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February 13, 1986

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

OPPOSITION OF TEXAS UTILITIES ELECTRIC COMPANY, ET AL. TO REQUEST FOR STAY

I. INTRODUCTION AND SUMMARY

Texas Utilities Electric Company, et al. ("Applicants"), hereby oppose the request of CASE for a stay of effectiveness of the order issued on February 10, 1986, extending the latest completion date in Construction Permit No. CPPR-126.

The request for stay should be denied. CASE has not made and cannot make a showing of irreparable harm from a continuation of construction activities. As to the merits, the NRC has appropriately exercised its discretion under Section 185 of the Act to grant an extension for good cause upon a late-filed application. It was appropriate to do so without a prior hearing because the extension involves no significant hazards consideration. In addition, granting the stay, with the result that construction activities would be halted, would cause substantial harm to Applicants, their

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customers and employees engaged in construction-related work on Unit 1.

II. STATEMENT OF FACTS

The construction permit for Comanche Peak Unit 1 was originally issued on December 19, 1974, and specified a latest completion date of August 1, 1981. Upon a request filed by Applicants on June 19, 1981, it was subsequently extended to August 1, 1985. As a result of an administrative oversight, Applicants did not become aware of the need to seek an extension of the latest completion date in the construction permit for Unit 1 until January 28, 1986. On the following day, Applicants filed their request for extension. In the interim since August 1, 1985, work on Unit 1 has proceeded as contemplated by the terms and conditions of the construction permit and under ongoing regulation by this agency.

By letter dated January 29, 1986, as supplemented on February 4, 1986,[1] Applicants requested that the latest completion date in the construction permit for Unit 1 be extended from August 1, 1985 to August 1, 1988. The Acting Director, Division of PWR Licensing-A, found that "good cause" existed for the extension within the meaning of

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1/ Copies of this correspondence were served by Applicants in Dallas on CASE's representative in Dallas by first class mail on January 30 and February 5, respectively.

Section 185 of the Atomic Energy Act, 42 U.S.C. §2235, and 10 C.F.R. §50.55(b), and that the requested extension was for a reasonable period.[2] He also concluded that the extension involved no significant hazards consideration under Section 189 of the Act, 42 U.S.C. §2239, and that therefore no prior public notice was required. Accordingly, the Acting Division Director granted the extension of the latest completion date on February 10, 1986. Applicants, who had voluntarily suspended physical on-site construction activities on Unit 1 pending action on the extension request,[3] recommenced those activities on February 11, 1986, in accordance with that order.

CASE's request for stay was served on the evening of February 11, 1986. The effect of a stay in these circumstances would be to reverse the status quo rather than preserve it.[4]

2/ The Staff had earlier published an Environmental Assessment finding no significant impacts associated with the extension. 51 Fed. Reg. 4834 (February 7, 1986).

3/ CASE misleads the Commission when it asserts that Applicants continued "physical corrective actions" on Unit 1. Stay Request at 5. Such was not the case. See Letter from Mr. Counsil to Mr. Denton, dated January 29, 1986, page 3.

4/ CASE bears an unusually heavy burden when seeking to use a stay to undo the status quo. See Matter of The Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 625 (1977).

III. ARGUMENT

CASE's right to the relief sought by its request for a stay is governed by the four-criteria test first laid down in Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), and further explained in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). As articulated in the Commission's Rules of Practice, 10 C.F.R. §2.788(e), these criteria are:

(1) Whether the moving party has made a strong showing[5] that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

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5/ CASE attempts to twist Washington Metro Area Transit, supra, into authority for the proposition that in all cases the first factor only requires "a substantial showing" or "fair ground for litigation." CASE Request at 5. However, just prior to the portions of Washington Metro quoted by CASE, the Court made clear that only in specific circumstances would those lower level demonstrations of likelihood of success be enough:

> "[U]nder Virginia Petroleum Jobbers a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits." 559 F.2d at 843 (emphasis added).

CASE has not made a sufficient showing on the other three factors to warrant the Commission even reaching the question of lowering the threshold for CASE's merits showing.

(4) Where the public interest lies.

The linchpin of CASE's argument for a stay is that they have been deprived of a hearing. That is the central issue on which they premise their prospect for success on the merits (Stay Request 5-13) and is the sole basis for their claim of irreparable harm (Stay Request 13-15). However, in the instant pleading, CASE blurs the fundamental distinction between the claimed right to a hearing and the question whether any such hearing must be completed before the licensing action in question. As a result, CASE never addresses the fundamental issue to any stay request -- irreparable harm -- in the context of comparing a pre-action hearing to a post-action hearing. In short, no harm could possibly occur to CASE if it has an opportunity for hearing following issuance of the extension. As Applicants pointed out in their February 4, 1986 letter to the Secretary (which we incorporate herein by reference), no risk to the public health and safety can possibly arise until fuel is loaded in a reactor, an activity not authorized by a construction permit.

A. CASE Has Failed to Show Irreparable Harm In The Absence Of A Stay

At the outset we discuss the second, and dispositive, of the Virginia Petroleum factors, viz., irreparable harm to the moving party. The Supreme Court has stressed on several occasions that the basis for a stay or similar injunctive relief "has always been irreparable harm and inadequacy of legal remedies." Sampson v. Murray, 415 U.S. 61, 88 (1974);

Weinberger v. Romero-Burcels, 456 U.S. 305, 312 (1982); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 61 (1975). Indeed the D.C. Circuit has recently held that where irreparable harm is not established, the other three factors of the Virginia Petroleum analysis need not even be addressed. Wisconsin Gas Company v. Federal Energy Regulatory Commission, No. 84-1358 (D.C. Cir. filed April 16, 1985), slip op. at 18. In Wisconsin Gas the Court emphasized that, to constitute irreparable harm, the claimed injury must be shown to be actual, severe, and imminent (slip op. at 18-19) (emphasis in original):

> First, the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time," Connecticut v. Massachusetts, 282 U.S. 660, 674 (1930); the party seeking injunctive relief must show that "[t]he injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." Ashland Oil, Inc. v. FTC, 409 F.Supp. 297, 307 (D.D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976) (citations and internal quotations omitted).

This Commission also has recognized the preeminence of the "irreparable harm" factor. "The most significant factor in deciding whether to grant a stay request is 'whether the party requesting a stay has shown that it will be irreparably injured unless a stay is granted.'" Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984), quoting Westinghouse Electric Corp. (Export to the Philippines), CLI-80-14, 11 NRC 631, 662 (1980).

CASE argues that irreparable harm is likely in the absence of a stay because they will be deprived of hearing rights. To obtain a stay on the basis of an alleged deprivation of procedural rights, the moving party must make a particularly strong showing. The asserted procedural infirmity must be "fundamental" and not one that could be corrected in the ordinary course of review. Amos Treat & Co. v SEC, 306 F.2d 260, 265 (D.C. Cir. 1962). Such relief "must remain very much the exception rather than the rule." Nader v. Volpe, 466 F.2d 261, 268 (D.C. Cir. 1972).

In this case, there can be no showing of a fundamental procedural infirmity sufficient to constitute irreparable harm. CASE alleges it has been deprived of a right to a hearing prior to the issuance of the extension of the latest completion date. But CASE makes no showing that a subsequent (as opposed to prior) hearing is inadequate to protect its alleged interests.[6]

6/ A comparison with the cases principally relied upon by CASE is instructive. Amos Treat, supra, concerned allegations of bias of a member of the SEC in connection with a proceeding for revocation or suspension of the appellant's broker-dealer registration. Cuomo v. NRC, No. 84-1264 (D.D.C. April 25, 1984), was concerned with allegations of unfairness in expediting the hearings leading to issuance of a low power operating license. Similarly, the irreparable injury discussion in Township of Lower Alloways Creek v. NRC, 481 F. Supp. 443 (D.N.J. 1979), concerned potential harm associated with plant operations (the reracking of spent fuel).

These cases are readily distinguishable. In Amos Treat, the company alleging irreparable injury was facing the imminent revocation of its license. CASE, in contrast, has no such valuable property right at stake. In Cuomo and Alloways Creek, the alleged irreparable injury was due to plant operations, not plant construction.

Moreover, CASE's basic premise that it is entitled to a prior hearing on the extension is incorrect.[7] The notice and hearing rights of CASE are defined by Section 189(a)(1) of the Act, 42 U.S.C. §2239. Under Section 189(a)(1), the Commission may dispense with prior notice and make an amendment to a construction permit immediately effective upon a finding that the amendment "involves no significant hazards consideration." This is confirmed by a review of the procedures under Section 189(a)(2)(A), which is part of the Sholly amendments to Section 189. Under Section 189(a)(2)(A), the Commission may make an amendment to an operating license immediately effective upon a finding of no significant hazards consideration, notwithstanding a pending request for hearing. See Center for Nuclear Responsibility, Inc. v. NRC, No. 84-5570 (D.C. Cir., filed January 21, 1986), slip op. at 3, n.1. That section further provides that "[s]uch amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing." A fortiori, the Commission should and may follow the same procedure in amending a construction permit that

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7/ CASE relies on San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1314-17 (D.C. Cir. 1984), for the proposition that an extension of a license cannot be approved without first providing a hearing. Stay Request at 8. This is a misreading of San Luis Obispo. The court simply held that an extension of a low power license constitutes a license "amendment" within the meaning of Section 189(a) for which the Commission must grant an opportunity for hearing, an opportunity that must take a form other than a chance to seek reopening of a closed hearing record. The Court did not hold that a prior hearing was required. 751 F.2d at 1315-16.

involves no use of special nuclear material or any hazards attendant thereto.[8]

The D.C. Circuit's decision in Brooks v. AEC, 476 F.2d 924 (D.C. Cir. 1973), is not to the contrary. There the court held that an interested party is entitled to notice and an opportunity for a hearing on an extension of the construction permit completion dates. In that case, however, the AEC had made no finding at all regarding significant hazards considerations. 476 F.2d at 926. Significantly, the court did not address the question whether the hearing had to be held prior to the issuance of the extension. The extension had in fact been granted, and the court declined to suspend construction pending the outcome of the subsequent administrative hearing. 476 F.2d at 925 and 928. See also Center for Nuclear Responsibility, Inc. v. NRC, 586 F.Supp. 579 (D.D.C. 1984), appeal dismissed, No. 84-5570 (D.C.

8/ This is consistent with the Commission's practice both before and after the Sholly amendments. The Commission has stated that it has never issued a construction permit amendment involving a significant hazards consideration. See Interim Final Rule, Standards for Determining Whether License Amendments Involve No Significant Hazards Consideration, 48 Fed. Reg. 14864 (April 6, 1983). Although the Commission had originally proposed to exclude construction permit extensions from the category of activities involving significant hazards considerations (45 Fed. Reg. 20491, 20492 (March 28, 1980)), it later decided to address all amendments to construction permits on a case-by-case basis. (48 Fed. Reg. at 14864). The ASLB in Matter of Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-84-16, 19 NRC 857, 875 (1984), went so far as to say that "only in relation to operating licenses will amendments ever raise safety issues significant enough to require that the effectiveness of the amendment be stayed pending a hearing."

Cir., filed January 21, 1986), a case in which the court denied requests for emergency injunctive relief to block the issuance, without a prior hearing, of certain amendments to an operating license, where the plaintiffs had argued that a prior hearing was required on the NRC's determination that the amendments involved no significant hazards considerations.

In short, CASE was not entitled to a prior hearing on the extension of the latest completion date, and thus there has been no fundamental procedural infirmity that could constitute irreparable harm.

B. CASE Has Not Shown a Requisite Likelihood of Success on the Merits

Apart from the hearing issue discussed above, there are essentially two substantive issues here:

1. Whether the NRC has authority under the Atomic Energy Act to grant an extension of the latest completion date upon a late-filed application therefor.

2. If so, whether the NRC Staff correctly found good cause for the extension.

These subjects have been fully addressed in our previous submissions. We will briefly summarize our positions here.

As explained in our January 29, 1986, application, the Commission has full authority under Section 185 of the Act to grant an extension of the construction permit completion dates upon a late-filed application. The similar provision of the Communications Act of 1934, 47 U.S.C. §319, has been held to permit the extension of the last completion date in a construction permit upon an application filed out of time and not

to cause expiration of such a permit absent an order of the regulating agency.[9] Mass Communicators, Inc. v. FCC, 266 F. 2d 681, 684 (D.C. Cir.), cert. denied, 361 U.S. 828 (1959). In Mass Communicators, the applicant filed a request for extension of a construction permit after the date specified for completion of construction. Nevertheless, the FCC granted the extension, finding that the applicant had exercised due diligence in carrying out construction. 266 F.2d at 683. A competing applicant sought judicial review and argued that under Section 319(b) of the Communications Act, there had been an automatic forfeiture of the construction permit on the date of its expiration. The D.C. Circuit rejected this argument, stating: "It is clear...that an expiration of a permit was by no means to be considered an automatic forfeiture of the permit." 266 F.2d at 684. In addition, despite FCC regulations stating that an extension application must be filed at least 30 days prior to expiration of the permit, the Court ruled that "the regulations cannot be read to limit the statutory grant of power" and affirmed the FCC's order extending the construction permit. 266 F.2d at 685.

In sum, Mass Communicators, supra, stands for the proposition that an agency does not lose its discretion to grant additional

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9/ The legislative history of the Atomic Energy Act indicates that the construction permit provisions of Section 185 were patterned after Section 319(b) of the Communications Act. See, e.g., Proposed Amendments to the Atomic Energy Act of 1946: Hearings on S.3323 and H.R. 8862 Before the Joint Committee on Atomic Energy, 83d Cong., 2d Sess. 118 (1954) (Representative Hinshaw).

time for the completion of construction simply because the application for extension of time was not timely filed.[10] Thus, contrary to what CASE argues (Request for Stay at 6), the passage of the latest completion date did not strip this agency of its authority to grant the requested extension.

CASE takes issue with the Staff's finding that the extension involves no significant hazards. However, CASE presents no reasoned analysis or argument to demonstrate that the instant construction permit extension request involves such hazards consideration. In fact, the foundation for CASE's argument on this point is contrary to the Commission's holding in Matter of Washington Public Power Supply System (WPPSS Nuclear Projects Nos. 1 and 2), CLI-82-29, 16 NRC 1221, 1229 (1982), that "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."

CASE's position is that technical qualifications to construct the plant, implementation of an adequate QA/QC program and general compliance with NRC regulations governing plant construction are proper issues for a construction permit amendment proceeding. CASE's request that health and safety

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10/ The test is whether substantial construction has in fact occurred, not when the application for extension was filed. Compare Mass Communicators, supra, with MG-TV Broadcasting Co. v. FCC, 408 F. 2d 1257, 1261 (D.C. Cir. 1968) (reversing FCC order granting extension because "no significant progress toward construction had been made," 408 F.2d at 1262), citing Mass Communicators, supra.

issues be adjudicated in a construction permit extension proceeding is inconsistent and incompatible with CLI-82-29, supra, and cannot be sustained. Thus, CASE's basis for seeking a "significant hazards consideration" determination for the construction permit extension is improper because it raises operating license safety issues, not matters that arise out of the construction permit extension.

It is also clear that the Staff's finding of good cause was correct. As we noted in our February 4 letter to the Secretary, the Commission has held that unless there are intentional delays in construction without a valid purpose, the good cause finding should be made. E.g., Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1189 (1984). The good cause test is clearly satisfied in this case because the delays in construction have been a result of Applicants' efforts to address concerns raised in the course of licensing. An applicant must be afforded the time either to demonstrate compliance with regulatory requirements or to detect and correct violations. CLI-82-29, supra, 16 NRC at 1230-31.

Taken on its face, CASE's request for hearing seeks to litigate only matters that NRC case law bars from consideration in construction permit extension proceedings. CASE has given no indication that it is able to formulate a valid contention going to the question of good cause which is necessary to obtain a hearing on the extension under 10 C.F.R. §2.714. Thus CASE has shown no likelihood of success on the merits.

C. Granting a Stay Will Substantially Harm Applicants and their Customers

Granting a stay of the effectiveness of the permit extension will bring construction activities to a halt. Applicants and their contractors currently employ hundreds of persons in activities related to Unit 1. A large portion of these employees will be laid off if construction must be suspended for any length of time. If this were to occur, Applicants would be faced with significant difficulties and costs associated with hiring and training new employees.

In addition, suspending activities pending a hearing on the extension can be expected to result in delay in eventual plant operation. This will result in substantial additional costs, including AFUDC (Allowance for Funds Used During Construction). It is settled that the increased costs inherent in delay of the construction of a nuclear power plant are cognizable injuries to the applicant under the harm-to-other-parties factor. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1188 (1977); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 634 (1977).

D. The Public Interest Favors the Continuation of Construction Activities

The public interest overwhelmingly favors the completion of final construction and rework activities at a plant that is essentially 100% constructed. Eventual power production from

the facility is also in the public interest. As the Staff concluded in the Final Environmental Statement (at 3-1), the capacity of the Comanche Peak units will enable Applicants to displace 12 billion kWh per year of generation from other sources that have greater economic costs and an equal or greater environmental cost. Although the Commission is not now addressing plant operation, any suspension of the remaining construction activities will no doubt delay the benefits of power production to Applicants' customers.

In addition, the public interest certainly favors continued construction activities with employment of the workers who would otherwise be laid off. See Matter of Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-349, 4 NRC 235, 269 (1976), vacated on other grounds, CLI-76-17, 4 NRC 451 (1976).

IV. CONCLUSION

Had the Applicants applied for an extension of the completion date on or before July 1, 1985, the continued construction of CPSES Unit 1 while a hearing (if requested and granted) was held would not even be questioned given the provisions of 10 C.F.R. §2.109. Through inadvertence, timely application was not made. Meanwhile construction continued in accordance with the permit's terms and under the regulation-in-fact of this Commission. The fundamental issue before the Commission is whether the inadvertence of the Applicants

requires a different result in this case than would have resulted if the application had been filed last June. It would be Draconian indeed if an administrative oversight required the Commission to order cessation of construction with its attendant costs to stockholders and the general public, worker layoffs and dislocation. For the Commission to grant the stay would require it to elevate form over substance. Legal analysis should employ common sense, not confound it. The request for stay should be denied.

Respectfully submitted,

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February 13, 1986

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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COMPANY, ET AL.	)	Docket No. 50-445
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(Comanche Peak Steam Electric	)	
Station, Unit 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Opposition of Texas Utilities Electric Company, et al. to Request For Stay" in the above-captioned matter were served upon the following parties by deposit in the United States mail, postage prepaid, or by express mail (*), or by hand delivery (**) on this 13th day of February, 1986 or will be served by hand delivery (***) on the 14th day of February, 1986.

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