

11/13/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

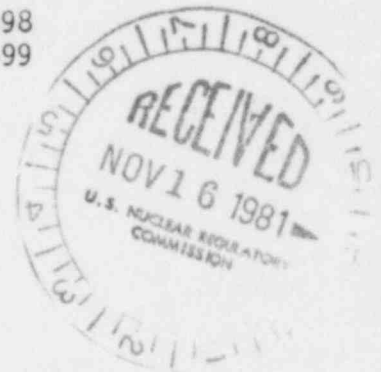
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

HOUSTON LIGHTING AND POWER COMPANY,)
ET AL.)

(South Texas Project, Units 1 & 2))

Docket Nos. 50-498
50-499



NRC STAFF RESPONSE IN OPPOSITION
TO CEU'S MOTION TO SUSPEND CONSTRUCTION */

I. INTRODUCTION

On October 29, 1981, Citizens for Equitable Utilities (CEU) filed a motion entitled "Citizens for Equitable Utilities' Motion to Suspend Construction" (CEU's Motion) with this Board and a petition entitled "Citizens for Equitable Utilities' Petition to Suspend Construction of the South Texas Project" (CEU's Petition) with the Commission. Both pleadings essentially seek the same relief; namely, immediate suspension of all construction activity at the South Texas Project, an independent review of the facility's design and an adjudicatory hearing on the

*/ The Staff has been orally informed that leave to withdraw the subject motion has been filed by CEU. The Staff has not yet received this pleading, but would not oppose withdrawal of the subject filing.

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adequacy of that design prior to authorizing any further safety related construction activity.^{1/}

1/ Paragraph thirty-nine (39) of CEU's Petition, which is incorporated by reference in CEU's Motion, states:

"Accordingly, CEU seeks the following relief:

- A) Immediate suspension of all aspects of construction at the South Texas Project.
- B) Commencement of an immediate independent review of the Brown & Root design at the South Texas Project, with initial emphasis on a reanalysis of the safety related versus non-safety relative distinction in identification of all inadequate areas of the design for which construction has previously been begun or completed.
- C) A prohibition on any further construction at the South Texas Project until the safety related versus non-safety related analysis has been completed, at which time non-safety related construction may proceed subject to paragraph 39 (E) below.
- D) A prohibition on further safety related construction at the South Texas Project until the independent review of the entire Brown & Root design has been completed, subject to paragraph 39 (E) below.
- E) Establishment of an Atomic Safety and Licensing Board to hold a full adjudicatory hearing with respect to (1) the adequacy of the safety related versus non-safety related analysis prior to permitting the renewal of non-safety related construction, and (2) the adequacy of the independent design review and the design itself prior to permitting the renewal of safety related construction."

Further, in its motion CEU asserts this Licensing Board has jurisdiction to revoke Houston Lighting and Power's construction permit and should exercise that authority if the evidence submitted warrants. CEU's Motion p. 3.

The basis for the relief requested by CEU is a report prepared by the Quadrex Corporation (Quadrex Report) raising questions concerning the design engineering by Brown & Root. Until recently, Brown & Root was the Applicant's (HL&P's) architect-engineer and constructor for the project.^{2/} Further justification for the relief sought by CEU is its concern over a letter dated October 16, 1981, wherein HL&P requested NRC concurrence to proceed on certain safety related construction activities.^{3/} This reason for CEU's motion has been called into question, however, since this letter has been superseded by a letter dated November 9, 1981, from J. Goldberg to Karl Seyfrit wherein HL&P considerably narrowed the scope of the work to go forward during the transition period. This letter is attached hereto as Attachment 1.

CEU next argues that this Board has jurisdiction to both halt further construction at the South Texas Project and revoke HL&P's construction permit by reason of the Commission decision dated

^{2/} The Staff initially notes that the Quadrex Report is a multi-volume report of over 1,000 pages and is currently under review by both the Office of Nuclear Reactor Regulation and the Office of Inspection and Enforcement. In addition, the Bechtel Power Corporation on behalf of Houston Lighting and Power is currently performing a benchmarking of the South Texas Project over the next several months and, as part of that review, is analyzing the effects of the Quadrex Report findings on the overall project. Consequently, any overly broad characterization of this report, such as has been set forth in CEU's two pleadings of October 29, 1981, is both simplistic and counterproductive to an understanding of what that report means relative to the entire project. Only after Bechtel has had an opportunity to perform its evaluation and the NRC Staff has reviewed that work can the implications of the Quadrex Report's findings be delineated for the balance of the plant's design and construction.

^{3/} See letter to Karl Seyfrit from G.W. Oprea, dated October 16, 1981.

September 22, 1980.^{4/} Although the Staff agrees this Board was granted a broad charter by the Commission to examine all issues impacting upon the safety of this plant, it was in the context of whether to grant, deny or condition an operating license. As stated by the Commission at 12 NRC 291-292: "... we expect the Board to look at the broader ramifications of these charges in order to determine whether, if proved, they should result in denial of the operating license application." (emphasis supplied)

On October 30, 1981, the Applicant filed its reply to CEU's Motion, arguing that this Board lacks jurisdiction to grant the requested relief and, further, counseled the Board not to take any action on CEU's request since a similar petition is currently pending before the Commission.^{5/}

The Staff first maintains that the concerns expressed in CEU's motion are moot by reason of HL&P's letter of November 9, 1981. Next, the Staff respectfully submits that this Board has neither statutory jurisdiction, nor was it granted such jurisdiction by any Commission

4/ See, CEU's Motion pg. 2-3.

The Commission decision allegedly conferring jurisdiction on this Board to hear construction permit matters is Houston Lighting and Power Company et al. (South Texas Project, Units 1 and 2) CLI-80-32, 12 NRC 281 (1980). In its order of October 30, 1981, this Board similarly indicated a position that CLI-80-32 "enhanced" its authority to pass on issues in the context of an operating license proceeding possibly to a point where an order to stop work could properly be issued. See, Memorandum and Order, October 30, 1981, pg.6.

5/ See, Applicant's Response to CEU Motion to Suspend Construction, p.1 & 4.

decision, to order an immediate halt to construction activities at the South Texas Project or revoke the construction permit previously awarded to HL&P.^{6/} Further, assuming arguendo, jurisdiction does reside in this Board, Commission policy dictates that such jurisdiction should not be exercised by this Board as (1) this matter is currently before the Commission in a petition pursuant to 10 C.F.R. § 2.206, thus it would be premature for this Board to take any action^{7/} and (2) it is the province of the NRC Staff in the first instance, principally the Office of Inspection and Enforcement and the Office of Nuclear Reactor Regulation,

^{6/} By challenging the Board's jurisdiction to grant the relief requested in CEU's Motion, the Staff is in no way questioning the Board's authority to hold the evidentiary hearings called for in its Order of October 30, 1981, in aid of deciding issues currently before the Board relative to the operating license proceeding.

^{7/} In this regard, the Staff stresses that contrary to what CEU suggests in its two pleadings of October 29, 1981, time is not of the essence in granting or denying the requested relief. The work requested to be authorized in HL&P's letter of October 16, 1981, has not yet been authorized by the Office of Inspection and Enforcement and will not be unless the technical Staff is satisfied that such work can proceed without jeopardizing the overall project in light of the concerns highlighted in the Quadrex Report.

to regulate the daily construction activities at the South Texas Project and to determine HL&P's compliance with licensing commitments.^{8/}

II. ARGUMENT

A. CEU'S MOTION IS MOOT

In this motion CEU seeks to suspend construction of the South Texas Project. By a letter dated November 9, 1981, (Attachment 1, hereto) HL&P stated, "Since Brown & Root will not continue as constructor, we plan to bring their current safety related construction activities (previously authorized by Region IV) to an orderly conclusion on or before December 1, 1981. The only safety related work which will continue beyond December 1, 1981, is listed in Attachment 1". As further stated in the letter, the sole criteria to judge whether work would continue in the next six months, during which a new contractor will assume responsibility for the work, was whether that activity was essential to maintain, preserve or protect safety related structures, systems or equipment."

^{8/} These Offices through their inspectors and technical reviewers are best equipped to pass upon a request such as the one made by CEU. For example, it is the Office of Inspection and Enforcement which has stationed a resident reactor inspector permanently at the South Texas site and augmented his efforts through a regional office of technical personnel monitoring construction activity. Similarly, the Office of Nuclear Reactor Regulation has technical reviewers currently reviewing the Quadrex Report to determine any impact it may have on licensing. Surely, these offices with their familiarity of the technical aspects of the project and their manpower resources are best equipped to pass upon the concerns expressed in CEU's Motion in the first instance. This Board can make no such constant review of the level of construction activity at the site.

As it does not appear HL&P is going ahead with construction, CEU's motion to suspend construction is moot and should be dismissed.

B. THIS BOARD DOES NOT HAVE JURISDICTION TO GRANT THE RELIEF REQUESTED IN CEU'S MOTION

A Licensing Board has only the jurisdiction and power delegated to it by the Commission. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167 (1976); Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 25 (1980) modified in part, CLI-80-12, 11 NRC 514, 517 (1980); New England Power Company, et al. (NEP, Units 1 and 2) LBP-79-9, 7 NRC 271, 279 (1978).^{9/} This grant of authority is to be narrowly construed and only gives the board authority to rule on a particular application or a specific matter referred to it. See, Shearon Harris, supra, 11 NRC at 517. An operating licensing board may not initiate any form of adjudicatory proceeding or direct hearings on whether a construction permit should continue in force. Cf., Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-381, 5 NRC 582, 589 (1977); Shearon Harris, supra, 11 NRC at 516; Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2) ALAB-513, 8 NRC 694 (1978); Union Electric Company (Callaway Plant, Units 1 and 2), LBP-78-31, 8 NRC 366, 370-71 (1978); see 10 CFR § 2.717(a).

^{9/} A Licensing Board may rule with respect to the scope of its jurisdiction when that authority is challenged. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-321, 3 NRC 293, 298 (1976).

Applying this law to the instant case results in the conclusion that this Board does not have jurisdiction to grant the relief sought by CEU. This Licensing Board has been empanelled and delegated the responsibility to decide issues with respect to the issuance of a facility operating license.^{10/} Contrary to CEU's assertion, the Commission in CLI-80-32 did not grant to this Board any authority to rule on the outstanding construction permit. It particularly refused to do so. The petitioners there (who are the intervenors in this proceeding) asked that a hearing be ordered on whether the construction permits should be suspended because of failures in HL&P's quality assurance program. The Commission refused to constitute a board with such authority in the context of a show cause proceeding. Instead, it stated that these issues should be looked at in the instant operating license proceeding; "in order to determine whether, if proved, they should result in denial of the operating license application. 12 NRC at 291-292.^{11/} (emphasis supplied).

^{10/} See, 43 Fed. Reg. 33969.

^{11/} As pointed out by CEU in its two pleadings, the Commission adopted the legal principles in its decision of September 22, 1980, that:

Either abdication of responsibility or abdication of knowledge, whether at the construction or operating phase, could form an independent and sufficient basis for revoking a license or denying a license application on grounds of lack of competence (i.e. technical) or character qualification on the part of the licensee or license applicant. 42 U.S.C. 2232a. 12 NRC at 291.

However, to translate that legal principle into a grant to this Licensing Board to reopen the construction permit proceeding or expand its authority to encompass stop work authority would be a leap in logic without foundation.

Nowhere in the Commission's decision of September 22, 1980, did it empower this Board, as suggested by CEU's motion, to not only deny an operating license, but to revoke the South Texas Project's construction permit or halt construction if justified by the evidence. That relief, which was sought by intervenors in the context of that show cause proceeding, was particularly denied.

Although this Board has the power to examine significant safety issues it feels is generated by the Quadrex Report, See, Consolidated Edison Company of New York (Indian Point Units 1, 2, 3), ALAB-319, 3 NRC 188, 190 (1976), in the context of whether an operating license should be granted, it lacks the jurisdiction to reopen the construction permit hearing or initiate a show cause proceeding to determine whether, in light of the Quadrex Report findings, construction should be halted. South Texas Project, supra, 5 NRC at 589; Shearon Harris, supra, 11 NRC at 516. In effect, this is the relief requested by CEU's motion and this Board is without jurisdiction to rule on that request. CEU has raised in this operating license proceeding the new questions of construction permit revocation and a stop work order. These issues are not fairly within the scope of the notice of hearing initiating this hearing, nor within the scope of issues anticipated by CLI-80-32, and accordingly, are beyond the jurisdiction of this Board to decide. See, Callaway, supra, 8 NRC at 370.

C. THIS BOARD SHOULD NOT ACT UPON CEU'S MOTION BEFORE THE COMMISSION ACTS ON CEU'S PETITION AND BEFORE THE STAFF HAS HAD AN OPPORTUNITY TO ACT.

i. This Board Should Not Act Upon CEU's Motion Before the Commission Acts on CEU's Petition.

As acknowledged by CEU in its motion to this Board, "CEU has raised these matters with the Commission itself in the attached Petition to Suspend Construction of the South Texas Project." CEU Motion p. 2. In addition, CEU seeks no further relief from this Board than it does from the Commission. ". . . CEU moves that the Board order all construction at the South Texas Project halted immediately pending an independent review of the design and further adjudicatory hearings, as requested in Paragraph 39 of our Petition to the Commission." CEU Motion p. 2 (emphasis supplied). Accordingly, with virtually the identical pleading currently before the Commission any action by this Board would be premature.

The Petition before the Commission was filed pursuant to 10 C.F.R. §§ 2.204, 2.206(c)(1) and 50.54. These regulations describe Commission authority which is not adjudicatory in nature, but rather, enforcement and licensing activity which has been delegated to the NRC Staff. For example, under 10 C.F.R. § 2.206(a) it is the staff which first passes on the question of whether a persons' request to institute a proceeding pursuant to § 2.202 should be granted. The essence of § 2.206 is the informality of its process. The Commission intended that the procedure would be free of the trappings of the formal adjudicatory process which could create artificial barriers to the Staff's consideration of

information brought to its attention by members of the public.^{12/}

Through CEU's motion, it is bypassing the direct line to the NRC technical staff afforded by a properly filed petition under § 2.206 and seeks to entangle its request for a review of a technical matter in an already complex judicial proceeding without any apparent good cause.

- ii. This Board Should Not Act Until the NRC Staff Has Reviewed the Quadrix Report and Taken Whatever Action the Staff Deems Appropriate.

Surely, for this Board to assume jurisdiction over and grant the relief requested by CEU's motion would be a disturbance of the delicate and well conceived balance of authority between Licensing Boards and the NRC technical staff. The Commission has established a carefully articulated regulatory scheme for the processing and adjudication of applications for the licensing of nuclear power plants. The Staff is responsible for an extensive and continuing review of massive amounts of data and plans related to the construction and operation of the plant. See generally, New England Power Company, et al. (NEP, Units 1 and 2), LPB-78-9, 7 NRC 271, 279 (1978). The Staff, among other documents, produces the safety evaluation report and the draft and final environmental statements. These studies and analyses are made independently by the Staff

^{12/} See LeBouef, Lamb, Leiby & MacRae - Denial of Petition for Rule-making, 41 Fed. Reg. 3359 (Jan. 22, 1976). In this denial, the Commission rejected proposals that it adopt formal requirements related to filing and service of documents, responsive pleading, and demonstration of standing per 10 C.F.R. 2.714 by sworn affidavit as part of the Commission's section 2.206 procedures. Because the handling of petitions under section 2.206 does not involve the formal adjudicatory process, the Commission is free to consult with the Staff on issues raised in 2.206 petitions without regard to ex parte communications, whereas separation of functions bars that communication in an adjudicatory context.

and Licensing Boards have no role or authority in their preparation. Id. See also, Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194 (1978). However, the reports themselves are subject to review by the Boards in an adjudicatory setting in which all parties with a demonstrated interest may participate. NEP supra, 7 NRC at 279.

Similarly, after a license is issued and a question is raised relative to whether an Applicant is carrying out its license obligations the respective roles between the Staff and Licensing Boards are well defined. The Staff has the ongoing regulatory responsibility not individual licensing boards. See Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-356, 4 NRC 525, 536-37 (1976); The Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386 (1978). It must be kept foremost in this Board's mind that it is not its job to police HL&P's compliance with its construction permit or to regulate the level of construction activity at the site. See Seabrook, supra, 4 NRC at 538; Fermi, supra, 7 NRC at 386. If an Applicant has violated the regulations or a license condition, then this is a matter in the first instance for the Staff. Id.

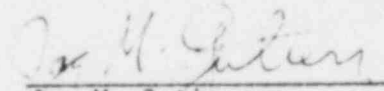
Consequently, in the instant case the duty to determine whether the findings of the Quadrex Report show HL&P has violated some condition of its construction permit, Commission Regulations, or whether such findings justify putting an immediate halt to construction is in the first instance the responsibility of the Staff. In contrast, it is this Board's role to eventually assure itself that the Staff's review of this matter was adequate in order to make a reasoned decision relative to an

operating license. See Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 774 (1977); see also, 10 CFR § 2.717(b).

III. CONCLUSION

For the reasons aforesaid, the Staff respectfully submits CEU's motion should be dismissed as moot by reason of HL&P's notification of November 9, 1981. In the alternative, the Staff submits this Board does not have jurisdiction to grant the relief requested in CEU's motion and, assuming the Board decides it has jurisdiction, such authority should not be exercised until the Commission rules on CEU's Petition or the Staff has reviewed the Quadrex Report in the first instance.

Respectfully submitted,


Jay M. Gutierrez
Counsel to NRC Staff

Dated at Bethesda, Maryland
this 13th day of November, 1981.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

HOUSTON LIGHTING AND POWER COMPANY,)
ET AL.)

Docket Nos. 50-498
50-499

(South Texas Project, Units 1 & 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE IN OPPOSITION TO CEU'S MOTION TO SUSPEND CONSTRUCTION in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 13th day of November, 1981.

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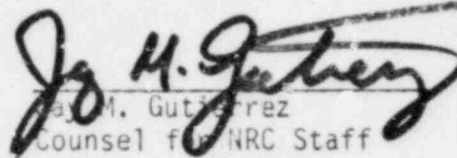
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