UNITED STATES
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
TEXAS UTILITIES GENERATING COMPANY, et al.	)	Dkt. Nos. 50-445-OL 50-446-OL
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2	)	

CASE REPLY IN SUPPORT OF ITS PENDING REQUESTS

Stripped of all rhetoric, Staff[1] and Applicants argue that, the construction permit extension having already been issued without notice, opportunity for hearing, or hearing, there is no relief to which CASE is entitled except, at best, a hearing after the fact and while construction continues. This argument is based on two demonstrably false premises:

1) CASE suffers no injury if construction continues and the hearings occur after the grant of the extension;

2) The Atomic Energy Act does not require that any hearing be held before issuance of a construction permit for which Staff asserts (without evidence or reasoning)

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1 Staff asserts that its 2/5/86 letter to Applicants was mailed to CASE and the parties on 2/7/86. That is not true, and Staff knows it. As Exhibit 1 to our 2/11/86 filing clearly demonstrates, that letter was not mailed until 2/10/86. Moreover, what justification exists for the two-day delay Staff admits occurred except that Staff was seeking to forestall any action by CASE to halt the issuance of the amendment in advance. Such a devious intent seems particularly likely since Staff now essentially argues that, since the amendment is already issued, CASE has no effective remedy.

that there is no significant hazard consideration. The facts of this case and relevant case law, ignored by Staff and Applicants, refute both propositions.

1. Irreparable Injury

If, as the evidence cited by CASE demonstrates, TUEC is not building this plant with a proper design, is not building it competently, and is not building it with a proper QA/QC program, then its current construction activities directly conflict with the Atomic Energy Act mandate, the findings uponn which its construction permit was issued, NRC regulations, and the public interest. If these failures are insufficient to prevent continued construction, then what is the basis for refusing to allow construction to begin until a construction permit has been issued, for Staff decisions to stop work, or for issuance of orders under §2.206? What validity is there to the mandates related solely to construction such as design criteria (10 CFR Part 50, Apendix A), QA/QC for construction (10 CFR Part 50, Appendix B)? Should an applicant decide to ignore all of this and wait for an operating license hearing to be approved, what power does the Commission have to stop it? Staff draws a two-edged sword, the consequences of which it would not wish to endure.

In addition, the failure to provide hearing rights when, as here, significant issues regarding failure to comply with NRC regulations are raised (none of which Staff or Applicants rebut on the merits) has been deemed sufficient to overturn a

Commission action and a return to the status quo that existed before the illegal action was taken. Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission, 735 F.2d 1437 (D.C. Cir., 1984); Union of Concerned Scientists v. Nuclear Regulatory Commission, 711 F.2d 370 (D.C. Cir., 1983); and Sholly v. Nuclear Regulatory Commission, 651 F.2d 780 (D.C. Cir., 1980) (per curiam), rehearing denied 651 F.2d 792 (1981), vacated on other grounds 459 U.S. 1194 (1983), vacated and remanded on grounds of mootness, 706 F.2d 1229 (1983).[2]

The Commission has held that construction activities do involve significant hazard considerations and that construction can be halted where Commission regulations have been violated. Cincinnati Gas & Electric (Zimmer), CLI-82-33 (11/12/82); Nuclear Engineering Co., Inc. (Sheffield), CLI-79-6, 9 NRC 673, 676-77; see also Gulf States Utilities (River Bend), correspondence between Union of Concerned Scientists and Victor Stello (8/18/80; 10/6/80) and subsequently between Chairman Ahearne and Victor Stello in the same matter.

Nor is it immaterial to safety that TUEC is allowed to continue building this plant in violation of the NRC regulations.

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[2] There is no way around the Sholly decision. Although vacated, the D.C. Circuit continues to cite it. See, e.g., Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission, supra, and San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir., 1984), rehearing en banc granted in part not relevant here and portion of original opinion vacated, 760 F.2d 1320 (1985). In addition, the reasoning is even stronger today because Congress has had to amend 42 U.S.C. §2239 to explicitly allow amendments to be issued for operating licenses without a prior hearing even if a no-significant-hazard finding is made. The language requiring that amendment for operating licenses is the same language for construction permit amendments. Staff's disingenuous argument to avoid the "bad faith" label of San Luis Obispo, id., won't sell.

The Commission's new backfit rule, 10 CFR §50.109, makes an effort to require new work or rework on a plant substantially more difficult and allows inclusion of the economic costs of the proposed changes. Applicants here are proceeding without any approvals to reinspect, redesign, and rework this plant and at this stage it is unclear whether and to what extent they may seek the shelter of the backfit exception to avoid Staff or ASLB rejection of their work.

CASE is entitled to participate in the process by which the decision on whether and under what conditions an extension to the construction permit will occur. A hearing after the fact is not a substitute for that right.[3]

2. The Right to a Hearing

According to Applicants and Staff, there is no right to a hearing prior to issuance of an amendment to a construction permit where there is a Staff finding of no-significant-hazard consideration. This argument not only ignores Sholly and the UCS cases,[4] but ignores the structure of the Act. In 42 U.S.C.

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[3] Although Applicants assert a construction halt now will injure them, that is only so if the construction work is acceptable. If, as the evidence before the Commission demonstrates, the construction work is all wrong, Applicants and/or their ratepayers (including CASE members) will suffer substantial financial injury. The time to decide whether construction and design are acceptable and, if not, what kind of reinspection and rework and NRC oversight will be required is now, not after the work is done.

[4] The Cuomo v. NRC case, No. 84-1264 (D.D.C., slip op. April 25, 1984), is also compelling. There the irreparable injury alleged was the absence of adequate time to prepare for the haering. Operation of the plant after the truncated hearing was only speculative. The immediate harm was inadequate opportunity to present a case. Here there was no opportunity.

§2239, Congress initially assures that in any proceeding for amending a license the NRC "shall grant a hearing upon the request of any [interested] person." It also provides that if a construction permit hearing has been held and "in the absence of a request" for another hearing the Commission can issue an amendment to a construction permit provided it gives 30 days notice in the Federal Register. Finally, it provides that the notice may be avoided if there is a determination that there is no significant hazard consisderation. At no time does the Commission hve the right to reject a request for a hearing that precedes the amendment. Such a request, regardless of the existence of 30 days notice, triggers the guaranteed right to a hearing. Neither Staff nor Applicants contradict this basic statutory structure. The issue they address is whether a hearing must be held before an amendment is issued if no request is received before the amendment is issued. This is not such a case.

The Staff and Applicants' argument would strip 42 U.S.C. §2239 of all meaning by converting the proceeding for issuance and amendment of a construction permit and operating license into a meaningless post hoc review of an already issued permit, license, or amendment. According to their argument, the proceeding goes on after the action is taken. Thirty years of AEC/NRC practice and court decisions reject that strained view.

CONCLUSION

In Union of Concerned Scientists v. Nuclear Regulatory

Commission, supra, 711 F.2d at 381, the court noted in reference to a strained NRC interpretation of its regulations:

> this interpretation does violence to the language of the rule and, as Judge John Sanborn once remarked, gives the regulation a "curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." Lynch v. Alworth-Stephens Co., 294 F. 190, 194 (8th Cir. 1923) (quoted in Lynch v. Alworth-Stephens Co., 267 U.S. 364, 370, 45 S.Ct. 274, 276, 69 L.Ed. 660 (1925)).

This language is particularly apt here where the Staff and Applicants argue that a statutorily guaranteed right to a hearing prior to issuance of an amendment to a construction permit is the same as a hearing held after the amendmennt is issued and while construction continues. Here the attempt to evade the clear statutory requirement is sufficiently bald that neither ingenuity, acuteness, nor a powerful intellect could be implicated. What we have is lawlessness, both necessitated and justified by the failure of TUEC to meet the most rudimentary NRC regulatory requirement -- that no construction may be pursued in the absence of a construction permit. 10 CFR §50.10(b).[5]

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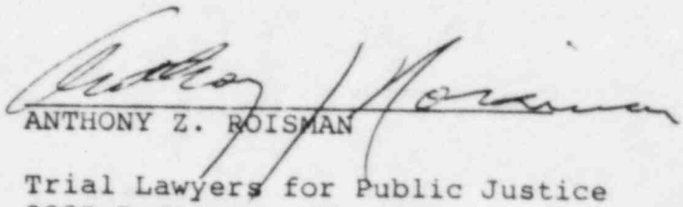
[5] We do not address here the validity of the Commission regulation allowing construction to continue after the expiration of a construction permit if application for an extension is received before expiration. The provision is certainly of doubtful validity where, as here, there is a strong opposition to the requested extension resting on substantial evidence. We also do not reargue the issue of the irrevocable expiration of the construction permit on August 1, 1985, but of course we do reurge it. Applicants and Staff brush over the crucial statutory language in §319(b) of the Communications Act which gives the FCC general discretion to extend completion dates plus the good cause extension given to the NRC. It is the general discretion language on which the court relies in Mass Communications, Inc. v. FCC, 266 F.2d 681 (D.C. Cir., 1959), cert. denied, 361 U.S. 828 (1959). It is also not irrelevant that the principal issues

Respectfully submitted,



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Dated: February 14, 1986

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involved before the FCC do not include the possible construction of misdesigned and unsafe nuclear power plants.

February 14, 1986

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CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of CASE's Motion for Leave to File a Reply and Reply in Support of Its Pending Requests have been sent to the names listed below this 14th day of February 1986, by: Express mail where indicated by *; Hand-delivery where indicated by **; and First Class Mail unless otherwise indicated.

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