., et al.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991).

The scope of a construction permit extension proceeding is limited to direct challenges to the permit holder's asserted reasons that show good cause justification for the delay. *Texas Utilities Co., et al.* (Comanche Peak Steam

Electric Station, Unit 1), ALAB-868, 25 NRC 912, 935 (1987). A petitioner may challenge a request for a permit extension by seeking to prove, on balance, delay was caused by circumstances that do not constitute good cause. *Washington Public Power Support System* (WPPSS Nuclear Project, Nos. 1 and 2), CLI-82-29, 16 NRC 1221, 1229 (1982).

The need to evaluate and correct safety deficiencies can be good cause for delay in construction completion even when those deficiencies resulted from deliberate corporate wrongdoing. If there was a corporate policy of violating NRC requirements and that policy was discarded and repudiated by the permit holder, any delays from the need to take corrective action would be delays for good cause. *Texas Utilities Electric Co., et al.* (Comanche Peak Steam Electric Station, Unit 1), CLI-86-15, 24 NRC 397, 402-403 (1986).

b. The Contention

Petitioners submitted the following contention:

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

As bases for the contention, Petitioners contend that a significant safety hazard exists where an applicant has employed and continues to employ corporate policies aimed at constructing a nuclear power plant in violation of NRC requirements and, as a result of these corporate policies, significant and substantial construction delays occurred and continue to occur. They further contend that the applicant has not repudiated or disregarded the corporate policies responsible for this delay. As a result they allege Texas Utilities is unable to demonstrate good cause for the delay and the amendment must be denied.

In support of the contention Petitioners allege that the facts contained in CPA-1, the 1988 proceeding in which Texas Utilities sought to extend the construction completion date for Unit 1 to August 1, 1988, demonstrate that a factual dispute exists as to whether Texas Utilities had a corporate policy to violate NRC requirements that had no valid purpose and resulted in a delay in the construction of Unit 2. They further allege that CPA-1 demonstrates a factual dispute as to whether the corporate policy had not been discarded or repudiated.

Petitioners contend that Texas Utilities misled the licensing board in CPA-1 about critical facts in an effort to conceal its ongoing corporate policy of construction in

violation of NRC requirements. These were said to include the use of restrictive settlement agreements, the payment of hush money, the use of incorrect construction standards and improper design certification methods.

Petitioners further contend that Texas Utilities continues to receive Notices of Violation and civil fines which demonstrate it employs the same corporate policies which originally resulted in construction delays.

In response Texas Utilities asserts that Petitioners have failed to allege even a single fact in support of their contention that Unit 2 was delayed due to improper and intentional conduct. It claims that Petitioners' supplement consists of nothing more than a discussion of disparate events occurring over the past ten years that have nothing to do with Texas Utilities' construction permit extension request. Texas Utilities states that the matters raised by Petitioners were previously brought to the attention of the Commission and satisfactorily resolved prior to the issuance of the operating license for Unit 1. Also, the construction permit completion date for Unit 2 was already extended by the NRC in November 1988 to August 1, 1992 on good cause justification for the delay that resulted from reinspection and corrective action programs at Unit 1, which were to be applied to Unit 2. It requests that Petitioners' petition

to intervene should be denied because they failed to establish a basis for a contention as required by 10 C.F.R. § 2.714.

Staff contends that the contention is not admissible because it does not address the issue in the proceeding, i.e., whether it was appropriate for Texas Utilities to have delayed significant construction activities at Unit 2 from 1988 to January 1991, when it resumed significant construction activities. It states that Petitioners fail to explain how the alleged corporate policies, which may or may not have caused the delay in the construction of Unit 1 in 1986, caused Texas Utilities to inappropriately defer the resumption of significant construction activities at Unit 2 for more than two years from 1988 until 1991. Staff asserts that the contention is not relevant to any matter in the proceeding.

Staff further contends that in support of their contention Petitioners chiefly rely on legal pleadings filed in either the operating license proceeding for Units 1 and 2 or CPA-1 without explaining how any of these pleadings, even if true, caused Texas Utilities to inappropriately delay significant construction activities at Unit 2. Staff claims that the events Petitioner alleges to have occurred since the CPA-1 proceeding was terminated are unsupported. It

concludes that Petitioners have failed to demonstrate that a genuine dispute of material facts exists making Petitioners' contention inadmissible.

Petitioners rely on the record in CPA-1, a proceeding to hear Texas Utilities' request of January 29, 1986 to extend the construction completion date of CPPR-126 for Unit 1 to August 1, 1988. Intervenor in that proceeding submitted a contention upon which the subject contention was modeled. The proceeding was considered along with the operating license applications for Unit 1 and its companion Unit 2. Docket No. 50-445-OL and Docket No. 50-446-OL.

The applications for operating licenses for Units 1 and 2 were filed in 1978. By 1983, the only contention remaining for litigation in the operating license proceeding challenged the quality assurance and quality control associated with the construction of the Units 1 and 2. During the course of the proceeding the licensing board found that the applicant had not demonstrated the existence of a system that promptly corrects design deficiencies and had not explained several design questions raised by the intervenor. It suggested the need for an independent design review and required the applicants to file a plan that might help to resolve the Board's doubts. *Texas Utilities Generating Company, et al.* (Comanche Peak Steam Electric

Station, Units 1 and 2), LBP-83-81, 18 NRC 1410 (1983). Applicants took various actions to address the concerns that had been raised. Subsequently, Applicants, Staff and the intervenor entered into an agreement in June 1988 to settle and dismiss the operating license proceeding and the application proceeding to extend the construction completion date for Unit 1. The licensing board concluded that as a result of the settlement it knew of no matters in controversy. LBP-88-18A, 28 NRC 101 (1988). It then dismi ed the proceeding on July 13, 1988. LBP-88-18B, 28 NRC 103 (1988).

Petitioners would incorporate by reference into this proceeding the record from the operating license applications and construction permit extension proceedings. The record runs into many thousands of pages. They also reference two pleadings containing more than 200 pages. Based on that record Petitioners would have us find that Texas Utilities had not repudiated, prior to the time the proceedings were settled, its corporate policy of violating NRC regulations which resulted in delays in the construction of CPSES.

This we cannot do. Commission practice is clear that a petitioner may not simply incorporate massive documents by reference as the basis for its contention. Petitioners are

expected to clearly identify the matters on which they intend to rely with reference to a specific point. To do otherwise does not serve the purposes of a pleading. *Public Service Company of New Hampshire, et al.* (Seabrook Station, Units 1 and 2) 29 NRC 234, 240, 241 (1989). This requirement is incorporated in 10 C.F.R. 2.714(b)(2)(ii) which Petitioners fail to meet with their request.

Petitioners also allege that the following raise an issue as to whether Texas Utility maintains a corporate policy of violating NRC regulations that caused the delay in the construction of Unit 2.

(1) Restrictive settlement agreements.

Petitioners assert that Texas Utilities has not repudiated its policy of entering into restrictive settlement agreements with former minority owners of CPSES in order to keep relevant information from the licensing board in CPA-1 and the NRC. Brazos Electric Power Cooperative, Inc. (Brazos), a minority owner in CPSES, had contended in an August 14, 1987 pleading in CPA-1 that Texas Utilities was responsible for failing to disclose material information and making misrepresentations to Brazos that may have delayed construction of Unit 1. Brazos asserted it was a continuing practice of the permit holder. Petitioners

assert that subsequently Texas Utilities and minority owners Brazos, Texas Municipal Power Agency and Tex-La Electric Cooperative of Texas entered into settlement agreements whereby Texas Utilities purchased the interest of the minority owners who in turn agreed to drop their litigation and not to assist or cooperate with third parties in all proceedings related to the licensing of Comanche Peak or permit their employees, attorneys and consultants from doing so. The agreements were signed in July 1988, February 1988 and March 1989, respectively.

We cannot discern from Petitioners' presentation how the entry of Texas Utilities into nondisclosure agreements resulted in delay in the construction of CPSES. The allegation was made but it is unsupported.

Moreover, even if Petitioners had alleged facts indicating intentional violations of NRC requirements as the root cause of the deficiencies requiring correction, it would not be sufficient to defeat the extension if the policy was discarded and repudiated by the permit holder and the delays occurred because of the need to correct the safety problems. *Texas Utilities Electric Co.* et al. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-15, 24 NRC 397, 401-404 (1986). For a petitioner to plead an admissible contention in a construction permit extension

proceeding it is necessary to directly challenge the permit holder's asserted reasons that show good cause justification for the delay. *Texas Utilities Electric Co., et al.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 935 (1987).

Petitioners at no time directly challenge Texas Utilities good cause justification for the delay in constructing Unit 2, i.e., applying safety modifications to Unit 2 based upon the reinspection and corrective action program applied to Unit 1. They do not present any supporting material to show that on balance the restrictive agreements were the cause of the delay at Unit 2 and not the reasons given by Texas Utilities in the application. Not only is this inconsistent with the law on contention requirements in a construction permit extension proceeding it is contrary to the requirements of 10 C.F.R. 2.714(b)(2)(iii). It requires petitioners to include references to the specific portions of the application that they dispute and the supporting reason for each dispute.

Petitioners allege that restrictive settlement agreements entered into with alleged whistleblowers established a practice of concealing evidence directly bearing on the issues to be litigated in the operating license and CPA-1 proceedings.

They claim the agreements demonstrate that Texas Utilities has not repudiated its corporate policy which resulted in construction delay. Agreements were entered into between Joseph J. Macktal, Jr. and the contractor of CPSES (Brown and Root, Inc.) in January 1987 and between Lorenzo Polizzi and the architectural engineer for CPSES (Gibbs and Hill, Inc.) in June 1988.

The individuals in settling employment claims with the contractors agreed not to voluntarily testify or otherwise participate in any proceeding or investigation involving CPSES. The Polizzi agreement permitted him to inform the NRC of safety concerns relating to CPSES. Texas Utilities argues that it was not a party to either agreement and that the individuals were informed in 1989 that the restrictive clauses would not be enforced.

The pleading is similarly deficient as that relating to the nondisclosure agreements entered into with minority owners. The claim that the settlement agreements resulted in construction delay is unsupported. Contrary to the requirements of 2.714(b)(2)(iii) Petitioners ignored and failed to challenge the reasons given by Texas Utilities for the delay of construction at Unit 2, which is critical for a contention opposing a construction permit extension.

(2) Pattern of continuing violations.

Petitioners allege that the operating license and CPA-1 proceedings demonstrated a corporate policy of Texas Utilities that resulted in a breakdown in the quality assurance (QA) and quality control (QC) programs employed by CPSES which delayed construction. They contend that Texas Utilities continues to receive numerous Notices of Violation and civil penalties which shows it continues to employ the same corporate policies which originally resulted in the delay of construction. In support Petitioners presented a printout of the Notices of Violation and penalties received since the settlement of the former proceedings.

Petitioners specifically called our attention to the six notices that are said to have occurred related to QA and QC breakdowns. They were identified as occurring on May 17, 1990; August 3, 1990; February 21, 1991; March 29, 1991; April 1, 1991 and March 31, 1992. Petitioners assert that the Notices of Violation demonstrate that Texas Utilities has not abandoned its post corporate policy which resulted in delay.

Texas Utilities states that it has taken corrective and preventative actions for each of the six violations and the NRC has closed all but the most recent violation. It

disclaims that the violations provide a basis for a contention that there is a current or ongoing corporate policy of violating NRC regulations.

We do not believe that which Petitioners have presented supports a claim of a pattern of violations that demonstrate a policy to violate NRC regulations. Inevitably, there will be some construction defects tied to quality assurance lapses in any project approaching in magnitude and complexity, the erection of a nuclear power plant. *Union Electric Company* (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1982). No information was provided to show that anything more was involved here. Furthermore, Petitioners have not shown how the violations were the cause of the delay at Unit 2 rather than as justified by Texas Utilities.

(3) Alleged misleading of licensing board in operating license and CPA-1 proceedings to conceal corporate policy of violating NRC regulations.

Petitioners allege that Texas Utilities misled the licensing board in July 1988 about the root causes of design defects incorporated in the design of CPSES, which required a complete redesign of the CPSES pipe support system, thereby delaying construction.

(i) "Hush money" settlement agreements.

Petitioners allege that Texas Utilities arranged to have whistleblowers paid money in exchange for agreeing not to bring safety concerns to the NRC and denied such activity at the prehearing conference on July 13, 1988, which resulted in the termination of the proceedings. Specific mention is made of the Polizzi agreement. Petitioners claim the failure of Texas Utilities to repudiate the agreements demonstrates that the practice will continue.

Texas Utilities denies that the agreements restrict whistleblowers from informing the NRC of safety concerns and that the NRC has so found. It asserts that the agreements are more than four years old and do not relate to the permit holder's current corporate policy.

The Board notes that the Polizzi agreement of June 23, 1988 provides that the agreement shall not "be interpreted to prevent Polizzi from informing the Nuclear Regulatory Commission of any and all safety concerns he may have relating to the Comanche Peak Steam Electric Station."

Even if we are to assume that "hush money" was paid, it does not *ipso facto* show that delay at Unit 1 was caused by the entering into the agreements or that the agreements, on

balance, caused the delay at Unit 2 rather than the reasons given by Texas Utilities. Petitioners have not provided a valid basis in support of the contention.

(ii) Incorrect stiffness valves were used to certify the CPSES pipe support system.

Petitioners allege that beginning in 1983 S.M.A. Hasan, an engineer at CPSES, had informed Texas Utilities management that incorrect stiffness valves had been used to certify the CPSES pipe support system. The project pipe support engineer was advised of this in August 1985. Petitioners state that the licensing board was not apprised of this situation as Texas Utilities was obligated to do. A minority owner advised the licensing board in January 1987 that Texas Utilities, that month, acknowledged using incorrect values in Unit 1. Petitioners further allege that the project pipe support engineer who oversaw the design of all piping support work at CPSES is believed to be currently employed as Texas Utilities' Manager of Civil Engineering. Petitioners claim this demonstrates that Texas Utilities has not repudiated its policy of construction in violation of NRC requirements including the concealment of significant safety deficiencies.

Texas Utilities asserts that in the mid-1980 Hasan made allegations to the NRC regarding the pipe support certifications. It states it advised the NRC that in July 1987 the pipe supports were being correctly validated and the NRC concluded Hasan's concern had been adequately resolved. Texas Utilities further asserts that the matters were made known to the licensing board prior to the dismissal of the proceeding on July 13, 1988. It claims that Petitioners' allegations related to pipe support certification are more than four years old and do not relate to Texas Utilities' current corporate policies or as to whether it had repudiated past policies.

Petitioners' claim that Texas Utilities maintains its policy of construction in violation of NRC requirements, including the concealment of significant safety deficiencies, is unsupported as prescribed in § 2.714(b)(2)(ii). Lacking is a showing that the alleged improper certifications and their concealments extended beyond 1988. The only connection made of the prior activities of Texas Utilities and its current practices is that it continues to employ the same manager as to whom the initial complaints were made. There is no showing that he presently allows improper certifications or conceals them. An additional defect in the pleading is that it does not

directly challenge the asserted reasons of Texas Utilities in justification for the delay.

(iii) Harassment and intimidation of whistleblowers.

Petitioners contend that Texas Utilities has harassed and intimidated whistleblowers at CPSES. They assert that numerous whistleblowers continue to file complaints against Texas Utilities and their contractors. Petitioners claim that Texas Utilities has not repudiated its corporate policy of constructing in violation of NRC regulations which has resulted in the delay of construction of Unit 2.

Petitioners rely on an April 28, 1988 statement of the intervenor in the operating license and CPA-1 proceedings in which the intervenor questions whether Texas Utilities has adequately identified the root cause of the harassment and intimidation of QC inspectors, managements' role in it and the alleged withholding of information regarding the intimidation of a contractor that was to conduct an independent assessment program. They also allege that Texas Utilities has not properly reviewed the concerns of whistleblowers and that harassment and intimidation still exists at CPSES. Petitioners seek discovery in order to

document evidence which they state supports these and other assertions.

In response Texas Utilities contends that the allegations of harassment and intimidation are unsupported. It further alleges that Petitioners did not provide a basis for the allegations that the intimidation and harassment or employee concerns resulted in the subject delay in the completion of CPSES Unit 2. Texas Utilities advises that in the mid-1980's an NRC special investigation team found that there were some incidents of intimidation and harassment, but there was no "climate of intimidation" at CPSES. Texas Utilities denies any deliberate corporate policy of violating NRC requirements.

Petitioners' assertion that an atmosphere of harassment and intimidation exists at CPSES is not supported as is prescribed in § 2.714(b)(2)(ii). The information supplied by Petitioners goes back to 1988 and before. No specifics were provided on who the whistleblowers are that continue to file complaints and what are their complaints. No nexus was provided between the alleged misconduct in the mid-1980's and Texas Utilities' alleged justification for the delay in the construction of Unit 2. Without such a connection the information provided is insufficient to support a litigable contention in a construction permit extension application.

Although Petitioners would like to further develop support for the contention through discovery, we cannot give them that right. Discovery is only available to a party following the admission of a contention. *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263; 10 C.F.R. § 2.740(b)(1).

The contention fails because it does not directly challenge Texas Utilities' good cause justification for the delay in construction of Unit 2, the time being needed to reinspect and to take corrective action at Unit 1 and to allow it time to make modifications at Unit 2 based on the knowledge gained. Petitioners' allegations of corporate wrongdoing do not show a genuine dispute exists with the applicant on its justification for the delay.

The contention also fails to comply with 10 C.F.R. § 2.714(b)(2)(iii) which requires that each contention contain sufficient information to show that as genuine dispute exists with the applicant on a material issue of law or fact. The showing must include references to the specific portions of the application that the petitioner disputes.

The contention is therefore inadmissible. 10 C.F.R. § 2.714(d)(1). The failure to submit a single admissible

contention results in Petitioners not being permitted to participate in the proceeding as a party. 10 C.F.R. § 2.714(b)(1). The Orrs' petition for leave to intervene and to hold a hearing shall be denied.

c. Additional Pleadings.

On November 17, 1992 Petitioners filed a document entitled "Notification Of Additional Evidence Supporting Petitions To Intervene Filed By B. Orr, D. Orr, J. Macktal, and S. Hansan" (Notification). Petitioners submit for consideration by the Board evidence they allege was not available to them on October 5, 1992, the date set for filing contentions.

The evidence consists of excerpts of settlement agreements entered into between Texas Utilities and minority owners Texas Municipal Power Agency (TMPA) and Brazos. The agreements are dated February 12, 1988 and July 5, 1988, respectively. They cover the purchase by Texas Utilities of the minority interests. The former minority owners agreed that they and their attorneys, employees and consultants would not assist or cooperate with third parties in proceedings relating to Comanche Peak.

Petitioners allege that they were first notified by letter of October 13, 1992 that the agreements were available for inspection in the NRC's Public Document Room which made it too late for their inclusion in the contention filed October 5, 1992.

They claim that through these restrictive settlement agreements Texas Utilities was able to secrete from the then convened licensing board, the NRC, and the public information calling into question aspects of the design and construction of CPSES and the ability of Texas Utilities to construct and operate the plants. Petitioners further claim that the agreements demonstrate a past corporate policy that has not been repudiated, which caused the delay in the construction of Unit 2. They also allege that the agreements show the payment of money for silence and that they violate the Energy Reorganization Act and important public policies.

Texas Utilities asserts in a response dated November 25, 1992, that Petitioners' Notification is procedurally improper and substantively irrelevant. It claims that the two documents were provided to the NRC years ago and were available to Petitioners long before October 13, 1992. It stated that at a minimum Petitioners should have addressed the five factors that must be

considered before a nontimely filing may be entertained, as provided for in 10 C.F.R. § 2.714(a)(1), and that their failure to do so should result in the rejection of the document.

Texas Utilities further argues that Petitioners make no effort to explain how the agreements have anything to do with the current extension request. It claims that the agreements predate the previous extension of the construction completion date and are irrelevant. The agreements are said to fail to satisfy the Commission's requirements for admission of a contention in a construction permit extension proceeding as contained in *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), CLI-86-15, 24 NRC 397 (1986).

Staff in a December 3, 1992 response argues that Petitioners have failed to establish good cause for the late filing of the Notification and that the information and legal arguments contained in it should not be considered by the Board. Staff also argues that the Notification fails to demonstrate that the contention has any discernable relationship to the issue in the proceeding. It asserts that the settlement agreements were last entered into in July 1988 which is prior to the relevant time frame in the proceeding which is November 18, 1992 when the previous

construction permit construction completion date was extended. Staff claims that Texas Utilities' defense of the agreements in no way demonstrates that the permit holder had a corporate policy that was responsible for the delay in the construction of Unit 2.

We find that the two settlement agreements cannot be considered as newly obtained evidence because they were publicly available prior to the October 5, 1992 filing date. The agreements were submitted to the NRC, in 1988, in support of two applications to amend the construction permits for CPSES to reflect the changes in ownership. The issuance of the amendments was noticed in the *Federal Register* along with the information that the application documents were available in the NRC's Public Document Room. 53 Fed. Reg. 31,778 (August 19, 1988); 53 Fed. Reg. 50610 (Dec. 16, 1988).

Furthermore, Petitioners were generally aware of the contents of the agreements when they filed their contention on October 5, 1992 and could have made in that filing all of the points they offer in the Notification. In the October 5, 1992 filing Petitioners submitted excerpts of a similar settlement agreement Texas Utilities entered into with Tex-La Electric Cooperative of Texas and argued that the agreement and those with Brazos and TMPA supported their

contention. Petitioners stated that they were unable to get copies of the Brazos and TMPA settlement agreements but argued on the basis of all three because they were all similar. The submission of excerpts of the two agreements in the Notification were but a formality in that their relevant contents had already been used in a basis in support of the contention.

Petitioners used the excerpts of the Brazos and TMPA settlement agreements as a vehicle to expand on the previous matters presented in support of the contention and to introduce new arguments such as the claim the settlement agreements reflected the payment of money for silence and that they violate the Emergency Reorganization Act and public policies.

Not only can the Brazos and TMPA settlement agreements not be considered new evidence because of their previous availability but their contents had already been used to support the contention. What Petitioners have proffered in their Notification is a late-filed amendment to the bases of their contention. It was offered without good cause and without addressing the five factors required to be considered by the Board prior to determining whether the nontimely filing should be entertained. 10 C.F.R. § 2.714(a)(1). We therefore reject the Notification.

Petitioners B. Irene Orr, D.I. Orr, Joseph J. Macktal, Jr. and S.M.A. Hasan filed a motion entitled "Motion To Compel Disclosure Of Information Secreted By Restrictive Agreements," dated November 15, 1992. Petitioners request the Board to declare null and void the provisions of the settlement agreements between Texas Utilities and the three minority owners, which prohibit the minority owners and those associated with them from disclosing any potential safety related information to Petitioners, the NRC and the general public. They also request that the Board require that the parties to the settlement agreements, and those affected by the agreements, submit to discovery by Petitioners. The purpose of the discovery is to permit Petitioners to file additional contentions and additional information in support of the previously filed contention.

Texas Utilities in a response dated November 25, 1992 requests that the motion be denied. It asserts that the request to declare the agreements null and void is beyond the scope of the Board's jurisdiction and that the request for discovery to frame contentions is for relief that a petitioner seeking to intervene is not entitled.

Staff, in its response dated December 3, 1992, agrees with Texas Utilities in opposing the motion. It also contends that the agreements neither violate the Energy

Reorganization Act or the Commission's regulations. However, to the extent the agreements are within the proceeding and they preclude the affected corporate entities from bringing information to the NRC they are without force and effect insofar as they relate to communications with the NRC.

We deny the motion because Petitioners seek relief that is not available to a petitioner for leave to intervene. The motion in effect is one for discovery. The request to declare parts of the settlement agreements null and void is but an integral part and in furtherance of the discovery request. Discovery is only available to a party to the proceeding that has already filed an admissible contention. *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263; 10 C.F.R. § 2.740(b)(1). Petitioners have not achieved that status and cannot be granted that relief. We do not rule at this time on whether the relief could be granted as requested had petitioners achieved party status.

B. The Dow Petition To Intervene

1. Requisite Interest For Standing.

R. Micky Dow, his spouse Sandra Long Dow and Disposable Workers of Comanche Peak Steam Electric Station (Workers), each petitions for leave to intervene in the proceeding, pursuant to 10 C.F.R. § 2.714.

R. Micky Dow alleges that he owns property within a 50-mile radius of CPSES and could be harmed by an accident at the plant. He claims to have already been adversely affected because of telephone threats by an officer of Texas Utilities which caused him to flee from his home and Texas.

Sandra Long Dow claims that in the normal course of events she would reside with her husband within a 50-mile radius of CPSES but has been precluded from doing so because of threats to him and harassment to her from those under the control of Texas Utilities.

Workers is stated to be an organization composed chiefly of persons who own property or reside within a 50-mile radius of the facility. Affidavits attesting to this are claimed by Petitioners to be already on file with the NRC. It was not identified where. The board of

directors of Workers is reported to be made up of former whistleblowers who were prevented from testifying before the Commission because of an allegedly illegal settlement agreement. Workers claims to have had standing in "past issues" and wants to reclaim it here. The "past issues" were not identified.

Petitioners claim all of those interested in the proceeding do, or will live, work, recreate, travel and raise families within a radius of 50 miles of CPSES. Much of the food and all of the water used in the area was said to be subject to radioactive or toxic material releases from the facilities. They assert that there is good reason to deny the request for an extension but do not further identify it.

Petitioners request the suspension of the subject proceeding based on vague arguments relating to other proceedings that they are engaged in before the NRC and the Federal Courts. They argue mootness and due process as a basis for suspending this proceeding.

Texas Utilities argues that the joint petition should not be accepted for filing. It asserts that it is one or more than a dozen actions involving CPSES that the Dows have initiated. Texas Utilities claims that the Dows have

engaged in a pattern of not complying with the Commission's requirements, of making frivolous and scurrilous claims, of omitting material facts and of harassing it and the NRC. Texas Utilities had requested the Commission to grant a similar motion in *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC ___ (1992), but in denying the Dows' petition for late intervention and to reopen the record, the Commission did not address the Texas Utilities' motion.

Texas Utilities asserts that the Dows have not established standing for themselves on the basis of the proximity of their residence or their property to CPSES. It claims that the probable reason that Dows have not chosen to remain in Texas is that he is a convicted felon and that there are felony arrest and misdemeanor warrants outstanding against him in Texas. Texas Utilities' position is that Dows' inability to establish standing is due to his own misconduct. It further argues that the Dows have not asserted any other injury-in-fact which falls within the zone of interest protected by the AEA and that organizational standing was not established on behalf of Workers. It would deny the Dow petition for lack of standing of the Petitioners.

Staff is of the same position as Texas Utilities that the Dow petition does not establish standing as provided in 10 C.F.R. § 2.714. It views Petitioners' request to suspend the proceeding on the basis of mootness and due process claims as irrelevant considering that they have not established standing.

The Dows individually cannot be presumed to be adversely affected by either plant operations or a credible accident at the plant where their base of normal everyday activities is not within close proximity (50 miles) of the facility. *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974).

The Dows fault Texas Utilities for not being able to reside within 50 miles from the plant and Texas Utilities blames the Dows for the situation. Irrespective of who is responsible, the Dows do not meet the conditions for invoking the presumption.

To establish standing they are therefore relegated to do so by alleging an injury-in-fact that is within the zone of interest protected by the AEA or NEPA. The injury should likely be remedied by a favorable decision granting the relief sought. *Dellums v. NRC, supra.*

The Dows individually have not met the foregoing requirements. They have not satisfactorily explained how they, who do not reside in Texas, would have their health and safety jeopardized or suffer environmental harm because of the construction of Unit 2. The property alleged to be owned near the plant was never identified.

The alleged threats and harassment that were said to result in the Dows fleeing Texas is not an injury protected under the AEA or NEPA. A favorable decision for the Dows in the subject proceeding would not remedy the alleged injury. The forum for resolving that dispute is not here. They do not have requisite interest for standing.

We find that the Workers has not been shown to have the necessary interest for organizational or representative standing.

For an organization to have standing, it must show injury-in-fact to its organizational interests or to the interest of members who have authorized it to act for them. If the organization is depending upon injury to the interests of its members to establish standing, the organization must provide with its petition identification of at least one member who will be injured, a description of the nature of that injury, and an authorization for the

organization to represent that individual in the proceeding. *Philadelphia Electric Co.* (Limerick Generating Stations, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982).

Workers does not state its organizational purpose nor does it claim any injury to its organizational interest. Its assertions that it had standing in the past in some unidentified matter does nothing to enhance its claim to standing in this proceeding. It is incumbent on Workers to establish standing on this record and it cannot rely on something elsewhere of which we know nothing.

Similarly it has not established representational standing. It relies on unsupplied affidavits that are said to attest to Workers' members owning property or residing within 50 miles of CPSES. The contents of the affidavits and the proceeding in which they were filed are unknown.

There is nothing in this record, as is required for representational standing, that identifies at least one member who will be injured, a description of the nature of that injury to the member and an authorization for the Workers to represent that individual in this proceeding. Sandra Long Dow does not fulfill the role of being the injured member for the reasons we stated previously as to why she has not established individual standing.

Not having established the interest for standing the request by the Dow petitioners to suspend this proceeding on claims of mootness and due process cannot be considered by us.

We will not decide on Texas Utilities' request that we not accept the filing of the Dow petition. There is insufficient evidence in this record to make that ruling. It would serve no useful purpose to further pursue the matter and thereby delay the disposition of this proceeding which can be disposed of on the existing record.

The petition for leave to intervene and to hold a hearing shall be denied on the grounds that Petitioners failed to establish the requisite interest for standing under 10 C.F.R. § 2.714.

2. - Aspects.

Texas Utilities and Staff claim that the Dow petition for leave to intervene fails to set forth the specific aspect or aspects of the subject matter of the proceeding as to which Petitioners seek to intervene, contrary to 10 C.F.R. § 2.714(a)(2).

We agree that this constitutes another defect in the Dow petition which is inadequate for establishing standing under 10 C.F.R. § 2.714.

3. The Request To File Contentions.

In a Memorandum and Order of September 11, 1992, we set October 5, 1992 as the date to file amended petitions and supplemental petitions containing contentions for litigation. On October 5 the Dow petitioners filed a motion for an extension of 30 days to make the filing. The request was based on a claim that movants were precluded from making a timely filing through circumstances over which they had no control. We denied the request on the grounds that their reason lacked credibility, was unsupported by probative evidence and failed to show good cause.

R. Micky Dow asserted that on September 3, 1992, he was apprehended, confined and held incommunicado for 30 days and his case materials were confiscated in order to disrupt his participation in the proceeding and to keep from timely making the October 5 filing date. Underscoring the lack of credibility of the story was that he said he was imprisoned on September 3, 1992 to keep him from making the October filing date, although it was not until September 11, 1992

that the Board issued its memorandum and set the date for filing.

In response to our Memorandum and Order of October 19, 1992 denying the motion, R. Micky Dow filed a motion for rehearing dated November 10, 1992. He now argues that he had no knowledge of the scheduling order and therefore could not timely respond. He asserts that granting an extension would not prejudice any of the parties and if the Board found his motion to be lacking in truth it would have been more appropriate to issue an order to show cause.

Texas Utilities opposes the motion because it provides no new information which would alter the Board's prior ruling that good cause for granting an extension had not been demonstrated. It contends the motion merely provides additional unsubstantiated details related to precisely the same events discussed in the initial motion.

Staff also opposes the motion. It argues that the motion fails to demonstrate that the October 19, 1992 order was erroneous or arbitrary. Staff considers the motion for rehearing as a motion for reconsideration and states the motion does not meet the standards for reconsideration. The Commission has held that motions to reconsider should be associated with requests for re-evaluation of an order in

light of an elaboration upon or refinement of arguments previously advanced and they are not the occasion for an entirely new thesis. *Central Electric Power Cooperative, Inc.* (Virgil C. Summer Nuclear Station, Unit 1) CLI-81-26, 14 NRC 787 (1981).

Staff alleges that the claim of a lack of knowledge of the filing date is new and improper to raise in the motion for rehearing. Additionally, it states that the movant reiterates the same argument without further elaboration, that he was separated from his evidentiary material and was unable to contact anyone, which is also improper pleading. It also alleges movant fails to understand his burden of proof in a motion for an extension of time and that the motion for rehearing was untimely.

The Dow motion for rehearing, along with the attached unverified statement of Mr. Dow only confirms our October 19, 1992 finding that the original motion lacked credibility, was unsupported by probative evidence and failed to provide good cause for the requested extension.

The heart of the original motion was the Dow claim that he had a rough draft of the pleading to be filed, that he was incarcerated on September 3 for more than 30 days and had his papers stolen so that he would not be able to timely

file. Having had the Board point out that it first ordered the pleading filed on September 11, 1992 he now states he never knew of the September 11 order and therefore could not meet it. This change merely conflicts with the original version and does nothing to enhance credibility.

Dow in his original motion claimed he was held incommunicado for more than 30 days and could not contact anyone regarding the possible extension of the filing date. In his current statement he advises of three telephone conversations with one attorney, a visit by another and of telephone calls he made but not with the frequency he wanted. He now undermines his claim that he could not contact anyone regarding the filing.

In his original motion of October 5, 1992, Dow stated that "the public record and court transcription in existence now will completely substantiate" his version of what occurred. The motion for rehearing remains unsupported by any probative evidence. All that was submitted was an unverified statement that conflicts with the original story.

Under 10 C.F.R. §§ 2.711(a) and 2.732 the Dows had the burden of showing good cause for the requested extension. They did not meet this burden provided for in the NRC's Rules of Practice and their motion for an extension failed.

We found no basis to employ a show cause procedure before deciding the motion. It was not required nor warranted by the circumstances.

The Dows contend that granting the extension will not prejudice anyone. To the contrary, to grant a motion that legally should be denied results in a denial of due process. Parties would be injured if this was permitted to occur and the administrative process would also suffer.

We will not deny the November 10, 1992 motion for rehearing on the grounds of untimeliness because there is no prescribed time for filing such a motion. We shall deny the motion on the basis that it failed to show that there was error in our denial of the motion for an extension of time to file contentions.

ORDER

Based upon all of the foregoing, it is hereby Ordered:

1. The November 15, 1992 "Motion To Compel Disclosure Of Information Secreted By Restrictive Agreements" filed by B. Irene Orr, D.I. Orr, Joseph J. Macktal, Jr. and S.M.A. Hasan is denied.

2. The November 17, 1992 "Notification Of Additional Evidence Supporting Petition To Intervene Filed By B. Orr, D. Orr, J. Macktal, And S. Hasan" is rejected.

3. The July 27, 1992 "Petition To Intervene And Request For Hearing Of B. Irene, D.I. Orr, Joseph J. Macktal, Jr. And S.M.A. Hasan," as supplemented on October 5, 1992, is denied.

4. The November 10, 1992 "Motion For Rehearing By R. Micky Dow, Petitioner" is denied.

5. The July 28, 1992 "Petition Of Sandra Long Dow dba Disposable Workers Of Comanche Peak Steam Electric Station, and R. Micky Dow For Intervention And Request For Hearings" is denied.

5. The proceeding is terminated.

This Order is subject to appeal to the Commission pursuant to the terms of 10 C.F.R. § 2.714a, and specifically 10 C.F.R. § 2.714a(b). Any such appeal must be filed within ten days after service of this Order and must include a notice of appeal and accompanying supporting brief. Any other party may file a brief in support of or in

opposition to the appeal within ten days after service of the appeal.

THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies, Chairman
CHIEF ADMINISTRATIVE LAW JUDGE

Dr. James H. Carpenter
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Bethesda, Maryland

December 15, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

TEXAS UTILITIES ELECTRIC COMPANY

(Comanche Peak Steam Electric Station, Unit No. 2)

Docket No.(s) 50-446-CPA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (LBP-92-37)..TERMINAT'G have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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

Administrative Judge
Morton B. Margulies, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
James H. Carpenter
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Peter S. Lam
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Marian L. Zobler, Esq.
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R. Micky Dow
Sandra Long Dow
Disposable Workers of Comanche Peak Steam Electric Station
Dept. 368, P. O. Box 19400
Austin, TX 78760

Docket No.(s)50-446-CPA
LB M&O (LBP-92-37)..TERMINAT'G

Dated at Rockville, Md. this
16 day of December 1992

Kris Cater
Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulies, Chairman
Dr. James H. Carpenter
Dr. Peter S. Lam

In the Matter of

Texas Utilities Electric Company

(Comanche Peak Steam Electric Station, Unit 2)

Docket No. 50-446-CPA

ASLBP No. 92-668-01-CPA

(Construction Permit Amendment)

October 19, 1992

MEMORANDUM AND ORDER
(Ruling On Dow Motion For Extension Of Time and Setting A Further Schedule)

The Board has before it for consideration a motion entitled "Motion For Extension Of Time To File Brief By Sandra Long Dow dba Disposable Workers of Comanche Peak Electric Station And R. Micky Dow," dated October 5, 1992, whereby movants seek a 30-day extension of the October 5, 1992 date the Board set for filing amendments and supplements to petitions.

Movants R. Micky Dow and his wife, Sandra Long Dow, had filed a joint petition, dated July 28, 1992, seeking leave to intervene and to hold a hearing on the Texas Utilities Electric Company (Texas Utilities) application to amend

Comanche Peak Construction Permit CPPR-127 by extending the plant construction completion date from August 1, 1992 to August 1, 1995. The Dow petition also appears to seek intervenor status for the Disposable Workers of Comanche Peak Steam Electric Station which is described as having a board of directors and whose membership is said to be composed chiefly of persons who own property or reside within a 50 mile radius of the construction site. Petitioners would deny the amendment.

In a Memorandum and Order dated and served September 11, 1992, the Board, having discussed Commission requirements for intervention in a construction permit extension proceeding and commenting on the Dow petition, among other things, established a schedule for amending the petitions and supplementing them with contentions for litigation at a hearing. The filing date was set at "no later than October 5, 1992."

DISCUSSION AND CONCLUSION

The Dow motion requests a 30-day extension of time to make the filing because of circumstances movants state were beyond their control. They allege that the pleadings to be filed were in rough draft form, in the possession of Mr. Dow, who was making a final investigative trip in this

matter to Colorado. They state he was apprehended on September 3, 1992, by unknown law enforcement officials and was confined, incommunicado, for 30 days in the Lincoln County Jail, in Hugo, Colorado. His case notes, the rough draft of the pleadings, and his computer equipment were said to have been seized and were removed to the State of Kansas where they were secreted thereby precluding him from timely finishing and filing the documents. The Dows allege that Texas Utilities and unnamed agencies of the United States government were involved in this action. Purportedly the scheme was "designed in some manner to prevent him from making a timely filing."

In an answer to the motion dated October 8, 1992, Texas Utilities calls for rejection of the motion. It asserts that movants' bald, incredible assertions do not constitute good cause for granting the motion. As an additional ground for denying the motion, the utility claims that nothing was shown to suggest Mrs. Dow was incapable of making the filing or that she was relieved from responsibility from doing so. Texas Utilities states that this is another example of the Dows' repeated abuse of the process and that their request to become parties should be summarily rejected.

Joint petitioners for intervention, B. Irene Orr, D. I. Orr, Joseph J. Macktal and S. M. A. Hasan filed a response

on October 8, 1992 in support of the Dow motion. They allege that the Dows have developed a wealth of information directly relevant to this proceeding and that Petitioners had come to rely on the Dows for factual information that only they can provide at this point. Petitioners point out that this was only the first extension sought and that no real prejudice would result from granting the motion. They would allow the Dows to file their motion out of time.

NRC Staff, in a response dated October 13, 1992, requests that the motion for an extension be denied. It asserts that the motion is replete with baseless and unsubstantiated allegations, which do not provide good cause for granting the motion. Staff notes that, although Mrs. Dow alleges that she was unable to prepare the required documents on behalf of Disposable Workers of Comanche Peak Steam Electric Station because of the seizure of Mr. Dow's property, she fails to explain how she could not otherwise obtain the knowledge necessary to prepare the documents to support the petition for the organization she heads.

For movants to prevail on their motion they have the burden of showing good cause for the requested extension. 10 C.F.R. § 2.711(a). It is a burden they have not met.

The movants base their request on a narrative that lacks credibility. It would be contrary to reason for the utility and the government to imprison Mr. Dow for a month and to confiscate case materials in order to disrupt his participation in the proceeding and to keep him from timely making the October 5 filing date. Other petitioners in the proceeding have met the October 5 filing date and none have reported any bizarre treatment.

Further the story lacks credibility considering Mr. Dow was said to be imprisoned on September 3, 1992 to keep him from making the October filing date, yet it was not until September 11, 1992 that the Board first issued an order setting the filing date. Adding to the lack of credibility is that the story is not supported by probative evidence.

All movants of the joint motion rely on the same grounds for the extension. It does not establish good cause and the motion should be denied as regards all of them.

The fact that the Dows may provide other petitioners with information that is important to their case does not alter the foregoing conclusion. Nothing in the denial of the Dow motion bars the Dows from continuing to provide information to the other petitioners.

ORDER

Based on all of the foregoing, it is hereby ordered that the Dow motion for an extension of the October 5, 1992 date the Board set for filing amendments and supplements to petitions is denied.

THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies, Chairman
CHIEF ADMINISTRATIVE LAW JUDGE

Dr. James H. Carpenter
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

King of Prussia, Pennsylvania
October 19, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of TEXAS UTILITIES ELECTRIC COMPANY (Comanche Peak Steam Electric Station, Unit No. 2)	Docket No.(s) 50-446-CPA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O RE DOW EXT. REQUEST have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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

Administrative Judge
Morton B. Margulies, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
James H. Carpenter
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
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Administrative Judge
Peter S. Lam
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Sandra Long Dow
Disposable Workers of Comanche Peak Steam Electric Station
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Monroeville, PA 15146

Docket No.(s)50-446-CPA
LB M&O RE DOW EXT. REQUEST

Dated at Rockville, Md. this
20 day of October 1992

Emile L. Julian
Office of the Secretary of the Commission

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

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

PETITIONERS RESPONSE TO MOTION FOR EXTENSION OF TIME TO FILE BRIEF BY SANDRA LONG DOW dba DISPOSABLE WORKERS OF COMANCHE PEAK STEAM ELECTRIC STATION AND R. MICKY DOW

Pursuant to the October 6, 1992 Order of the Atomic Safety and Licensing Board ("ASLB"), Petitioners B. Irene Orr, D.I. Orr, Joseph J. Macktal and S.M.A. Hasan (hereinafter "Petitioners") hereby respond to Sandra Long Dow's and R. Micky Dow's ("Dows") motion to allow a 30-day extension of time to file a brief in response to the September 11, 1992 Memorandum and Order of the ASLB.

It cannot, in good faith, be disputed that the Dows have developed a wealth of information directly relevant to this proceeding. The record amassed in the prior ASLB licensing and Construction Permit Amendment proceedings is extensive and the Dows were involved in an extensive time-consuming search for factual information directly related to the contention raised by Petitioners in the instant proceeding. Through discussions prior to the submission of Petitioners' November 5, 1992 supplement, Petitioners' counsel had contacted the Dows and, given the vastness of the record, had come to rely on the Dows to provide this Board with factual information that only the Dows can

provide at this juncture. For reasons outside the control of Petitioners, the Dows were unable to file their brief on November 5, 1992. But, this Board should note that Petitioners specifically reference in their November 5, 1992 supplement that information in the control and possession of the Dows was indispensable to demonstrate that disputed facts exist with respect to the contention Petitioners' seek admission. See Petitioners' supplement at p. 28, fn. 18.[1]

Petitioners submit that, irrespective of whether the Dows can establish good cause for their need for an extension, Petitioners were harmed by the Dows' inability to file on time as Petitioners came to rely on the Dows to supplement the factual record with respect to information solely in the control and possession of the Dows.

Last, Petitioners wish to note that this is the first extension of time sought by any of the parties and, as the other parties have yet to file a response to Petitioners brief, no real prejudice appears to be implicated by the Dows' request for an extension of time.

---

[1] Petitioners specifically relied on the facts in the control and possession of the Dows as evidence demonstrating that a factual dispute exists with respect to whether Texas Utilities has repudiated its past corporate polices. In order for this tribunal to better weight the weight of this evidence it is critical that the Dows be, at a minimum. allowed to supplement the factual record with respect to the contention Petitioners now seek to have admitted.

WHEREFORE, Petitioners respectfully suggest that, in the interest of creating a full and complete record, the Dows be allowed to file their brief out of time.

Respectfully submitted,

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Stephen M. Kohn

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon the following parties by U.S. Mail, first class, being placed in the LeDroit Park Post Office Annex on October 8, 1992:

Secretary,
U.S. Nucelar Regulatory Commission
Washington, D.C. 20555

Hon. James H. Carpenter
Atomic Safety and Licensing Board
Nucelar Regulatory Commission
Washington, D.C. 20555

Hon. Morton B. Margulies
Chairman, Atomic Safety and Licensing Board
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Hon. Peter S. Lam
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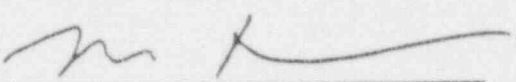


Michael D. Kohn

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulies, Chairman
Dr. James H. Carpenter
Dr. Peter S. Lam

In the Matter of Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2)	§	Docket No. 50-446-CPA ASLBP No. 92-668-01-CPA (Construction Permit Amendment)

MOTION FOR REHEARING
BY R. MICKY DOW, PETITIONER

Comes now, R. Micky Dow, hereinafter Movant, and files this, his Motion For Rehearing, of a Memorandum and Order, issued October 19, 1992, in the above-styled and numbered cause, and in support of which would show:

I.
BACKROUND

In a Memorandum and Order dated and served September 11, 1992, the Board established a schedule for amending the petitions, by all parties seeking intervention and hearings, the same being for the purpose of supplementing them with contentions for litigation at a hearing. The filing date was set at "no later than October 5, 1992."

On October 5, 1992, both petitioners, Sandra Long Dow dba Disposable Workers of Comanche Peak Steam Electric Station, and R. Micky Dow, filed their Motion For Extension of Time, wherein they requested the Board grant them a thirty day extension of time to file their a-

mended petition, and assert their contentions; and, on October 7, 1992, the Board issued an order requiring all responsive pleadings to that motion to be mailed, no later than, October 3, 1992.

On October 19, 1992, the Board issued the Memorandum and Order, the subject of this motion, wherein the Board stated, on page 4, thereof "For movants to prevail . . . they have the burden of showing good cause. . . . It is a burden they have not met.", and did, thereby, deny the motion for extension of time.

II.
ARGUMENTS

A. The Board Erred In Assertion That Good Showing Not Met.

This movant's statements that he was confined, from September 3, 1992, until, on or about, October 3, 1992, is more than a sufficient showing of good cause for his inability to make timely filing. The fact that the order establishing a schedule for filings was not issued until September 11, 1992 is prima facie that this movant could not have known about the same. As movant stated in his original motion, his place of confinement was Hugo, Colorado. He further averred that he was denied communication with his spouse. How, then, could he have known of an order, by this Board, which would have, certainly, been sent to his residence in Pennsylvania, and not Colorado? As was also stated, in his request for extension, when he did learn of the scheduling order, he immediately responded with the only manner of pleading the circumstances allowed, that of a request for extension of time.

It is of no consequence, or merit, whether this movant was precluded from the knowledge of the scheduling order by virtue of his be-

ing confined in the Lincoln County Jail, in Hugo, Colorado; Walter Reed Hospital, in Washington, D.C.; or, lost, in Yellowstone National Park. What is of consequence, and certainly has merit, is that this movant had no knowledge of the scheduling order, due to circumstances of which he had no prior knowledge, or control, that prevented him from being at his residence, in Pennsylvania; and, in addition, was not able to have contact with anyone, at that residence, to advise him of the receipt of the same. What would follow, then, is that, what the petitioner was unaware of, he could not adhere to. It would also follow, that, if one petitioner had all the papers, notes, and materials with him, then his co-petitioner was powerless to do anything on her own, as was clearly pled in the request for extension. It then would seem, that the most logical, and only practical filing that could be made, when first finding out about the schedule giving the October 5 date as the final date, and only discovering that on October 3, 1992, would be to file a request for extension. The key point of merit is established by public record, court transcript and these petitioners averments in their request. If the Board finds these to be lacking in credibility, and or truth, then an order to show cause, not denial is more in order, and should have issued.

B. The Response By The Utility Ludicrous, Barely Worthy Of A Reply.

As reference was made to it, by the Board, the movant will make a minimul reply to the response of Texas Utilities. The very wording and styling of the pleadings submitted by Texas Utilities constitutes an ever downward spiraling in credibility and demonstrates, not only a decided lack of professionalism, but tends to underscore this movant's primary contention that they lack the competence and capability

to operate the CPSES facility. One newspaper account, of this movant, described him as a "skinny, one-legged, tattoed, Indian, "outlaw" attorney. How can one, described thusly, be such an apparent threat to a multi-million dollar corporation, and in such a way as to evoke the detailed, and theatrical search of the English language, for a different set of adjectives, each and every time, with which to attempt to have a discrediting influence over these petitioners' pleadings?

Let us please recall, with a degree of accuracy, exactly WHAT was pled in the Request For Extension of Time. This movant has never indicated, mentioned, and, more accurately, alleged, any manner of "scheme", but, rather, stated "The suspect conditions . . . are clearly indicative of interference. . . .", and to editorialize an averment to preclude that it was made in an unsubstantiated manner, by its very author, is not, at all, adherent to the rules of good pleading. Lines 3-6, of page 3, of the Request For Extension of Time, clearly, again, show, that it was pled in specifics that "the parties could not confer with each other . . . and because all other materials were with R. Micky Dow, nothing could be prepared or filed prior to this date.". Is it to be believed that, because this movant failed to identify the other "party" as Mrs. Dow, "the utility claims that **nothing** (emphasis added) was shown. . . ."? This utility is doing nothing less than proving movant/petitioners' case for them by their very conduct, and movant would ask when some of the very terminology that is used as an abuse, by this utility, will be directed toward them, by way of disciplinary action? This movant prays the Board not treat the foregoing as simple argument, but take a hard look at the style itself, its manner, and more particularly, its design and intent.

C. Only Credible Argument Submitted By Petitioners For Intervention.

It is imperative that the Board take judicial notice of the detail and impact of Petitioners' For Interventions' response in support of the request for extension of time, and to look at it from an angle of understanding the reaction of Texas Utilities. The entire history of this matter has been the very personal, orchestrated, attempt to preclude, at whatever cost, the parties Disposable Workers of Comanche Peak Steam Electric Station, and R. Micky Dow, from ever achieving a forum whereby they can introduce the evidence they have accumulated, as they know what its result will be.

It is equally important to remember that this movant is not an attorney, is an indigent, and has attempted to adhere to the rules, scheduling, and all other requirements in as timely and professional manner as possible; and, that, although, the required contentions were not filed, as he did not find out about the schedule until two days before it was exhausted, he did, with a great deal of difficulty, get a logical request for extension filed in a timely fashion. By NRC regulation, the construction permit is not suspended by any challenge to it, construction continues, and, therefore, a short delay is not, and cannot be construed, to be prejudicial to any but the petitioning parties, who have stated they have no argument with delay. In most manners of litigation, one continuance is granted as a matter of right upon any reasonable request. This is the first and only such request.

D. The Response Of The NRC Staff Is Also Without Merit Or Logic.

It was, again, clearly stated in the Request For Extension of Time that all of the papers, materials, evidence, and equipment, were with Mr. Dow, and were, therefore, unavailable to Mrs. Dow. The word all

is self-explanatory, in itself; and one would think it to be, at least in this case, synonymous with only. The statement "she fails to explain how she could not otherwise obtain the knowledge necessary to prepare the documents to support the petition. . . .", in view of the very nature of both the circumstances and the contents of the pleading itself, are not only ludicrous, but preposterous.

It is idiotic to assume, much less infer, that these parties, in view of their well documented record of relentless litigation in this matter, have merely just sat back and "let the clock tick away" without making every effort to overcome a situation which was not of their design or orchestration, and certainly not under their control, which caused them to file for a request for extension.

E. Irrefutable Statement Of Fact Not To Be Confused With Narrative.

These petitioners, and particularly this movant, based their request for an extension of time on one primary factor, and one factor alone. This movant averred that he was arrested in Limon, Colorado on September 3, 1992, held in the Lincoln County Jail, in Hugo, Colorado, until October 3, 1992, without access to communications with his wife and co-petitioner, access to any manner of legal materials, method of preparation, and, even, the mails. He also stated that he was separated from his evidenciary materials, case notes, and equipment. Any other substance or matter pled, was done so hypothetically and was clearly indicated as such. Movants personal feelings and allegations as to the cause of his confinement are matters which can be addressed at a later time, but in no way change or alter the facts as stated hereinabove. This is not a lack of credibility, but, apparently, the failure to understand the obvious. As a mere aside, to the statement

on page 5, which states, "Other petitioners [quite ambiguous, as there are but one other set of petitioners] . . . have met the October 5 filing date and none have reported any bizarre treatment.", can be qualified in several respects, first with the phrase, "in this instance" as this movant is quite sure Mr. Macktal would argue the point, and this entire matter is filled with the mistreatment of parties; however, fortunately for them, none were arrested, as was this movant. An arrest is most definately, on its face, not bizarre.

The Board is respectfully requested to search the logic of paragraph 2 on page 5, and reminded of the attention given to it hereinabove. If this movant was arrested and confined in Colorado from the 3rd of September until the 3rd of October, 1992, and not allowed sufficient communication, how could he be aware of a scheduling order mailed to his home in Pennsylvania after the 11th of September? In further question of that paragraph, the Board is respectfully reminded that October 3, 1992 is a Saturday, and, October 5, 1992 is a Monday. How can this movant provide, other than by averment, probative evidence of a jail confinement, in the span of one eight hour business day, without the benefit of subpoena, which consists of records which have either not yet been transcribed by the court, or jail records which have not yet been written or filed. Once, again, an order to show cause would have been more appropriate, rather than outright dismissal and/or denial of the request.

F. Delay Shown To Be Immaterial By Board's Very Action.

Petitioners, and, more particularly, this movant, made a request for an extension of time, in order to finish preparing and submit their supplemental pleading to this Board. The suggested length of time in

that request was for thirty days, and the Board, certainly, had the discretionary power to shorten or lengthen it accordingly, in the absense of any specific showing by the petitioners for a need of exactly thirty days. As has been shown, by this movant and the other petitioners, no prejudice will result from granting the request. What is further proof that no prejudice will result is that it took this Board 14 days to render its decision on the request, which is fully one-half the period of time requested. Movant would respectfully ask, why not render a decision granting five days from the issuance of the memorandum and order?

III.
CONCLUSIONS

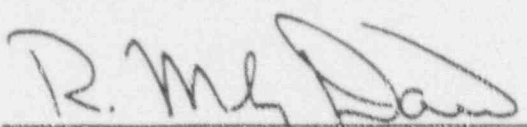
This movant would submit that, in fact, a good cause showing for the granting of an extension of time has been given to this Board. The movant would further submit that the granting of the extension will in no way cause prejudice to the utility or the NRC, as it can have no effect upon continued construction of Unit 2, at CPSES. The other petitioners to this matter support the request, and they are they only other parties who might be prejudiced by the extension.

Surely this Board does not, in good conscience, believe that the present memorandum and order would, or could, ever survive a review by the appellate court. There are some very serious discretionary and due process concerns herein. Neither the utility, or the NRC, have introduced one fact which would refute anything alleged, and/or averred by these petitioners and, more particularly, this movant. In keeping with the presumption of truthfulness, the precepts of Rule 11 of the Federal Rules of Civil Procedure, it is far more viable, more practi-

cal, and equitable, that, if the Board does entertain serious doubts about the request for extension of time, it issue an order to show cause why same should not be granted, and let the parties submit their supportive materials. To render a decision, which would be dispositive of these partys' participation, based upon nothing more than the theatrical blustering of the utility, is, at best, arbitrary, and cannot survive review.

WHEREFORE, PREMISES CONSIDERED, this movant would respectfully request a period of ten days, in which to file a supplemental pleading to the original petition. In addition, movant would hereby attach and incorporate by reference, the same as if fully copied and set forth at length, a copy of the statement prepared for both the Federal Bureau of Investigation, and the Department of Justice, with regard to the incident which caused the filing of the original request, for reference by this Board.

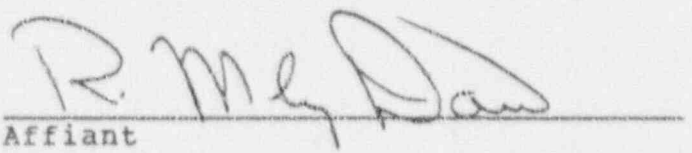
Respectfully submitted,



R. MICKY DOW, pro se
P.O. Box 875
Monroeville, Pennsylvania 15146
(412) 823-9043
Movant

CERTIFICATE OF SERVICE

This is to certify that the original of the foregoing Motion For Rehearing By R. Micky Dow, Petitioner was telefaxed to Emile L. Julian Chief, Docketing and Service Branch, Office of the Secretary, with the original being sent by courier and a true and correct copy sent to the parties listed below on this the 10th day of November, 1992.



Affiant

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

Administrative Judge
Morton B. Margulies, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge
James H. Carpenter
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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SANDRA LONG DOW dba DISPOSABLE WORKERS OF COMANCHE PEAK STEAM ELECTRIC STATION, and R. MICKY DOW,

Petitioners,

vs.

THE UNITED STATES NUCLEAR REGULATORY COMMISSION,

Respondents.

No. _____

COPY

PETITION FOR REVIEW
OF ADMINISTRATIVE ORDER

Sandra Long Dow dba Disposable Workers of Comanche Peak Steam Electric Station, and R. Micky Dow, hereby petition the Court for review of the order, issued by the United States Nuclear Regulatory Commission, December 14, 1992, in action number DD-92-06 (Docket Number 50-445/446 [2.206]), wherein the Director of the NRC denied the petition, pursuant 10 CFR 2.206, for revocation of license, and the Commission refused to review same, regarding the Comanche Peak Steam Electric Station, located in Glen Rose, Texas, owned and operated by Texas Utilities Electric Company of Dallas, Texas.

Respectfully submitted,

Sandra Long Dow

SANDRA LONG DOW dba DISPOSABLE
WORKERS OF COMANCHE PEAK STEAM
ELECTRIC STATION, pro se
Dept. 368, P.O. Box 19400
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512-280-5833

R. Micky Dow

R. MICKY DOW, pro se
Dept. 368, P.O. Box 19400
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CERTIFICATE OF SERVICE LIST

This is to certify that a true and correct copy of the foregoing was sent, by regular U.S. Mail, to the parties listed below on this the 28th day of December, 1992.

R. M. Dow

Affiant

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Secretary of the Commission
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Honorable Dale McPherson
County Judge, Somervel County
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Thomas E. Murley, Director
Office of Nuclear Reactor Reg.
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE
SECRETARY

December 17, 1992

Ms. Sandra Long Dow
Mr. R. Micky Dow
Dept. 368
P.O. Box 19400
Austin, Texas 78760-9400

Re: Docket No. 50-445/446 (2.206)

Dear Mr. and Ms. Dow:

This is to inform you that the time provided by NRC regulation within which the Commission may act to review the Director's Decision (DD-92-06) in this docket has expired. The Commission has declined any review.

Accordingly, the decision became final agency action on December 14, 1992.

Sincerely,

Samuel J. Chilk
Secretary of the Commission

cc: Service List

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

November 19, 1992

Docket Nos. 50-445
and 50-446

Ms. Sandra Long Dow
Mr. R. Mickey Dow
322 Mall Boulevard #147
Monroeville, Pennsylvania 15146

Dear Mr. and Ms. Dow:

I am responding to your Petition of May 19, 1992. Your request was referred to the staff in accordance with Section 2.206 of Title 10 of the Code of Federal Regulations (10 CFR § 2.206).

Enclosure 1 contains the Director's Decision (DD-92-06) responding to your Petition. For the reasons stated in the Director's Decision, I find no adequate basis in your Petition for taking the action that you have requested. The staff previously evaluated most of the allegations you have made, and the licensee had corrected the deficiencies you described. To address certain allegations raised in the Petition, a copy of the Petition was provided to the U.S. Nuclear Regulatory Commission (NRC) Inspector General (IG) on June 10, 1992 for any action the IG considered appropriate.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with 10 CFR § 2.206(c). As provided for in this regulation, the Decision will constitute the final action of the Commission 25 days after the date of issuance of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

I have enclosed a copy of the notice, which is being filed with the Office of the Federal Register for publication.

Sincerely,

Thomas E Murley

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

Enclosures:
1. Director's Decision
2. Notice

cc w/enclosures:
See next page

cc w/enclosures:
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Honorable Dale McPherson
County Judge
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Group Vice President, Nuclear
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Dallas, Texas 75201

DD-92-06

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the matter of	)	
	)	
TU ELECTRIC COMPANY	)	Docket Nos. 50-445
	)	and 50-446
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	10 CFR § 2.206
	)	

DIRECTOR'S DECISION UNDER 10 CFR 2.206

I. INTRODUCTION

On May 19, 1992, Ms. Sandra Long Dow, Disposable Workers of Comanche Peak Steam Electric Station, and Mr. R. Micky Dow (the Petitioners) filed a request (the Petition) with the Director, Office of Nuclear Reactor Regulation, requesting that the U.S. Nuclear Regulatory Commission (NRC) take action regarding the Comanche Peak Steam Electric Station (CPSES), Units 1 and 2.

Petitioners requested that the Commission order the immediate shutdown of Unit 1 of the Comanche Peak Steam Electric Station and institute a proceeding to modify, suspend, or revoke the license held by the Texas Utilities Electric Company (licensee) for Unit 1. They also requested that the NRC suspend considering whether to extend or modify the construction permit for Unit 2 of the facility until resolving any proceeding regarding the license for Unit 1. Petitioners allege, as a basis for this request, that the licensee has failed to demonstrate the necessary character and capability that are the primary factors to be

considered in granting a license, and has shown a "downward spiral" in violations, reportable incidents, and NRC staff concerns. Petitioners allege that the NRC staff failed to respond to requests for information about several of these incidents. Petitioners also offered, as they have previously, to give the Commission transcripts of 16 reels of audio tapes that contain conversations between the licensee and certain individuals that allegedly indicate duplicity between Region IV and the licensee.

Previously, on February 20, 1992, Petitioners filed a motion for late intervention to reopen the CPSES operating license proceeding (Docket Number 50-445) and the construction permit amendment proceedings (Docket Number 50-446). On April 4, 1992, Petitioners filed a motion seeking to present oral argument before the Commission on their February 20, 1992 motions. On August 12, 1992, the Commission denied these requests. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12. Additionally, Petitioners' request to reopen the proceedings for the operating license for Units 1 and 2 because of alleged deficiencies in the labeling of pressure valves and limit switches was referred to the staff for consideration as a Petition submitted pursuant to 10 CFR 2.206. That issue will also be addressed herein.

In my letter of June 10, 1992, I acknowledged receipt of the May 19, 1992, Petition and stated that the NRC would take action on Petitioners'

request within a reasonable time.[1] In an Order dated July 28, 1992, the staff extended the construction completion date for CPSES Unit 2 to August 1995. This action constituted a partial denial of the Petition, specifically the request to suspend consideration of extension or modification of the construction permit for Unit 2. In a letter of July 28, 1992, I informed Petitioners of the partial denial. The staff based its decision on 10 CFR 50.55(b), which states that the construction completion date may be extended for a reasonable period of time upon a showing of good cause. In its request dated February 3, 1992, the licensee demonstrated that the delay in construction of Unit 2 was necessary to concentrate resources on the completion of Unit 1. The NRC agreed that a period of three years is necessary for construction and testing, plus a period for unanticipated delays.

I have evaluated the Petition and have determined, for the reasons set forth below, that no adequate basis exists to take action against the licensee for CPSES, Units 1 and 2. Accordingly, the Petition is denied.

II. DISCUSSION

Petitioners support their request with several incidents that occurred since November 1991. Petitioners allege that the following matters demonstrate the inadequate character and capability of the licensee to hold licenses:

---

[1] Because Petitioners assert wrongdoing by the NRC Region IV staff, the Petition was also referred to the Office of the Inspector General on June 10, 1992, for such action as it may deem appropriate.

1. A leak in a pressure tank caused 100 mile-per-hour winds in the access tunnel between Units 1 and 2, which resulted in a female employee being blown into a radiation area.
2. Resin spilled into the core because of personnel error and misaligned valves.
3. A "hot" valve in Unit 1 was cut in two, causing a radiation release and exposure to several individuals.
4. Sample lists of NRC documents available in the public document room were submitted with the Petition. The lists contain 26 documented "reportable incidents", numerous areas showing direct concern by Region IV, and at least six reactor trips.
5. The NRC proposed fines for violations by the licensee totaling close to $100,000 for 1992.
6. An additional reactor trip occurred, after which the spent fuel pool for Unit 1 was without cooling water for approximately 20 hours causing an abnormal rise in temperature. Petitioners submit this incident as evidence of a continuing problem involving the use of improperly trained control room personnel.
7. The Petitioners submitted, as an attachment to the petition, a photograph which they assert shows Comanche Peak control room staff to be asleep, which they state is known to be the "common manner" for control room personnel.

8. Petitioners allege that the licensee has failed to label and mislabeled pressure valves and limit switches on both units.

Petitioners submitted several written statements from Texas Utilities employees and local citizens expressing concern about safety of the plant in support of the Petition. The statements of Ron Jones and Dobie Hatley allege specific safety concerns, which the NRC previously evaluated when it considered the February 20, 1992, motion of Petitioners to reopen the record. The Commission found that these statements did not raise substantial safety concerns. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, (August 12, 1992). The remaining statements express a general concern for the safety of the plant or the treatment of employees but present no facts or evidence to support Petitioners' request. Sixteen signed statements express support for Petitioners' Motion to Reopen the Record but do not address issues raised by the Petition herein. Five affidavits or letters, addressed to whom it may concern, express general concern about the operation of Comanche Peak and about the presence of waste disposal sites containing toxic and radiation contaminated materials. The NRC previously determined that waste disposal sites at Comanche Peak do not raise a substantial safety concern and denied a request for enforcement action under 10 CFR 2.206. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), DD-91-04, 34 NRC 2011 (1991).

Each of the issues raised in the Petition is summarized and evaluated below.

A. Employee injured in airlock

Petitioners claim that a leak in a pressure tank caused 100 mph winds in the access tunnel between Units 1 and 2 and resulted in a woman employee being injured when she was blown into a radiation area so hard that she bent welded piping.

In its review of this allegation, the NRC staff found that the licensee had informed the resident inspector of the incident and provided him with copies of a written report, Operations Notification Evaluation Form FX-91-1102. The incident occurred on October 6, 1991, in the personnel airlock between Unit 1 containment and the safeguards building. The airlock consists of two air-tight doors which are only allowed to be opened individually during operation to preserve containment integrity. At the time of the incident, Unit 1 was shut down in preparation for a refueling outage. Under these conditions, both doors of the airlock are allowed to be open since the containment atmosphere has very low radiation levels. The operators were in the process of opening the airlock to provide access to containment. The outer door was open and the differential pressure across the inner door was measured to be 0.2 psid. A negative pressure in containment is desirable for containment integrity. The operators did not recognize this as a high pressure differential that could be dangerous. The operators also did not close the containment purge supply and exhaust dampers prior to defeating the door interlocks, contrary to operating procedures. When the inner door was unlatched, the force swept the employee into containment. The actual speed of the wind is not known. The employee hit a 3-inch insulated pipe

with her forearm and was then pulled around a corner where she struck more piping. There was no report of an overexposure of radiation to the employee. The employee was examined on site and returned to work when no injuries were found. Examinations and x-rays taken later by the employee's doctor revealed no broken bones or deformities.

The licensee evaluated the incident to determine root causes. The licensee took corrective action by informing all employees of the event, emphasizing the failure to close the purge dampers before opening the doors, and the failure to recognize the danger of opening a door against a differential pressure. The licensee added this incident to the training program and revised the training to cover the potential danger of a differential pressure. The licensee also changed the procedure for opening airlock doors to address these concerns.

Petitioners are concerned that Region IV treated this incident as unreportable. The NRC requires employee injuries to be reported only when a radioactively contaminated person is transported to an offsite medical facility for treatment. 10 CFR § 50.72. The employee in this incident was treated at the site. The event did not result in damage to any safety equipment, did not change plant conditions, and did not affect the safety of the plant. Because it was not in any of the categories mentioned, the event is not required by regulations to be reported to the NRC. Moreover, the licensee informed the resident inspector of the event and provided him with copies of the internal report containing several written statements by eye witnesses, a thorough review of the root causes, and copies of documents which implemented the corrective actions.

Although the event was not reportable, the NRC was informed of the event by the licensee at the time of occurrence. The NRC staff followed up to ensure that the licensee took appropriate actions to correct deficiencies in its training and procedures. Petitioners provide no new information and no basis to conclude that the licensee is unable or unwilling to operate CPSES in a safe manner. Accordingly, I conclude that the incident does not present a substantial public health or safety concern that justifies the requested action.

B. Resin in the core

Petitioners contend that resin was spilled into the core as a result of personnel error. In its review of the incident, the NRC staff found that on November 6, 1991, some fine particles of resin and three resin beads bypassed the resin traps on a demineralizer filter for the spent fuel pool. The demineralizer is part of the spent fuel pool cooling and purification system which has two redundant trains, each consisting of two cooling pumps, two coolers, two purification pumps, two demineralizers, and several filters and skimmers. At the time of the incident, both trains of the purification system were running. When resin particles were discovered in a routine sample taken at the outlet of demineralizer 2, the licensee shut down that train of the purification system and isolated it to avoid releasing any more resin into the spent fuel pool, the refueling cavity, and ultimately into the reactor coolant system. Train 1 continued to purify the refueling cavity. The cause of the resin release was a failed resin trap and not operator error as

alleged by Petitioners. Shortly after the event, the licensee informed the resident inspector and gave him a copy of the written report of this incident, Operations Notification Evaluation Form FX-91-1455.

As a short term corrective action to maximize cleanup of the spent fuel pool and reactor coolant system, the operators increased the amount of reactor coolant sent through the chemical and volume control system and placed three temporary filters in service.

Westinghouse Electric Corporation evaluated the effect of resin in the reactor coolant system in a letter to the licensee dated November 19, 1991. Westinghouse stated that the resin products are not considered to be corrosive to primary system piping and that normal use of the chemical and volume control system is adequate for control of system cleanup. Based on the small quantity of resin released, Westinghouse concluded that the material could have had no adverse consequences on fuel assembly integrity or operations. Upon review of the letter, the NRC staff came to the same conclusion.

At the time of the incident, the NRC staff determined that the licensee took appropriate corrective actions and that the incident was not detrimental to the safety of the plant. Petitioners provide no facts to contradict these findings. Therefore, I conclude that Petitioners have not raised a substantial health or safety concern.

C. "Hot" valve cut in two

Petitioners claim that a "hot" valve in Unit 1 was cut open, causing a radiation release and exposure to several individuals.

On March 17, 1992, a work request was written to have work performed on valve 2CS-7048A, a valve located in Unit 2. However, personnel disassembled and reassembled valve 1CS-7048A, in Unit 1, a valve similiar to the Unit 2 valve which was the subject of the work request. Upon reviewing the work logs after maintenance was completed, a radiation protection technician thought the contamination levels appeared excessively high for what should have been a Unit 2 valve. The contamination levels were consistent with the normal levels in that area of Unit 1. Before the maintenance work was performed, a radiation protection technician had established a radiological barrier around the Unit 1 valve. Because of the barrier, personnel working on the valve took appropriate precautions and did not receive an overexposure of radiation. After discovering the mistake, personnel performed the required maintenance on the Unit 2 valve.

On August 23, 1992, the NRC issued a Severity Level IV violation for failure to follow authorized work instructions, citing both this incident and a similar incident that occurred on February 23, 1992 in Unit 1. The NRC documented the incident in Inspection Report Nos. 50-445/92-08 and 50-446/92-08, April 23, 1992.

The NRC staff found the licensee's corrective action to be suitable. After the event, Unit 2 management suspended all activities to disassemble or reassemble components within the operations controlled

area for permanent plant equipment in Unit 2 until the licensee reviewed the incident. After reviewing the incident, the licensee took short-term actions requiring double verification of component identification before beginning work. A Unit 1 task team had been formed previously in response to the February 23, 1992, incident. The team was exploring a number of corrective actions regarding procedural compliance to be implemented in Unit 1. The staff found no reason to conclude that the licensee could not or would not operate CPSES safely. Petitioners provide no facts to conclude otherwise. Therefore, I conclude that the event does not present a substantial health or safety concern.

D. Reportable incidents and reactor trips

Petitioners submitted a sample of weekly reports which they claim contain reports of 26 reportable incidents and at least 6 reactor trips, which Petitioners find excessive. The weekly reports cover the period from January 19 to April 18, 1992, and consist of the Local Public Document Room list of correspondence between the NRC and TU Electric, such as inspection reports, licensee event reports (LERs), periodic operating reports, and general correspondence.

Upon reviewing these documents and NRC records, the NRC staff found that the licensee submitted 10 LERs during this period. These 10 LERs are written reports of nonemergency incidents that occurred at CPSES. NRC regulations require that licensees report shutdowns, deviations from technical specifications, and events that result in degradation of safety barriers or place the plant in a condition outside of its design basis. The licensee is also required to include in the report an assessment of

the safety consequences and a description of all corrective actions. 10 CFR § 50.73. This reporting process ensures that the plant is in a safe condition after the event and that steps are being taken to avoid repeating the problem.

The 16 other documents that Petitioners cite were updates or revisions to LERs of events that occurred several months (or years) earlier, and 10 CFR Part 21 reports of defects in components that could affect performance.

The monthly operating reports for the period between January 19 and April 18, 1992 show that no reactor trips occurred during this period. The licensee reduced power four times to make repairs but did not shut down the reactor. During the 19 months between January 1991 and July 1992, Unit 1 was shut down 11 times. The licensee manually shut down the reactor four times for maintenance; once the unit was shut down for a refueling outage; twice the reactor automatically tripped because equipment failed; and four trips were caused by operator error. Therefore, nearly half of the shutdowns were initiated by the licensee to improve plant performance or comply with regulations. The two automatic reactor trips that resulted from equipment failure were the result of problems with the main turbine and did not affect the nuclear or safety-related portion of the plant. In each case of operator error-related trip, the licensee evaluated the causes of the event and implemented appropriate corrective actions. Each event and corrective action was reviewed by the NRC resident inspectors and was found to have no safety significance. In each reactor trip, all systems functioned as expected

to bring the plant to a safe shutdown condition.

The 10 reportable incidents which occurred during the time period specified by Petitioners did not place the plant in an unsafe condition and the reactor did not trip during this period. The six automatic trips which occurred between January 1991 and July 1992 did not affect the safety of the plant. Petitioners have not provided any information to contradict this conclusion. The NRC was informed of each of the events at the time of occurrence and determined that the licensee took appropriate corrective actions. Accordingly, I conclude that Petitioners have not raised a substantial safety concern.

E. Fines of $100,000

Petitioners claim that civil penalties of approximately $100,000 imposed for violations by the licensee during 1992 demonstrate that the licensee cannot safely operate the plant.

In evaluating violations to determine the appropriate enforcement action, the NRC staff assesses the safety and regulatory significance of the violations, the licensee's corrective actions to prevent future occurrences, and other relevant factors. During its review, the NRC considers whether a violation warrants shutting down a plant. In neither of these cases did the NRC staff conclude that the licensee was unable or unwilling to safely operate the facility, or that shutdown of the plant was warranted.

On December 4, 1991, the NRC proposed imposition of a civil penalty of $25,000 on the licensee. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units 1 and 2), EA 91-189 (December 27,

1991). This incident is documented in NRC Inspection Report Nos. 50-445/91-62 and 50-446/91-62, December 27, 1992. The violation involved a misalignment of the residual heat removal system which would have prevented the system from actuating automatically in an emergency. The system was misaligned for 53 hours while the plant was in hot standby mode. No events occurred during this time that would have required the use of the residual heat removal system, and if this had been necessary, the system could have been properly aligned by opening two crosstie valves. Therefore, while this was a violation of the operating license, the misalignment did not pose a serious safety concern. The NRC staff concluded that the licensee identified the misalignment, promptly corrected the lineup, and took appropriate actions to avoid recurrence and assure proper control of plant configurations.

In July 1992, the NRC proposed imposition of a civil penalty of $125,000 on the licensee. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units 1 and 2), EA-92-107 (July 23, 1992). The violation resulted from a loss of cooling to the spent fuel pool. The plant was never in an unsafe condition. This event is discussed in detail below in Section II.F.

The NRC staff reviewed the licensee's corrective actions for both of these violations and concluded that the licensee's management adequately implemented its commitments and demonstrated the proper concern for safety to operate CPSES. Petitioners present no new information and no basis to change these conclusions. Therefore, I find that Petitioners' contention is without merit and does not present a substantial health or

safety concern.

F. Loss of cooling to spent fuel pool

Petitioners claim that the spent fuel pool was without cooling for 20 hours, resulting in an abnormal rise in temperature which would have caused a meltdown if not detected by the resident inspector. Both the licensee and the NRC evaluated this incident in great detail. The NRC proposed imposition of a civil penalty of $125,000. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units 1 and 2), EA-92-107 (July 23, 1992). This incident is documented in NRC Inspection Report Nos. 50-445/92-20 and 50-446/92-20, June 9, 1992.

The spent fuel pool is a large pool of water located outside the containment. Fuel bundles that are depleted of most of their uranium are stored in the pool after being removed from the core. The fuel emits a small amount of decay heat (less than 0.001 percent of the heat generated during operation) into the water of the spent fuel pool. The water is cooled by passing through heat exchangers that are cooled by the component cooling water system. At the time of this event, the pool contained only 64 fuel assemblies. The pool has a capacity of 554 fuel assemblies and therefore, the heat in the pool was only a fraction of the design heat load.

On May 12, 1992, the spent fuel pool was without cooling for 17 hours because the component cooling water system was misaligned. This allowed the temperature to rise 5 degrees from 80 to 85°F. The maximum fuel pool temperature allowed in the Final Safety Analysis Report is 152°F. Therefore, the pool was never in danger of overheating. Since

the spent fuel pool water is part of a system completely separate from the reactor coolant system, the fuel in the core was never in danger of a meltdown. The resident inspector discovered the problem upon finding a discrepancy in the alignment of valves on the control board, not by noticing a temperature rise as alleged by Petitioners. If the alignment discrepancy had not been discovered, the operators would have become aware of the problem when the temperature reached 139°F by an alarm in the control room.

Upon learning of the problem, the operators corrected it by aligning the Unit 2 cooling water to the heat exchanger. This action was a violation of the Unit 1 operating license since the Unit 2 cooling system was not under full control of the operations department and was not incorporated into the licensing basis for Unit 1.

The NRC assessed a civil penalty of $125,000 for this violation, primarily because the event demonstrated that managers were not exercising proper control of licensed actions, not because of the safety significance of the event.

Petitioners also claim that the incident was caused by using undertrained operators and that this has been a continuing problem of concern to the NRC as evidenced by an NRC letter of December 15, 1989. This letter was a request for additional information about the operating experience of the control room staff. A request for additional information is the standard means of obtaining information needed for the NRC to complete reviews and does not imply that the NRC has a safety concern or that the licensee has withheld information. The licensee's

response of December 28, 1989, demonstrated that the licensee had satisfied all requirements for training and experience.

In reviewing this event, the NRC identified minor training deficiencies related to operator knowledge of design modifications and procedural changes. NRC Inspection Report Nos. 50-445/92-20 and 50-446/92-20, June 9, 1992. The licensee took corrective actions that included developing more effective methods of informing operators of design changes, and providing operators with a list of systems that could be crosstied.

Petitioners also refer to a reactor trip that occurred 4 days before the loss of cooling to the spent fuel pool and which Petitioners allege was caused by undertrained personnel. This trip was not related to the loss of cooling event as implied by Petitioners. The trip on May 8, 1992, was caused by an inadvertent actuation of the reactor protection system when technicians opened an incorrect power supply breaker while calibrating the power monitor module. LER 92-009, June 4, 1992; NRC Inspection Report Nos. 50-445/92-14 and 50-446/92-14, July 1, 1992. The licensee determined that the root cause was using personnel who were inexperienced in this type of calibration. To correct this problem, the licensee now requires that an experienced technician supervise all sensitive tasks being performed for the first time. This event generated no safety consequences since all systems responded as expected.

The July 23, 1992, enforcement action prompted the licensee to evaluate the loss of cooling to the spent fuel pool thoroughly. The

licensee and the NRC found no substantial health or safety concern. Petitioners have presented no facts or basis to reach a different conclusion.

d. Photo of sleeping operators

Petitioners submitted a copy of a photograph allegedly showing a member of the CPSES control room staff asleep. Petitioners state that the photograph is the subject of in-plant humor, since sleeping is known to be the "common manner" for control room personnel. It cannot be ascertained from this poor quality copy either whether the person is sleeping or whether the room shown is in fact the Comanche Peak control room.

The NRC considers inattentiveness by control room operators a very serious offense. The NRC requires control room operators to be fully attentive at the controls to monitor plant safety status and to take corrective action if abnormal circumstances arise. Random control room observations by the resident inspectors allow the NRC to check the adequacy of the licensee's programs for enforcing this requirement. The senior resident inspector at CPSES confirmed that the four resident inspectors normally make control room observations several times during normal working hours and several times a month during night and weekend hours. The residents have never found an operator asleep or inattentive in the control room at CPSES.

I find that Petitioners have failed to demonstrate any merit to their contention and have not substantiated a health or safety concern.

H. Labeling deficiencies

Petitioners allege that an employee of CPSES testified that the licensee failed to label components and mislabeled pressure valves and limit switches on both units.

While conducting an inspection in October 1989, the NRC found minor labeling deficiencies. NRC Inspection Report Nos. 50-445/89-200 and 50-446/89-200, February 14, 1990. The inspectors found a number of valves without identification labels, unofficial hand-written tags used to label rooms, and small metal label tags on some components which were difficult to read. The inspectors believed that this could cause operator errors. The licensee had identified the missing labels earlier and was in the process of installing temporary tags. The licensee had initiated a program to improve labeling in 1988 but had delayed implementation. This inspection prompted the licensee to implement the program sooner than planned. The licensee also audited the labeling program and revised administrative procedures to give guidance to personnel on performing independent verification of labeling.

The licensee labeled each of the rooms in Unit 1, and equipment containing both Unit 1 and Unit 2 components, before the licensing of Unit 1. The licensee scheduled to complete the upgrade program during the first refueling outage in December 1991. The NRC inspected the labels four more times and found that the program was on schedule and was being implemented effectively. The NRC documented its findings in

Inspection Report Nos. 50-445/90-20 and 50-446/90-20, July 23, 1990; 50-445/91-32 and 50-446/91-32, August 22, 1991; 50-445/91-41 and 50-446/91-41, October 9, 1991; and 50-445/91-70 and 50-446/91-70, February 12, 1992. During the last inspection, documented in Report Nos. 50-445/91-70 and 50-446/91-70, the staff found that the licensee had completed 95 percent of the label upgrade in Unit 1 with the remaining labels to be handled by the ongoing label maintenance program.

The NRC considers this to be a closed item because the licensee's labeling program exceeds NRC requirements. The components and systems in Unit 1 have been labeled with clear and informative labels which assist the plant operators and maintenance personnel to accurately identify equipment. On March 24, 1992, William D. Johnson, senior Resident Inspector at Comanche Peak Unit 1, submitted an affidavit in support of the staff's response to the Petitioners' February 21, 1992, motion to reopen the record. The affidavit summarizes the NRC staff's evaluation of and conclusions about the effectiveness of labeling in the plant.

Therefore, I conclude that the Petitioners have presented no basis to change the NRC staff's conclusion that the licensee's labeling program meets NRC requirements. Petitioners have failed to raise a substantial safety concern.

III. CONCLUSIONS

The NRC staff has reviewed the allegations in the Petition that the licensee does not demonstrate the appropriate character or capability to operate a nuclear plant. The incidents described in the Petition, as

examples of the licensee's inability to operate the plant, are either events which had been evaluated and resolved by the NRC staff or are unfounded accusations with no technical merit, and provide no basis for the requested action. The staff assessed the inspections, enforcement actions, NRC documents, and evaluations conducted by both the licensee and the staff, related to Petitioners' concerns. The staff evaluated the 10 exhibits attached to the Petition. Most of these documents are NRC inspection reports or letters and therefore do not present any new information. The remaining exhibits consist of statements written by TU employees or members of the public which either do not address safety issues or discuss events that do not relate to the issues of this petition. Petitioners have presented neither any information nor any reason to question the continued safe operation of CPSES.

The institution of proceedings in response to a request in accordance with 10 CFR 2.206 is appropriate only when substantial health and safety issues have been raised. See Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975) and Washington Public Power Supply System (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). I have applied this standard to determine if any action is warranted in response to the Petition. For the reasons discussed above, I find no basis for taking any action in response to the Petition as no substantial health or safety issues have been raised by the Petition. Accordingly, the NRC is taking no action pursuant to 10 CFR 2.206 in this matter.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 CFR 2.206(c).

FOR THE NUCLEAR REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland
this 19th day of November 1992

7590-01

UNITED STATES NUCLEAR REGULATORY COMMISSION

DOCKET NOS. 50-445 AND 50-446

TEXAS UTILITIES ELECTRIC COMPANY

COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2

ISSUANCE OF DIRECTOR'S DECISION UNDER 10 CFR § 2.206

Notice is hereby given that the Director, Office of Nuclear Reactor Regulation, has taken action with regard to a Petition for action under 10 CFR 2.206 received from Sandra Long Dow and R. Micky Dow (Petitioners) dated May 19, 1992, regarding the Comanche Peak Steam Electric Station, Units 1 and 2.

The Petitioners requested that the Commission order the immediate shutdown of Unit 1 of the Comanche Peak Steam Electric Station and institute a proceeding to modify, suspend, or revoke the license held by the Texas Utilities Electric Company (TU Electric or the licensee) for Unit 1. The Petitioners also requested the Commission to suspend any consideration of extending or modifying the construction permit for Unit 2 of the facility until resolving any proceeding on the license for Unit 1.

Petitioners asserted as a basis for their Motion that the licensee failed to demonstrate the necessary character and capability that are the primary factors to be considered in granting a license, and has shown a "downward spiral" in violations and reportable incidents. Petitioners also assert wrongdoing by the NRC Region IV staff. To support this general assertion, the Petitioners alleged that numerous specific

incidents occurred since November 1991 including: (1) 100 mile-per-hour winds in the access tunnel between Units 1 and 2 resulted in an employee being blown into a radiation area; (2) resin was spilled into the core; (3) a "hot" valve was cut in two causing a radiation release and exposure to several individuals; (4) 26 documented "reportable incidents", numerous areas showing concern by Region IV, and at least 6 reactor trips; (5) the NRC proposed fines for violations nearing $100,000 for 1992; (6) the spent fuel pool was without cooling water for approximately 20 hours causing an abnormal rise in temperature; (7) a photograph showing control room personnel asleep is widely circulated in the plant; and (8) the licensee failed to label and mislabeled pressure valves and limit switches.

The Director of the Office of Nuclear Reactor Regulation has decided to deny the Petition. The reasons for this denial are explained in the "Director's Decision Under 10 CFR 2.206," (DD-92-06) which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, N.W., Washington, D.C. 20555, and at the Local Public Document Room for the Comanche Peak Steam Electric Station, at the University of Texas at Arlington Library, Government Publication/Maps, 701 South Cooper, P.O. Box 19497, Arlington, Texas 76019. A copy of the decision will be filed with the Secretary for the Commission's review in accordance with 10 CFR 2.206(c) of the Commission's regulations. As provided by this regulation, the Decision will constitute the final action of the Commission 25 days after the

date of issuance of the decision unless the Commission on its own motion institutes a review of the decision within that time.

Dated at Rockville, Maryland, this 19th day of November 1992.

FOR THE NUCLEAR REGULATORY COMMISSION

Thomas E Murley

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

Attachment -

In re El Paso Electric Co., Adversary Proceeding
No. 92-1285FM (W. D. Tex.)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

In re EL PASO ELECTRIC COMPANY, Debtor.	Case No. 92-10148-FM (Chapter 11)
EL PASO ELECTRIC COMPANY, Plaintiff and Counterclaimant, v. THE FIRST NATIONAL BANK OF BOSTON, DBP CORP., LaSALLE NATIONAL BANK, and HARRIS TRUST AND SAVINGS BANK, Defendants and Claimants.	Adversary Proceeding No. 92-1285FM

MOTION OF THE UNITED STATES TO INTERVENE

Pursuant Bankruptcy Rule 7024 and Rule 24(a)(2) of the Federal Rules of Civil Procedure, the United States, on behalf of its Nuclear Regulatory Commission, requests that the Court allow it to intervene as a defendant in this adversary proceeding. The grounds for this motion are set forth in the accompanying memorandum, which is incorporated herein by reference.

Respectfully submitted,

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IN THE UNITED STATES BANKRUPTCY COURT
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MEMORANDUM OF THE UNITED STATES IN SUPPORT OF ITS MOTION TO INTERVENE

STATEMENT

A. Background and Procedural History

The debtor, El Paso Electric Company ("EPEC"), is a public utility. It is principally engaged in the business of generating, transmitting and distributing electricity. In 1973, EPEC acquired an undivided 15.8% interest in a nuclear power plant know as the Palo Verde Nuclear Generating Station ("Palo Verde"). Palo Verde includes three nuclear generating units, known as Unit 1, Unit 2 and Unit 3, together with facilities used by all three units. EPEC is licensed to possess an interest in Palo Verde by the Nuclear Regulatory Commission ("NRC").

In 1986, EPEC entered into a series of transactions whereby it sold its interest in Unit 2 and leased back that interest for a term of 27 years. In 1987, it sold and leased back 39.5% of its interest in Unit 3 for a term of 29 years. EPEC sold its interest in the plants to specially created Owner Trusts. The beneficiaries of the Owner Trusts are a group of financial institutions.[1] First National Bank of Boston ("FNBB") is the trustee for all of the trusts. The NRC approved the sale and leaseback transactions subject to the restrictions contained in the Atomic Energy Act of 1954, P.L. 89-703, 68 Stat. 919 (1954), codified at, 42 U.S.C. §§ 2011 et seq. (1988) ("the AEA").

The other Palo Verde participants are municipalities and utility companies, including Arizona Public Service Company ("APSC"). All of the Palo Verde participants executed a participation agreement pursuant to which APSC was appointed operating agent. All of the participants are responsible for paying the operation, maintenance, and decommissioning costs. In addition, they are required to sit on committees, including an administrative committee, an engineering and operating committee, and an auditing committee.

On January 8, 1992, the Debtor filed a petition for reorganization under chapter 11 of the Bankruptcy Code.

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[1]They include Alexander Hamilton Life Insurance Company of America, Chrysler Financial Corporation, Commercial Federal Investment Corporation, DBP Corp. (as successor in interest to Burham Leasing Corporation), Energy Investments Inc., Palatine Hills Leasing Inc., Security Pacific Capital Leasing Corporation, and Palo Verde Leasing Corporation.

Thereafter, on September 8, 1992, it filed its proposed disclosure statement and plan of reorganization. The centerpiece of the Debtor's plan is its purported rejection of the Palo Verde leases. The debtor contends that the leases are real estate leases which were rejected by operation of law in accordance with § 365(d)(4) of the Bankruptcy Code. Alternatively, it claims the leases are deemed rejected under the terms of its plan.

On September 9, 1992, the debtor commenced this adversary proceeding against FNBB.[2] The primary relief it seeks is a declaration that damages resulting from termination of the leases are limited to three years lease payments under § 502(b)(6) of the Bankruptcy Code.

On August 31, and again on September 4, 1992, the United States advised the debtor that its purported rejection of the Palo Verde leases may amount to an unapproved transfer to its lessor of its interest in and license for Palo Verde in violation of the AEA. The United States and the debtor engaged in discussions, but did not agree on how to remedy the violations. While the debtor offered to continue paying operation and maintenance expenses, the NRC is concerned about its ability to enforce such an offer. It is also concerned about protecting its regulatory jurisdiction.

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[2]The suit is also against DBP Corp. which filed a separate proof of claim. (FNBB filed a proof of claim on behalf of the other trust beneficiaries). It is also against LaSalle National Bank and Harris Trust and Savings Bank who are the indenture trustees with respect to bonds issued to finance the sale and leaseback transaction.

B. Statutory and Regulatory Background

Pursuant to the AEA, the NRC has broad, regulatory authority to control and supervise nuclear power facilities in the United States. It has exclusive authority, under 42 U.S.C. §§ 2131 and 2234, over the licensing of nuclear power facilities. The AEA is designed to protect public health and safety and to promote the common defense and security. See 42 U.S.C. §§ 2011, 2012, and 2133; see also, 10 C.F.R. §§ 50.40 and 50.54(cc), 52 Fed. Reg. 1292 (January 12, 1987).

Section 101 of the AEA, 42 U.S.C. § 2131, makes it unlawful for anyone to transfer any nuclear power facility without a license issued by the NRC. It provides:

> It shall be unlawful . . . for any person within the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export any utilization or production facility except under and in accordance with a license issued by the Commission . . . .

Section 184, 42 U.S.C. § 2234, makes it unlawful for a licensee to transfer or dispose of its license. It provides:

> No license granted hereunder and no right to utilize or produce special nuclear material granted hereby shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly, or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing.

Furthermore, the rights of creditors of NRC licensees may be exercised only in compliance with, and subject to, the same requirements and restrictions as would apply to the licensee pursuant to the provision of the license. 42 U.S.C. § 2234; See also, 10 C.F.R. § 50.81(a)-(d).

ARGUMENT

The NRC seeks to intervene as a defendant in this adversary proceeding to protect its regulatory role and responsibility to approve any transfers of nuclear power facilities and licenses. It also seeks to protect the public health and safety and the Nation's defense and security. If intervention is permitted, the NRC intends to move the Court for an order referring the regulatory issues to the NRC.

I. THE NRC HAS A RIGHT TO INTERVENE

The NRC, by and through the United States, can intervene, pursuant to Bankruptcy Rule 7024, whenever it meets the factors set forth in Rule 24(a)(2), Fed. R. Civ. P. The NRC must show that: (1) its application to intervene is timely; (2) it has an interest relating to the property or transaction which is the subject of the action; (3) without intervention, disposition of the matter will impair or impede its ability to protect its interest; and (4) the parties to the adversary proceeding cannot adequately protect its interest. See Ceres Gulf v. Cooper, 957 F.2d 1199, 1202 (5th Cir. 1992); Gulf State Utilities Co. v. Alabama Power Co., 824 F.2d 1465, 1475-76 (5th Cir. 1987). If

the NRC establishes each of these factors, the Court must allow intervention.

A. The NRC's Motion is Timely

The NRC's motion is timely. Pursuant to Local Bankruptcy Rule 7016(c)(1), a motion to intervene must be filed within 30 days of the date of entry of the Order Relative to Pretrial. On September 23, 1992, the Court issued a Scheduling Order in lieu of an Order Relative to Pretrial. The United States filed its motion to intervene on October 19, 1992, within 30 days of the entry of the Scheduling Order.

Furthermore, intervention by the United States will not prejudice any of the parties. The Debtor will not be prejudiced because it is aware of the NRC's concerns and intention to intervene. Because the United States is seeking to intervene at an initial stage of the litigation, neither the Court's docket nor any of the other parties will be prejudiced.

B. The NRC Has An Interest In The Adversary Proceeding

The NRC has a strong interest in protecting its regulatory authority. Under the AEA, the NRC has the authority and responsibility to pass upon any proposed transfer of nuclear facilities or licenses for nuclear facilities. See 42 U.S.C. §§ 2131 and 2234. Furthermore, in determining whether to approve a proposed transfer, the NRC uses its specialized knowledge and expertise to analyze the transaction and determine a potential transferee's fitness in a manner that is designed to produce uniform results. It analyzes the transferee's technical,

financial, character, and citizenship qualifications. See 42 U.S.C. § 2232. A regulator is entitled to intervene as of right in a suit affecting its statutory power to protect its interest in administering the statutory scheme and to bring its specialized knowledge and expertise to bear to ensure nationwide uniformity. See Ceres Gulf v. Cooper, 957 F.2d at 1203-04; Gulf State Utilities Co. v. Alabama Power Co., 824 F.2d at 1476; New Orleans Public Service v. United Gas Pipe Line, 690 F.2d 1203, 1208 (5th Cir. 1982) ("NOPSI I").[3]

The NRC also has an interest and a duty, under the AEA, to protect the public health and safety. The AEA is by definition a health and safety statute; it is contained in Title 42 of the United States Code which is entitled "Public Health and Welfare." The United States Supreme Court has recognized that health and safety is an overriding interest in any bankruptcy proceeding. See Midlantic National Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494 (1986). In Midlantic, the Court held that a debtor could not abandon property, under 11 U.S.C. § 554(a), without formulating conditions that would adequately protect the public health and safety. The Court further emphasized that obligations under nonbankruptcy regulatory law

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[3] In New Orleans Public Service, Inc. v. United Gas Pipeline Co., 732 F.2d 452 (5th Cir.) (en banc) ("NOPSI III"), cert. denied, 469 U.S. 1019 (1984), the court reversed NOPSI I's holding allowing the intervention of city officials because the Court discovered that the officials' statutory authority to regulate had been transferred to another agency. Thus, NOPSI III governs intervention by non-regulators and is inapposite here. See Gulf States Utilities Co. v. Alabama Power Co., 824 F.2d at 1476 n. 14.

continue regardless of whether a petition in bankruptcy is filed. 465 U.S. at 513, 526-27.

C. The NRC Will Be Harmed By Not Permitting Intervention

If the NRC is not allowed to intervene, the Court may not be aware of its role and responsibility in the oversight and licensing of nuclear facilities. The NRC's authority might be impaired, and its ability to achieve uniformity and consistency could be compromised.

What is more, unauthorized persons, i.e., the lessors, could acquire an ownership interest in a nuclear power plant, and the public health and safety could be jeopardized. Serious questions exist regarding the fitness of the lessors, a group of financial institutions, to own Palo Verde. While an ownership interest would not confer upon them the right to operate the plant, it would confer upon them significant financial responsibilities and the responsibility to sit on various committees that could affect the plant's operation.

D. The NRC's Interest Is Not Adequately Represented

In determining the adequacy of representation, it is appropriate to examine whether the interest of a present party is such that it will undoubtedly make all of the potential intervenor's arguments; whether any present party is capable and willing to make such arguments; and whether the potential intervenor would offer any necessary elements that other parties would neglect. United States v. State of Oregon, 839 F.2d 635, 638 (9th Cir. 1988).

The NRC has an unique interest in fulfilling its regulatory role and in protecting the public interest which the present parties may not be willing or capable to represent. The NRC can offer a view of the proposed lease rejection from a regulatory perspective. The present parties, as lessor and lessee, are seeking only a determination of their personal rights and obligations vis-a-vis one another. See New Orleans Public Service v. United Gas Pipe Line, 690 F.2d at 1209 ("NOPI I").

II. ALTERNATIVELY, THE COURT SHOULD EXERCISE ITS DISCRETION TO PERMIT THE NRC TO INTERVENE

Alternatively, the Court should exercise its discretion to allow permissive intervention, pursuant to Rule 24(b), Fed. R. Civ. P. Permissive intervention should be allowed whenever a potential intervenor's claim raises questions of fact and law that are common to the original action unless intervention will unduly delay or prejudice the adjudication of the rights of the original parties. See, Gulf States Utilities Co. v. Alabama Power Co., 824 F.2d at 1476; New Orleans Public Service v. United Gas Pipe Line, 690 F.2d at 1209 (NOPSI I).

The NRC's claim arises from the same set of facts that give rise to the main action, i.e., the debtor's purported rejection of the Palo Verde leases. It raises the same legal question, i.e., whether the rejection is legally effective. Intervention will not unduly delay or prejudice the adjudication of the rights of the parties. The NRC's motion was timely filed. In addition, the NRC does not intend to delay the adversary proceeding by

moving for a stay of the entire proceeding; it will move for an order referring only the regulatory issues to the NRC.

CONCLUSION

For the reasons stated herein, the Court should grant the United States' motion to intervene.

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