

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,)
Units 1 and 2),)

APPLICANTS' RESPONSE TO CITIZENS FOR
EQUITABLE UTILITIES' MOTION TO REQUIRE
FULL DISCLOSURE AND INDEPENDENTLY
PREPARED AFFIDAVITS DATED MARCH 1, 1982

I. Introduction

By Motion dated March 1, 1982,^{*/} Citizens for Equitable Utilities, Inc. (CEU) has requested that HL&P and the NRC Staff submit extensive information, including sworn affidavits, regarding a recent visit to the South Texas Project (STP) site by Commissioner Roberts and an earlier site visit by Commissioner Gilinsky. CEU is not entitled to the relief requested and its Motion should be denied.

^{*/} Citizens for Equitable Utilities Motion to Require Full Disclosure and Independently Prepared Affidavits With Respect to the Ex Parte Communication with Commissioner Roberts of February 21, 1982, and With Commissioner Gilinsky of December 1981 (Motion, hereafter).

II. Background

Pursuant to a request initiated by his office, Commissioner Roberts toured the STP site on February 21, 1982. CEU was notified of the impending visit, but apparently due to the Commissioner's late arrival at the site, its representative was unable to accompany him on the tour. CEU has alleged that the Commissioner's visit resulted in ex parte communications in violation of 10 C.F.R. § 2.780. It has therefore requested that the Board order HL&P and the NRC Staff to, inter alia, identify and obtain sworn affidavits from all persons who met with Commissioner Roberts or were involved in arranging his visit, provide detailed descriptions of scheduling arrangements and produce all documents relating to the site visit including scheduling documents.*/

*/ More fully, CEU has requested the following remedies:

1. Identification of all NRC Staff and HL&P personnel or agents involved in arranging for Commissioner Roberts' visit, including a detailed description and chronology of all contacts or communications with Commissioner Roberts or his office, and providing copies of all documents of any sort, including handwritten notes, concerning arrangements for and preparation for the visit. The description of communications must detail the substance of the communications and must be in affidavit form and under oath.

(foctnote continued on page 3)

CEU has also requested that HL&P and the NRC Staff provide identical information concerning a site visit conducted by Commissioner Gilinsky in December, 1981.

In its Motion, CEU contends that the issues before this Board encompass "virtually all past actions by HL&P directly related to the South Texas Project."^{*/} As a result, it

(continuation of footnote from page 2)

2. Identification of all participants in the visit itself, including a detailed chronology describing precisely how the visit took place from the first point at which Commissioner Roberts or a member of his staff came in contact with NRC Staff or HL&P personnel. The chronology shall state what conversations or contacts took place between what individuals, when and precisely where they took place, in what order, and the substance of each.
3. Separate sworn affidavits from all individuals involved in or present while trip arrangements were being made or during the visit itself. These affidavits shall state the individuals' recollection of all events of the arrangements or the visit and of all conversations or other communications engaged in or heard by the individuals during the arrangements or the visit itself. These affidavits must be prepared independently by each individual and submitted without review by any other individual and without communicating anything concerning the affidavit or its substance to any other person before the affidavit is filed with the Board.
4. Provide copies of all other documents related to the visit, including handwritten notes and other handwritten materials, and any post-visit reports or other writings memorializing the visit in any way.

Motion at 5-6.

*/ Motion at 3.

concludes that "[i]t is essentially impossible to have a conversation about the South Texas Project, much less to visit and tour the site, without becoming involved in discussions or receiving communications regarding substantive matters at issue in this licensing proceeding"^{*}/ and that therefore the prohibitions against ex parte contacts have been violated.

III. Argument

CEU's Motion must be denied because the jurisdiction of this Board does not encompass matters involving the conduct of individual members of the Commission. It is well established that Licensing Boards possess only that authority delegated to them by the Commission and may not exercise any additional powers not established by regulation, Commission order or otherwise. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4) ALAB-577, 11 NRC 18 (1980); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2) ALAB-316, 3 NRC 167 (1976). Licensing Board authority to investigate actions taken by members of the Commission cannot reasonably be inferred from regulation, policy statement or

^{*}/ Motion at 3.

any Commission pronouncement in this proceeding, including CLI-80-32.

If CEU is concerned that members of the Commission may have engaged in improper behavior or been influenced by parties to this proceeding, its remedy is resort to the Commissioners themselves, not to the Licensing Board established to rule on the particular issues arising out of HL&P's application for an operating license for the South Texas Project.^{*/} The gist of CEU's motion is an effort, however, to embroil the Board in developing information as to the propriety of Commissioner Roberts' and Gilinsky's actions in touring the STP site in the absence of intervenor representatives. Such involvement by the Licensing Board is neither authorized nor proper.

The inappropriateness of Licensing Board relief in these circumstances is buttressed by the specific language of the governing regulation. In section 2.780 the Commission

^{*/} In an analogous area, the Commission has made it clear that allegations of misconduct or impropriety aimed at Commissioners must be addressed by the Commissioners themselves. 10 C.F.R § 2.704(c) provides that a presiding officer who is the object of a motion to disqualify must in the first instance rule on the motion. In Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2) CLI-80-6, 11 NRC 411 (1980), intervenors sought disqualification of two Commissioners on the basis of ex parte conversations with PG&E officials. The Commission concluded that the decision to disqualify rested exclusively with the challenged Commissioners. See also, Consolidated Edison Co. of New York (Indian Point, Unit No. 2) CLI-81-1, 13 NRC 1, 2n.1 (1981).

has clearly provided for the action to be taken by any Commissioner allegedly involved in an ex parte communication:

If unsuccessful in preventing such communication, the recipient thereof will . . . make a fair, written summary of such communication and deliver such summary to the NRC public document room and serve copies thereof upon the communicator and the parties to the proceeding involved.*/

(emphasis added). Accordingly, if the Commissioners received substantive communications relating to the instant proceeding,**/ their obligations are fulfilled by issuing statements summarizing such communications. The remedy provided by Section 2.780 does not require Applicant or Staff action.

Furthermore, the breadth of CEU's remedial request far exceeds the remedy provided under Section 2.780. That

*/ 10 C.F.R. § 2.780(c).

**/ CEU submits that Commissioner Roberts was recently quoted as saying that nuclear safety issues are so complex that the public does not understand them. It suggests that such a statement reflects "a belief that public participation in NRC hearings is a useless obstruction" and then speculates that perhaps something said during the Commissioner's tour of the STP site triggered his remarks. Motion at 4. Not only is CEU's disparaging characterization of the Commissioner's remarks unjustified, it also utterly fails to provide any support for the charge that ex parte communications occurred during the February 21, 1982 visit.

provision, in an effort to preserve the integrity of the adjudicative process, mandates disclosure, via a fair, written summary, of only substantive communications relevant to the issues in the proceeding in question. No disclosure is required if the ex parte contacts involved purely procedural or other matters bearing no relationship to the admitted issues. CEU, however, has requested disclosure of information that cannot possibly be viewed as substantive, let alone relevant to the issues in the operating license proceeding. Much of the information requested relates to the logistical planning for the Commissioners' visits.^{*/} No basis exists for disclosure of conversations, correspondences or memoranda generated as part of such purely administrative matters as the effort to plan and implement the Commissioners' requests for site tours.

CEU also seeks identification of all participants in the site visits and sworn affidavits from all such persons describing their recollections, without regard to the nature of their participation or the substance of the communications in which they participated. Finally, all documents "related

^{*/} CEU seeks the names of all persons involved in planning the visits, detailed descriptions and chronologies of all contacts with the Commissioners' offices and production of all documents "concerning arrangements for and preparation for the visit[s]." Motion at 5.

to the visit[s]" are requested.^{*/} Once again, if any ex parte communication took place during the Commissioners' site tours, all that would be required would be an accurate, written summary of the gist of those substantive remarks. No burden of the type requested by CEU would be imposed on individuals incidentally involved in the Commissioners' visits.

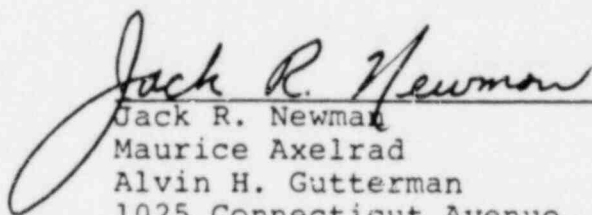
IV. Conclusion

The Licensing Board has no jurisdiction over alleged ex parte communications between parties to this proceeding and members of the Commission. Clearly any request for relief must be addressed to the Commissioners themselves, rather than the subordinate Licensing Board. Furthermore any request for relief from HL&P or the NRC Staff is misplaced given the remedy provided in Section 2.780. Finally, it is manifest that CEU has requested extraordinary and superfluous relief to which it would not be entitled even if its claim had been raised in the appropriate forum. For the

^{*/} Motion at 6.

reasons stated above, CEU's Motion should be denied.

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: March 16, 1982

LOWENSTEIN, NEWMAN, REIS
& AXELRAD
1025 Connecticut Ave., N.W.
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

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CERTIFICATE OF SERVICE

I hereby certify that copies of APPLICANTS' RESPONSE TO CITIZENS FOR EQUITABLE UTILITIES' MOTION TO REQUIRE FULL DISCLOSURE AND INDEPENDENTLY PREPARED AFFIDAVITS DATED MARCH 1, 1982 have been served on the following individuals and entities by deposit in the United States mail, first class, postage prepaid, on this 16th day of March, 1982.

Charles Bechhoefer, Esq.
Chairman, 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, North Carolina 27514

Ernest E. Hill
Administrative Judge
Lawrence Livermore Laboratory
University of California
P.O. Box 808, L-46
Livermore, California 94550

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

Brian Berwick, Esq.
Assistant Attorney General
for the State of Texas
Environmental Protection
Division
P.O. Box 12548, Capitol Station
Austin, Texas 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, Texas 78233

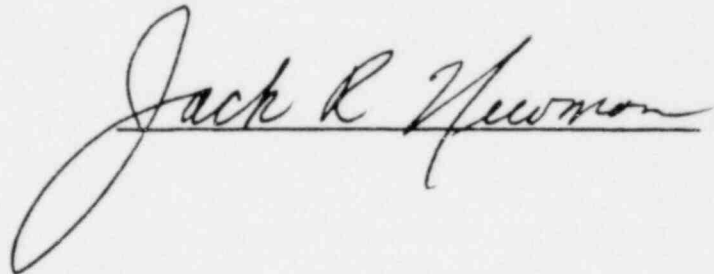
Lanny Sinkin
2207-D Nueces
Austin, Texas 78705

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

A handwritten signature in cursive script that reads "Jack R. Newman". The signature is written in dark ink and is positioned in the lower right quadrant of the page.

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I hereby certify that copies of Applicants' letter to Commissioner Victor Gilinsky and Commissioner Thomas M. Roberts dated March 16, 1982, have been served on the following individuals and entities by deposit in the United States mail, first class, postage prepaid, on this 16th day of March, 1982.

Chairman Nunzio J. Palladino
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Victor Gilinsky
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Peter A. Bradford
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner John F. Ahearne
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Thomas M. Roberts
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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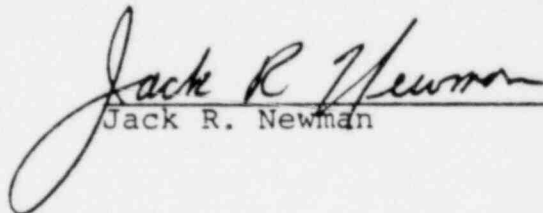
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