

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 15, 1981

APPLICANTS' RESPONSE TO THE NRC STAFF'S "NOTICE OF
APPEAL AND LIST OF EXCEPTIONS" AND
"MOTION FOR DIRECT CERTIFICATION PURSUANT TO
10 C.F.R. § 2.785(d)"



The NRC Staff seeks appellate review of the ASLB's March 24, 1981, Memorandum and Order (Order) granting the motion of Citizens Concerned About Nuclear Power (CCANP) to compel the identification of individuals who provided information to NRC's Office of Inspection and Enforcement (OIE) during an investigation of construction practices at the South Texas Project site. The NRC Staff had earlier refused to provide the identities of these individuals on the grounds that such disclosure is exempted under 10 C.F.R. § 2.790. ("NRC Staff Additional Response to CCANP 'Requests For Information,' " December 8, 1980, at 2-4).

At the November 19, 1980, prehearing conference, the ASLB ruled that motions to compel discovery could be filed at any time before February 2, 1981. (Tr. 330-331; Second Prehearing Conference Order, Dec. 2, 1981 at 5). In the context of the instant discovery request, this was a considerable extension

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beyond the 10 days allowed by the Commission's regulations. (10 C.F.R. § 2.740(f)). CCANP did not file its motion to compel discovery even within this extra time period.^{*/} Nevertheless, the Board found that CCANP had demonstrated good cause for its untimely filing. (Order at 3).

The Staff lists four exceptions to the ASLB's ruling. First, it contends that the Board should have denied the motion to compel as untimely. Second, it contends that the Board erred in finding that disclosure of the identities of the subject individuals is necessary for a proper decision in this proceeding. Third, it contends that the Board erred in not making the requisite findings under 10 C.F.R. § 2.744. Fourth, the Staff contends that the ASLB erred in failing to make an in camera inspection of the requested information so that it could make the determination required by 10 C.F.R. § 2.744 prior to ordering disclosure.

The Staff asserts that the ASLB's ruling is reviewable as a final order under the "collateral order doctrine" enunciated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949) and under subsequent cases refining that doctrine. In the alternative, the Staff asks that the Appeal Board permit discretionary interlocutory review pursuant to its authority to direct certification of important issues under 10 C.F.R.

^{*/} "CCANP Motion To Compel NRC Staff To Provide Information," March 16, 1981. The Motion to Compel was accompanied by a "Motion For Leave To File Motion Out Of Time To Compel NRC Staff To Provide Information."

§ 2.718(i) and § 2.785(b). Finally, the Staff asks that the Appeal Board direct certification of this issue to the Commission because "the appeal involves major and novel questions of policy, law and procedure." (Motion for Direct Certification at 1).

Applicants support the Staff's request for immediate appellate review. In our view, the issues raised by the Staff's appeal warrant appellate consideration at this time.^{*/} Applicants also agree that the ASLB erred in requiring blanket disclosure of the names of individuals who provided information to OIE during its investigation at the STP site.

Appellate Review Is Appropriate

Whether viewed as an appeal of a final collateral order^{**/}

^{*/} In accordance with the Commission's mandate, however, the public interest demands an expedited hearing on the QA/QC issues presently before the ASLB. Applicants therefore request that the Appeal Board (or Commission) set an accelerated briefing schedule so that this appeal can be resolved without delaying the completion of the expedited portion of the OL proceeding. Even if this appeal is not decided by the May 12, hearing date set by the ASLB, the Applicants and the Staff could still proceed with their entire case, and the intervenors could proceed with the unaffected portions of their case.

^{**/} As the Staff explains, to fall within the "collateral order doctrine," as defined in the federal courts, the challenged order must meet three requirements: (1) the lower court must have fully disposed of the issues sought to be reviewed on appeal; (2) the challenged order must not have been a mere step toward the final judgment on the merits, but must be collateral to the cause of action asserted; and (3) the lower court ruling must affect important rights which would be irreparably lost if review of the challenged order had to await final judgment and hence, to be effective, appellate review must be immediate. Abney v. United States, 431 U.S. 651, 658, 97 S.Ct. 2034, 2040 (1977); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458 (1978); United States v. Gurney, 558 F.2d 1202, 1207 (5th Cir. 1977).

or as a request for discretionary interlocutory review,^{*/} the issue that the Staff seeks to have reviewed warrants appellate consideration at this time. Central to both doctrines of appellate review is the notion that the ruling in question will cause immediate and irreparable injury to the rights affected by that ruling which cannot be properly protected by a later appeal. Such is the case at bar.

The ASLB's Order requires the Staff to immediately divulge the identities of those individuals who provided information to investigators from OIE during an investigation of construction practices at the STP site. The Board has also stated that it will require the Staff to reveal the names of informants, and possibly require their appearance as witnesses, at the evidentiary hearings scheduled to begin on May 12, 1981. Even if those names are released only under a protective order and if those individuals are called only at in camera sessions of the hearing, it is obvious that release of the identities of these individuals could irreparably affect the Commission's ability to conduct its governmental functions.

^{*/} The Appeal Board has stated that it will undertake discretionary interlocutory review only in those exceptional cases where: (1) the party adversely affected by that ruling may suffer immediate and serious irreparable harm; or (2) the challenged ruling affects the structure of the proceeding in a basic and unusual manner. E.g., Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-593, 11 NRC 761, 762 (1980); Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC 693, 694 (1979).

In its instant pleading, the Staff has expressed a concern that exposure of informants in this case will have a negative impact on the Staff's ability, during future investigations, to obtain information affecting public health and safety. Thus, the issue which the Staff seeks to have addressed involves considerations of the public interest which go beyond the instant proceeding, and would seem to fall within the class of issues which could properly be referred to the Appeal Board pursuant to 10 C.F.R. § 2.730(f).^{*/}

Finally, the issues raised by the Staff appear to derive from final collateral rulings which are reviewable under the collateral order doctrine. Southern Methodist University Ass'n. v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979). The ASLB has issued its final ruling on the disclosure issue and that issue is not a step toward final judgment, but rather is collateral to the issue of the Applicants' qualifications to obtain an operating license.^{**/}

^{*/} A party seeking directed certification must establish, at a minimum, that referral pursuant to 10 C.F.R. § 2.730(f) would have been appropriate. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483 (1975).

^{**/} It is not clear whether the collateral order doctrine, as enunciated in the federal courts, is directly applicable in NRC proceedings, or whether somewhat different standards, similar to those governing directed certification, are to be applied. See, Toledo Edison Company (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975).

Applicants also support the Staff's request that this issue be certified to the Commission so that the Commission can, if it wishes, rule immediately and avoid potential additional delay. The ASLB, in accordance with the Commission's directive to hold an "expedited hearing" on the QA/QC issues, has set a May 12, 1981, date for the commencement of evidentiary hearings so that these hearings might be completed by this summer. Such completion might well be frustrated if the issues raised by this appeal were to be reviewed sequentially by the Appeal Board and then the Commission.

CCANP'S Motion To Compel Should
Have Been Rejected As Untimely

As stated above, CCANP waited approximately six weeks before filing its motion to compel. It did so in the face of an explicit ASLB caveat that:

In view of the Commission's emphasis upon an expedited hearing, we expect the parties to adhere to the foregoing schedule as closely as possible. Modifications will not be granted absent a strong showing of good cause.

(Second Prehearing Conference Order, December 2, 1980, at 7).

In its motion for leave to file out of time, filed with the ASLB on March 16, CCANP claimed that good cause existed for its late filing because counsel hired by CCANP in November 1980, failed to fully carry out their responsibilities, including a failure to timely file motions to compel discovery from the Staff.

Applicants have recently argued to the Appeal Board that this excuse is not good cause for an untimely filing.^{*/} Intervention in NRC proceedings carries with it not only the rights afforded by the Commission's rules of practice, but also the responsibilities which those rules impose. Offshore Power Systems (Manufacturing License For Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813, 815 (1975). A party organization cannot retain counsel of its own choosing, have no member of the organization work with counsel to assure that the organization's litigation objectives are being served, and then belatedly claim the right to additional time because its cause was not fully advanced by chosen counsel. This is especially true in the case at bar, since the Commission has ordered an expedited hearing, and CCANP's delay in filing its motion to compel threatens to prevent timely resolution of the legal questions CCANP^{*} now raises. If the Staff is now compelled to provide the names of its informants, delays will occur in order to complete such further disclosure and to prepare any additional resulting testimony. The ability to complete this proceeding in a timely fashion will be seriously compromised.^{**/}

^{*/} "Applicants' Response to Citizens' Notice of Appeal" at 7 through 9; "Applicants' Response to Citizens' Notice of Appeal and Request for Directed Certification" at 5 through 6 (both dated April 9, 1981).

^{**/} The untimeliness of CCANP's motion to compel should be an independent basis for reversal of the ASLB's decision. However, since the ASLB has stated that it will require identification of the informants at the hearing, sua sponte, (Order at 8) either the Commission or the Appeal Board should weigh the policy considerations raised by this appeal and determine whether blanket disclosure at the evidentiary hearings would be appropriate.

The ASLB Erred In Requiring Blanket
Disclosure of Identities

The Staff has identified the important competing policy considerations that must be weighed in deciding whether to require disclosure of individuals who have provided information to the Staff with a promise of anonymity. (Motion For Direct Certification at 4-8). The Applicants recognize the importance of both considerations. Since our interests are directly affected by the actions of the Staff's investigatory arm, in the abstract we can appreciate the desirability of obtaining the identities of such informants so that we can protect our interests in proceedings before the Commission.

However, on balance, Applicants believe that the ASLB's ruling, requiring blanket disclosure of identities without a particularized showing of need, unnecessarily threatens the integrity of this and future Staff investigations. Consistent with the provisions of 10 C.F.R. § 2.744, disclosure should be required only where a requesting party makes a strong showing that the identity of a specific individual is indispensable to a sound decision in the proceeding, and that the information sought by the requesting party cannot be obtained by any means other than disclosure. Since the Staff has revealed the substance of the information it obtained from each informant, and CCANP has made no showing that the identity of any informant

is necessary, its motion to compel should be denied.^{*/}

Apart from CCANP's motion, the ASLB has indicated that it will require the Staff, at the upcoming hearings, to provide the names of all the informants and may call them as witnesses. (Order at 8). This ruling is not only premature, but is also in error. Applicants respectfully request that the Appeal Board rule that the ASLB should not require that informants be identified unless, as the testimony at the hearing unfolds, the ASLB determines that identification of a specific informant is indispensable to a sound decision in the proceeding and that the information that might be obtained from such informant cannot be obtained by any other means.^{**/}

Conclusion:

For all of the foregoing reasons, Applicants urge the Appeal Board to direct certification of the Staff's appeal to the Commission, or in the alternative, to undertake appellate review at this time of the important policy questions raised by the Staff's notice of appeal.

In addition, Applicants request that, if it undertakes appellate review at this time, the Appeal Board (or Commission)

^{*/} If CCANP had made any such showing as to any particular informant based on the information already revealed by the Staff, the ASLB could have resorted to in camera review of the identity of such informant and any additional related information the Staff could provide to determine the necessity for ordering the disclosure of that informant's identity. (See 10 C.F.R. § 2.744(d)). However, this step is not necessary in light of CCANP's failure to make a showing as to any informant.

^{**/} A similar position was expressed by the Staff at the March 17, 1981 prehearing conference. (Tr. 679-80).

set an expedited briefing schedule so as to minimize any potential delay caused by the Staff's appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of Applicants' Response to the NRC Staff's "Notice of Appeal and List of Exceptions" and "Motion for Direct Certification Pursuant to 10 C.F.R. § 2.785(d)" have been served on the following individuals and entities by deposit in the United States mail, first class, postage prepaid, or by hand delivery as indicated by an asterisk, on this 15th day of April, 1981.

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