

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



BEFORE THE COMMISSION

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 TO APPLICANTS' MOTION
FOR ACTION BY THE COMMISSION IN LIGHT
OF THE APPEAL BOARD'S ORDER OF APRIL 15, 1982

Jay M. Gutierrez
Counsel for NRC Staff

April 28, 1982.

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I. INTRODUCTION

On April 20, 1982, the Applicants filed two (2) pleadings with the Commission: "Motion for Actions by the Commission in Light of the Appeal Board's Order of April 15, 1982" (Applicants' Motion) and "Applicants' Petition for Review of Appeal Board's Order of April 15, 1982" (Applicants' Petition). Applicants' Petition seeks Commission review of the Appeal Board's April 15, 1982, Order in the South Texas proceeding disqualifying Administrative Judge Ernest Hill.^{1/}

1/ 10 C.F.R. § 2.786(b)(3) states in relevant part:

"[a]ny other party to the proceeding may, within ten (10) days after service of a petition for review, file an answer opposing Commission review. . . . No answer in support of a petition for review or further replies to answers will be entertained by the Commission."

The Staff does not intend to file a brief in opposition to the Applicants' Petition for Review.

Applicants' Motion seeks additional interim relief pending Commission review of the Appeal Board's disqualifying order in light of certain actions taken by the Licensing Board in response to that order. Specifically, the Applicants request that the Commission: (i) direct Judge Bechhoefer and Judge Lamb to proceed with the scheduled hearings in May and June under the quorum rule; (ii) order an expedited briefing schedule should the Commission determine to review the Appeal Board's order; (iii) direct the Appeal Board to expedite the issuance of its memorandum in support of its order; and (iv) instruct the Chairman of the Atomic Safety and Licensing Board not to appoint a replacement for Judge Hill until the Commission determines whether to review the Appeal Board's order.

II. BACKGROUND

On September 22, 1980, the Commission ordered this Licensing Board to hold an expedited hearing on the QA/QC issues in this operating license proceeding and to issue an early and separate decision on that aspect of the application.^{2/} Pursuant to the Commission directive, a prehearing conference was held in November 1980, and an order was prepared

^{2/} Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), CLI-80-32, 12 NRC 281, 291-2 (1980).

wherein the issues of the expedited portion of the operating license proceeding were articulated and a schedule was established for discovery and prehearing matters.^{3/} The evidentiary hearing commenced May 4, 1981. This hearing has continued over the past year to the present and has generated over 10,000 transcript pages.

On September 24, 1981, Houston Lighting and Power (HL&P) informed the Board and parties that Brown and Root had been dismissed as the architect-engineer of the South Texas Project and that Bechtel Power Corporation has been awarded that function.^{4/} On September 28, 1981, HL&P notified the Board and parties of the existence of a review of Brown and Root design engineering prepared by the Quadrex Corporation (the Quadrex Report). Due to these developments a fourth prehearing conference was held on December 8, 1981. In its Fourth Prehearing Conference Order of December 16, 1981, the Board determined to further divide this hearing into three phases: the current expedited phase previously ordered by the Commission together with certain topics relative to the transition of functions; a second phase on all aspects of the Quadrex Report following Bechtel's analysis and the Staff's review of that report; and finally, a hearing session at a time nearer to the project's completion date on emergency planning and any other remaining issues.

^{3/} See, Second Prehearing Conference Order, December 2, 1980.

^{4/} Subsequently, the Board and parties were advised that Brown and Root would be replaced as the constructor by Ebasco Services, Inc.

On March 9, 1982, with approximately two weeks of hearing required to close the record on the expedited phase of the application, Citizens Concerned About Nuclear Power (CCANP) filed a motion for Administrative Judge Ernest E. Hill to recuse himself from further participation in this proceeding. The motion and supporting affidavits challenged Judge Hill's impartiality. By an Order dated April 13, 1982, the Licensing Board, sitting as a quorum, denied CCANP's Motion as without merit. In addition, Judge Hill declined to recuse himself for reasons set forth in a separate statement attached to the Licensing Board's Order.

In accordance with 10 C.F.R. § 2.704(c), the Licensing Board referred its decision to the Appeal Board to "determine the sufficiency of the grounds alleged." In an Order of April 15, 1982, the Appeal Board concurred with the Licensing Board that CCANP's motion and supporting affidavits did not provide a sufficient grounds for Judge Hill's recusal; however, the Appeal Board went on to say that certain of the comments contained in Judge Hill's separate statement gave rise to serious doubt respecting his ability to judge CCANP and its assertions dispassionately. The Appeal Board set forth its reasoning behind that conclusion in a memorandum issued April 21, 1982.^{5/}

On April 19, 1982, the remaining members of the Licensing Board, over the objections of both the Applicants and NRC Staff, cancelled the

^{5/} See Houston Lighting and Power Company, et al. (South Texas Project, Units 1 & 2), ALAB-672, ___ NRC ___ (1982).

evidentiary hearings set for the week of April 19, 1982, and deferred to a later date the determination of whether to hold the hearings currently scheduled for May and June until the "uncertainties concerning the disqualification order are resolved."^{6/} On April 20, 1982, the Applicants brought the instant motion directly before the Commission rather than the Appeal Board because it felt that it was essential for the Commission to step in at this time to provide the guidance and direction necessary to assure that these matters are resolved promptly and that no further unnecessary delay occurs. Motion at 3.^{7/}

III. DISCUSSION

In its motion, the Applicants ask the Commission to take the following action:

- (1) Direct Chairman Bechhoefer and Judge Lamb to proceed under the quorum rule with the hearing sessions scheduled in May and June and any extension or additions thereto as may be appropriate, until the Commission completes its review of the Appeal Board's Order;

^{6/} The Licensing Board's decision to cancel further hearings pending resolution of any challenges to the disqualification order originally was announced in a conference call between the parties and the Board on April 16, 1982. Hearings are currently scheduled for the weeks beginning May 3, June 1, and June 14.

^{7/} If the Commission deems it appropriate to refer Applicants' Motion to the Appeal Board for a ruling in the first instance, the Staff requests this answer be similarly referred. See, Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-5, 13 NRC 361, 364 (1981).

(2) Determine to review the Appeal Board's order of April 15, 1982, and direct all parties to file briefs thereon on an expedited basis within 10 days after the date of the Appeal Board's forthcoming opinion (e.g., by May 3 if the Appeal Board's opinion is issued on April 23);

(3) Direct that the Appeal Board serve all parties on an expedited basis when it issues its opinion, and advise the Commission and the parties of the tentative date of issuance if it is not issued on or before April 23;

(4) Instruct the Chairman of the Atomic Safety and Licensing Board Panel not to appoint a replacement for Judge Hill until the Commission completes its review of the Appeal Board's Order. [footnote omitted]."

The Staff will address each requested action in turn. As to the first, the Commission's rules of practice provide that hearings by quorum are allowed. 10 C.F.R. § 2.721(d); Commonwealth Edison Company (Zion Station, Units 1 & 2), CLI-74-35, 8 AEC 374, 376 (1974). In the instant case, the Commission has expressly ordered this Licensing Board to proceed on an expedited basis and issue an early and separate decision on the QA/QC aspects of the operating license. See, Houston Lighting and Power Company, et al. (South Texas Project, Units 1 & 2), CLI-80-32, 12 NRC 281, 291-2 (1980). Since approximately two more weeks of hearing would close the expedited phase of the record on matters not related to the Quadrex Report, the hearing should continue. The Staff sees no reason why the Board should await final disposition by the Commission of the Applicants' Petition seeking review of Judge Hill's disqualification before proceeding. As the Commission observed in Zion, supra, 8 AEC at 375-376, "the hearing transcript is always available to the absent board member [whether that be Judge Hill or a new member]; witnesses can be recalled to answer questions by that member if it is essential; and, in any event, the Licensing

Board's final decision must rest upon the record as developed in a particular case."^{8/}

The second action requested by the Applicants simply states their desire to have an expedited briefing schedule should their petition for review be accepted. In light of the fact the Commission has already directed this proceeding to go forward on an expedited basis in CLI-80-32, 12 NRC 281, the Staff concurs with the Applicants' suggestion. Nothing need be said relative to the third action requested directing the Appeal Board to file its opinion on an expedited basis since the Appeal Board's memorandum was issued on April 21, 1981.

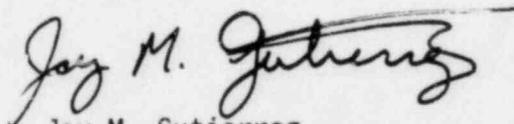
With respect to the fourth item of relief requested, the Staff agrees with the Applicants that until the Commission decides whether or not to review ALAB-672 it would be premature for the Chairman of the Atomic Safety and Licensing Board Panel to appoint a replacement for Judge Hill. It would be an inefficient use of Licensing Board resources for a new panel member to be appointed if the Commission eventually reverses ALAB-672, and therefore any appointment should await final Commission action relative to the Appeal Board's order.

^{8/} The Staff acknowledges that scheduling matters are typically within the sound discretion of the Licensing Board, however, in the present proceeding the Licensing Board's discretion has to a great extent been removed by the Commission in ordering an expedited hearing. Houston Lighting and Power Company et al., (South Texas Project, Units 1 & 2), CLI-80-32, 12 NRC 281 (1980).

IV. CONCLUSION

For the reasons aforesaid, the Staff respectfully submits that the Commission should direct the Licensing Board to proceed under the quorum rule with hearing sessions currently scheduled for May and June, establish an expedited briefing schedule should review of ALAB-672 be accepted and direct the Chairman of the Atomic Safety and Licensing Board Panel not to appoint a replacement for Judge Hill until the Commission determines whether to review ALAB-672.

Respectfully submitted,

A handwritten signature in cursive script that reads "Jay M. Gutierrez". The signature is written in black ink and is positioned above the typed name and title.

Jay M. Gutierrez
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 28th day of April, 1982.

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE TO APPLICANTS' MOTION FOR ACTION BY THE COMMISSION IN LIGHT OF THE APPEAL BOARD'S ORDER OF APRIL 15, 1982 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 28th day of April, 1982.

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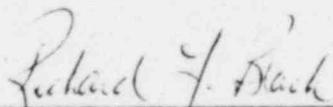
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