



03/11/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
UNION ELECTRIC COMPANY
(Callaway Plant, Unit 1)

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Docket No. STN 50-483

RESPONSE OF THE NRC STAFF TO JOINT INTERVENORS'
MOTION FOR ADMISSION OF ADDITIONAL EVIDENCE

I. INTRODUCTION

By motion dated February 19, 1982, Joint Intervenors filed their ". . . Motion For Admission Of Additional Evidence" (hereafter "the motion"). In said filing, Joint Intervenors request the receipt into evidence of a letter dated April 9, 1980 from Bechtel Power Corporation to Donald F. Schnell, of Applicant, Union Electric Company, with a fourteen page attachment entitled "Listing of Plates with Manually Welded Studs Installed in Concrete by 6/9/77."

In its response to this motion, Applicant has stated that this document was obtained by Joint Intervenors from Applicant in the discovery phase of this proceeding in July, 1981.^{1/} The subject matter

1/ See "Applicant's Answer To Joint Intervenors' Motion For Admission Of Additional Evidence" p. 4 (March 8, 1982).

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of the proffered document arguably relates to Contention 1A, which concerns embedded plates.^{2/}

Applicant's witness panel on this contention, which consisted of six members, was subjected to cross-examination by Joint Intervenors for approximately one week (five hearing days). In the course of that examination, Joint Intervenors offered approximately thirty-five (35) exhibits into the record. The proffered document was not used, or referred to by Joint Intervenors at the hearing. Moreover, the document in question was not designated by Joint Intervenors for use in this proceeding by November 6, 1981, in accordance with the Board's "Memorandum and Order" (Modification of Hearing Schedule) of September 24, 1981.

On February 1, 1982, Applicant timely filed its proposed findings in accordance with this Board's briefing schedule. On March 1, 1982, approximately one week late,^{3/} Joint Intervenors filed their proposed findings, and have extensively relied therein on the proffered document as "Joint Intervenor's Exhibit 78," while the instant motion was pending.

The only statement pertaining to the justification for Joint Intervenors' treatment of the proffered document is in a footnote to the motion:

This document was not submitted during the hearing due to inadvertence and oversight. Not until the

^{2/} The essence of Joint Intervenors' contention is that certain embedded plates installed in concrete structures at Callaway prior to June 9, 1977 may contain faulty welds. If such welds were to fail, Joint Intervenors contend that the consequence could be the collapse of an entire floor, breakage of critical piping, or core melt down.

^{3/} This matter is sub judice before this Board with respect to "Joint Intervenors' Motion For Extension Of Time," filed February 22, 1982.

drafting of the Joint Intervenors' proposed findings of fact was the importance of this document discovered (Motion, p. 1, n.1).

For the reasons discussed below, the Staff believes that Joint Intervenors have not satisfied the applicable criteria for reopening the record in order to receive the proffered document into evidence as Joint Intervenors' Exhibit 78. If, however, the Board does reopen the record, the Staff requests that the attached affidavit of Eugene Gallagher be admitted as well.

II. DISCUSSION

A. Legal Standards

The standards for reopening a record in Commission proceedings are defined in Kansas Gas & Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978):

As is well settled, the proponent of a motion to reopen the record has a heavy burden. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 NRC 619, 620 (1976). The motion must be both timely presented and addressed to a significant safety or environmental issue. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); *id.*, ALAB-167, 6 AEC 1151-52 (1973); Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 409 (1975). Beyond that, it must be established that "a different result would have been reached initially had [the material submitted in support of the motion] been considered." Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974).

These standards have been applied in situations where, as exists here, the request to reopen the record was filed after the record had

been closed but prior to the issuance of the initial decision. Public Service Company of Oklahoma et al. (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775 (1979). There, the Appeal Board stated:

To be sure, "a matter may be of such gravity that the motion to reopen should be granted notwithstanding that it might have been presented earlier." A board need not reopen the record, however, if the issues sought to be presented are not of "major significance." * * * . . . and there was no need to reopen absent a "showing that the outcome of the proceeding might be affected thereby." 10 NRC at 804 (footnotes omitted).

Finally, the Commission has endorsed these aforementioned standards, in the context of addressing the question of whether the evidentiary record on safety issues once closed, should be reopened on TMI-related issues. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 362-63 (1981).^{4/}

Thus, the instant motion to reopen the record should be judged after evaluating the questions of: (1) whether the motion has been timely filed; (2) whether proposed Joint Intervenors' Exhibit 78 addresses significant safety issues; and (3) whether a different result might be reached upon timely presentation of the newly proffered material. These factors will be discussed seriatim below.

^{4/} See also Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876 at 879-881; Id., ALAB-644, 13 NRC 903, 994-95 (1981) for a further discussion and application of the aforementioned standards for reopening a record.

B. The Facts And Circumstances Do Not Support Reopening

1. Timeliness

With respect to the first criterion for evaluating the request to reopen the record, it is clear that Joint Intervenors obtained the proffered document in the discovery phase of this proceeding, in July of 1981. Even though both the recipient of this letter (Mr. D. Schnell of Union Electric Company) and Mr. E. Thomas from Bechtel, who is mentioned by name in the body of the first page of the document, were part of Applicant's panel on this very issue, Joint Intervenors have not attempted to explain their failure to utilize this document at the hearing, where it could have been the subject of inquiry by the parties and the Board. The sole attempt at justification, as aforementioned, was simply "inadvertence and oversight." This explanation fails to excuse the untimeliness of the instant motion.

2. Whether It Addresses Significant Safety Issues

The proffered materials raise no new issues in this proceeding; what is sought is receipt of an additional exhibit on the embedded plates sub-contention. The proposed exhibit identifies four embedded plates with reduced load capacities equal to the intended design load capacity (Gallagher Affidavit, para. 7). However, a sufficient safety margin exists between the actual load and the yield limit of the plates and anchor rods, based upon design conservatisms (Gallagher Affidavit, paras. 6, 8).

The information with respect to these four plates (of a total 259 plates) does not raise a significant safety question, and does not affect the Staff's previous conclusions on this matter (see Gallagher Affidavit, paras. 7).

While it is arguable that the proffered materials are relevant to the embedded plate matter, the question of whether these materials provide significant new information should be analyzed in the context of the concluded operating license hearing,^{5/} where the opportunity to fully explore the embedded plates sub-contention was fully provided. In that context, while any data that deals with embedded plates is arguably relevant, the proffered information does not appear to reach the threshold of "significant" safety information (see Gallagher Affidavit paras. 6, 8) so as to justify reopening the record.

3. Whether a Different Result Might Be Reached Upon Timely Presentation Of The Proffered Material

The record already includes a summary of the calculations of reduced load carrying capacity for the manually welded plates (see Applicant's Ex. 4, Appendix B, Calculation Sheet 3). The proffered materials delineate in more detail this data on a plate-by-plate basis for 259 plates (see Gallagher Affidavit, para. 8). However, the reduced capacity of four of

^{5/} All issues with the exception of three emergency planning contentions have been litigated or otherwise resolved.

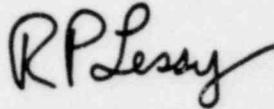
those 259 embedded plates does not affect the Staff's conclusions regarding the overall safety of the plates (Gallagher Affidavit, para. 6), and should not affect the outcome of the litigation of this contention. Moreover, Joint Intervenor's substantial reliance in their proposed findings on this -- in the Staff's view -- relatively insignificant document underscores the disadvantages and problems associated with the failure to utilize the document during the hearing when qualified witnesses (including Bechtel who transmitted it, and Mr. Schnell who received it) were available to comment upon it.^{6/} With respect to the four plates that were identified with load capacities equal to the intended design load capacity, as aforementioned, a sufficient margin exists between the actual load and the yield limit of the plates and anchor rods (Gallagher Affidavit, para. 7). Thus, the third criteria for reopening the record, that the outcome of the proceeding would be affected by the reopening, has not been met.

^{6/} On pp. 1-2 of its motion, Joint Intervenor's state that the proffered materials "demonstrate[s] that Applicant and Bechtel have apparently made material misrepresentations of fact to the NRC Staff and to this Board" It is regrettable that this proceeding, which has heretofore been characterized by cooperation among counsel, must terminate on such a note. Not only have Joint Intervenor's been remiss in not utilizing this document during the hearing, but Joint Intervenor's have greatly overestimated the meaning of the document. In any event, the Staff believes that there have been no such material representations and that Applicant's counsel has adequately responded to this aspect of Joint Intervenor's motion on pages 6-9 of its March 8, 1982 Answer.

IV. CONCLUSION

Based upon the above discussion, the Licensing Board should not reopen the record to receive into evidence proposed Joint Intervenor's Exhibit 78. If, however, the Licensing Board should decide that the Commission's requirements for reopening the record have been met by the Joint Intervenors, the Staff requests that the attached affidavit of Eugene Gallagher be admitted as well.

Respectfully submitted,



Roy P. Lessy
Deputy Assistant Chief Hearing
Counsel

Dated at Bethesda, Maryland
this 11th day of March, 1982.