



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of  
HOUSTON LIGHTING AND POWER CO.  
(Souch Texas Project, Units 1  
and 2)

Docket No. 50-498  
50-499

CITIZENS FOR EQUITABLE UTILITIES  
OPPOSITION TO NRC STAFF APPEAL AND  
MOTION FOR DIRECT CERTIFICATION

By Order of April 24, 1981, the Appeal Board asked all parties in this proceeding to provide concise responses to the NRC Staff's "Notice of Appeal and List of Exceptions," and "Motion for Direct Certification Pursuant to 10 CFR §2.785(d)," by May 1, 1981. The NRC Staff filed these two documents on April 3, 1981, seeking the following:

1. Appeal of the Licensing Board's grant of intervenors' Motion for Leave to File Out of Time.
2. Appeal of the Licensing Board's grant of intervenors' Motion to Compel the NRC Staff.
3. Directed Certification to the Commission of the issue of compelling the staff to reveal the names of "confidential" sources interviewed in the course of investigations that lead to a show cause order of May 1980.

Citizens for Equitable Utilities opposes these requests because (1) none of the issues is ripe for appeal and (2) if an appeal were granted, the NRC Staff's arguments would fail on their merits.

8105050 545  
G

2503  
50/1

I. Appeal Of The Grant Of Leave To File Out Of Time.

According to its List of Exceptions, the Staff wishes to appeal the Licensing Board's order granting intervenors permission to file out of time to compel the NRC Staff to respond to discovery. That the Staff should make this request in light of the consistent and long-standing NRC precedents is nothing short of remarkable. This is a classic example of the sort of procedural decision that is well within the discretion of the Licensing Board and is not subject to interlocutory appeal.

A review of the Licensing Board's decision of March 24, 1981, establishes that the Board was thoroughly familiar with the scheduling issues, the various deadlines, and the likely impacts on the parties of allowing the Motion to Compel to be filed late. Further, the Board specifically found good cause for the late filing based on the need for effective participation by intervenors. In light of the great deference given to the Licensing Board in scheduling and other procedural matters and of the fact that the late filing of the Motion to Compel in no way prejudices the NRC Staff or any other parties, the Staff appeal of this issue is clearly interlocutory and may not be heard. Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-563, 10 NRC 449 (1979); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-602, 12 NRC 28 (1980).

II. Appeal And Request For Directed Certification Of  
The Order Compelling Discovery.

Although the NRC Staff's attempt to appeal the Licensing Board's order, and its request for Directed Certification are slightly different, they will be argued together here since the relevant points are quite similar. In neither case is consideration by a higher tribunal than the Licensing Board appropriate at this stage of the proceeding.

With respect to the appeal request, the NRC Staff relies on the "collateral order doctrine" and on cases concerning the authority for discretionary review. In NRC practice, these merge in the principles set out in the Marble Hill decision:

Almost without exception in recent times, we have undertaken discretionary interlocutory review only where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive and unusual manner.

Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). The NRC Staff cannot meet either of those tests here.

The similar test for Directed Certification is found in 10 CFR 2.785(d):

In the proceedings described in paragraph (a) of this section, an Atomic Safety and Appeal Board may, either in its discretion or on direction of the Commission, certify to the Commission for its determination major or novel questions of policy, law or procedure.

Of course, major or novel issues arises in many cases, but not all of them are appropriate to be heard by the Commission. To the contrary, the directed certification authority is to be "exercised sparingly," and "absent compelling reason," the Appeal Board will decline to certify a question to the Commission. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station) and Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-421, 6 NRC 25, 27 (1977). The NRC Staff has failed to demonstrate any such compelling reason in this case.

The core of the Staff argument that either the Appeal Board or the Commission should consider these issues is the as yet unfounded allegation that the carefully protected disclosure of source names in the context of a licensing hearing will somehow compromise Staff's ability to gain access to confidential sources in the future. In particular, the NRC Staff suggests that employees and others at nuclear plants would be fearful of talking to NRC inspectors and investigators because their identities might later be revealed and they might be subjected to physical, financial, and social penalties. Certainly no one is more sympathetic to the plight of these employees than is Citizens for Equitable Utilities, which has seen so many of them harassed so unmercifully after having their names revealed in the public press. However, the NRC Staff conveniently ignores the very purpose of protective orders and in camera proceedings. Assuming, as we must in the absence of contrary evidence,

that all parties will adhere to the protective orders, there is absolutely no basis for believing that the names of employees will ever be revealed improperly.

The NRC Staff attempts to sidestep the protective order and in camera hearing protections by suggesting that they cannot go far enough since individuals can be identified entering or leaving a hearing room or a building in which a hearing takes place. There is no basis for the suggestion that this needs to occur. People can be protected when entering buildings and when entering hearing rooms, and there is no need for anyone to obtain their identity.

The Staff argues, in essence, that it will suffer immediate and serious irreparable harm if the Licensing Board's order to compel is allowed to stand. This claim is based on the allegation that the order will have a "chilling effect" on further Staff investigations and the use of confidential sources at the South Texas Project and at other nuclear facilities throughout the country. Again, there is no basis for this claim.<sup>1/</sup> Aside from the fact that identities

---

<sup>1/</sup> We are deeply distressed to see that the NRC Staff, although it has apparently taken a position in favor of the issuance of an operating license to Houston Lighting and Power, believes that there will be a continuing need for the use of confidential sources at the South Texas Project. Surely if they are correct in that assumption, they are incorrect in asserting that the applicant has the competence and character necessary to obtain an operating license. It is inconceivable that the NRC would issue any sort of license to a company that the NRC itself believed would need to be investigated through the use of confidential sources.

will be protected, as discussed above, the NRC also has the authority to subpoena such potential sources as it deems necessary, and it has the authority to take virtually whatever actions are appropriate to assure that companies do not interfere with NRC investigations. Given the latitude of those remedies, it cannot be said that the release of source names under strict protective orders in this particular case would cause any significant degree of harm to the NRC. In addition, there is no reason to believe that the order in this case will have repercussions at other facilities or in other cases. Undoubtedly, Licensing Boards will view each situation on its particular facts and take such actions as may be necessary to protect confidential sources while at the same time assuring a complete record.

For these reasons, the NRC Staff has failed to demonstrate that it would suffer immediate and serious irreparable harm or to show any compelling reasons for certifying these issues to the Commission at this time.<sup>2/</sup> Indeed, the only way that one of the various tests for appeal or certification would be met in this case is if the Licensing Board's order were reversed, discovery were denied, and the Licensing

---

<sup>2/</sup> For the same reasons, the NRC Staff has failed to meet the standards of the "collateral order doctrine" as stated in its Notice of Appeal. In particular, it has not demonstrated that important rights would be irreparably lost if the Licensing Board's order were allowed to stand.

Board never heard from the individuals who can provide the information that is central to this case. If that were to occur, it would affect the basic structure of the proceeding in a pervasive and unusual manner, as discussed below.

III. The Staff's Appeal Must Fail On Its Merits.

The Staff's Notice of Appeal states three exceptions that go to the merits of the issuance of the order to compel. Each must fail.

The second exception suggests that the names of particular inspectors are not necessary since all of the information obtained by those individuals has already been supplied to the parties to the proceedings. Of course, this information was provided by the NRC Staff, and the intervenors have no way of judging whether what has been provided to them in any way reflects an accurate rendition of what was said by the inspectors in question. As adverse parties in this proceeding, the intervenors must have an opportunity to examine that question. Otherwise, the NRC Staff will have taken on the role of the Licensing Board itself, and the Board will be unable to make an independent judgment on the validity of the Staff's assertions. The Staff can hardly be allowed to assume the role of determining what facts shall be heard when it is also an adversary party to this proceeding.

The Staff's third exception argues that the Board did not make the requisite findings of 10 CFR §2.744. The most cursory review of the Licensing Board's decision, particularly pages 5-7, demonstrates that this assertion is flatly incorrect.

Finally, the NRC Staff argues that the Licensing Board committed reversible error in failing to make an in camera inspection of the requested information. 10 CFR 2.744(c) clearly does not require the Board to make such an inspection. It simply provides that material shall be produced for in camera inspection "if requested by the presiding officer." It is impossible to interpret the relevant language as requiring in camera inspection prior to the issuance of an order to compel, regardless of the facts of a case.

Most important, the individuals whose identities are at issue here are precisely those people who have the best information concerning what has been happening at the South Texas Project for the past several years. Their information forms the basis for the NRC's stopwork order. By necessity, their information will form a major part of the basis for the Licensing Board's ultimate decision. These issues are too important to be allowed to proceed on the NRC Staff's hearsay statements of what they have learned from the actual QA/QC inspectors who were subjected to harassment. That is particularly the case if the NRC Staff is to take a position in favor of continued participation in the South Texas Project by Houston Lighting and Power and by Brown and Root. Given that position by the NRC Staff, reversal of the Order to Compel would eliminate the ability of the only parties adverse to Houston Lighting and Power and Brown and Root to determine the truth of factual assertions made by those favorable to the Houston Lighting and Power and Brown and



Root positions, and it would seriously damage, if not destroy, the intervenors' ability to participate effectively in this proceeding.

Conclusion

For these reasons, the appeal should not be heard, the Motion for Direct Certification should be denied, and if the merits are to be considered, the appeal should be denied.

Respectfully submitted,

---

William S. Jordan, III  
Harmon & Weiss  
1725 I Street, N.W.  
Suite 506  
Washington, D.C. 20006  
(202) 833-9070

Counsel for Citizens for Equitable  
Utilities

May 1, 1981

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
 )

Houston Lighting and Power Co. )  
(South Texas Project, Units 1 and )  
and 2) )  
 )

Docket No. 50-498 OL  
50-499 OL

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned will appear  
in this matter for Citizens for Equitable Utilities.

Name: William S. Jordan, III  
Address: Harmon & Weiss  
1725 I Street, N.W.  
Suite 506  
Washington, D.C. 20006  
Telephone: (202) 833-9070  
Admissions: Supreme Court of Michigan  
District of Columbia Court of  
Appeals  
U.S. District Court for the  
District of Columbia  
U.S. Court of Appeals for the  
District of Columbia  
Party: Citizens for Equitable Utilities

William S. Jordan, III

Dated: April 28, 1981



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

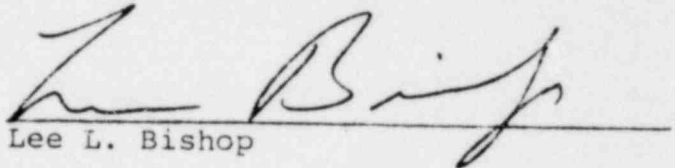
Kim Eastman, Co-coordinator  
Barbara A. Miller  
Pat Coy  
Citizens Concerned About  
Nuclear Power  
5106 Casa Oro  
San Antonio, TX 78233

Docketing and Service Section  
Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Betty Wheeler, Esq.  
Tim Hoffman, Esq.  
Hoffman, Steeg & Wheeler  
1008 S. Madison  
Amarillo, TX 79101

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

Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555

  
Lee L. Bishop