



and indicated that supporting information would follow. <sup>3/</sup> By letter dated May 28, 1980 the Petitioners provided information in support of their request. <sup>4/</sup> For the reasons stated herein, the Staff, pursuant to 10 CFR 2.730 of the Commission's Rules of Practice, moves the Commission to deny this request for a hearing.

#### BACKGROUND

The Order on which a hearing is requested was issued by the Director, Office of Inspection and Enforcement, as a result of his findings that the quality assurance/quality control program at the South Texas Project was deficient and did not meet the standards of 10 CFR Part 50, Appendix B. The Order required, among other things, that the Licensee review and correct deficient work completed to date, improve and clarify procedures, review the management structure for the quality assurance program, and submit certain information to the Director. The Order stated that the Director will review the responses to the Order to determine whether safety-related construction will be conducted in accordance with 10 CFR Part 50, Appendix B and that the Director may take, as appropriate, further enforcement action. In addition, the Order required that the Licensee and Brown and Root attend a public meeting to discuss the action taken in response to the Order. At such meeting, the Director and his staff intend to question the Licensee and Brown and Root

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<sup>3/</sup> In addition to the Petitioner, Mrs. Nelson Keen, on behalf of herself and 11 other citizens of Matagorda County, Texas, has requested a hearing. The basis of this request is that conditions of the plant should be revealed to the citizens. Mrs. Keen's request is attached as Appendix A. Irene H. Anderson, Chairperson, 21st Senatorial District Convention, Bexar County, Texas, submitted on May 19, 1980 a resolution requesting a public hearing to provide the public with full information. This resolution is attached as Appendix B. Gale Van Hoy, Houston Gulf Coast Building Trade Council, has by telegram dated May 20, 1980 also requested a hearing. Mr. Hoy's request is attached as Appendix C. For the reasons submitted herein, these additional requests should be denied also.

<sup>4/</sup> The Licensee, on June 13, 1980 filed a response opposing the Petitioner's request.

to obtain additional information in order to determine whether further action is appropriate. Members of the public will be given an opportunity to raise questions concerning the matter.

A HEARING ON THE ORDER IS NEITHER COMPELLED BY LAW  
NOR AN APPROPRIATE EXERCISE OF DISCRETION

A Hearing is not Legally Required

In accordance with section 189 of the Atomic Energy Act of 1954, as amended, a hearing is required to be held on this enforcement order if the Petitioners have an interest which would be affected by the ordered action. It is important to note in this regard that section VII of the Order provided that in the event a hearing is held the issue to be considered at such hearing will be whether the Licensee shall be required to take the action specified. If they could in any way be adversely affected by it, the Petitioners would have an interest entitling them to a hearing. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC \_\_\_\_\_, Slip opinion at 3 (March 13, 1980). See Wisconsin Electric Power Company (Point Beach, Unit 1), Commission Order (May 12, 1980). The Petitioners must, however, meet the "injury in fact test" in order to have a hearing granted as a matter of right. Portland General Electric Company (Pebble Spring Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976), and Marble Hill, *supra*, Slip opinion at 7.

In this case the Licensee has consented to the Order. But for a hearing on the Petitioners' request, the only result in this proceeding in accordance with 10 CFR 2.202(e) is the effectiveness of the Order. The Petitioners have neither taken issue with the underlying factual basis of the Order, nor do they object to the requirements

of the Order.<sup>5/</sup> They have alleged no recognizable injury flowing directly from the Order. Indeed it is difficult to imagine how the requirement to conduct management reviews, clarify procedures, and review and correct deficiencies could injure any person other than the Licensee.

The Petitioner argues that it should be entitled to a hearing to determine whether the action ordered by the Director was sufficient (e.g., whether the construction permit should be revoked).<sup>6/</sup> However, the sufficiency of the action is not the issue under the Order. The Order provided that the hearing issue would be "whether the Licensee shall be required to take the actions specified in section V(A), above, within 90 days of the date of this Order". The Order does not confer standing on persons "asserting injury from failure to grant more extensive relief". Marble Hill, supra, Slip opinion at 7.

It is reasonable to limit the issue to whether the enforcement action selected is supported by the underlying facts of the Order. Marble Hill, supra, Slip opinion at 5. Not to so limit the proceeding would be contrary to the Commission's "policy that encourages licensees to consent to, rather than contest, enforcement

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<sup>5/</sup> Petitioners seek to find "injury" to them in the requirement in section V(A)(4) of the Order that the video tape associated with the Brown and Root brochure on quality assurance be "destroyed or revised". The Director's intention here was merely to assure that the inappropriate emphasis on production at the expense of quality assurance depicted in the tape not be perpetuated. No "book burning" was intended despite the unfortunate use of the word "destroy". In all events, the Staff has made a duplicate of that tape, a copy of which will be made available to the Petitioners if they so desire.

<sup>6/</sup> Petitioners' request at 9.

actions".<sup>7/</sup> Moreover, limitation of the hearing to that issue in this case is appropriate in view of the fact that the Order contemplated the possibility of a further enforcement action after the Director reviews the response of the Licensee to the Order.<sup>8/</sup> If further enforcement action was not taken at that time, the Petitioners are always free to submit a petition under 10 CFR 2.206 seeking particular enforcement action, if they believe on the basis of specific facts further enforcement action is warranted.

The Petitioners here do not meet the "injury in fact" test. No interest of theirs could be adversely affected by the action ordered. Accordingly, a hearing

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<sup>7/</sup> "We believe that public health and safety is best served by concentrating inspection and enforcement resources on actual field inspections and related scientific and engineering work, as opposed to the conduct of legal proceedings. This consideration calls for a policy and encourages licensees to consent to, rather than contest, enforcement actions. Such a policy would be thwarted if licensees which consented to enforcement actions were routinely subjected to formal proceedings possibly leading to more severe or different enforcement actions. Rather than consent and risk a hearing on whether more drastic relief was called for, licensees would, to protect their own interests, call for a hearing on each enforcement order to ensure that the possibility of a less severe action would also be considered. The end result would be a major diversion of agency resources from project inspections and engineering investigations to the conduct of hearings." (emphasis added) Marble Hill, supra, Slip Opinion at 6.

<sup>8/</sup> Section V(c) of the Order stated:

"The Director, Office of Inspection and Enforcement, will review the responses to Section (a) above, to determine whether safety-related construction will be conducted in accordance with Appendix B of 10 CFR Part 50 of the Commission's regulations and may taken, as appropriate, further action."

as a matter of right should not be granted on the Order.

A Discretionary Hearing Should Not Be Granted

The Commission, if it so desired, could order a hearing on the construction problems at the South Texas Project. <sup>9/</sup> However, such a hearing is neither necessary nor appropriate. The Petitioners, the staff, and the Licensee have not opposed the actions required by the Order.

In Edlow International Co. (SNM Export License), CLI-76-6, 3 NRC 563, 574 (1976) the Commission rejected the notion that it hold a hearing for the sake of holding a hearing on the issuance of export licenses: "Participation in a hearing is not in itself, but must be related to an issue - in this case, grant or denial of a license." Clearly, the holding of a hearing on an ordered action to which no potential "parties" object would waste valuable resources. In determining whether to conduct a discretionary hearing or to grant discretionary intervention in a hearing the Commission has in analogous circumstances used the factors listed in 10 CFR 2.714. Portland General Electric Co., supra, 4 NRC at 616; Edlow International Co., supra, 3 NRC at 578. Applying these factors in this case

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<sup>9/</sup> The Commission can hold hearings as it deems necessary in exercising its authority in the administration and enforcement of the Atomic Energy Act. Section 161 c., 42 U.S.C. 2201(c). Similarly, as it recognized in Portland General Electric Company, 4 NRC at 616 the Commission may at its discretion permit intervention in a proceeding by persons who do not meet the tests for intervention as a matter of right. The Commission has broad discretion in establishing the scope of intervention rights. See BPI v AEC, 502 F.2d 424 (D.C. Cir. 1974).

demonstrates that a discretionary hearing is not warranted. <sup>10/</sup>

The Petitioners, although not adversely affected by the Order, are persons affected by the licensing proceeding. In fact, the Petitioners have submitted contentions in the on-going operating license proceeding which overlap the findings of the Director under the Order. These contentions have been accepted by the Licensing Board for litigation in the operating license proceeding.

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- 10/ 1. The nature of the Petitioner's right under the Act to be made a party to the proceeding: The Petitioner's right to be made a party is dependent on the presence of an interest which may be affected by the proceeding. Petitioners are not adversely affected by this proceeding.
  2. The nature and extent of the Petitioner's property, financial or other interest in the proceeding: Petitioners have demonstrated a general interest in matters concerning the South Texas Project. They are intervenors in the operating license proceeding. There is, however, no recognizable potential injury to Petitioners which could occur as a result of the Director's Order.
  3. The possible effect of any order which may be entered in the proceeding on the Petitioner's interest: The effect of a proceeding on this Order would be to uphold the Order. Petitioners have not demonstrated that they are adversely affected by the imposition of this Order.
  4. The availability of other means whereby Petitioner's interest will be protected: As noted below, quality assurance contentions have been filed in the on-going operating license proceeding. The Petitioners are free to litigate these matters in that proceeding. Petitioners may also seek relief under 10 CFR 2.206. Petitioners may also express their views at the public meeting to be held under the Order.
  5. The extent to which the Petitioner's interest will be represented by other parties: This factor is not applicable here, because unless Petitioners' request is granted there will not be a hearing where parties' positions would be represented.
  6. The extent to which Petitioner's participation will inappropriately broaden or delay the proceeding: Unless Petitioners' petition is granted, there will be no hearing. Consequently, granting this request for a hearing would clearly broaden this proceeding. It is unnecessary to hold a hearing to provide a factual and legal basis for the Order.

Petitioners state at page 6 of the petition that "[n]ot having the subject hearing would adversely affect the ability of the ASLB to evaluate this project and the ability of the intervenors to support their contentions before the ASLB." The essence of this allegation is that it will "deny existing evidence and potential evidence to the Intervenors and by so doing deny such evidence to the ASLB". <sup>11/</sup> However, it is clear that the issue which the Petitioners really desire litigated is the issue which goes to the heart of the operating license proceeding, i.e., whether there is reasonable assurance that the facility has been constructed soundly and therefore can be operated safely. That issue is clearly not within the scope of the Director's Order and it would be inappropriate to expand proceedings on the Order to probe the ultimate question of whether the operating license should be issued.

The assertion that the issuance of the Order adversely affects the Petitioners' position in the operating license proceeding is without merit. First, the discovery period for the operating license proceeding has been extended through August 1980 and during this time the Petitioners have all of their discovery tools to make a record for the operating license proceeding. <sup>12/</sup> Second, the Atomic Safety and Licensing Board for the South Texas Project operating license proceeding has indicated that it believes a hearing on issues relating to asserted construction and QA/QC deficiencies might profitably be held at a much earlier date such as in the winter of 1980-81. <sup>13/</sup> Such a hearing would cover the quality

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<sup>11/</sup> Petition at 7.

<sup>12/</sup> Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), ASLB Order, April 28, 1980.

<sup>13/</sup> Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), ASLB Memorandum, March 10, 1980.

assurance contentions of the Petitioners. In view of the discovery rights and the potential for an early hearing in the operating license proceeding, a hearing on the Director's Order would not place the Petitioners in any better position to make an evidentiary record than if the matters of concern are addressed in the context of an operating license proceeding.<sup>14/</sup>

In any event, the staff would expect that the quality assurance questions be given early consideration by the Board and that should there be any matter which the Board believes justifies additional enforcement action, e.g., suspension, then such matters would be promptly referred to the Director for his consideration.

There is no dispute that serious items of noncompliance with the Commission's requirements did occur at the South Texas Project. The staff has not completed its review of construction at this project. However, at this juncture, the staff is not in a position to recommend action beyond which it has already taken. The petition submitted by the Petitioners did not contain or suggest that there may be additional factual information which has not been identified by the staff's own investigation or that would lead the staff to some other conclusion than it has previously reached. To the extent that the Petitioners believe that they have specific information that would warrant further enforcement action, the Petitioners are encouraged to submit this information to the Director. A hearing is not necessary to obtain such information. If the Petitioners believe that the facts indicate that further action by the Commission should be considered, they should identify such facts

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<sup>14/</sup> Moreover, the fact that the Licensee has consented to the Order and the imposition of a civil penalty should be of some support to the Petitioners in the operating license proceeding.

and request further action in a petition under 10 CFR 2.206. <sup>15/</sup> The Director will not hesitate to take further enforcement action should information be brought to his attention that justifies such action.

#### Conclusion

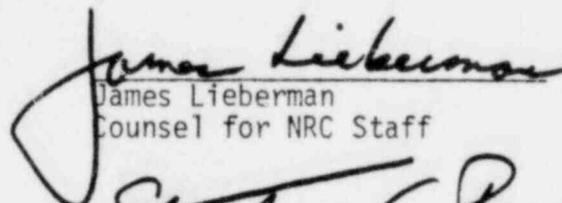
The Petitioners are not entitled to a hearing as a matter of right on the Director's Order. The Licensee is not disputing the Order. A further record is not needed to support the Order. The extraordinary step of ordering a discretionary hearing is not warranted by the circumstances as it would serve no useful purpose when no potential "parties" are opposed to the actions mandated by the Order. Moreover, any discretionary hearing would duplicate

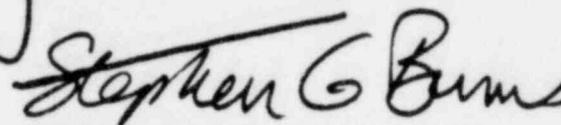
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<sup>15/</sup> Although a petitioner under 10 CFR 2.206 is not entitled to a hearing on his petition and may not appeal the denial of his petition to the Commission, the staff does not believe that 10 CFR 2.206 is a weak or inadequate remedy. The holding of hearings is not per se the function of 10 CFR 2.206. Rather, 10 CFR 2.206 is a mechanism whereby members of the public may bring information to the attention of the staff Directors which information they believe either compels the NRC to take action to fulfill its statutory responsibilities or warrants discretionary action by the appropriate Director. The Commission has full power to review sua sponte a denial of relief by the staff. The Commission may find that the Director failed to take action under circumstances in which he was required to act, i.e., circumstances in which "substantial health or safety issues" were raised that required issuance of an order. See Consolidated Edison Co. (Indian Point Station, Units 1-3), CLI-75-8, 2 NRC 173, 176 (1975). Even where the Director may have the discretion not to take the requested action, the Commission itself may determine in the exercise of its inherent supervisory authority over the staff that some action should be taken such as issuance of an order or the holding of a discretionary hearing.

matters already set forth in the operating license proceeding. For these reasons the Petitioners' request should be denied.

Respectfully submitted,

  
James Lieberman  
Counsel for NRC Staff

  
Stephen G. Burns  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 24th day of June, 1980.

Enclosures:

- Appendix A - Letter from Mrs. Keen to Mr. Stello dated 5/15/80.
- Appendix B - Letter from Irene Anderson to Mr. Stello dated 5/19/80.
- Appendix C - Mailgram from Gale Van Hoy to V. Stello dated 5/20/80.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of )  
HOUSTON LIGHTING AND POWER COMPANY ) Docket Nos. 50-498  
(South Texas Project, Units 1 & 2) ) 50-499  
(Show Cause Order)

CERTIFICATE OF SERVICE

I hereby certify that copies of STAFF MOTION TO DENY REQUEST FOR A HEARING 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 24th day of June, 1980.

Jack R. Newman, Esq.  
Lowenstein, Newman, Reis,  
Axelrad & Toll  
1025 Connecticut Avenue, N.W.  
Washington, D.C. 20036

Finis Cowan, Esq.  
Baker & Botts  
3000 One Shell Plaza  
Houston, Texas 77002

Atomic Safety & Licensing Board Panel\*  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Samuel J. Chilk\*  
Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Mrs. M. Keen  
2602 Encino  
Bay City, Texas 77414

Mr. Gale Van Hoy  
Houston Gulfcoast Buildings & Construction  
Trades Council  
2704 Sutherland  
Houston, Texas 77023

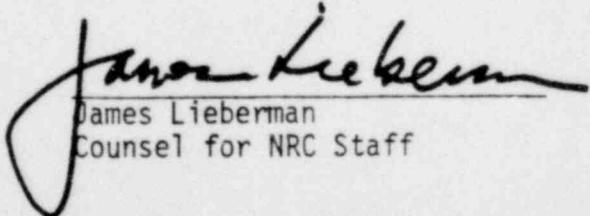
Mrs. Peggy Buchorn  
Executive Director  
Citizens for Equitable Utilities  
Route 1, Box 432  
Brazoria, Texas 77422

Mr. Lanny Alan Sinkin  
Citizens Concerned about Nuclear Power  
E. Magnolia  
San Antonio, Texas 78212

Atomic Safety & Licensing Appeal Panel\*  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Docketing and Service Section\*  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Ms. Irene H. Anderson  
8715 Starcrest, #18  
San Antonio, Texas 78217

  
James Lieberman  
Counsel for NRC Staff