

May 1 1981

United States of America
Nuclear Regulatory Commission

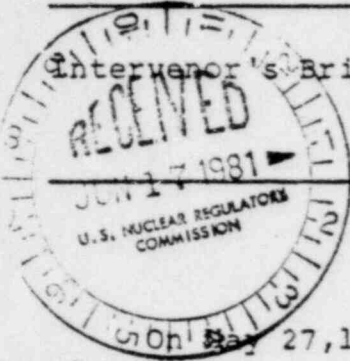


BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)
HOUSTON LIGHTING & POWER COMPANY, et al.)
(South Texas Project, Units 1 & 2))

Docket Nos. 50-498,
50-499

Intervenor's Brief on Appeal and Cross-Appeal of March 24, 1981
ASLB Memorandum and Order



Introductory Statement

On May 27, 1980 Citizens Concerned About Nuclear Power ("CCANP") requested a public hearing on the NRC's Order to Show Cause dated April 20, 1980. In stating its arguments on behalf of a public hearing, CCANP mentioned that at such a hearing it would be expected that "the NRC would produce the actual witnesses and sworn statements which formed the basis of the Order to Show Cause." Letter to Victor Stello, p.6. CCANP went on to assert that,

To deny the request for a public hearing would be to deny existing evidence and potential evidence to the Intervenor and by so doing deny such evidence to the ASLB. Id. 6-7.

On September 22, 1980 the Commission responded to CCANP's request for a hearing on the Show Cause Order in a Memorandum and Order denying the request for a public hearing at which the evidence supporting the Show Cause Order would be disclosed.

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In rejecting Intervenor's argument that failure to provide a public hearing on the Show Cause Order would effectively conceal the evidentiary background of the Order, the NRC stated,

Citizens can file either interrogatories with the staff or a Freedom of Information request with the Commission in order to learn the identities of persons with knowledge about the incidents covered by the Director's order. Memorandum and Order, 12 NRC 281 (Slip Opinion at 14).

Thereafter, on October 28 and 29, 1980 two members of CCANP independently requested information concerning the Show Cause Orders. For example one request signed by Kim Eastman requested "items identified by NRC investigators in this investigation which were not included in the Show Cause Order."

On November 17, 1980, in its "NRC Staff Response to CCANP 'Requests for Information' and Motion for Additional Time" the NRC communicated its refusal to produce the requested information. This informal and tentative communication was subsequently followed up by an "NRC Staff Additional Response to CCANP 'Requests for Information'" dated December 8, 1980. Because of incapacity and subsequent withdrawal by CCANP's attorneys, CCANP was unable to file its "CCANP Motion to Compel NRC Staff to Provide Information" until March 16, 1981. This motion made abundantly clear that CCANP sought all of the information concerning the evidentiary basis of the Show Cause Order that the Commission had said would be made available to Interveners in its September 22, 1980 Order.

In its Memorandum and Order dated March 24, 1981, the ASLB granted CCANP leave to file its Motion to Compel out of time and granted the motion to compel in part. This Appeal dated April 3 and Cross-Appeal dated April 13 then followed.

In its "Notice of Appeal and List of Exceptions" dated April 3, 1981 the NRC has stated four exceptions to the Board's March 24, 1981 Memorandum and Order. CCANP has responded to each of these exceptions in its "Opposition to NRC's 'Notice of Appeal and List of Exceptions' and Cross Appeal to March 24, 1981 Order" (Title amended hereinto correct typographical error in original). At the same time CCANP stated, in the alternative, three exceptions of its own to the March 24, 1981 Board order. In its "NRC Staff's Opposition to CCANP's Cross Appeal and Agreement With Shortening the Briefing Time" dated April 24, 1981 the NRC has stated its arguments in opposition to Intervenor's Cross-Appeal. These arguments are discussed below.

DISCUSSION

1. The NRC claims that CCANP's cross appeal is untimely. In its argument the NRC does not mention Federal Rule of Appellate Procedure 4(a) which was plainly cited by CCANP in its cross appeal. Under this Rule after a notice of appeal is filed by a party, any other party has 14 days after the time of the initial notice of appeal to file a cross appeal.

The NRC admits that the the NRC rules of procedure make no provision for a cross appeal. In fact other than a few very generally stated provisions, the rules of procedure contained in 10 CFR, Part 2, make very few detailed provisions for procedure on appeal. It is a well known principal that when agency rules do not provide detailed provisions for the rules of Procedure governing adjudicatory proceedings the Federal Rules will provide a supplementary guide to the rules that shall govern the agency proceeding. The present Case is an apt one for application of this rule.

A Cross appeal after notice of appeal has been filed by another party is well accepted in both federal and state practice. Simply because the brief and sketchy rules provided by the NRC do not make express reference to this practice does not mean that it should not be followed by the NRC as it is in the Federal Courts. The denial of a right of cross appeal would serve no good purpose. The happenstance of omission from the patently deficient NRC rules of procedure is insufficient reason, standing alone, to refuse to recognize the long-standing practice of cross appeal as followed in the Federal Courts. The failure to mention cross appeal in the sketchy NRC rules does not mean that it should not be applied in NRC practice. Failure by the NRC to expressly provide for this well accepted procedure simply means that it must not expressly address the issue. If for some reason the NRC believes that the practice followed by the United States Courts of Appeals is not worthy to be followed by the NRC, the NRC is now directly called upon to justify its position. If on the contrary the NRC practice indeed does conform to that followed by the Federal Judiciary, it is clear that CCANP's cross appeal was filed in good time.

At page 2, note 2 of the NRC's April 24 "Opposition" the NRC attempts to argue that the information referred to in the exceptions stated in CCANP's cross appeal was not earlier requested in CCANP's requests for information and Motion to Compel. However these documents make clear that it was ever CCANP's intent to obtain the full information concerning the Show Cause Order that the Commission stated would be available in its September 22, 1980 Order. CCANP's

request for all of this information is not a recent one. Although because of lack of legal advice it may have been poorly formulated on occasion, CCANP's request has consistently been for all of the evidentiary background to the NRC's Show Cause Order. Only part of this information was ordered to be provided under the ASLB's March 24, 1981 order. It is the remainder which CCANP now seeks on this cross appeal. There is no way to distinguish the information which the ASLB allowed and the information which it did not allow.

2. In part two of its "Opposition" dated April 24, 1981, the NRC repeats the argument stated in footnote 2 of its argument in part 1, i.e. that CCANP had not earlier requested

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. Cross-appeal, exception 2.

On the contrary, this information is well within the general request submitted by Kim Eastman on October 29, 1980 quoted above, for information not included in the Show Cause Order. The Motion to Compel again made it clear that the full range of information obtained by the NRC was sought when it requested

the identities and sworn statements of those inspectors who supplied information which formed the basis of the Order to Show Cause.

This request was not limited to QA/QC inspectors. The remainder of the Motion to Compel, especially the alternatively stated request for Board Certification number 1, show the full scope of CCANP's request to be coterminous with the information the Commission stated would be available in its September 22, 1980 Memorandum and Order. The use of a few inelegant modes of expression by lay members of the intervenor in formulating their requests pursuant to the September 22, 1980 order does not change the

actual nature of the CCANP request for information, if fairly construed. The manner in which the Board formulated its order below indicates that it also understood the CCANP request for information to be broader than that which it granted.

3. The NRC's final objection to Intervenor's cross appeal is that it would constitute an interlocutory appeal. The NRC's own underlying appeal is itself an interlocutory appeal and accordingly subject to the same objection. The Board below balanced the interests of a fair hearing against the NRC's objections to the adequacy of a protective order and found that at least as to some of the requested information the interests of a fair hearing prevails.

The NRC itself has stated the criteria for discretionary interlocutory review of licensing board rulings:

- 1) where the party adversely affected by that ruling may suffer immediate and serious irreparable harm, or
- 2) where the challenged ruling may affect the structure of the proceeding in a basic way.

If CCANP is unable to present its principal case on the allegations contained in the Show Cause Order because of lack of access to the evidentiary background of the order, CCANP will be irreparably injured in its ability to present its principal case and at the same time the structure of the proceeding will be affected in a basic way through CCANP's inability to present a principal part of its case.

CCANP opposes the NRC's interlocutory appeal. But little difference can be seen between the merits of the NRC's appeal and that of CCANP's cross appeal for purpose of taking an interlocutory appeal. They both arise out of the same circumstances. There is no reason to review the Board's order only from the point of view of the NRC's objections. If the Order is to be reviewed

the Appeals Board
at all /: must review the balance which the Board struck
between the NRC's interests in questioning the efficacy
of a protective order in assuring its confidentiality concerns
and the Intervenor's interest in a full and fair hearing on
the issues. This balance cannot be reviewed by looking at only
one side. While the NRC contends that the balance should be
struck closer to its own interests, CCANP believes that
the balance should properly have been struck in a manner
to require production of more information than it did.
If the Appeals Board is to look at the NRC's side of the argument
at this time, it should also look at the other side in the
interest of fairness and justice.

CCANP has fully answered the substance of the NRC's
exceptions on appeal in its "opposition" dated April 13, 1981.
Intervenor continues to be in need of the names and statements
of persons who provided information to the NRC in connection
with the Show Cause Order if it is to adequately present
this information to the ASLB. It is not sufficient that the
Intervenors might have some of these names available to it among
the names of the many people who have worked at STNP. CCANP
needs to know the specific persons who gave important information
to the NRC which formed the basis of the Show Cause Order if
it is to have any hope of presenting these issues effectively.
Intervenors do not have the investigatory resources of the NRC
to duplicate the work already accomplished in preparing the
Show Cause Order.

Respectfully Submitted,

Robert Hager, Esq.,
Of counsel

Pat Coy, for Citizens Concerned
About Nuclear Power and CEU

CERTIFICATE OF SERVICE

I hereby certify that the foregoing INTTBRIEF ON APPEAL AND CROSS APPEAL OF MARCH 24, 1981 ASLB MEMORANDUM AND ORDER has been served on the following individuals and entities by deposit in the U.S. Mail, first class postage prepaid on this 1st day of May, 1981.

Pat Coy

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

Charles Bechhoefer, Esquire
Chairman
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. John H. Buck
Member
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. James C. Lamb
313 Woodhaven Road
Chapel Hill, North Carolina 27514

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

Mr. Ernest E. Hill
Lawrence Livermore Laboratory
University of California
Livermore, California 94550

Atomic Safety and Licensing
Appeal Panel (5)
U.S. Nuclear Regulatory Commission
Washington, D.C. 20036

Edwin J. Reis
Office of the Executive Legal
Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Thomas B. Hudson, Jr., Esquire
Baker and Botts
3000 One Shell Plaza
Houston, Texas 77002

Brian E. Berwick
Assistant Attorney General for
the State of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711

Docketing and Service Section (7)
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mrs. Peggy Buchorn
Route 1, Box 1684
Brazoria, Texas 77422

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

