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

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)	October 15, 1982

MEMORANDUM AND ORDER
(Ruling Upon CCANP's Motion To Adopt Contentions Of CEU)

On June 15, 1982, we approved the joint request of Citizens for Equitable Utilities (CEU) and the Applicants that CEU be permitted to withdraw as an intervenor from this proceeding, subject to certain terms and conditions (Tr. 10384). See Memorandum (Memorializing Certain Rulings Announced During Evidentiary Hearing Sessions of June 15-17, 1982), dated June 24, 1982. As we pointed out in that Memorandum, CEU's withdrawal would normally serve to remove that party's contentions from the proceeding (at least insofar as those contentions have not yet been heard). See Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111 (1981). At the request, however, of Citizens Concerned About Nuclear Power (CCANP), another

intervenor, we permitted that organization to advise us whether it wished to adopt and pursue any of the five contentions that CEU alone had sponsored (numbers 4-8), as well as the additional "American Bridge" proposed contentions which CEU had originally sponsored and CCANP had later co-sponsored.

On July 29, 1982 (within the amended schedule approved by the Board), CCANP moved to adopt all five of the contentions that CEU, through its withdrawal, had abandoned. (CCANP made no mention of any of the "American Bridge" proposed contentions.) On August 13 and 18, 1982, respectively, the Applicants and NRC Staff each filed a response opposing CCANP's motion. For reasons hereinafter set forth, we grant CCANP's motion with respect to contention 4 but deny it with respect to the other contentions which CCANP seeks to adopt. Because the proposed "American Bridge" contentions relate primarily to the vendor surveillance program of the project's former construction contractor, an organization which will no longer be employed for further construction, we regard those contentions as moot (as well as abandoned) and dismiss them for those reasons.

1. Contentions (such as those involved here) filed later than 15 days prior to the special prehearing conference (which in this case took place in early 1979) are considered as late-filed. Except in limited circumstances (see note 1, infra), they may be admitted only if they meet the normal standards for contentions (e.g., basis and specificity) and, as well, upon a favorable balancing of the five factors set forth in 10 CFR § 2.714(a)(1), viz:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

See, e.g. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 509 (1982).

We are here concerned only with the "lateness" or "good cause" factors, inasmuch as we have previously determined that the former CEU contentions met the other requisite requirements for contentions. The "good cause" factors of 10 CFR § 2.714(a)(1) apply equally to the admissibility of both late-filed intervention petitions and late-filed contentions. See 43 Fed. Reg. 17798 (April 26, 1978); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC ___, ___ (August 14, 1982) (slip op. at 23). Moreover, as the Applicants and Staff each point out, the required balancing of factors is not obviated by the circumstance that the proffered contentions are those of a participant that has withdrawn from the proceeding. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 795-98 (1977). As there stated:

> If, in the circumstances of the particular case, there is a sound foundation for allowing one entity to replace another, it can, of course, be taken into account in the making of the "good cause" determination.

Id. at 796.

In balancing the "lateness" factors in the circumstances before us, we must take all of the factors into account.[1/] However, we are not required to give the same weight to each one of them. South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981). Where "good cause" for failure to file on time (factor (i)) has not been demonstrated, a contention may still be accepted, but the burden of justifying acceptance of a late contention on the basis of the other factors is considerably greater. Nuclear Fuel Services (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). In that regard, the likelihood that acceptance of a contention will contribute to the development of a sound record on a particular question is of significant importance. Midland, LBP-82-63, supra, 16 NRC at ___ (slip op. at 8); Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station), LBP-80-24, 12 NRC 231, 237 (1980); accord, Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976). In any event, even where the factors are balanced in favor of admitting a late-filed contention, a tardy petitioner with no good excuse for lateness may be required to take the proceeding as it finds it. West Valley, CLI-75-4, supra, 1 NRC at 276.

We turn now to CCANP's request.

2. CCANP's motion to adopt contentions 4-8 is perfunctory at best. It briefly recites the subject matter of each of those contentions. It

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1/ Information emanating from recently issued Staff documents could give rise to contentions without the necessity of balancing the various factors. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC ___ (August 19, 1982). No such information is involved in our present consideration of CCANP's motion.

goes on to state that CEU has already met the standards of specificity and has established a sufficient basis for the litigation of these contentions--a proposition with which no party disagrees and which, as we have previously pointed out (p. 3, supra), is not in issue. As for good cause for lateness, CCANP states only that its motion is responding to the withdrawal of CEU, and that the questions raised by the contentions "were not answered prior to CEU's withdrawal" and "relate to potentially serious health and safety problems which could be created should the South Texas Nuclear Project [ever] be given a license to operate." CCANP adds that it "considers itself obligated to pursue these questions to a satisfactory resolution."

These cursory assertions, taken alone, are insufficient to produce a balance of the factors in 10 CFR § 2.714(a)(1) which would cause us to allow CCANP to adopt any of CEU's abandoned contentions. Cf. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980). Nonetheless, we recognize that CCANP is not represented by counsel and that a pro se intervenor is not "to be held to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere." Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546 (1980); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973). Thus, in balancing the "lateness" factors, we have taken into account not only the limited claims made by CCANP but also facts and circumstances of which we

are aware and which, in our opinion, are relevant to a balancing of the "lateness" factors.

In reaching a balance of the factors on the various contentions, we have found that factor (i) balances the same way for all of the contentions but that the other factors balance differently for contention 4 (hurricanes) than they do for contentions 5-8. We shall therefore discuss factor (i) first and then turn to the application of the other factors to contentions 5-8 and 4, respectively.

a. The only reason cited by CCANP, or of which we are aware, for the late filing of these contentions is that the filing resulted from the withdrawal of CEU. CCANP filed its motion within a reasonable time after that withdrawal. Before doing so, however, it never had exhibited any particular independent interest in any of the contentions in question. But the withdrawal of one party has been held not to constitute "good cause" for the belated delay of a petitioner in seeking to substitute itself for the withdrawing party (or, comparably, to adopt the withdrawing party's contentions). River Bend, ALAB-444, supra, 6 NRC at 796-97. As the Court of Appeals has stated (in a decision relied on by the River Bend Appeal Board):

> We do not find in statute or case law any ground for accepting the premise that proceedings before administrative agencies are to be constituted as endurance contests modeled after relay races in which the baton of proceeding is passed on successively from one legally exhausted contestant to a newly arriving legal stranger.

Easton Utilities Commission v. AEC, 424 F.2d 847, 852 (D.C.Cir. 1970). And, as we noted earlier, the same standards apply to an existing

intervenor seeking to adopt the abandoned contentions of another intervenor as to a "newly arriving legal stranger."[2/]

Based on the foregoing authority, we find that CCANP as a matter of law has not established "good cause" for its delay in asserting its interest in litigating contentions 4-8.

b. In the context of this case, factors (ii) and (iv) are related. As applied to contentions 5-8, we are aware of no means outside the NRC for CCANP's interest in those contentions to be protected; and, if CCANP is not permitted to adopt those contentions, its interest in those contentions will not be represented by an existing party. On the other hand, one of the parties to this proceeding--the NRC Staff--has the primary responsibility for reviewing all safety and environmental issues prior to the award of any operating license. Although such review does not involve the adjudicatory process, the Staff nevertheless seeks to provide reasonable assurance that an issue is resolved satisfactorily. CCANP has provided us with no reason to question whether the NRC Staff's review of the issues raised by contentions 5-8 will be adequate. It has advanced only its conclusory opinion that, as of last June, the issues had not been resolved--a not too surprising situation given the current status of the project and the fact that neither construction nor the

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2/ See also South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887 n.4 (1981) and Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 644-45 (1977), in each of which the Appeal Board ruled that allegedly inadequate representation by an existing intervenor did not constitute good cause for another petitioner's late-filed intervention.

Staff's review is scheduled to be completed for more than 4 years. Moreover, with respect to contentions 5-8 (and unlike contention 4), we have no reason to question whether the Staff's review will be adequate. (We will discuss contention 4 in section 3, infra.) For those reasons, and lacking any contrary information from CCANP, we conclude that CCANP's interest in having contentions 5-8 resolved will be adequately protected by the NRC Staff, albeit outside the adjudicatory process. We regard this factor as neutral with respect to permitting CCANP to adopt contentions 5-8.

c. CCANP has not provided any information as to how it would assist in developing a sound record on any of CEU's contentions. It has not indicated whether it would call any witnesses or whether it would present documentary or other evidence beyond that already identified by CEU. The adjudicatory consideration of various issues, and in particular the availability of cross-examination, will invariably produce a more complete record than would the non-adjudicatory consideration of those same issues. Moreover, CCANP's participation to date has served this purpose. We would expect that its proposed findings (if comparable to those we have recently received from CCANP) would serve to present forcefully and competently views somewhat at odds with those advanced by the Applicants or Staff. Thus, to some extent, our acceptance of CCANP as a sponsor of contentions 5-8 would inevitably serve to assist in producing a better record on those contentions than would otherwise be the case. We balance this factor slightly in favor of accepting contentions 5-8.

d. Permitting CCANP to adopt contentions 5-8 would perforce result in a broadening of the issues, but delay in this extended proceeding would not necessarily result. These issues would not likely be heard until phase III of this proceeding (some time in 1986). There is sufficient time in the interim to establish schedules for additional discovery and hearings which could preclude any delay in completion of the proceeding. However, some uncertainty with respect to potential delay does remain, since we cannot predict with perfect accuracy the length of time needed to hear these issues. Therefore, we regard factor (v) as balancing slightly against accepting contentions 5-8.

e. In sum, factor (i) must be balanced against accepting any of the contentions, including 5-8. Factor (iii) balances slightly in favor of accepting contentions 5-8, and factor (v) balances slightly against accepting those contentions. Factors (ii) and (iv) are neutral. Based on this balance of the factors, we conclude that the strong showing needed to offset the absence of good cause for late filing has not been made with respect to contentions 5-8. We therefore decline to permit CCANP to adopt those contentions.

3. As we have explained, CCANP's showing of good cause for late filing (factor (i)) was as inadequate for contention 4 as for the other contentions. Nonetheless, based on the record before us, the balance of

the factors is considerably different for contention 4 (hurricanes) than for the other contentions.[3/]

a. With respect to factors (ii) and (iv), and as was the case with the application of those factors to the other contentions, we know of no forum outside NRC for CCANP's interest in contention 4 to be protected; and, if CCANP is not permitted to adopt contention 4, its interest in that contention will not be represented by an existing party. The NRC Staff will undertake its normal review of the design of this facility vis-a-vis hurricanes. However, although CCANP has not provided us with information demonstrating that the normal review might be deficient, we have reason to question whether the Staff's review will be adequate (see section 3.b, infra). For that reason, we conclude that CCANP'S interest in contention 4 may not be adequately protected by the NRC Staff and that factors (ii) and (iv) balance slightly in favor of permitting CCANP to adopt that contention.

b. As in the case of the other contentions, adjudication by its very nature would assist in producing a better record on contention 4 than would otherwise be the case. With respect to this contention,

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3/ Contention 4 reads as follows:

> The South Texas Project (STP) Category I structures and equipment are inadequately designed and constructed with respect to wind loadings as demonstrated by the fact that actual wind velocities associated with hurricanes which have occurred along the Texas Gulf Coast have exceeded wind loadings for which STP structures have been designed and evaluated. Further there are non-Category 1 structures containing equipment which if destroyed or damaged would jeopardize the safe operation of STP. These non-Category 1 buildings are not designed to withstand winds generated by hurricanes and if damaged would provide missile type projectiles which could penetrate Category 1 structures which are inadequately protected.

however, adjudication may be the only way of achieving an adequate record. The contention asserts that the facility has been inadequately designed to withstand hurricanes which have occurred along the Texas Gulf Coast. CEU advanced this claim with respect to both Category I structures and equipment, and non-Category I structures and equipment that might provide missile type projectiles which could penetrate Category I structures. It challenged the adequacy of the operating wind speed of 120 mph (with a peak gust value of 156 mph) appearing in the Applicants' Environmental Report and the Staff's construction-permit Safety Evaluation Report (SER). In support of this claim, its intervention petition (dated February 23, 1979) asserted, inter alia, that Hurricane Carla (September 1961) had winds in excess of 170 mph at Port Lavaca and from 150-175 mph in the Matagorda area, and that Hurricane Celia (August 1970) had gusts at the time of landfall of 160-180 mph. In a response to discovery which it filed on April 23, 1980, CEU provided, inter alia, studies by the Department of Commerce (NOAA) and the Center for Applied Geosciences, College of Geosciences, Texas A&M University, which appear to support the allegations of the contention.

In contrast, the FSAR at the OL stage reflects that, although wind speeds greater than 156 mph had been recorded relatively close to the site, for varying reasons they were not utilized by the Applicants. Hurricane Carla is said to have produced wind gusts of 175 mph at Port Lavaca (approximately 40 miles from the site) and 160 mph at Matagorda (approximately 8 miles from the site). These readings were

discounted by the Applicants because they were assertedly "obtained from instruments not installed, calibrated, or maintained by the U.S. Weather Bureau [citing a non-published personal communication dated June, 1974] * * * and may not have been calibrated or maintained according to prescribed U.S. Weather Bureau procedures" (FSAR, § 2.3.1.2.6, at p. 2.3-6a, emphasis supplied). The FSAR goes on to state that the instrument at Matagorda was capable of monitoring wind speeds of up to 125 mph; and that, during Hurricane Carla, "the indicator continued to move beyond the 125 mph limit to a position on the dial estimated to be 183 mph, at which time the support structure failed" (id., at p. 2.3-7). For such reasons, the FSAR denominated these high wind speed readings as "highly questionable" and, accordingly, declined to utiize them in determining the wind speed for which the facility was to be designed. Instead, the FSAR utilized the weighted average of the highest wind speeds recorded for various hurricanes (including Celia and Carla) at Corpus Christi, Galveston and Victoria, Texas, locations considerably farther from the site than Matagorda or Port Lavaca.

As should be readily apparent, this analysis includes many unanswered questions. For instance, is a composite of high wind speeds at locations somewhat distant from the site acceptable for determining the "most severe [hurricane] * * * historically reported for the site and surrounding area," as contemplated by 10 CFR Part 50, Appendix A, Criterion 2, or for determining the "fastest mile of wind" as contemplated by § 2.3.1 of the Standard Review Plan (NUREG-0800)? Is it appropriate to discount or ignore local high wind speeds on the ground

that they stem from instruments which "may" not have been calibrated or maintained in accordance with Weather Bureau (NOAA) procedures? Should not high wind speeds appearing at least in the NOAA report supplied by CEU (which explicitly took the "facts on each storm * * * from Weather Service records") be utilized in determining the appropriate hurricane design basis for this facility--particularly since those wind speeds apparently occurred much closer to the site than those utilized by the Applicants? In short, does the current record of this proceeding reflect an effort of the Applicants to explain away the highest reported wind speeds, rather than an effort to assure that the facility is appropriately designed to resist wind speeds which could predictably be reached at the site?

Normally, we would expect that questions of this sort would be resolved by the Staff prior to its grant of an operating license. At the construction permit stage, however, the Staff accepted a virtually identical submission by the Applicants (PSAR, §§ 2.3.1.3.1, 2.3.1.3.6). The Staff noted that the Applicants had examined and discounted reports of extreme wind speeds in the site area but concluded, without explanation, that the selected operating wind speed of 120 mph (with a peak gust value of 156 mph) was "acceptable based on the data available" (construction permit SER, NUREG-75/075, § 2.3.2, at p. 2-10).[4/] For that reason, given the existing Staff conclusion

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4/ The construction-permit hearing was uncontested on this issue, and the Licensing and Appeal Boards did not even refer to hurricane wind speeds. LBP-75-46, 2 NRC 271, 308; LBP-75-71, 2 NRC 894, 901 (1975); affirmed, ALAB-306, 3 NRC 14 (1976).

at the construction permit stage, there is a significant question in our minds whether the Staff would seriously consider or reconsider questions such as we have outlined or would provide an adequate on-the-record response to such questions.

There is anotner reason for a serious review of hurricanes at the OL stage. In August, 1980, after the construction permit review--indeed subsequent to the submission and acceptance of CEU's hurricane contention--another hurricane (Allen) occurred with wind speeds reportedly as high as 180 mph (although not necessarily at the point where that hurricane passed nearest to the site). The ramifications of this hurricane should be thoroughly studied prior to reaching any decision on an appropriate hurricane design for this facility.5/

Finally, and of significant importance, the timing of our consideration of the hurricane issue will produce a more sound licensing record than if the Staff considers this issue during the normal course of its review. The Staff would not normally consider this question until it issues its SER for operations; that issuance will not likely occur in this proceeding until some time in 1986, when construction of the facility is virtually complete. At that time, however, alteration of the facility to achieve additional hurricane protection, should that be necessary, would be difficult. The only practicable remedy for inadequate hurricane design which might then be viable mignt be a

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5/ We have already advised the parties that hurricane Allen should be examined in conjunction with contention 4 (Tr. 9042). Section 2.3 of the FSAR (which includes discussion of hurricanes) was most recently amended in May, 1979 and thus includes no discussion of Hurricane Allen.

technical specification limiting operations in the event of the approach of a severe hurricane.6/ That remedy, in our view, presents potentially undesirable social, if not technical, implications. In contrast, at the stage of construction to be reached in the relatively near future, structural alteration likely could be made if necessary to accommodate hurricane winds higher than those for which the facility is currently designed.

At the prehearing conference in December, 1981, we suggested that the hurricane issue be dealt with in Phase II of the proceeding (i.e., sometime during 1983). Tr. 9042-43, 9085-86; Fourth Prehearing Conference Order, dated December 16, 1981, pp. 5-6. The Staff was not enthusiastic over that approach. Tr. 9085-88. We opine that, if left to the Staff, the issue will not likely be considered until too late in the review to produce what might turn out to be the best resolution. For that additional reason, the record on hurricanes is likely to be more sound if developed by the Licensing Board through adjudication, on the schedule which we have recommended, than by the Staff through its normal review procedures.

In sum, we find that contention 4 is a serious safety issue and that the record on this contention will be significantly

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6/ The Staff apparently is imposing a condition of that type on Indian Point Unit 2, an operating reactor which it believes is inadequately designed to withstand severe hurricanes. See Nucleonics Week, Vol. 23, No. 36 (September 9, 1982), at pp. 3-4.

improved if developed through adjudication, and we balance factor (iii) strongly in favor of permitting CCANP to adopt that contention.

c. Permitting CCANP to adopt contention 4 would result in a broadening of the issues, but delay clearly would not result. As set forth above, we plan--indeed we find it essential--to litigate contention 4 during phase II of this proceeding; those hearings will take place some time in 1983, approximately three years prior to the likely issuance of the SER. Further discovery on contention 4 need not extend beyond the period heretofore scheduled for phase II discovery (a 90-period commencing with the future issuance by the Staff of its review of Bechtel's analysis of the Quadrex Report, see Tr. 10664-667).7/ For that reason, we consider factor (v) as balancing slightly in favor of permitting CCANP to adopt contention 4.

d. In sum, factor (i) must be balanced against accepting contention 4 as well as the others. Factors (ii), (iv) and (v) balance slightly in favor of permitting CCANP to adopt contention 4. Factor (iii) balances strongly--even conclusively--in favor of accepting contention 4. Based on this balance of the factors, we conclude that the strong showing needed to offset a lack of showing of good cause for late filing has been made with respect to contention 4 (hurricanes). We are therefore permitting CCANP to adopt that contention.

7/ We earlier contemplated that issues other than the Quadrex Report would be included in this discovery period. Memorandum dated June 24, 1982, p. 3.

With respect to contention 4, much discovery has already been undertaken, albeit by and from CEU rather than CCANP. CCANP must take the proceeding with regard to that contention as it finds it. Thus any further discovery with respect to contention 4 (which, as we have stated, is not to extend beyond the time frame previously established for phase II discovery) must be limited to supplementary or additional information. (The Applicants and Staff may, of course, seek to determine whether CCANP plans to present information beyond that previously identified or produced by CEU; CCANP may inquire whether the Applicants or Staff possess relevant information additional to that which was provided to CEU.) We are permitting such discovery with respect to contention 4 to commence immediately .

For the reasons stated, it is, this 15th day of October, 1982

ORDERED

1. That CCANP's motion to adopt contentions of CEU is granted with respect to contention 4 and denied with respect to contentions 5-8.

2. That the proposed "American Bridge" contentions are dismissed.

3. That discovery on contention 4 (as outlined herein) may begin immediately but shall extend no later tnan the period heretofore established for other phase II issues.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE