

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

HOUSTON LIGHTING & POWER COMPANY
ET AL.

(South Texas Project, Units 1 & 2)

Docket Nos. 50-498
50-499

NRC STAFF'S OPPOSITION TO CCANP'S CROSS APPEAL
AND AGREEMENT WITH SHORTENING THE BRIEFING TIME

INTRODUCTION

On April 13, 1981, the Intervenor Citizens Concerned About Nuclear Power (CCANP) served a pleading entitled "Opposition to NRC's 'Notice of Appeal and List of Exceptions' and Cross Appeal - March 24, 1981."^{1/} In this pleading CCANP attempts to file a "cross appeal" on the following issues (p. 2):

1. The ASLB erred by denying discovery of the names of persons interviewed on relevant matters by the NRC's Office of Inspector and Auditor (p. 7, note 2).
2. The ASLB erred by denying discovery of the names of all persons who supplied information to the NRC on all relevant matters forming the basis of the Order to Show Cause dated April 30, 1980, rather than limiting such discovery to QA/QC inspectors and employees furnishing information on harassment of QA/QC inspectors (pp. 7, 9).

^{1/} A statement of this proceeding appears in the NRC "Motion for Direct Certification Pursuant to 10 C.F.R. § 2.785(d)," April 3, 1981, in which Intervenor's pleading was in partial reply.

The Rules of the Commission do not provide for a responsive pleading to a notice of appeal.

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At p. 8 of that pleading CCANP also suggested that an expedited briefing schedule be set.

DISCUSSION

A. The NRC Staff opposes Concerned Citizens About Nuclear Power's (CCANP) "cross appeal" because:

1) It is untimely.

2) Part of the material upon which CCANP seeks to predicate an appeal from a denial of discovery, was never requested below. Thus, there was no appealable order in regard to such information.

3) To the extent CCANP seeks to appeal a denial of discovery, it seeks to appeal an interlocutory order not subject to appeal.

1. 10 C.F.R. § 2.762(a) provides that a notice of appeal be filed within 10 days of a decision. No provision is made and no separate time is provided for a "cross appeal." CCANP's "cross appeal" was not filed until April 13, 1981, some 20 days after the Board's March 24, 1981, "Memorandum and Order." Such filing was beyond the time provided in the Commission's Rules of Practice for filing a notice of appeal.^{2/}

^{2/} CCANP did not even seek discovery of the matters as to which it now seeks to file this "cross appeal" until long after its time to seek discovery of those matters expired. The time to file discovery against the NRC Staff expired on February 2, 1981. "Second Prehearing Conference Order," December 2, 1980, p. 5. The request for the names of persons interviewed by the Office of Inspector and Auditor was first made by CCANP orally during the Third Prehearing Conference on March 18, 1981, some 44 days after the time to make such a request expired. The request for other names was apparently first made in the purported notice of "cross appeal" of April 13, 1981, some 70 days after the time to make such requests expired. Thus not only is the CCANP appeal untimely, but the requests for discovery on which this appeal is based were made out of time.

Pro se intervenors, as all others appearing before the boards of this Commission, have an obligation to abide by the time limits in these Rules of Practice. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), ALAB-474, 7 NRC 746, 748-749 (1978); cf. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-613, 12 NRC 317, 339-340 (1980); Detroit Edison Co. (Enrico Fermi Atomic Plant, Unit 2), ALAB-4698, 7 NRC 470 (1978). Therefore, this late filed appeal must be dismissed as untimely. See Consolidated Edison Co. of New York (Indian Point Station, Unit No. 3), ALAB-281, 2 NRC 6 (1975); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-310, 3 NRC 33 (1976).

2. CCANP cannot appeal a denial of discovery of material it did not seek below. The second issue on which CCANP seeks to appeal is a denial of discovery of the names of all other persons" who supplied information to the NRC on all relevant matters forming the basis of the Order to Show Cause dated April 30, 1980, rather than limiting such discovery to QA/QC inspectors and employees furnishing information on harassment of QA/QC inspectors." No showing was made that this information was ever sought in discovery below. One may only appeal matters raised below. Where such a matter was not raised below, no appeal lies.

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), ALAB-486, 8 NRC 9, 28 n. 36 (1980); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-463, 7 NRC 341, 351-352 (1978).

3. The appeal seeks to raise issues involving a purported denial of discovery. Such a denial is an interlocutory order and may not

be appealed. Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-370, 5 NRC 131 (1977); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-116, 6 AEC 258 (1973). Any error in denying discovery can be corrected upon a final determination if the ruling was prejudicial. See Illinois Power Co. (Clinton Nuclear Power Station, Units 1 & 2), ALAB-340, 4 NRC 27 (1976); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 859 (1975).^{3/}

B. The NRC Staff is in agreement with the suggestions of the Intervenor CCANP at p. 8 of their "Opposition to NRC 'Notice of Appeal and List of Exceptions' and Cross Appeal - March 24, 1981," that an expedited briefing schedule be set. The Applicant at pp. 9-10 of its April 15, 1981 "Applicant's Response to the NRC Staff's 'Notice of Appeal and List of Exceptions' and 'Motion for Directed Certification Pursuant to 10 C.F.R. § 2.785(d)'" also suggested an expedited briefing schedule. Hearing is now set to commence on May 12, 1981. The Staff suggests that the Staff be given 7 days to brief its appeal from an order of this

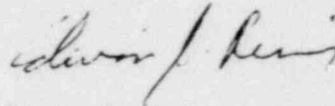
^{3/} A different situation is presented on appeal of an order granting discovery where the harm to be caused by such an order could not be corrected upon appeal after final determination of the proceeding. See Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-122, 6 AEC 322 (1973); see also Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752,758 (1975).

Board, and that the other parties have 7 days from the service of Staff's brief to respond.^{4/}

CONCLUSION

For the above stated reasons, the NRC Staff asks that the "cross appeal" be dismissed and the times to brief the Staff's appeal be shortened.

Respectfully submitted,



Edwin J. Reis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 24th day of April, 1981.

^{4/} The Staff will serve its brief by Express Mail.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S OPPOSITION TO CCANP'S CROSS APPEAL AND AGREEMENT WITH SHORTENING THE BRIEFING TIME" 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 April, 1981:

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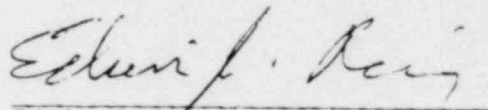
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