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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF RESPONSE TO APPEAL OF LICENSING BOARD'S DECISION DENYING PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING FILED BY B. IRENE ORR AND D.I. ORR

Marian L. Zobler
Counsel for NRC Staff

January 15, 1993

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INTRODUCTION

On January 8, 1993, B. Irene Orr and D.I. Orr, Petitioners, filed their brief in support of their appeal (Appeal) of the December 15, 1992 Atomic Safety and Licensing Board (Board) decision denying the Orrs'[1] petition for leave to intervene and request for a hearing in the above captioned proceeding.[2] Petitioners claim that the Board erred by not admitting Petitioners'

[1] The initial petition for leave to intervene and request for hearing was filed jointly by four petitioners, the Orrs, Joseph J. Macktal and S.M.A. Hasan. Mr. Hasan's and Mr. Macktal's request was denied for failure to demonstrate the requisite interest necessary for standing. Order at 8. They have not appealed the decision as it relates to them.

[2] On December 30, 1992, Petitioners timely filed an "Appeal of Atomic Safety and Licensing Board Memorandum and Order" and "Petitioners' Motion for Continuance to File Appeal Brief," requesting an extension of time in which to file the required brief in support of appeal. *See* 10 C.F.R § 2.714a. Neither the Staff nor the Licensee objected to the request and the Petitioners' request was granted on December 31, 1992.

contention and, accordingly, the decision must be reversed. Appeal at 17. As discussed further below, the Board's December 15, 1992 decision should be upheld, since it is not erroneous.

BACKGROUND

Construction Permit No. CPPR-127, authorizing construction of Comanche Peak Steam Electric Station (CPSES) Unit 2, was issued by the Atomic Energy Commission on December 19, 1974, specifying a latest date for completion of construction of August 1, 1983. The construction completion date has been extended several times. The latest extension, excluding the extension which is the subject of this proceeding, was granted on November 18, 1988.[3] "Order Extending Latest Construction Completion Date, 53 Fed. Reg. 47888 (November 28, 1988).

On February 3, 1992, as supplemented on March 16, 1992, Texas Utilities Electric Company (TU or Licensee) filed a request for extension of the latest construction completion date specified in the construction permit for Unit 2 to August 1, 1995. The Staff issued an "Environmental Assessment and Finding of No Significant Impact" relating to the proposed extension on June 23, 1992. 57 Fed. Reg. 28885 (June 29, 1992). An "Order Extending the Latest Construction Completion Date for Unit 2" was issued on July 28, 1992. 57 Fed.

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[3] The construction completion date was also extended for Unit 1, a currently operating unit at the same site as Unit 2, on several occasions, including on February 10, 1986 and on November 18, 1988. "Order Extending Latest Construction Completion Date," 51 Fed. Reg. 5622 (February 14, 1986); "Order Extending Latest Construction Competition Date," 53 Fed. Reg. 47889 (November 28, 1988). The 1986 extension was the subject of a proceeding which was settled in July 1988. *Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88 18B, 28 NRC 103 (1988).

Reg. 34323 (August 4, 1992). In response to the publication of the "Environmental Assessment and Finding of No Significant Impact," the Petitioners filed "Petition to Intervene and Request for Hearing of B. Irene Orr, D.I. Orr, Joseph J. Macktal, Jr., and S.M.A. Hasan" on July 27, 1992.

On September 11, 1992, the Board issued a "Memorandum and Order (Setting Pleading Schedule)." In that order, the Board ruled that each Petitioner must file, no later than October 5, 1992, an amended petition and supplement to his or her petition containing contentions which the Petitioner seeks to have litigated in a hearing. Order at 7. The Board deferred ruling on the Petition until the final round of pleadings had been filed. *Id.* at 4.

On October 5, 1992, Petitioners filed their "Supplement to Petition to Intervene and Request for Hearing of B. Irene Orr, D.I. Orr, Joseph J. Macktal, Jr., and S.M.A. Hasan," (Supplement). In the Supplement, Petitioners proposed one contention to be litigated in this proceeding. The proposed contention states:

> 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.

Supplement at 1. This contention is almost identical to a contention that was admitted in a previous construction permit extension for CPSES, Unit 1 (CPA-1 proceeding), except that the previously admitted contention referenced Unit 1 instead of Unit 2. *Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Unit 1), LBP-86-36A, 24 NRC 575, 580-81 (1986), *aff'd*, ALAB-868, 25 NRC 912 (1987). The CPA-1 proceeding was settled in 1988. *Comanche Peak*, LBP-88-18B, 28 NRC 103.

On November 19, 1992, Petitioners filed two other documents with the Board, "Notification of Additional Evidence Supporting Petition to Intervene Filed by B. Orr, D. Orr, J. Macktal, and S. Hasan" (Notification) and "Motion to Compel Disclosure of Information Secreted by Restrictive Agreements" (Motion). On December 15, 1992, the Board issued its decision denying intervention to the Orrs on the basis of their failure to submit an admissible contention. *Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 35 NRC ___, slip op. at 31-32 (December 15, 1992). The Board also declined to consider the information submitted in Petitioners' Notification and denied their Motion. *Id.* at 36, 38. On December 30, 1992, Petitioners filed their "Appeal of Atomic Safety and Licensing Board Memorandum and Order." On January 8, 1993, Petitioners filed their brief. For the reasons set forth below, the Board's decision was not erroneous. Accordingly, Petitioners' Appeal should be denied.

DISCUSSION

I. Legal Standards For the Appeal of a Licensing Board's Decision Denying the Admission of a Contention in A Construction Permit Extension Proceeding

The Commission's regulations regarding intervention in Commission proceedings require, *inter alia*, that a person who has filed a petition for leave to intervene in a Commission proceeding must file a list of contentions which the petitioner seeks to have litigated in the hearing. 10 C.F.R. § 2.714(b)(1). A petitioner who fails to file at least one admissible contention will not be permitted to participate as a party. *Id.* Section 2.714(b)(2) requires that a petitioner provide the following information:

> (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. . . .
> (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. . . .

10 C.F.R. § 2.714(b)(2)(i-iii).[4] Failure to meet any one of the above criteria of section 2.714(b)(2) would cause a contention to be inadmissible. 10 C.F.R. § 2.714(d)(2)(i).

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." *Washington Public Power Support System* (WPPSS Nuclear Project, Nos. 1 & 2), CLI-82-29, 16 NRC 1221, 1229 (1982); *See also Comanche Peak*, ALAB-868, 25 NRC at 935. In a construction permit extension proceeding, contentions having no discernable relationship to the scope of the proceeding are inadmissible. *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear 1), LBP-81-6, 13 NRC 253, 254, (1981); *see Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 570 (1980).

In the instant proceeding, the asserted good cause for the delay in CPSES, Unit 2 was the fact that from April 1988 until February 1990, the Licensee had suspended construction at Unit 2 until the reinspection and corrective action program at Unit 1 was completed so that the safety modifications to Unit 2 could be made as a result of the lessons learned at Unit 1. *See*

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[4] The above contention requirements became effective on September 11, 1989. "Rules of Practice for Domestic Licensing Proceedings--Procedural Changes in the Hearing Process," 54 Fed. Reg. 33168 (August 11, 1989). The adoption of these new requirements, however, did not overturn previous Commission case law regarding the general requirements for contentions. *See, id.* at 33169-71. (August 11, 1989).

LBP-92-37 at 3-4. *See also* "Safety Evaluation of Request for Extension of the Latest Construction Permit Completion Date, Texas Utilities Electric Company, *et al.*, Comanche Peak Steam Electric Station, Unit 2," at 2 (July 28, 1992). The construction permit for Unit 2 had been previously extended in 1988 for the same purpose.[5] 53 Fed. Reg. 47888. *See also* LBP-92-37 at 4. Because the program at Unit 1 took longer than anticipated, significant construction activity at Unit 2 was not resumed until January 1991. 57 Fed. Reg. 34323. *See also* LBP-92-37 at 4. It was, therefore, necessary for TU to request an additional extension. *Id.* That additional extension is the subject of this proceeding. Accordingly, the only issue in this proceeding is whether it was appropriate for TU to delay significant construction activities at Unit 2 from November 18, 1988 (the date of the last construction permit extension for Unit 2) until 1991.

Section 2.714a of the Commission's regulations provides for review of certain rulings on petitions for leave to intervene and requests for hearing. Where a licensing board has wholly denied a petition for leave to intervene, the petitioner may appeal that decision. 10 C.F.R. § 2.714a(b). Where, as here, a licensing board denies a petition on the grounds that the petitioner failed to set forth an admissible contention, the decision will not be overturned unless it is erroneous. *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 631 (1988).

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[5] No one, including Petitioners here, challenged the November 1988 construction permit extension for Unit 2.

II. The Board Appropriately Considered the Nondisclosure/"Hush Money" Agreements

In support of their contention, Petitioners assert that TU had a corporate policy to violate Commission requirements, which had not been repudiated, as evidenced, in part, by the existence of nondisclosure/"hush money" agreements. Supplement at 4. Petitioners assert that the Board misconstrued the significance of the nondisclosure/"hush money" agreements. Appeal at 5. Although Petitioners fail to specify which agreements they are referring to in this argument, the Staff assumes that Petitioners are referring to the two different groups of settlement agreements referenced in their Supplement. *See* Supplement at 5, 8. The first group consists of agreements between TU and former minority owners of CPSES which settled state court civil proceedings. *See id.* at 5. The second group of agreements consists of settlement agreements between contractors of TU and former employees at CPSES of employment discrimination claims. *See id.* at 8. The Board correctly analyzed these settlement agreements as they relate to Petitioners' arguments in support of their contention and appropriately determined that the agreements did not support Petitioners' contention. *See* LBP-92-37 at 21-23.

The Board, in ruling on the nondisclosure agreements, held that Petitioners failed to present any supporting documentation which demonstrated, on balance, that the restrictive agreements were the cause of the delay at Unit 2 and not the reasons given by TU. LBP-92-37 at 22-23, 26-27. Petitioners, in their Appeal, assert that the Board misconstrued the significance of these agreements. Appeal at 4-5. They claim that the settlement agreements are only evidence of TU's non-repudiation of the corporate policies which were responsible for the delay, but not the cause of the delay itself. *Id.* at 6. Petitioners claim that the mere existence of these

agreements is sufficient to demonstrate that TU has not repudiated its corporate policy to violate the Commission's regulations. *Id.* Petitioners assert, therefore, that the Board erred when it required a "nexus" between the settlement agreements and the cause for the delay of construction at Unit 2. *Id.* at 5-6.

The Board's ruling that these agreements did not support Petitioners' contention was based on the fact that the Petitioners had failed to demonstrated that these agreements related to the issue of this proceeding, i.e., whether it was appropriate for TU to have delayed construction of Unit 2 in order to complete Unit 1 and incorporate the lessons learned as a result of the reinspection and corrective action program at Unit 1. *See* LBP-92-37 at 22, 26-27. The Board's ruling is correct and is supported by both the facts and logic. The Board determined that Petitioners failed to demonstrate that a corporate policy to violate the Commission's regulations in fact existed. *Id.* Even if Petitioners had submitted facts sufficient to demonstrate that the corporate policy existed, Petitioners failed to demonstrate that this policy caused the delay at Unit 2 and not the reason asserted by TU or that TU had not repudiated this policy. *Id.*

The Board correctly determined that it was necessary for Petitioners to allege some facts which demonstrated that a link did exist between the agreements and the actual cause of the delay of construction at Unit 2. Even if the settlement agreements were indicative of a corporate policy to violate the Commission's regulations which has not been repudiated, if the corporate policy could not be shown to be the cause for the delay at Unit 2, the Licensee's repudiation or non-repudiation of that policy is not relevant to this proceeding. *See id.* at 21-22. Clearly, such a policy would warrant appropriate Commission action, but such action would not be within the scope of this proceeding. The Board, therefore, did not err when it determined that the

nondisclosure agreements did not support Petitioners' contention because they failed to challenge TU's assertion of good cause. *Id.* at 22, 26-27.

III. The Board Correctly Declined to Consider Two Lengthy Documents Referenced in Petitioners' Supplement

Petitioners claim that the Board erred when it failed to consider two lengthy documents, containing over 200 pages, referenced in their Supplement, and specifically erred when it refused to consider whether these documents support Petitioners' claim that the delay in construction was caused by the Licensee's misconduct. Appeal at 7-8. However, as explained below, the Board's decision not to consider these lengthy documents is supported by Commission case law and the regulations. Accordingly, the Board's decision should be upheld.

The Board, in its decision, citing to both section 2.714(b)(2)(ii) of the Commission's regulations and *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-241 (1989), determined that a petitioner may not simply incorporate massive documents by reference as a basis for its contention. LBP-92-37 at 19-20. Section 2.714(b)(2)(ii) states that a contention must contain references to specific sources on which a petitioner intends to rely. The Commission itself has explicitly stated that:

> Commission practice is clear that a petitioner may not simply incorporate massive documents by reference as the basis for or as a statement of his contentions. Such a wholesale incorporation by reference does not serve the purposes of a pleading. The Commission expects parties to bear their burden and to clearly identify the matters on which they intend to rely with references to a specific point. The Commission cannot be faulted for not having searched for a needle that may be in a haystack.

Seabrook, CLI-89-3, 29 NRC at 240-41 (citations omitted.) The Board correctly found that Petitioners failed to clearly identify the matters on which they intend to rely with references to a specific point.[6] LBP-92-37 at 20. Accordingly, the Board's decision to refuse to review these documents was clearly correct.

IV. The Board Correctly Determined that the Minority Owner Settlement Agreements Did Not Provide A Factual Basis for Petitioners' Contention and Correctly Denied Their Motion For Discovery

In their Supplement and their Notification, Petitioners claimed that restrictive settlement agreements between TU and former minority owners of CPSES, settling state court civil proceedings, is further evidence that TU has not repudiated its corporate policies which caused the delay of construction at Unit 2. Supplement at 8, Notification at 12. Petitioners further alleged that through these agreements, TU has secreted information which would provide a factual basis for their contention, and as such, requested the Board to require TU to provide this information to Petitioners. Appeal at 9; Motion at 1-2. In their Appeal, Petitioners assert that they are "entitled to an inference that the documentation concealed sufficiently established the factual bases for the contention" and accordingly, the Board erred in not admitting their contention. Appeal at 9. The Petitioners further state that the "regulatory process requires that

[6] Petitioners' reliance on the Appeal Board's decision in ALAB-868 (*Comanche Peak*, ALAB-868, 25 NRC 912) is misplaced. While the Appeal Board did state that a petitioner may reference documents to support its contention, it did not hold that a petitioner may reference massive documents without citing to the specific portions of the documents which support the contention. The Commission's decision in *Seabrook* explicitly states that the wholesale incorporation by reference of massive documents is not permissible. Petitioners fail to address the Commission's decision, which was specifically cited in the Board's decision. LBP-92-37 at 20.

the information obtained by TMPA and BEPC [two of the three former minority owners of CPSES] which relates, in any manner, to the licensing of CPSES (or the issues related to this proceeding) be fully disclosed to Petitioners." *Id.* at 10-11. Petitioners provide no support for their assertions.

In considering the settlement agreements between TU and the former minority owners of CPSES, the Board stated that Petitioners failed to support their allegation that these agreements resulted in the delay in the construction of Unit 2 and failed to explain how these agreements demonstrated that TU failed to repudiate the alleged corporate policies. *See* LBP-92-37 at 23. The Board correctly denied Petitioners' request for discovery because discovery is only available to a party in a proceeding who has filed an admissible contention. *Id.* at 38. The Board's denial of Petitioners' request for discovery is fully consistent with Commission case law which states that only parties to a proceeding may obtain discovery. *See* *Wisconsin Elec. Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982).

Petitioners also assert that the Board itself should have reviewed the documentation which was allegedly secreted by TU through the execution of the settlement agreements with the former minority owners of CPSES before rejecting their contention. Appeal at 9. Petitioners provide no support for their assertion and nothing in the Commission's regulations requires that the Board compel a licensee to disclose documentation in order to provide support for a petitioners' contention and the Board correctly declined to do so. *See* LBP-92-37 at 38. A petitioner is expected to come forward with the information sufficient to support its contention.

See Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 345 (1973). *See also* 54 Fed. Reg. 33168, 33171.

Petitioners further argue that the agreements between TU and the former minority owners of CPSES violate the Commission's regulations, the Energy Reorganization Act, and public policy. Appeal at 10-15. In their Motion and Notification, Petitioners had requested that the Board declare null and void certain portions of those agreements which would prevent the bringing of safety concerns to the NRC as being a violation of the Commission's regulations, the Energy Reorganization Act, and public policy. Motion at 1; Notification at 14. The Board declined to consider Petitioners' request because the Board determined that the request was an integral part of Petitioners' impermissible discovery Motion. LBP-92-37 at 38.

Petitioners do not challenge the Board's ruling regarding their request to declare null and void certain portions of the settlement agreements between TU and former minority owners of CPSES. In their Appeal they simply reiterate their original argument regarding the legality of the settlement agreements between TU and the former minority owners of CPSES. *See* Appeal at 11-15; Notification at 18-21.[7] Petitioners' challenge to the settlement agreements in the Notification was fully addressed by the Staff's response to their Notification. *See* NRC Staff Response to Motion to Compel Disclosure of Information Secreted by Restrictive Agreements and Notification of Additional Evidence Supporting Petition to Intervene Filed by B. Orr, D. Orr, J. Macktal, and S. Hasan" (Staff Response to Notification) at 5-10. As articulated in the Staff Response to Notification, these agreements do not fall within the scope of either section

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[7] In fact it appears that this portion of their Appeal is an exact copy of the same portion of their Notification. Compare Appeal at 11-15 with Notification at 18-21.

50.7(f) of the Commission's regulations or section 211 of the Energy Reorganization Act because they are not contracts which affect the terms of employment. *See id.* *See also* 10 C.F.R. § 50.7(f) and Energy Reorganization Act of 1974, as amended § 211, Pub L. No. 486, 106 Stat. 2776, 42 U.S.C. § 5851.

The Staff did, however, determine that certain provisions of the agreements were inconsistent with Commission policy to the extent that they could be interpreted to preclude communication with the NRC. As such, the Staff has sent out letters to TU and the former minority owners of CPSES requesting that they inform the NRC of what actions they have taken or are taking in order to ensure that individual employees and organizations, because of the terms of the agreements, do not believe that they are precluded from coming to the NRC with safety concerns or are precluded from assisting third parties from doing the same. *See* Staff Response to Notification at 8 n.4. Petitioners totally fail to address any of the Staff's arguments and even fail to note that the Staff agreed that certain provisions of the agreements were inconsistent with the Commission's policy regarding the free flow of information to it. Petitioners' reiteration of their previous arguments regarding the settlement agreements, without challenging the Board's decision regarding them, does not support their appeal.

V. The Board Correctly Determined That Petitioners Failed to Satisfy Section 2.714(b)(2)(iii)

Section 2.714(b)(2)(iii) of the Commission's regulations requires that a submitted contention include specific references to those portions of the application that the petitioner disputes. The application for a construction permit extension requires an explanation of the

asserted good cause for the delay. *See* 10 C.F.R. § 50.55(b). A petitioner seeking to challenge an application for a construction permit extension must, accordingly, specifically reference those portions of the applicant's assertion of good cause the petitioner disputes. *See* 10 C.F.R. § 2.714(b)(2)(iii). Section 2.714(b)(2)(iii) further requires that a petitioner submit sufficient information to demonstrate that a genuine dispute exists with the applicant on a material issue of law or fact.

In this proceeding, the Board held that, although Petitioners claimed they were challenging TU's justification of good cause for the delay in the construction of Unit 2, they failed to specifically address TU's reasons for the delay, that is, the need to apply the safety lessons learned from Unit 1 to Unit 2. LBP-92-37 at 22, 23, 31. The Petitioners, therefore, failed to specifically reference TU's application for the extension. *Id.* Additionally, the Board determined that Petitioners failed to submit sufficient information to demonstrate that a genuine dispute exists with the applicant on a material issue of law or fact. *Id.* at 31. Accordingly, the Board correctly held that Petitioners failed to satisfy section 2.714(b)(2)(iii) of the Commission's regulations. *Id.* at 22, 23, 31.

Petitioners, in their Appeal, argue that they satisfied section 2.714(b)(2)(iii). Petitioners argue that they referenced TU's application by stating that they were challenging TU's asserted good cause for the delay of construction. Appeal at 16. According to the Petitioners, by simply stating that they were challenging TU's assertion of good cause, without further elaboration of this challenge, they satisfied section 2.714(b)(2)(iii). *Id.* Petitioners also claim that they have submitted sufficient information to demonstrate that a genuine issue exists with the applicant on a material issue of fact. *Id.* at 3, 17. Petitioners further aver that the Board's interpretation of

section 2.714(b)(2)(iii) would require them to prove their case at the initial pleading stage, which is not the intent of the regulation. *Id.* at 16.

The Board correctly interpreted section 2.714(b)(2)(iii) as requiring at least specific references to the application. Section 2.714(b)(2) of the Commission's regulations specifically states: "the petitioner shall provide the following information with respect to each contention:. . . (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. . ." 10 C.F.R § 2.714(b)(2) (emphasis added.) The Board's application of section 2.714(b)(2)(iii) is supported by the Statements of Consideration accompanying the promulgation of section 2.714(b)(2)(iii). The Commission stated that:

> The Commission believes it to be a reasonable requirement that before a person or organization is admitted to the proceeding it read the portions of the application . . . that address the issues that are of concern to it. . . Many intervenors in NRC proceedings already ably do what is intended by this requirement: they review the application before submitting contentions, explain the basis for the contention by *citing pertinent portions* and explaining why they have a disagreement with it.

54 Fed. Reg. 33168, 33171 (emphasis added.) Furthermore, the Board's interpretation of section 2.714(b)(2)(iii) does not require the Petitioners to prove their case at this stage of the proceeding, just merely to make specific references to the portions of the application for the construction permit extension with which they disagree. Accordingly, the Board's decision regarding Petitioners' failure to satisfy section 2.714(b)(2)(iii) should be upheld.

Petitioners further assert that they have satisfied section 2.714(b)(2)(iii) by submitting sufficient information to demonstrate that a factual dispute exists as to whether the Licensee

continues to employ corporate policies in violation of NRC requirements, that these policies caused delays in construction, and that the Licensee has not repudiated these policies.[8] Appeal at 3-4, 17. Therefore, according to Petitioners, the Board's decision must be reversed. *Id.* at 17. To support their argument Petitioners claim that portions of the record of the CPA-1 proceeding and the two specific documents filed in that proceeding contain sufficient facts to demonstrate that a factual dispute exists. *Id.* at 3. As already discussed, the Board properly declined to consider these lengthy documents. LBP-92-37 at 19-20.

Petitioners claim that they submitted sufficient information to demonstrate that TU had a corporate policy which caused and is still causing the delay in construction at CPSES.[9] *Id.* at 2, 17. Petitioners allege that TU had used "improper design certification methods" and intentionally relied on incorrect construction standards in the construction of CPSES and concealed these acts of misconduct.[10] *Id.* at 2, 4. The Board did not err when it determined that in fact Petitioners had not submitted sufficient information. LBP-92-37 at 27-28, 31. The

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[8] Petitioners claim that the above facts must be viewed in a light most favorable to Petitioners when determining whether Petitioners have succeeded to raise an issue of fact. Appeal at 4. However, Petitioners fail to support their assertion and, in fact, are not supported by the Commission's regulations which place the burden of coming forward with information in support of its contention on the petitioner. *See Midland*, ALAB-123, 6 AEC at 345. *See also* "Rules of Practice for Domestic Licensing Proceedings--Procedural Changes in the Hearing Process," 54 Fed. Reg. 33168, 33171.

[9] Petitioners' assertion that there are still delays in construction at Unit 2 is inaccurate. In fact, it is the Staff's understanding that TU will soon be requesting issuance of the low power license for Unit 2.

[10] Petitioners do not elaborate on their allegation by identifying what design methods or construction standards the Licensee has allegedly improperly employed in the construction of Unit 2. The Staff assumes they are referring to their allegation in their Supplement that incorrect stiffness values were used to certify the pipe support system at CPSES. *See* Supplement at 14.

Board determined that Petitioners' assertions were unsupported. *Id.* at 28. Furthermore, even if true, the Board correctly held that Petitioners have failed to establish that these practices continued after 1988. *Id.* The Board, therefore, determined that Petitioners failed to satisfy section 2.714(b)(2)(iii) of the Commission's regulations.[11]

Petitioners also claim that they submitted sufficient information, pursuant to section 2.714(b)(2)(iii), to demonstrate that the Licensee still employs the same corporate practices which caused the delay in construction. Appeal at 4. Petitioners claim that the fact that the issuance of Notices of Violations (NOV) and civil penalties demonstrates that the Licensee still employs the same corporate policies which caused the delay in construction. *Id.* at 4. However, as the Board correctly held, it is inevitable that in a project as large in magnitude as the construction of a nuclear power plant, some construction defects tied to quality assurance lapses are to be expected. LBP-92-37 at 25. The Board, relying on *Union Elec. Co.* (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 364 (1983), held that mere fact that the Licensee has received NOVs and civil penalties does not demonstrate a corporate policy to violate Commission regulations. *Id.* Petitioners failed to provide any further information which suggests that these violations were the result of corporate policies to violate the Commission's regulations or that they may have caused the delay of construction of Unit 2 instead of the reasons asserted by TU. *Id.* Accordingly, the Board correctly determined that Petitioners failed to provide sufficient information to show that a genuine dispute of fact exists, pursuant to section 2.714(b)(2)(iii).

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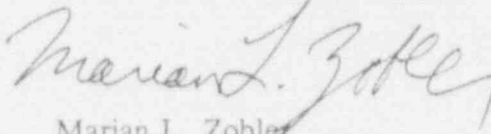
[11] Furthermore, the Board correctly determined that Petitioners' allegations regarding incorrect construction standards and "improper design certifications" fail to directly challenge TU's assertion of good cause for the delay in construction at Unit 2. LBP-92-37 at 28-29.

CONCLUSION

For the reasons set forth above, the Board's December 15, 1992 Memorandum and Order denying Petitioners' petition for leave to intervene and request for hearing on the basis of Petitioners' failure to submit an admissible contention, should be upheld.

Respectfully submitted,



Marian L. Zobler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 15th day of January, 1993

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO APPEAL OF LICENSING BOARD'S DECISION DENYING PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING FILED BY B. IRENE ORR AND D.I. ORR" 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 15th day of January, 1993:

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Washington, D.C. 20555

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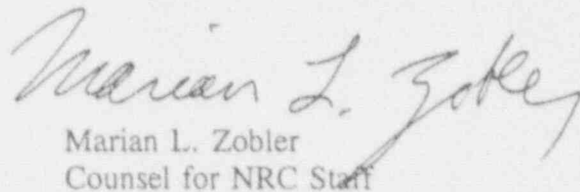

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