

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)
)
HOUSTON LIGHTING & POWER) Docket Nos. 50-498 OL
COMPANY, ET AL.) 50-499 OL
)
(South Texas Project,)
Units 1 and 2) April 9, 1981

APPLICANTS' RESPONSE TO CITIZENS^{*/}
NOTICE OF APPEAL AND REQUEST FOR
DIRECTED CERTIFICATION

This is a proceeding on the issuance of an operating license (OL) for the South Texas Project (STP). On March 10, 1980, the ASLB determined to hold a separate, early hearing to consider certain contentions advanced by Citizens relating to alleged quality assurance and quality control deficiencies during plant construction. (Memorandum, March 10, 1980 at 2).

Subsequently, and apart from the OL proceeding, the NRC's Office of Inspection and Enforcement, after an investigation which disclosed items of non-compliance, issued an Order to Show Cause why certain safety-related construction at STP should not be suspended. (April 30, 1980). Citizens filed a request with the Commission for a separate hearing

*/ In this Response, Applicants will refer to inter-venors, Citizens for Equitable Utilities (CEU) and Citizens Concerned About Nuclear Power (CCANP) jointly as "Citizens."



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on the Show Cause Order, which the Commission denied on grounds that the matters sought to be pursued could be litigated without prejudice to Citizens' interest in the separate, early hearing that the ASLB had already decided to hold in the ongoing proceeding. The Commission agreed with the ASLB's decision to hold an "expedited" hearing on QA/QC issues and directed it to "issue an early and separate decision on this aspect of the operating license proceeding." Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 291-92 (1980).

In denying Citizens' request, the Commission addressed matters broadly relating to management competence and character, and directed the ASLB to consider them during the expedited portion of the OL proceeding. Acting in response to the Commission's Order, the ASLB ordered a prehearing conference for November 19, 1980, to discuss the issues injected into the proceeding by the Commission's Order and the schedule for the expedited proceeding. (Memorandum and Order, September 24, 1980).

At the November 19 prehearing conference, the ASLB heard extended argument on the proper scope of the issues to be litigated during the expedited proceeding. (Tr. 201-300). Citizens contended that the Commission had directed the ASLB to consider only assertions of deficiencies in Applicants' past practices as reflected in Citizens' contentions and in the Order to Show Cause. Applicants and the NRC Staff advanced

the view that the ASLB should consider the totality of Applicants' conduct, including any corrective actions taken or proposed by the Applicants in response to the Order to Show Cause.

The ASLB indicated from the bench its view that findings on an applicant's qualifications to operate a nuclear plant are predictive and that, barring uncorrectable deficiencies, an applicant should be permitted to demonstrate how deficiencies have been, or will be, corrected. (Tr. 302). This determination was reflected in a Prehearing Conference Order dated December 2, 1980, (Order at 4) attached to which was a statement of six issues reflecting the ASLB's interpretation of the proper scope of the proceeding.

The instant appeal may be crystallized by referring to Issues A and B as admitted by the ASLB; these issues were essentially the focus of the debate at the November 19 prehearing conference. Issue A asks whether, in light of certain alleged violations or deficiencies, HL&P possesses the necessary "managerial competence or character" to be granted an OL. Issue B asks whether, in light of remedial steps which have been taken, there is reasonable assurance that HL&P does have the requisite competence and character. Citizens argued at prehearing conferences on November 19, 1980, and March 17, 1981, that a negative determination on Issue A would preclude any further inquiry into remedial or corrective measures.

On March 16, over 14 weeks after issuance of the ASLB's Order of December 2, 1980, and on the eve of the third prehearing conference scheduled by the ASLB, Citizens filed a joint "Motion for Alteration of Board Order dated December 2, 1980" (Joint Motion) regarding the scope of the issues to be litigated during the expedited QA/QC hearing.^{*/} Citizens asserted, on the grounds discussed above, that the ASLB erred in construing its charge from the Commission under CLI-80-32, (i.e., that a separate hearing should be held and a decision rendered on the alleged QA/QC deficiencies without regard to corrective measures.) Again, the ASLB rejected Citizens' assertion (Tr. 555-56) and the grounds for the ASLB's ruling were set forth in a Third Prehearing Conference Order dated April 1, 1981. The ASLB also refused to refer this issue to the Commission. (Order at 11, Tr. 556).

Citizens have now filed a "Notice of Appeal and Request for Directed Certification" asking the Commission^{**/} to

^{*/} The Joint Motion was served on Applicants at 10:45 P.M. the night before the March 17, prehearing conference. (Tr. 353). The Staff received it on the morning of the prehearing conference. (Id.). The ASLB received it at about 11:30 the night before. (Tr. 352). The ASLB ruled that it would not strike the Motion as untimely because "[w]e would like to rule on most of these matters on the merits, if we could." (Tr. 357).

^{**/} On April 1, 1981, the Appeal Board took jurisdiction over the appeal pursuant to 10 C.F.R. §§ 2.718(i) and 2.785(b).

reverse the ASLB's decision. Citizens' Joint Motion and the resulting instant appeal are clearly untimely; Citizens have failed to address why interlocutory review of the ASLB's decision is necessary; and they have not shown that the ASLB's decision is inconsistent with the intent of the Commission as reflected in CLI-80-32, nor with the relevant law. For these reasons, the Applicants urge that the Appeal Board deny the instant appeal.

The Appeal Is Untimely

Citizens' pleading is untimely in the extreme; if granted it would work a substantial hardship on Applicants and the NRC Staff and would frustrate the Commission's Order.

The ASLB issued its ruling on the scope of the contentions to be litigated during the expedited hearing in its Second Prehearing Conference Order dated December 2, 1980. Under the Commission's regulations, parties objecting to any of the rulings set forth in that Order were required to file "objections" within five days after service of that Order. (10 C.F.R. § 2.752(c).) No objections were filed by either CEU or CCANP. Instead, Citizens waited over three months (until the eve of the third prehearing conference) to file a request for reconsideration. The only reason advanced by Citizens for the failure to file in a timely manner was an

illness of CEU's representative, Ms. Buchorn.^{*/} No reason was given why some other member of CEU could not have filed an objection.^{**/} Nor was any reason provided as to why CCANP, then represented by counsel, did not file a timely objection.^{***/} Thus, it is clear that no "good cause" has been provided for the extended delay.

Acting in reliance on the ASLB's Order of December 2, 1980, Applicants and the NRC Staff have fashioned their

^{*/} See, "Citizens Motion for Leave to File Motion Out of Time Objecting To Prehearing Conference Order Dated December 2, 1980." This Motion was filed simultaneously with the Joint Motion on the night before the third prehearing conference.

^{**/} CEU's Petition to Intervene in this proceeding, dated February 23, 1979, states that CEU has some 5,000 members in the South Texas area.

^{***/} CCANP has elsewhere argued that a delay in the proceeding is warranted because of the illness and conflicting caseload of counsel who has since withdrawn. Details of such illness and conflicts are wholly missing from the filings and statements of both CCANP and its former counsel. Suffice it to say that those factors could not possibly have prevented counsel for CCANP from filing an objection shortly after December 2, 1980, when such counsel were still engaged in the case. In fact, counsel for CCANP informed counsel for Applicants that they had met with a representative of CCANP (Mr. Sinkin) during the Christmas period in 1980. Work of counsel continued until at least February 21, 1981, when Ms. Wheeler (for CCANP) filed with the Applicants "informal" answers to interrogatories. Discussions between counsel for Applicants and counsel for CCANP never indicated that they had been prevented by extrinsic factors from filing objections to the December 2, 1980, Order. Counsel for CCANP did not withdraw until March 12, 1981.

respective cases and are well along in the preparation of direct testimony. (Tr. 732-34; Tr. 743; Tr. 744). As both Applicants and the Staff have strongly pointed out, since many of the issues in this proceeding are closely intertwined, they have not prepared the testimony of their many witnesses (35 identified for Applicants and 18 for the NRC Staff) in a manner which readily separates Issue A from other issues (Tr. 732-40); thus, a ruling in Citizens' favor would require substantial revisions in Applicants' and the Staff's direct cases which almost certainly could not be carried out within the current hearing schedule adopted by the ASLB. Such delay would be particularly inappropriate since the Commission has called for an expedited hearing, and Citizens' late appeal, if allowed, would inevitably frustrate this objective. ^{*}/

Interlocutory Review Is Not Appropriate

The Commission's regulations set forth in 10 C.F.R. § 2.730(f) proscribe interlocutory appeals except in cases where the ASLB in its discretion determines that a prompt review of its ruling "is necessary to prevent detriment to

^{*}/ It is also important to note that if, as Citizens argue, only Issue A is to be heard during the expedited portion of the OL proceeding, it is very possible that the ASLB will be required to hold two separate hearings, and issue two separate decisions, on QA/QC matters unless past practices can be shown to preemptively disqualify the Applicants. This would cause additional unnecessary delay and expense.

the public interest or unusual delay or expense...." In this instance the ASLB has already ruled that referral of its ruling on the scope of contentions in the expedited QA/QC hearing is not warranted. (Third Prehearing Conference Order at 11).

In addition, motions to direct certification may be filed with the Appeal Board pursuant to 10 C.F.R. § 2.718(i). Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482-83 (1975). However, a party seeking directed certification must establish, at a minimum, that referral of the matter by the Licensing Board would have been appropriate. (Id. at 483). Directed certification "is to be resorted to only in exceptional circumstances." Consumers Power Company (Midland Plants, Units 1 and 2), ALAB-382, 5 NRC 603, 606 (1977). The Appeal Board has made clear that certification will be directed sparingly and only if the Licensing Board's ruling:

- (a) threatens the party adversely affected with immediate and serious irreparable harm which could not be remedied by a later appeal or
- (b) affects the basic structure of the proceeding in a pervasive or unusual manner.

E.g., Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-593, 11 NRC 761, 762 (1980); Public Service Electric and Gas Company (Salem Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980);

Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1972); accord, Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC 693, 695 n. 5 (1979) (and cases cited therein).

Citizens have never set out reasons why this ruling is so "exceptional" as to require interlocutory review, nor why the public interest will suffer, or unusual delay or expense will result, if the ASLB proceeds on its charted course. They state only that:

As now structured, the expedited hearings will not provide a separate and independent consideration of, and decision on Issue A. While Issue A is drawn separately, Issue B and the Board intention to consider Issue A in the context of Issue B removes the separate and independent relief.

(Joint Motion at 8).

Citizens argue that by hearing evidence on Applicants' attempts to improve QA/QC procedures after issuance of the Order to Show Cause, the ASLB will somehow deny them "relief specifically mandated by the Commission." What Citizens really seek, however, is an appellate determination (prior to the development of any evidentiary record) of the legal standards which govern the issues in this early hearing relating to management competence and character.

Under the ASLB's Second and Third Prehearing Conference Orders, Citizens may adduce evidence on every factual allegation which they contend demonstrates that Applicants do not have the necessary competence or character to operate this plant. If they are concerned only about alleged practices which occurred before the Order to Show Cause, these concerns can be addressed in response to Issue A, and Citizens are free to provide testimony, and to submit proposed findings of fact and conclusions of law on this contention alone.

Citizens will also have ample opportunity to press their interpretation of the law before the ASLB. The ASLB has already directed the parties to file trial briefs addressing "the standards which govern the managerial competence and character issues." (Third Prehearing Conference Order at 7). After the evidence has been presented, Citizens can, in proposed findings of fact and conclusions of law, argue their interpretation of these standards as applied to the facts developed in the record. Finally, as the ASLB stated, Citizens will have an opportunity to appeal the partial initial decision on QA/QC issues long before an operating license can be issued, utilizing the Commission's normal appellate procedures. (10 C.F.R. § 2.762). Citizens never

state why this relief will be inadequate.^{*/}

The Licensing Board's Ruling Complies
With the Commission's Memorandum and
Order of September 22, 1980

As noted above, Citizens interpret the Commission's Memorandum and Order to forbid the ASLB from receiving at this time evidence on any remedial actions taken by Applicants subsequent to issuance of the Show Cause Order. In Applicants' view, nothing in that Memorandum and Order supports Citizens' narrow interpretation, and NRC case law and regulations are to the contrary.

In the Joint Motion, Citizens cite various statements in the Commission's Memorandum and Order as purportedly showing that the Commission intended to preclude consideration of corrective actions. However, as the Licensing Board explained, the Commission merely noted that certain deficiencies (e.g., abdication of responsibility and knowledge) "could form an independent and sufficient basis" for denying the license, not that they must. (12 NRC at 291). In addition, the Commission's statement that the history of past practices "is relevant" to the issue of basic competence and character, (12 NRC at 291) does not mean that only such past practices

^{*/} In the past intervenors have argued that by hearing evidence on remedial actions, the evidence of past practices will be "diluted" and the ASLB "confused" by inappropriate matters. This, of course, is bald speculation and assumes, in advance, that the ASLB will be unable to weigh the facts before it when the time comes to issue a decision.

are relevant to that issue, or that the ASLB is forbidden from looking at the circumstances surrounding those matters or remedial actions taken in response thereto. Citizens simply do not cite, nor were Applicants able to find in the plain meaning of the Commission's Order, any support for Citizens' interpretation of the Commission's intent.

Citizens' interpretation is also inconsistent with Commission regulations, and case law, which set forth standards by which Applicants' qualifications should be judged. (See, e.g., 10 C.F.R. §§ 50.40, 50.54(e) and (f), 50.55(e); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), LBP-77-68, 6 NRC 1127 (1977), reaff'd., LBP-78-10, 7 NRC 295, aff'd., ALAB-491, 8 NRC 245 (1978). At a minimum,^{*/} the law and regulations support the view expressed by the ASLB that:

If we were to find that...the record of compliance leading to the show-cause order is sufficient to deny operating licenses -- and the deficiencies are not correctable, we might then decline to decide the remaining issues (even though we would have taken evidence on them). But if we found that the past

^{*/} In Applicants' view, past, present and proposed practices should be considered together. In addition, we believe the Commission's statement that certain allegations could form an independent and sufficient basis for denying a license, meant only that particular allegations, even apart from other allegations, could provide independent grounds for denial; not that all circumstances pertaining to such particular allegations, including remedial actions, should be ignored. However, the precise legal standards should be properly argued to the ASLB in a trial brief and in proposed findings of fact and conclusions of law.

deficiencies are correctable, we would additionally, as a predicate to an operating license, have to consider...whether the deficiencies have in fact been corrected.

...the Board views the operating license procedures of the Commission as contemplating that an Applicant demonstrate compliance with various requirements in order to obtain an operating license; and that, if deficiencies are uncovered, the applicant be permitted to demonstrate that the deficiencies have been corrected. This process has been followed in all operating license proceedings of which we are aware.

(Third Prehearing Conference Order at 10). The ASLB also directed Citizens' attention to the fact that, in providing guidance with respect to the standards for denying operating licenses, the Commissioners, in various separate statements, had cited decisions which stress the totality of a licensee's conduct and the importance of actions mitigating the significance of adverse findings concerning prior practices. Cosmopolitan Broadcasting Corp. v. F.C.C., 581 F.2d 917 (D.C. Cir. 1978); Atlantic Research Corp., ALAB-594, 11 NRC 841 (1980).

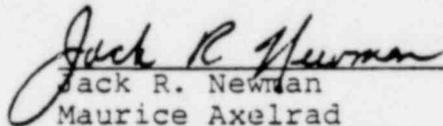
In sum, the Commission's Memorandum and Order was intended to ensure the "full airing of all relevant information regarding the safety of the nuclear plant" as Citizens had requested. (12 NRC at 290, citing Citizens' May 28, 1980, request for hearing). That Memorandum and Order does not support Citizens' allegation that the ASLB may consider only evidence of deficiencies in past practice. ^{*/}

^{*/} In any event, the Commission chose to direct consideration of QA/QC issues as part of the ongoing operating license proceeding. Thus, the ASLB has an obligation to look beyond the narrow issue of the effect of past practices to determine Applicants' overall qualifications to operate the STP.

Conclusion

For the reasons set forth in more detail above, Citizens' appeal of the ASLB's ruling of December 2, 1980, should be denied because it is untimely, an interlocutory appeal is not warranted, and Citizens have misinterpreted both the Commission's Memorandum and Order of September 22, 1980, and applicable law.

Respectfully submitted,



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