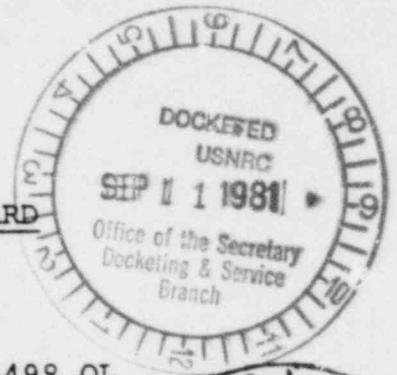


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of)
)
HOUSTON LIGHTING & POWER)
COMPANY, ET AL.)
)
(South Texas Project,)
Units 1 and 2))

9/9/81

Docket Nos. 50-498 OL
50-499 OL



APPLICANTS' BRIEF ON THE APPLICATION OF ALAB-580 to
CONCRETE CONSTRUCTION PROCEDURE-25

Statement

At the conclusion of Intervenors' cross-examination of Applicants' witnesses Fraley, Purdy and Carvel ("concrete restart" panel) CCANP requested that Applicants be required to "produce for the record" a number of concrete construction procedures, including those previously in use at STP and the current procedure, CCP-25^{*/} (Tr. 7383-84). The Board denied the request for the older procedures (Tr. 7391), but deferred ruling with respect to the new procedure, CCP-25, until it hears the views of the parties regarding the application to this situation of the Appeal Board's decision in Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-580, 11 NRC 227 (1980) (hereinafter "Diablo Canyon" or "ALAB-580"). (Tr. 7401)

^{*/} CCP-25 is approximately 250 pages long and specifies the procedures to be followed for such concrete construction activities as water stops, shotcreting, form removal, curing, repairs and concrete transportation.

DS03
50/1

This brief presents the views of Applicants on the applicability of ALAB-580 to the request for CCP-25. It is Applicants' position that ALAB-580 does not require the Board to admit into the record or to review CCP-25, and that CCP-25 should not be added to the record because it is inadmissible under 10 CFR § 2.743 and would unnecessarily burden the record.

Argument

In ALAB-580 the Appeal Board reviewed and reversed the Licensing Board decision that the Diablo Canyon applicant's physical security plan complied with applicable NRC regulations. The intervenors having been held in default on the issue, the Licensing Board had based its decision on uncontested in camera testimony from the applicant and the NRC Staff and on a tour of the plant. The Appeal Board found that "[t]he regulatory requirements of section 73.55 coupled with the complexities of the plan are such that a brief hearing even when supplemented by an hour's walking tour of the plant, are insufficient to dispense with actual examination of the plan." 11 NRC at 229, n. 6. It characterized the Board's determinations concerning the provisions of a security plan that it had not read as "empty findings in the absence of essential evidence." 11 NRC at 230. It noted that "[o]f course circumstances may arise where a Board might determine that a thorough inquiry was not necessary. But in that case its minimum obligation would be to acknowledge the fact and to explain it. Here the Licensing Board did neither." Id.

The circumstances of Diablo Canyon readily distinguish it from the matter before this Board. In Diablo Canyon the entire matter to be decided with reference to the physical security plan was whether it complied with the applicable NRC requirements, primarily 10 CFR § 73.55, which sets forth very specific requirements for security plans. Thus, the precise terms of the physical security plan were directly in issue. In sharp contrast to Diablo Canyon, in STP there is no issue regarding CCP-25. No one has alleged that CCP-25 is deficient nor is there a specific regulation regarding the content of construction procedures against which the application for licenses to operate must be reviewed by NRC.

In Diablo Canyon, the parties attempted to prove through testimony that the physical security plan contained each of the specific terms required by 10 CFR § 73.55. Here although the Applicants' testimony referenced CCP-25 at various points and addressed the concrete placement practices, the testimony did not attempt to prove the details of CCP-25 because CCP-25 is not in issue. Instead, the Applicants' "concrete restart" witnesses testified regarding improvements made in the concrete placement program during 1980 including the process by which the concrete construction procedures were reviewed and consolidated. The principal purpose of their testimony was to show that the procedures were carefully reviewed and revised with the objective of making them clearer. In Applicants' view, in this hearing on HL&P's managerial competence and character to operate STP, the fact that the Applicants undertook

this thorough procedure review is an important indication of their actions in response to the Show Cause Order. Because the Board has no need to make findings regarding the specific contents of CCP-25, or any other construction procedure, it need not review those procedures and CCP-25 is not required for the record.

The distinction between the proof of the terms of the physical security plan in Diablo Canyon and the more generalized proof about construction practices here is similar to distinctions recognized under the best evidence rule. That rule provides that to prove the content of a writing the original writing is required, with certain exceptions. Fed. R. Evid. 1002. The rule's similarity to the ALAB-580 "essential evidence" holding is apparent. The best evidence rule does not apply where the terms of the writing are not material to the issues (e.g., Long Island Rail Road v. United States, 307 F. Supp. 988 (E.D. N.Y. 1969,)); or where the issue which the writing concerns is collateral or relatively unimportant to the issues in the case (Fed. R. Evid. 1004(4); Reistroffer v. United States, 258 F.2d 379 (8th Cir. 1958)). Moreover, it doesn't apply where the testimony concern facts which the witnesses know independently of the writing (Sayen v. Rydzewski, 387 F.2d 815 (7th Cir. 1967)); or where the testimony merely proves the existence of the writing and not its terms (Chicago & N.W. Ry. Co. v. Green, 164 F.2d 55, 63 (8th Cir. 1947)). Similarly, here the "essential evidence" rule of ALAB-580 is not applicable because the specific terms of CCP-25 are not in issue, or are

at most collateral issues. Review of the specific procedures used to perform each of the various types of construction activities would entail a level of inquiry that is simply not required to resolve any of the issues or contentions admitted by the Board. Certainly CLI 80-32, the sole basis for issues not raised by the intervenors' contentions, was not a mandate to perform such a dissection of the construction procedures.

There are also a number of other facts which distinguish ALAB-580. A physical security plan is implemented by procedures. The regulations provide that the procedures that implement the physical security plan need not be included in that plan. 10 CFR Part 73, App. C. Instead, as with CCP-25, the only NRC review of those procedures is normally the review by I&E during inspections. CCP-25 is more closely analogous to the implementing procedures, than it is to the physical security plan itself. The Diablo Canyon Appeal Board did not hold that the procedures implementing the physical security plan should have been reviewed by the Licensing Board. Accordingly, it would be totally unwarranted to interpret ALAB-580 as requiring that the Board review CCP-25 or the other detailed STP construction procedures.*

*/ This fact also provides an important distinction between ALAB-580 and the QA procedures which Intervenor at one time requested. (Tr. 1985-92) That request was apparently abandoned by failing to press it at the time of Applicants' testimony on the QA Program. However, had it been pressed it should have been rejected. Applicants' Exhibit 8, the QA Program Description is the QA document that is analogous to the physical security plan. ALAB-580 thus requires no further QA documents for the record.

Another distinction between ALAB-580 and this case is the difference in the detail of the regulatory standards applicable to physical security plans as opposed to those applicable to construction procedures. 10 CFR § 73.55 specifies numerous detailed requirements by which the adequacy of a physical security plan is to be judged. Physical barriers around vital equipment, isolation zones, bullet resisting walls, doors and windows in the control room, access control, search of vehicles, the number of armed guards, and use of deadly force are among the requirements addressed specifically in § 73.55. There are no such objective NRC criteria applicable to concrete construction procedures. As a result there is no need to have CCP-25 in the record, and were it admitted there would be no objective regulatory standard by which to judge its adequacy.

Finally, the physical security plan is required by 10 CFR §§ 50.34(c) and 73.55 to be a part of the application for an operating license and as such it represents commitments of the applicant which cannot be changed significantly without prior NRC approval. As with the procedures that implement physical security plans, construction procedures are not required to be submitted under the regulations which dictate the contents of an application for either a construction permit (10 CFR § 50.34(a)) or for a license to operate (10 CFR § 50.34(b), (c), and (d)). They are working documents that are subject to revision without prior approval, and can be expected to be revised regularly. Accordingly, review of the details of such procedures is not required.

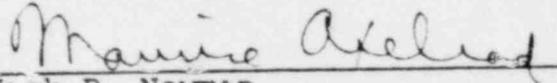
If CCP-25 were to be required evidence then other construction procedures might also be requested. A number of welding procedures were mentioned in the testimony of the welding experts, and placement, inspection and testing procedures were mentioned in the expert testimony on backfill. Should all welding and backfill procedures be made part of the record? We think not. The Board should exclude these procedures from the record because the regulations require that evidence be material to the issues. (10 CFR § 2.743(c)). There are no issues or contentions regarding CCP-25 or the construction procedures in general. If Intervenors believe there are issues the Board should consider regarding the contents of CCP-25, then those issues should have been raised in the contentions, or at a minimum during the cross-examination of Applicants' witnesses. No such issues were raised. Accordingly, in light of the issues in this proceeding and the state of the record these procedures would be immaterial.

Conclusion

CCP-25 is not the subject of any contention or issue in the proceeding. It is not a document that is submitted to the NRC Staff for review in the licensing process and review of it will not assist the Board in deciding any of the issues. Accordingly, ALAB-580 does not require the admission into the record of CCP-25 or any of the numerous other STP construction procedures. Since the content of these procedures

is not material to the issues before the Board and would improperly burden the record, the procedures are not admissible under 10 CFR § 2.743 and should not be made a part of the record.

Respectfully submitted,



Jack R. Newman
Maurice Axelrad
Alvin H. Gutterman
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Finis E. Cowan
Thomas B. Hudson, Jr.
3000 One Shell Plaza
Houston, TX 77002

Dated: September 9, 1981

LOWENSTEIN, NEWMAN, REIS
& AXELRAD
1025 Connecticut Ave., NW
Washington, D.C. 20036

BAKER & BOTTS
3000 One Shell Plaza
Houston, TX 77002

Attorneys for HOUSTON LIGHTING
& POWER COMPANY, Project Manager
of the South Texas Project
acting herein on behalf of itself
and the other Applicants, THE
CITY OF SAN ANTONIO, TEXAS,
acting by and through the City
Public Service Board of the City
of San Antonio, CENTRAL POWER
AND LIGHT COMPANY and CITY OF
AUSTIN, TEXAS

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,) September 9, 1981
Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of Applicants' Brief on the Application of ALAB-580 to Concrete Construction Procedure-25 has been served on the following individuals and entities by deposit in the United States mail, first class, postage pre-paid on this 9th day of September, 1981.

Charles Bechhoefer, Esq.
Chief Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. James C. Lamb, III
Administrative Judge
313 Woodhaven Road
Chapel Hill, NC 27514

Ernest E. Hill
Administrative Judge
Lawrence Livermore Laboratory
University of California
P.O. Box 809, L-123
Livermore, CA 94550

Mrs. Peggy Buchorn
Executive Director
Citizens for Equitable
Utilities, Inc.
Route 1, Box 1684
Brazoria, TX 77422

Brian Berwick, Esq.
Assistant Attorney General
for the State of Texas
Environmental Protection
Division
P.C. Box 12548, Capitol Station
Austin, TX 78711

William S. Jordan, III, Esq.
Harmon & Weiss
1725 I Street, N.W.
Washington, D.C. 20006

Kim Eastman, Co-coordinator
Barbara A. Miller
Pat Coy
Citizens Concerned About
Nuclear Power
5106 Casa Oro
San Antonio, TX 78233

Lanny Sinkin
2207-D Nueces
Austin, TX 78705

Jay M. Gutierrez, Esq.
Office of the Executive
Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

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

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

Shirley H. Lutter