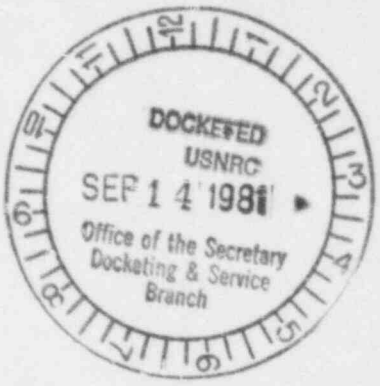

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Charles Bechhoefer, Chairman
Dr. James C. Lamb
Mr. Ernest E. Hill

SERVED SEP 14 1981

In the Matter of	
HOUSTON LIGHTING AND POWER COMPANY, ET AL.	Docket Nos. STN 50-498 OL STN 50-499 OL
(South Texas Project Units 1 and 2)	September 14, 1981

MEMORANDUM AND ORDER
(Denying Motion to Quash Subpoenas)

During the hearing session on July 24, 1981 (at Tr. 7844-7863), the Applicants made an oral motion to quash the subpoenas previously issued at the request of CCANP to Ms. Freda Cortez and Mr. James Tobola. The Board had issued these subpoenas on the basis of CCANP's showing of "general relevance", which we had required pursuant to the provisions of 10 CFR §2.720(a). The Applicants' motion was founded upon CCANP's expressed intent not to pursue further through these witnesses the subject upon which its earlier showing of "general relevance" had been premised.

We heard oral argument on the motion during the above-referenced hearing session. At that time, the NRC Staff tentatively supported the motion. CCANP opposed it, mentioning several other general subjects upon which Ms. Cortez and Mr. Tobola would testify. (CEU agreed with CCANP's

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position.) We determined that CCANP (and CEU) should be provided an opportunity to develop further their responses to the motion and to describe further the general relevance of the testimony sought, and that the Applicants and Staff should be given an opportunity to respond.

CCANP filed a response on August 7, 1981 which (1) took the position that the Applicants were not permitted under NRC rules to file the motion to quash, and (2) in the alternative, provided further details concerning the "general relevance" of the testimony sought. On August 14, 1981, the Applicants filed a response in support of their motion, asserting that they were permitted to file such a motion under the NRC rules and that CCANP still had not shown the "general relevance" of the testimony. The Staff's response of the same date also indicated that the rules permitted the filing of the motion. But the Staff modified its earlier position in light of CCANP's response and claimed that a minimal showing of "general relevance" had been proffered. (CEU did not file any additional response.)

We agree with the Staff's position and, accordingly, deny the motion to quash.

1. CCANP asserts that 10 CFR §2.720(f) identifies only the prospective witness as a person who can file a motion to quash. As both the Applicants and Staff point out, however, the reference in §2.720(f) to the prospective witness merely defines the time period in which a motion to quash may be filed. Nowhere does that section limit the ability of any party to move to quash subpoenas. Nor does any other section of the NRC rules of which we are aware. See, e.g., 10 CFR §2.730. That being so, CCANP's position in this respect is based on a

misreading of the rules and hence must be rejected. Cf. Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-311, 3 NRC 85, 87-89 (1976).

We note, however, that when a motion to quash is based on such factors as the burden to the prospective witness, such burden must be demonstrated by the prospective witness. Federal Trade Commission v. Texaco, Inc., 555 F.2d 862, 882 (D.C. Cir. 1977), cited approvingly in Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 695 (1979). Except to the limited extent discussed below, that consideration is not involved in this motion.

2. The rule providing for the issuance of subpoenas permits--although it does not mandate--us to require a showing of "general relevance". But it specifically enjoins us from attempting to determine the admissibility of the evidence sought at the stage of issuing the subpoenas. 10 CFR §2.720. As the Staff points out, this rule has been strictly construed in favor of the issuance of subpoenas. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 93 (1977); Stanislaus, ALAB-550, supra, and cases there cited; see also Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457 (1974). The Supreme Court itself has held that the information sought by an administrative subpoena need only be "reasonably relevant" to the inquiry at hand. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950). Moreover, the Appeal Board has held that a person filing a motion to quash must meet a particularly heavy burden to attain that relief. Zion, ALAB-196, supra, 7 AEC at 463.

In its August 7, 1981 filing, CCANP supplemented its earlier description of the testimony it hopes to elicit from Ms. Cortez and Mr. Tobola. That testimony would comprehend such topics as the interface between management and non-management, including daily interactions between representatives of those groups; abdication to the contractor of the Applicants' responsibilities; attempts by the witnesses to correct various matters while employed at the site, and management's response to those corrective efforts; the assignment of personnel to tasks for which they are not qualified; a claim that procedures and personnel are in constant flux; issuance of equipment allegedly unsuitable for the task given; alleged arbitrary acts by management; and the lack of concern on the part of management for worker safety. Those topics are said to be relevant to whether the Applicants have the requisite corporate character and competence to safely complete construction of and operate the facility (issues B and D in this proceeding).

In commenting upon CCANP's showing of general relevance, the Applicants have stated that CCANP has provided insufficient detail for us to determine "whether the testimony will be relevant to the proceeding" (Applicants' response, p. 4). Insofar as admissibility is concerned, that may well be so. But, as the Staff points out, a showing of general relevance (or even relevance "to any matter in issue" under §2.720(f)(1)) requires far less detail than the showing of relevance, materiality, and reliability required to determine admissibility. See 10 CFR §2.743(c). CCANP has pointed to the issues to which the testimony will relate, and it has outlined some of the aspects of those issues which the testimony

will address. We agree with the Staff that at least some of the information sought from Ms. Cortez and Mr. Tobola is arguably relevant, on its face, to the Applicants' technical competence and corporate character to build and operate South Texas Project and that, under applicable Commission decisions, CCANP has made a sufficient showing of general relevance.[1/]

One aspect of the Applicants' response merits further comment. They claim (Applicants' response, p. 9) that the issue here is "whether the government should use its polic powers to coerce two individuals to participate in a proceeding against their will." They suggest that, as a prerequisite to the use of such force, CCANP must demonstrate the "real necessity" of doing so. To the extent this suggestion is at all pertinent to the matter before us, it can only relate to a potential burden upon the two prospective witnesses. Neither of those witnesses has advised us in any way of any objection to being subpoenaed. As we have earlier noted (p. 3, supra), objections of that sort must be advanced by the witnesses themselves, not by the Applicants. Moreover, if we were to adopt the Applicants' suggestion, we would in effect be engrafting upon the "general relevance" criterion for subpoenas the additional and potentially onerous requirement of showing "real necessity". To do so would be contrary to the guidelines outlined in

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1/ The Applicants' attempt to distinguish Seabrook, ALAB-422, supra, is misplaced. The circumstance that prepared testimony was available in Seabrook made it easier to determine whether "general relevance" had been demonstrated but did not affect the standard for determining the "general relevance" of that proposed testimony.

Seabrook, ALAB-422, supra, 6 NRC at 93, and in Zion, ALAB-196, supra, 7 AEC at 468 ("* * * the reasonable necessity concept plays no part in relevance determinations"). We decline to adopt that course.

3. In declining to quash the two subpoenas, we wish to emphasize that we are not ruling upon the admissibility of any testimony which these witnesses will offer. For example, Ms. Cortez and Mr. Tobola may not be competent to testify to certain of the matters for which they are being called. At this stage, however, it is not appropriate for us to make any determination of that sort. Seabrook, ALAB-422, supra, 6 NRC at 93. If called upon to do so, CCANP must make a more particularized showing when specific questions are put to these witnesses of how their testimony is relevant and material to specific issues which are before us and whether it can be sponsored by the particular witness.

4. For the foregoing reasons, it is, this 14th day of September, 1981

ORDERED

That the Applicants' oral motion to quash the subpoenas directed to Ms. Freda Cortez and Mr. James Tobola is hereby denied.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Charles Bechhoefer

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE