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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
TEXAS UTILITIES ELECTRIC COMPANY, et al.	)	Docket No. 50-445OL
	)	
(Comanche Peak Steam Electric Station, Unit 1)	)	

NRC STAFF ANSWER TO
CASE REQUEST FOR STAY

Lawrence J. Chandler
Special Litigation Counsel

February 13, 1986

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I. Introduction

On February 11, 1986, intervenor CASE filed with the Commission, a ". . . Request For Stay of Effectiveness of Construction Permit Extension and For Other Relief" (Request) regarding the Order issued on February 10, 1986, extending the construction permit completion date for Comanche Peak Unit 1 to August 1, 1988. This request alleges that the construction permit extension was unlawful, having been issued without a prior hearing where one is required in light of CASE's timely request and the asserted existence of a significant hazards consideration associated with the action.

For reasons discussed below, the NRC Staff opposes the Request for a stay and urges that it be denied.

II. BACKGROUND

On January 29, 1986, the Applicants in this proceeding filed an application with the Staff requesting that the construction permit for

Comanche Peak Unit 1, No. CPPR-126, be extended until August 1, 1988. Applicants note that the construction permit reflected a latest completion date of August 1, 1985, [1/] but that, due to an unfortunate administrative oversight, a timely request for extension had not been made. In general terms, Applicants state that although construction of Unit 1 was essentially completed in early 1985, major efforts are continuing to complete the Comanche Peak Response Team (CPRT) and project efforts directed toward resolving the technical issues identified by the Staff, particularly the Technical Review Team, and by the Board and parties in the operating licensing hearing currently underway. Although Applicants believe that the CPRT and related efforts will be completed by mid-1986, because of the possibility that additional issues may continue to arise and due to uncertainties associated with the scheduling of the hearing process, Applicants sought an extension until August 1, 1988 to cover such contingencies.

On January 31, 1986, intervenor CASE filed a request with the Commission seeking: (1) imposition of a fine because of Applicants' alleged violation of 10 C.F.R. § 50.10, by continuing construction activities on Unit 1 after the expiration of the construction permit on August 1, 1985; (2) a direction from the Commission that all work on that unit should be suspended until a new construction permit is issued

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1/ The construction permit, issued in December 1974, originally specified August 1, 1981 as the latest date for completion of construction. Following a timely request for extension filed on June 19, 1981, the latest date was extended to August 1, 1985, by order issued on April 30, 1982.

followed a mandatory hearing; [2] and (3) a hearing prior to acting on the Applicants' request to extend the construction permit, in the event the Commission concludes that the permit can, in fact, be extended even though it had expired, because of the alleged existence of a significant hazards consideration associated with the extension request.

On February 7, 1986, the Staff published an environmental assessment and notice of no significant impact in the Federal Register in connection with the proposed extension of the construction permit. 51 FR 4834. [3] On February 10, 1986, the Staff, pursuant to its delegated authority, issued an Order extending the construction completion date of construction permit No. CPPR-126 to August 1, 1988, having made a determination that the Applicants had shown good cause for the delay encountered in completing the facility and that the period of time for which the extension was sought was reasonable, and, further, that the requested extension did not involve a significant hazards consideration. The Staff's assessment of these matters is contained in its Evaluation of Request for Extension, dated February 10, 1986.

2/ The Staff on its own recognized, prior to granting the extension, that there may be enforcement implications associated with the action which are being considered by the Staff as a separate matter.

3/ A copy of the Staff's letter of February 5, 1986 to Applicants transmitting a copy of the notice sent to the Federal Register, was sent to the Licensing Board and parties on February 7, 1986, the same day on which the notice appeared in the Federal Register.

III. DISCUSSION

In deciding whether to grant an application for stay, consideration must be given to whether the applicant has made a strong showing that it is likely to prevail on the merits, whether it will suffer irreparable harm unless the stay is granted, whether there will be harm to other parties, and where the public interest lies. 10 C.F.R. § 2.788(e). 4/ In determining whether the movant has satisfied the four factors set forth in 10 C.F.R. § 2.788(e), it must be recognized that:

> The burden of persuasion of these factors rests on the moving party. While no single factor is dispositive, the most crucial is whether irreparable injury will be incurred by the movant absent a stay. To meet the standard of making a strong showing that it is likely to prevail on the merits of its appeal, the movant must do more than merely establish possible grounds for appeal. In addition, an "overwhelming showing of likelihood of success on the merits" is necessary to obtain a stay where the showing on the other three factors is weak.

Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and), CLI-81-27, 14 NRC 195 (1981; footnotes omitted); see also, Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977); Cuomo v. NRC, 772 F.2d 972, 976 (D.C. Cir. 1985) ("A party moving for a stay is required to demonstrate that the injury claimed is 'both certain and great.' Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir.

4/ Inasmuch as the present controversy does not arise in the context of an action or decision rendered in an adjudicatory proceeding, it is unclear whether this regulation governs. Nonetheless, the applicability of its principles is not disputed by CASE or the Staff. Because this regulation does not literally apply, the Staff has not adhered to the 10-page limit that would otherwise control.

1985)"). The significance of the first two factors was confirmed by the U.S. Court of Appeals:

> To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or vice versa.

Cuomo v. NRC, supra, at 974. CASE, in its Request, has failed to demonstrate that these factors support the grant of a stay in this instance.

1. With respect to the first factor, likelihood of success on the merits, CASE first contends that by virtue of the expiration of the construction permit on August 1, 1985, the permit is null and void and, thus, that before any further construction activities can be undertaken, a wholly new construction permit must be issued following a mandatory hearing. Request at 6. CASE claims that the language of Section 185 of the Atomic Energy ACT (AEA) is unequivocal and mandatory in providing that unless construction of a facility is completed by the latest date set forth in a construction permit and unless, upon timely request, that date is extended by the Commission for good cause, the permit expires and the permittee's rights are forfeited. See CASE Request For Imposition of Fine . . ., January 31, 1986 at 3-4. 5/

Such conclusion is simply not compelled by the AEA, the Commission's regulations or by pertinent caselaw. It is not disputed that

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5/ Notably, CASE's January 31 Request on which they rely in their most recent filing, is devoid of any caselaw or other analysis of their ipse dixit assertion.

Section 185 of the AEA allows a construction permit to be extended upon a finding that good cause exists. It is also clear that, if a timely request for extension is filed, that is, at least thirty days before expiration of the permit, the permit is continued past its expiration until the request can be acted on. 10 C.F.R. § 2.109; also, 5 U.S.C. § 558(c). But neither the AEA or the Commission's regulations speak to the question of when a request for extension must be filed or what effect the failure to make a timely request has on the permit in terms of the Commission's ability to act to extend its terms if a request for extension is made after its expiration date. A review of the legislative history of the AEA and the regulations as well as Commission caselaw is equally unilluminating.

A review of the statute of one other regulatory agency, the Federal Communications Commission, however, does shed some light on the issue. As does the AEA, the Communications Act of 1934 provides for a bifurcated licensing process for the construction and operation of regulated facilities. Although not explicitly articulated in the legislative history of the AEA, Section 185 of the AEA appears to have been patterned upon Section 319(b) of the Communications Act which provides that:

> (b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

While recognizing that differences in statutory language do exist, the Staff urges that the parallel between the foregoing provision of the Communications Act and Section 185 of the AEA is sufficient to permit reliance on interpretations of the former to guide the Commission on the matter before it. In Mass Communicators, Inc. v. FCC, 266 F.2d 681 (D.C.Cir. 1959), cert. den., 361 U.S. 828 (1959), a case factually comparable to the instant matter, Section 319(b) of the Communications Act was interpreted to permit the FCC to grant an extension of a construction permit even though the extension request was filed after the expiration date specified in the permit. In Mass Communicators, the holder of a construction permit failed to file a timely application to extend the permit. The Court, noting that the request was untimely in terms of the FCC's regulations, held that "the regulations cannot be read to limit the statutory grant of power under Section 319(b). One of the major purposes of the section is to allow the Commission to exercise its discretion [to extend a permit] before an automatic forfeiture takes place." 266 F.2d at 685. Furthermore, the Court tacitly upheld the FCC's decision in an earlier administrative proceeding, that

> The statute confers on the Commission the discretionary power to allow additional time for construction. Moreover, the statute contains no requirement that this power be exercised by the Commission only upon application filed prior to the completion date specified in the permit.

Bremer Broadcasting Corp. 3 Pike & Fischer R.R. 1579, 1582 (1947). And while the FCC, subsequent to the Bremer decision, amended its regulations to expressly permit applications to extend a permit to be filed after the expiration date, the Court held that "the new regulation presumably was to make explicit what the statute itself already allowed,"

Mass Communicators, 266 F.2d at 684, namely that the FCC could extend a permit even in circumstances in which the extension request was filed after the expiration date specified in the permit. In fact, in that case the permit extension sought was untimely even under that new regulation.

Based on the foregoing, the Staff concludes that the Commission does have the discretion to extend the completion date of a construction permit upon request made after the date of expiration upon a finding of good cause.

CASE next contends that, even if such action can lawfully be taken, it was improper for the Staff to have granted the request without holding a hearing on the issues of the existence of a significant hazards consideration and the existence of good cause. Request at 6-9. The Staff does not dispute that the requested extension of the construction permit constituted a "license amendment" within the meaning of Section 189(a) of the AEA, Brooks v. Atomic Energy Commission, 476 F.2d 924 (D.C.Cir. 1973), and that CASE has an opportunity to request a hearing. But Brooks should not be read for the proposition that, because such action constitutes an amendment, a hearing prior to acting on an extension request is, perforce, required. Rather, in Brooks, the Court held that a prior hearing was called for in that case since the Commission had failed to make any determination as to the existence of a significant hazards consideration. In the instant situation, on the other hand, the Staff has in fact concluded, as stated in its February 10, 1986 Order, that the requested extension involves no significant hazards consideration. Brooks, therefore, is simply inapposite.

Likewise, CASE's reliance on Sholly v. NRC, 651 F.2d 780 (D.C.Cir. 1980), rehrg. en banc den., 651 F.2d 792 (1980), cert. grantcd, 451 U.S. 1016 (1981), vacated and remanded, 459 U.S. 1194 (1983), vacated and remanded to NRC, 706 F.2d 1229 (D.C.Cir. 1983), lends no support to their contention. Although the Sholly decision held that a prior hearing is required, even in the face of a finding that an action involves no significant hazards consideration if a hearing was requested before the action was authorized, that decision has been vacated and is not binding or of any precedential effect. People of Three Mile Island v. Nuclear Regulatory Commissioners, 747 F.2d 139, 147 (3d Cir. 1984). 6/ In any event, the factual circumstances surrounding the Sholly decision are conspicuously distinguishable from the instant matter. First, there, the action taken involved the amendment of an operating license which could obviously bear on the public health and safety; here, the only action taken extends the date for completion of construction of a facility but does not authorize any change in the substantive activities previously authorized by the issuance of the construction permit in December 1974. And second, and perhaps most significant, there, the action authorized, the venting of krypton from the TMI-2 containment into the atmosphere, was fundamentally irreversible and no remedy could be provided as a

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6/ It is noteworthy that, because of the so-called "Sholly" amendment to the AEA, P.L. 97-415, in 1983, which amended Section 189(a) of the act with respect to operating license amendments, the Supreme Court, which had granted certiorari, did not rule on the merits of the Commission's position challenging the Court of Appeals holding in Sholly.

consequence of an after-the-fact hearing; here, the action certainly is not irreversible and CASE has not shown that, assuming that the matters it seeks to raise are litigable in an extension proceeding, an after-the-fact hearing would not serve to afford it an appropriate remedy.

CASE further relies on San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), vacated in part and rehrg. granted on other grounds, 760 F.2d 1320 (D.C. Cir. 1985), for the proposition that notice and an opportunity for hearing, and, if requested, a hearing, must be must be provided prior to any action extending a Commission license. Request at 8. 7/ That decision, however, simply does not support CASE's position here. The issue involved in that decision, to the extent pertinent hereto, was the correctness of the Commission's ruling in the Diablo Canyon proceeding, that the applicant's request to extend the Unit 1 low power operating license was subsumed within the then ongoing, reopened full power operating licensing proceeding. The Court concluded that such ruling was proper insofar as issues of design quality assurance were concerned, inasmuch as that matter was the subject of the ongoing proceeding, but was improper with respect to construction quality assurance issues which had been rejected

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7/ CASE's suggestion that the Staff has acted in bad faith, citing San Luis Obispo Mothers For Peace, Request at 7, 9, is patently frivolous. Irrespective of whether that decision and its predecesors may have clarified the law as applicable to operating license amendments, the paucity of case law alluded to by the Court in the context of that decision is every bit as true with respect to contruction permit amendments as it was theretofore with respect to operating license amendments; the matter now before the Commission is, to the Staff's knowledge, one of first impression.

on grounds that the intervenors had failed to satisfy the Commission's reopening standards, that is, they failed to sustain their burden of establishing that the information they sought to present was material. 751 F.2d at 1312. Section 189(a) of the AEA, on the other hand, requires a hearing on any material issue and does not require that to obtain such hearing one must meet the higher standard to demonstrating the materiality of the evidence. Id.; see also 1314-1316. In the matter now before the Commission, however, the foregoing questions are not reached; notice and opportunity for a hearing are not truly in dispute. The Staff contends that the publication of the Order constitutes due notice and that CASE does have an opportunity to request a hearing on the construction permit extension, albeit after-the-fact. 8/ This possibility is not even acknowledged by CASE in its Request.

Finally, CASE argues that the Commission should undertake to probe the validity of the Staff's determinations, reflected in the Order extending the construction permit and the underlying Evaluation, that good cause for the delay exists and that the action does not involve a significant hazards consideration. Request at 9-13. The short answer to CASE's position on this point is that the appropriate time and place to consider such matters would be in a hearing to be held after the extension action has been taken, consistent with the Commission's

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8/ Whether such hearing right would properly be satisfied by the ongoing operating license proceeding need not now be decided.

decision in Washington Public Power Supply Service (WPPSS Nuclear Project Nos. 1 & 2), CLI-82-29, 16 NRC 1221, 1231. 9/

2. In connection with the second factor, irreparable harm, CASE fundamentally argues that the harm to it flows from the deprivation of its due process right to a hearing on the matter. Even accepting this argument for purposes of discussion, however, CASE ignores a most basic flaw in their logic - they are not being denied their right to a hearing. Rather, the only consequence of the action taken is to effect an extension of the Comanche Peak Unit 1 construction permit prior to any hearing that may be held, an action which is amenable to alteration by such hearing, if warranted by the record developed. See, e.g., 10 C.F.R. § 2.717(b). See, WPPSS, supra.

3. With respect to the third factor, harm to other parties, it is clear that the issuance of a stay would cause harm to the Applicants. If the construction permit extension is stayed, Applicants will have to defer many of the current activities underway which are intended to address and resolve the many issues of potential safety consequence which must be concluded prior to issuance of an operating license. To stay such

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9/ For purposes of the Request now before it, the Commission need not reach the question of whether the matters which CASE seeks to raise are, in fact, properly litigable in a construction permit extension proceeding. But, in any event, that corrective action by an applicant may be necessary and may have contributed to or caused a delay in completion of construction is neither novel nor has it previously been found to vitiate a finding of good cause or of no significant hazards consideration. See, e.g. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 553 (1983); WPPSS, supra, at 1230-1231.

activities when not required as a matter of law and with no concommitant safety benefit is unwarranted.

4. The fourth factor, public interest, likewise, does not support CASE. Where, as here, there has been a failure to satisfy the first two factors, most significantly in light of the failure to present a significant safety issue, the public interest does not favor issuance of a stay. Southern California Edison Company et al (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 692 (1982). Furthermore, the public interest is not served by staying the remedial action now underway pending completion of what could amount to a lengthy hearing process to consider issues (presumably those CASE has identified in its Request) which could well have been raised for many years pursuant to 10 C.F.R. § 2.206 and many of which, in any event, are already encompassed by the ongoing operating license proceeding.

IV. CONCLUSION

For the foregoing reasons, the Staff believes that CASE has failed to satisfy the Commission's regulations, in particular, the principles set forth in 10 C.F.R. § 2.788, so as to warrant the grant of a stay. Accordingly, its Request should be denied.

Respectfully submitted,

Lawrence J. Chandler
Special Litigation Counsel

Dated at Bethesda, Maryland
this 13th day of February, 1986

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO CASE REQUEST FOR STAY" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 13th day of February, 1986:

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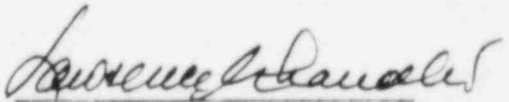

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