03/08/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
HOUSTON LIGHTING AND POWER COMPANY	)	Docket No. 50-466
	)	
(Allens Creek Nuclear Generating Station, Unit 1)	)	

NRC STAFF RESPONSE IN OPPOSITION TO
MARRACK'S MOTION FOR CONTINUANCE OF HEARING

I. INTRODUCTION

On February 18, 1982,[1/] Intervenor Dr. Marrack filed a document entitled "Motion for Review of Dates For Re-opening Hearing And Continuence." (Sic) The motion seeks a postponement of all further action on this construction permit application including a continuance of the reopened hearing scheduled to commence on April 12, 1982 until such time as the Applicant states that it is "irrevocably committed to build the ACNGS." This motion is predicated on the Applicant's public announcement on February 12, 1982,[2/] that it was reevaluating the feasibility of continuing the Allens Creek project. The NRC Staff opposes the motion and submits that it should be denied for the following reasons.

1/ The Motion's certificate of service is dated February 15, 1982.

2/ Dr. Marrack's motion indicated that the news release was on February 5, 1982. However, it appears that HL&P announced its reevaluation of the Allens Creek project on February 12, 1982. See attached copy of a letter from J. H. Goldberg, HL&P, to Mr. Harold Denton, NRC, dated February 12, 1982.

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II. DISCUSSION

Dr. Marrack's abbreviated motion asks that "all further action on this Permit Application be postponed until such time as Applicant states in writing that he is irrevocably committed to build the ACNGS should he receive a construction permit to do so." [sic]

To the extent the motion might be interpreted to seek an order directing the Staff to cease its regulatory review function on this application, the Licensing Board lacks that authority. As stated in Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 202 (1978):

> It is a virtual watchword of the Commission's system that "[t]he responsibilities of the boards are independent of those of the staff." Citing Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-298, 2 NRC 730, 737 (1975).

Thus, adjudicatory boards lack the power to direct the Staff in the performance of its independent responsibilities and, under the Commission's regulatory scheme, boards cannot direct the Staff to suspend review of an application. See New England Power Co. (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 278-79 (1978).

To the extent Dr. Marrack seeks a Board order directing the continuance of any further evidentiary hearings in this proceeding until an irrevocable commitment to construct the facility is received from the

Applicant it should also be denied.[3/] There can be no doubt that a licensing board has the general authority to "regulate the course of the hearing." 10 C.F.R. § 2.718(e). This authority extends to a determination as to when a particular hearing should take place. Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-39, 4 AEC 727 (1971). The question presented here, however, is whether the Licensing Board should postpone or defer the commencement of the reopened hearing on technical qualifications until such time as the Applicant irrevocably commits to proceed with the project. To decide the merits of this request, it must be initially determined whether there is a legislative or administrative mandate embodied in NRC practice which would require the deferral of evidentiary hearings until an "irrevocable commitment" to the project is made.

In Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975), a question was decided regarding whether evidentiary hearings should proceed where applicant had definitely announced a postponement of construction and operation by several years. The Appeal Board first decided that

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3/ The substance of this motion might be considered similar to a request for a stay filed pursuant to the provisions of 10 C.F.R. § 2.788(e). However, since the motion does not seek a stay pending appellate review of a Board decision or action, the regulation does not strictly apply. However, the criteria to be considered in judging the merits of the motion -- i.e., whether the movant will be irreparably injured if the continuance is not allowed; consideration of harm to other parties; and consideration of the public interest -- are similar. Cf. Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671 (1975) where the Appeal Board held that the traditional stay factors should be considered on appeal in determining whether proceedings before another tribunal should be stayed.

there was nothing in the Atomic Energy Act, NEPA, or the Commission's regulations which required that the commencement of hearings "must await the approach of the time at which the applicant will wish to obtain a limited work authorization or construction permit." Id. at 545. Accordingly, the deferral of evidentiary hearings is not required, as a matter of law, until an "irrevocable commitment" to proceed is obtained. See also Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-75-2, 1 NRC 39 (1975) where the Commission held that the deferral of a plant which has been noticed for hearing does not necessarily mean that hearings should be postponed.

Although the Appeal Board recognized that rigid scheduling criteria were not established by statute or legislation, the absence of such criteria suggested that licensing boards should be free to decide the merits of proceeding with evidentiary hearings after weighing the circumstances of each individual case. Thus, the Appeal Board left that discretion to the licensing boards, but suggested that three principal factors should be considered when deciding whether to defer the proceedings:

1) The degree of likelihood that any early findings on the issue(s) would retain their validity;

2) The advantage, if any, to the public interest and to the litigants in having an early, if not necessarily conclusive, resolution of the issue(s); and

3) The extent to which the hearing of the issue(s) at an early stage would, particularly if the issue(s) were later reopened because of supervening developments, occasion prejudice to one or more of the litigants. Douglas Point, supra at 547.

Dr. Marrack's motion has not attempted to address these factors in any detail. Be that as it may, we believe that the Board should deny the motion based upon its own consideration of these factual and equitable factors.

A. Validity of early findings

The only issue left for consideration in the reopened hearing is the Applicant's technical qualifications to design and construct the ACNGS, particularly in light of the recently published Quadrex Reports. See Board's Memorandum and Order, dated January 28, 1982. There is nothing on the record which would indicate that any finding with respect to this issue would change materially over time. To the contrary, the gravamen of the reopened issue concerns matters that occurred in the past rather than issues which might be subject to change in the future. Thus it is logical to assume that any alleged deficiencies in the Applicant's management or technical competence which were highlighted in the Quadrex Reports would be corrected and stay corrected. Accordingly, any Board findings pertaining to cured deficiencies in the Applicant's organization would, in all likelihood, retain their validity.

B. Public interest in seeking early resolution

The crux of this factor to be applied for this motion is whether public interest considerations weigh in favor of continuing these proceedings to their conclusion in light of the announced economic and

financial uncertainties surrounding the project. Dr. Marrack believes that a postponement is required in order to reduce expenditures of additional public monies. The Staff disagrees.

This proceeding is near conclusion. There have been 87 days of hearing. It appears that only several more days of hearing are required to conclude the evidentiary segment. Proposed findings from all parties except TexPirg have been submitted and the reopened hearing will probably generate only minor changes to existing proposed findings. Thus, additional expenditures of public resources will be minimal. These additional public expenditures have to be compared with the potential costs of delay if this proceeding is postponed and the advisability of now concluding this long-continuing proceeding.

Based on the most recent announcement, it appears that ACNGS is still a viable project in light of current or projected economic and financial conditions. The application for a construction permit has not been withdrawn or terminated in any way. Accordingly, a valid application is still before the NRC for review and approval. It is NRC practice to continue the review of any application that has not been informally or formally withdrawn. Speculation with respect to the viability of ACNGS is and will be rampant. However, it is not in the public interest to substitute speculation for a utility's best "business judgment" regarding the long-term economic and financial feasibility of a nuclear project. This type of speculation is not required under the Atomic Energy Act, NRC regulations, or the provisions of the National

Environmental Policy Act and should not be contemplated here.[4/] Accordingly, the public interest is served by processing this valid application as expeditiously as possible.

C. Prejudice to litigants

The holding of further hearings might undeniably result in some degree of inconvenience and additional expense to one or more of the intervenors. However, Staff cannot imagine that this inconvenience and expense would be large given the very limited nature and extent of the reopened hearing. Certainly this possible inconvenience and expense is not tantamount to prejudice. Cf. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-212, 7 AEC 986, 993 (1974).[5/]

4/ NRC regulatory requirements do not require a demonstration of certainty in long-term financial forecasting. The Applicant, of course, has to satisfy the financial requirements of 10 C.F.R. § 50.33(f) which basically require that it demonstrate reasonable assurance of obtaining the necessary funds to cover estimated construction and fuel cycle costs. The Applicant and Staff have concluded that a reasonable financing plan in light of relevant circumstances has been demonstrated for this application. (See Applicant's Proposed Findings of Fact and Conclusions of Law (¶s 14-23), dated January 8, 1982.) See also Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1 (1978); NRC Proposed Rule on Financial Qualifications, 46 Fed. Reg. 41786 (Aug. 18, 1981).

5/ In addition, litigation expense and other time and energy expenditures have been held not to constitute irreparable injury in stay applications. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 779 (1977); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 625 (1977). Furthermore, the Appeal Board has noted that a stay application which does not even attempt to make a showing of irreparable injury is virtually assured of failure. Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 530 (1978).

On the other hand, indefinite deferral of this proceeding could work a substantial prejudice on the Applicant. Not only would momentum toward a decision-date be lost, but the Applicant alleges that it will be "unable to rely upon a reasonably certain licensing date in making rational planning decisions affecting this project." "Applicant's Response to Marrack's Motion for Review of Dates for Reopening Hearings and Continuance," dated March 1, 1982, p. 3. This prejudice outweighs the inconvenience and minor expense borne by the other litigants if the reopened hearing proceeds.

In conclusion, the gist of the above arguments is that the public interest could possibly suffer if the Applicant narrows its list of viable energy options because of regulatory delays. In matters of scheduling, the paramount consideration is the public interest. The public interest is usually served by as rapid a decision as possible consistent with everyone's opportunity to be heard. Douglas Point, supra at 552. These public interest consideratons and the absence of any prejudice to the intervenors mandate that this request for an indefinite postponement of the scheduled hearings be denied.

III. CONCLUSION

For the above stated reasons, the NRC Staff submits that Dr. Marrack's motion must be denied.

Respectfully submitted,

Richard L. Black

Richard L. Black
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 8th day of March, 1982.

HOUSTON LIGHTING & POWER COMPANY
P.O. BOX 1700
HOUSTON, TEXAS 77001

G. W. OPREA, JR.
EXECUTIVE VICE PRESIDENT

February 12, 1982

54-466

Mr. Harold Denton, Director
Office of Nuclear Reactor Regulation
U. S. Nuclear Regulatory Commission
7920 Norfolk Avenue
Bethesda, Maryland 20555

Dear Mr. Denton:

During my conversation with you on February 9, 1982, I notified you that Houston Lighting & Power Company was in the process of re-evaluating the feasibility of continuing the Allens Creek project and I made mention of a news release and the timing for such release. Attached is a copy of the release which was issued this date to the news media.

As I indicated during our meeting, the final decision as to the outcome of the Allens Creek project could take a few months. However, I will keep you informed should anything significant materialize during the interim.

Very truly yours,

GWO/sra
Attachment
cc: J. H. Goldberg
G. Copeland

B001
S.1.1

Add: H. Denton

News
from Houston Lighting & Power Company

ELECTRIC TOWER HOUSTON, TEXAS 77001

FOR FURTHER INFORMATION PLEASE CONTACT:

Graham Painter
(713) 229-7125

FOR RELEASE:

Houston Lighting & Power Company announced today that it is reevaluating plans for its Allens Creek Nuclear Generating Station. Originally announced in 1972, the plant is still in the Federal licensing process and not yet under construction.

Citing uncertainties in maintaining construction schedules and cost estimates, HL&P President Don D. Jordan said all options are being explored to manage Houston's electricity needs in the 1990's when Allens Creek is scheduled for completion. These options include completion of Allens Creek in its present form, use of the Allens Creek site for a coal plant, and possibilities available to recover as much of HL&P's investment in the project as possible, including the sale of major equipment components already purchased.

HL&P has had an application for a construction permit for the Allens Creek facility pending before the U. S. Nuclear Regulatory Commission since 1977. Since that time, soaring interest rates, inflation, changing Federal requirements and regulatory delays have driven up the price of nuclear construction. The Allens Creek cost estimate has grown from approximately $600 million per unit in 1972 to over $2 billion per unit today.

HL&P's financial position is such that it must continually reassess its ability to raise the money necessary to maintain its huge construction program.

"Allens Creek was a prudent, workable project when it was conceived a decade ago," Jordan said, "but conditions have changed to the point that reevaluation is necessary." During the study period, Jordan stressed that expenditures associated with Allens Creek will be reduced to an absolute minimum.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO MARRACK'S MOTION FOR CONTINUANCE OF HEARING" 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 8th day of March, 1982:

Sheldon J. Wolfe, Esq., Chairman*
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. E. Leonard Cheatum
Administrative Judge
Route 3, Box 350A
Watkinsville, Georgia 30677

Mr. Gustave A. Linenberger*
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

J. Gregory Copeland, Esq.
Baker & Botts
One Shell Plaza
Houston, TX 77002

Susan Plettman, Esq.
David Preister, Esq.
Texas Attorney General's Office
P.O. Box 12548, Capitol Station
Austin, TX 78711

Hon. Jerry Sliva, Mayor
City of Wallis, TX 77485

Hon. John R. Mikeska
Austin County Judge
P.O. Box 310
Bellville, TX 77418

Mr. John F. Doherty
4327 Alconbury Street
Houston, TX 77021

Mr. William J. Schuessler
5810 Darnell
Houston, TX 77074

Jack Newman, Esq.
Lowenstein, Reis, Newman &
Axelrad
1025 Connecticut Avenue, N.W.
Washington, DC 20037

Brenda A. McCorkle
6140 Darnell
Houston, TX 77074

Mr. Wayne Rentfro
P.O. Box 1335
Rosenberg, TX 77471

Leotis Johnston
1407 Scenic Ridge
Houston, TX 77043

Margaret Bishop
J. Morgan Bishop
11418 Oak Spring
Houston, TX 77043

Stephen A. Doggett, Esq.
Pollan, Nicholson & Doggett
P.O. Box 592
Rosenberg, TX 77471

Carolina Conn
1414 Scenic Ridge
Houston, TX 77043

Atomic Safety and Licensing
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing
Appeal Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

D. Marrack
420 Mulberry Lane
Bellaire, TX 77401

Texas Public Interest
Research Group, Inc.
c/o James Scott, Jr., Esq.
13935 Ivymount
Sugarland, TX 77478

Rosemary N. Lemmer
11423 Oak Spring
Houston, TX 77043

Carro Hinderstein
Houston Bar Center
723 Main Suite 500
Houston, TX 77002

U.S. Nuclear Regulatory Commission
Region IV, I&E
611 Ryan Plaza Drive, Suite 1000
Arlington, TX 76011

Bryan L. Baker
1923 Hawthorne
Houston, TX 77098

Robin Griffith
1034 Sally Ann
Rosenberg, TX 77471

Mr. William Perrenod
4070 Merrick
Houston, TX 77025

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

Richard L. Black
Counsel for NRC Staff