UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	§	
	§	
HOUSTON LIGHTING AND POWER	§	Docket Nos. 50-498 OL
COMPANY, ET AL.	§	50-499 OL
	§	
(South Texas Project,	§	
Units 1 & 2	§	

APPLICANTS' BRIEF IN SUPPORT OF MOTION TO QUASH SUBPOENAS FOR MS. FREDA CORTEZ AND MR. JIM TOBOLA

During the hearing on July 24, 1981, intervenor Citizens Concerned About Nuclear Power, Inc. (CCANP) announced that it intended to subpoena Ms. Cortez and Mr. Tobola and confirmed that CCANP would not question these witnesses about the matters described in I&E Report 81-11, which was the only specific matter listed for these witnesses in Intervenors' Request for Subpoenas (Tr. 7843-4, 7859). After a prolonged discussion, the Board suggested that Motions to Quash the subpoenas be made and that CCANP be given the opportunity to respond to such motions in writing (Tr. 7856). Applicants, the NRC Staff and Citizens for Equitable Utilities, Inc. were granted the right to comment on CCANP's response to the Motion to Quash. (Tr. 7859,

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7861-2). Pursuant to the Board's authorization, Applicants submit the following and move that the subpoenas previously issued to Ms. Freda Cortez and Mr. Jim Tobola be quashed.

I. Applicants are authorized to move to quash the subpoenas at issue.

CCANP initially argues that 10 C.F.R. § 2.720(f) identifies only the prospective witness as a person who can move to quash a subpoena and, thus, Applicants are not entitled to make such a motion.1/

This argument, however, is an obvious misreading of the rule. The phrase "and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed" simply modifies the phrase "On motion promptly made" and thereby defines the time period in which a motion to quash may be made. Nowhere does § 2.720(f) limit the ability of any party to move to quash subpoenas.

1/ Section 2.720(f) reads as follows: On motion made promptly, and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, and on notice to the party at whose instance the subpoena was issued, the presiding officer or, if he is unavailable, the Commission may (1) quash or modify the subpeona if it is unreasonable or requires evidence not relevant to any matter in issue, or (2) condition denial of the motion on just and reasonable terms.

Moreover, CCANP ignores the fact that the Board authorized and accepted the motion at the hearing (Tr. 7856, 7859). The Board is authorized to take such action pursuant to its general authority to regulate the conduct of the parties before it, to dispose of procedural requests or similar matters and to take appropriate action to avoid delay and to maintain order. 10 C.F.R. § 2.718(e), (f).

II. There has been no showing that the testimony of Ms. Cortez and Mr. Tobola will be relevant to any issue in this proceeding.

Pursuant to 10 C.F.R. § 2.720(a), the presiding officer may require "a showing of general relevance of the testimony or evidence sought" as a prerequisite for the issuance of a subpoena.2/ The presiding officer has exercised

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2/ Public Service Company of New Hampshire, et al., 6 NRC 33 (1977) is the only case of which we are aware that interprets this regulation in a situation similar to that existing here. In that case, the Appeal Board found that the standard of general relevance was met by examining the prepared written testimony of the witness to be subpoenaed. Thus, the Appeal Board was able to compare the proposed testimony with the issues in the case to determine its relevancy. By contrast, CCANP has made such an inquiry impossible in this case by refusing to divulge the subject matter of the witnesses testimony with any degree of specificity.

Other NRC cases on this subject involve a subpoena duces tecum issued during the discovery phase of a proceeding. Obviously a more lax standard of relevance is used in the discovery process because the party requesting the subpoena does not know what he will discover. See, e.g., Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), 9 NRC 683 (1979).

this authority with respect to the subpoenas at issue (Tr. 7851, 7856). Such a showing would normally consist of two parts. First, the expected testimony must be described, i.e. the party requesting the subpoena must state in general terms what it expects the witness to say. Second, a connection must be drawn between the expected testimony and a matter at issue in the proceeding. It is not sufficient for purposes of § 2.720(a) for the requesting party to simply state that the witness will address contention X. There must be some explanation of how the witness will address the contention. CCANP has failed to make the required showing because it has refused to divulge to any degree what it expects the witnesses to say. Without knowing in at least some minimal detail what the testimony is likely to be, it is impossible for the Board to determine whether the testimony will be relevant to the proceeding.

It should be noted that CCANP's refusal to describe the testimony expected from the witness does not result from ignorance of the need to make such a showing. The Chairman clearly put CCANP on notice as to the nature of the required showing by stating:

> The Board thinks that we would like to know a little more about what Ms. Cortez is going to testify about, particurarly since her testimony will be on a different subject than that for which we issued the subpoena.

> I think we need to know in a little more detail, more than just the particular contention to which it relates. (Tr. 7851).

Following further attempts by CCANP to link the expected testimony to a contention without really describing the testimony, the Chairman again stated:

> ...we do think the response should delineate in some detail at least, give the parties and the Board some idea about the subject of Ms. Cortez' testimony.
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> We're not playing surprises here. We do think as much information as possible should be on the table before we come in so parties can prepare adequately for cross-examination, so that you could confer with Ms. Cortez and get some idea of where her testimony will -- I mean what subject areas with some specificity,....
> (Tr. 7856)

Despite these specific instructions from the Board, CCANP's response goes no further in describing the expected testimony than the unsatisfactory, conclusory statements made on July 24.

CCANP's response first repeats the general conclusions stated on July 24 as grounds for the subpoena. These arguments were considered on July 24 and found lacking as the Board requested more detail in the written response. (Tr. 7851). If these statements had constituted a sufficient showing of relevance, the Board would not have directed CCANP and the other parties to make more detailed written submissions. The Board clearly wanted to give CCANP an

oppurtunity to contact the witnesses and then more fully describe the subject of their testimony in the written pleading. CCANP failed to do so and, thus, the arguments under section B.1 of CCANP's response do not satisfy the required showing of relevance.

CCANP next argues in section C.1 that the witnesses should be heard because they are not management representatives. Under this standard, most of the 2,300 site employees of Brown & Root would be subject to subpoena. Obviously, management status or lack thereof does not establish relevance to the contentions. Morevoer, CCANP's predicate is inaccurate. Applicants' witnesses include the following individuals involved in day-to-day activities on the site; Messrs. Buckalew, Carvel, Duke, Fraley, Logan, Long, Singleton, Warnick and Wilson. The subpoenaed witness, excluding Cortez and Tobola, will provide another seven (7) witnesses who have worked on the site in non-management capacity. Thus, there will be no shortage of witnesses who can testify regarding daily activities on the site.

CCANP next argues that the witnesses should be subpoenaed because they will testify about morale of the work force. The morale of the work force at large and other general internal personnel matters, however, are not at issue. Concerns have been raised in the past that poor

morale amoung QC inspectors might affect their performance, but CCANP has not even alleged that these witnesses can or will address QA/QC issues. Mr. Tobola was a back-hoe operator in the electrical department and has not worked at the site since early January 1981. Ms. Cortez is a clerk in the electrical termination shack and has not been involved in any safety-related work. These individuals have not been in a position to work directly with QC inspectors and it is very doubtful that they possess first hand knowledge relevant to the basic QA/QC issues raised in this proceeding. CCANP might have been able to remove this doubt by candidly explaining what the witnesses would say, but has refused to do so despite repeated requests.

In section C.3, CCANP argues that the Board should be given broad exposure to the acts of Applicants in situations calling for remedial action. Applicants have no quarrel with this general proposition and have applied it in the presentation of evidence on QA/QC issues. Extensive testimony has been presented regarding the remedial measures promised and taken in response to numerous occurrences including the discovery of concrete voids, specific situations of confrontation between QC inspectors and construction personnel, and the show cause order. CCANP has had ample opportunity to test the resolve of Applicants to correct deficiencies and

take action promised in areas which directly relate to the contentions. There is absolutely no need to look beyond the areas related to contentions to determine if Applicants are willing to rectify deficiencies or fulfill their promises of corrective action. To do so would result in the proceeding having no defineable scope. Under CCANP's formulation of relevance, any situation requiring corrective action of any nature could be the subject of testimony because of its value as an indicator of Applicants' future behavior. Such a far-reaching expansion of the proceeding's scope is wholly without basis. Moreover, CCANP does not even allege that the subpoenaed witnesses will testify about any specific remedial acton situation. Given this lack of detail about the Cortez-Tobola testimony and the extensive record regarding Applicants' remedial actions in relevant areas, there is no basis for granting a subpoena on the grounds stated in section C.3.

CCANP argues in section D that the distinction between safety-related and non-safety related work should have no bearing on the subpoena issue. Even if the arguments made were correct, a proposition that Applicant contests, section D does not demonstrate any relevance between the expected testimony and this proceeding. Section D is nothing more than a rather abstract argument to the effect that

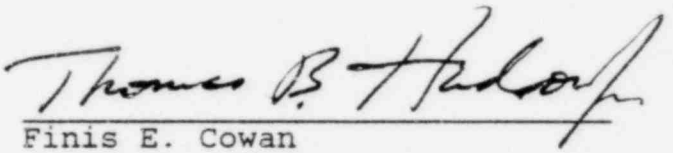
non-safety related activities might affect safety-related activities. There is no allegation, much less a showing, that the witnesses' testimony will demonstrate the validity of any of the abstract arguments. Thus, section D is not an independent basis for granting subpoenas.

Section E of CCANP's response addresses questions of admissibility which are not to be decided at this time. 10 C.F.R. § 2.720(a). Applicants will address such questions if and when the testimony is presented.

The issue presented here is whether the governemnt should use its police powers to coerce two individuals to participate in a proceeding against their will. Before such force is used, CCANP must demonstrate the real necessity of forcing these individuals to testify. Such a demonstration could have been made by describing the evidence to be obtained and relating its importance to this proceeding. CCANP has failed on both counts. The expected testimony has not been decribed sufficiently to show any relevance. An already

lengthy record should not be further extended by use of the subpoena power in this situation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, and any documents for which it is a cover letter, have been served on the following individuals and entities by deposit in the U.S. Mail, first class, postage prepaid on this 14 day of August, 1981.

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