

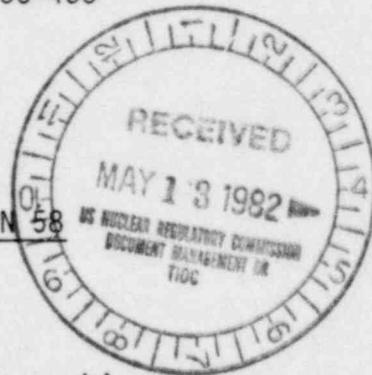
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
HOUSTON LIGHTING AND POWER COMPANY)
(Allens Creek Nuclear Generating)
Station, Unit 1))

Docket No. 50-466



NRC STAFF RESPONSE IN OPPOSITION TO
INTERVENOR DOHERTY'S MOTION TO ADD CONTENTION 58

I. INTRODUCTION

On April 22, 1982, Intervenor Doherty filed a motion seeking admission of Contention 58 in this proceeding. Contention 58 is composed of two parts -- (A) and (B) -- and generally pertains to the Applicant's alleged failure to report deficiencies pursuant to 10 C.F.R. § 50.55(e) found by the Quadrex Corporation in its report on design and engineering work by the Brown & Root Company at the South Texas Nuclear Project (STP). In Contention 58(A), Intervenor Doherty alleges that the Applicant's failure to comply with 10 C.F.R. § 50.55(e) with respect to STP demonstrates that it "lacks the technical competence to construct ACNGS." (Motion, p. 1) In essence, this contention is not asserting that the Quadrex perceived deficiencies at STP will result in an adverse effect on safe operation, but rather that the Applicant lacks the technical competence to analyze the STP Quadrex Report and to recognize deficiencies in order to comply with the reporting requirements of 10 C.F.R. § 50.55(e). In Contention 58(B), Intervenor Doherty alleges

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that the Applicant deliberately prevented the NRC, the Licensing Board, and the parties in this proceeding "from learning the true significance of the Quadrex/STNP Report's findings, and their implications for judging the Applicant's technical competence . . .". (Motion, p. 6).

The record of this lengthy construction permit proceeding was officially closed on April 14, 1982. (Tr. 22020). Therefore, this motion was submitted after the closing date and, accordingly, it must be measured against both the standards that apply to a motion to reopen the record and the standards that apply to a late-filed contention. Consequently, the Staff response to this motion will consist of two parts -- (1) whether the subject matter raised in the motion is timely and significant enough to warrant reopening of the record, and (2) whether the motion satisfies the good cause and other untimeliness factors set forth in 10 C.F.R. § 2.714(a)(1) for the admission of a late-filed contention. For the reasons argued below, the NRC Staff submits that this motion to add Contention 58 must be denied.

II. DISCUSSION

A. Standards to Reopen the Record

Since the record in this proceeding has been closed, this motion must be weighed against the standards that are applicable to a motion to reopen the record. Where a record has been closed, one seeking to reopen the record with a late-filed contention has an additional burden of showing that the issues belatedly raised are significant and might lead to a different result in the proceeding. See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant, Units 1 & 2), ALAB-598, 11 NRC 876,

879 (1980); Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978). Thus, a record in an NRC proceeding should not be reopened absent a strong showing that the new proffered information is of environmental or safety significance which might change the outcome of the proceeding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 64 n. 35 (1977); Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-573, 10 NRC 774, 804 (1979); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Plant), ALAB-138, 6 AEC 520, 523 (1973), reconsid. den., ALAB-141, 6 AEC 576.

An additional factor to be considered in deciding the merits of a motion to reopen is whether it was timely filed. Although a motion to reopen may be filed and the Licensing Board may at any time entertain it prior to issuance of the full initial decision, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-86, 5 AEC 376 (1972), the question of timeliness hinges more on whether the matters sought to be addressed on the reopened record could have been raised earlier. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83 (1978).

In sum, a decision on whether to reopen a record to litigate a new issue rests on the consideration of three factors: (1) Is the motion timely? (2) Does it address significant safety or environmental issues? (3) Might a different result have been reached had the newly proffered material been considered initially. Diablo Canyon, supra. However, the controlling consideration is the seriousness of the issues raised. Vermont Yankee, supra.

The instant motion has not separately addressed these discrete factors nor has it attempted to argue the overall merits of reopening the record.^{1/} However, the motion has set forth sufficient facts with respect to the proffered issue in order to assess the above factors. We now turn to that assessment.

1. Timeliness

Intervenor Doherty contends that he filed this motion in a timely manner after the Board allegedly foreclosed his inquiry at the April 12th hearing into matters pertaining to the Applicant's ability to recognize and assess 10 C.F.R. § 50.55(e) deficiencies and the Applicant's withholding of the STP Quadrex Report. (Motion, p. 8, 9) This allegation falls wide of the mark and must be rejected to establish timeliness for several reasons.

First, it is clear that the facts giving rise to the matters on which Mr. Doherty wishes to reopen the record were known to him at least six months ago when he first filed a motion to consider issues relating to the STP Quadrex Report. On October 15, 1982, Mr. Doherty filed a motion with the Board requesting additional evidence on TexPirg Contention 31 in light of the STP Quadrex Report. The Board requested further specification in an Order dated November 10, 1981, and Mr. Doherty supplied that information in a renewed motion dated December 7, 1981. The renewed motion specified issues (A) through (O) which the Board

^{1/} Apparently, Intervenor Doherty filed this motion under the impression that only the good cause and other factors set forth in 10 C.F.R. § 2.714(a) had to be addressed.

accepted in its January 28, 1982 Order. Thus, Mr. Doherty shaped the course of the April 12th hearing through his motions. At no time did his prior motions raise the issue of the Applicant's ability to recognize and assess 10 C.F.R. § 50.55(e) deficiencies. There are no new facts alleged in the instant motion pertaining to the Applicant's capability or conduct which were not largely known to him at the time of his previous filings. Accordingly, he was given ample opportunity to raise the issue, he did not do so, and now his motion to again reopen the record on these facts over six months later is certainly untimely.^{2/}

Further, the allegation infers that the Board improperly limited the scope of inquiry at the April 12th hearing. This inference simply demonstrates Mr. Doherty's continuing mistaken impression regarding the scope of the further hearing on the technical qualification issue (TexPirg Contention 31) established by the Board's Order of January 28, 1981. In essence, the Board's Order requested testimony regarding "what specific corrective or preventive procedures HL&P will follow to assure

^{2/} With respect to the issue of the Applicant's deliberate non-disclosure of the STP Quadrex Report (Proposed Contention 58(B)), we would also note that Mr. Doherty could have raised this issue in a timely fashion to be heard at the April 12th hearing. Apparently, Mr. Doherty has based this contention on an NRC Staff assessment of the chronology of the STP Quadrex Report, dated December 15, 1981, which was attached to the NRC Staff's Reply to Intervenor Doggett's First Set of Interrogatories and Request for Documents, dated March 24, 1982. However, the Board on April 8, 1982, ruled that the timing of the Report's disclosure was only marginally relevant and it was only interested in why Staff and Applicant witnesses did not advert to and discuss the STP Quadrex Report during the October 1981 hearings. (Order, p. 7) Accordingly, by raising this issue on April 22, 1982, Mr. Doherty is seeking reconsideration of a Board ruling of April 8, 1982 and, therefore, it should be denied as untimely. Cf. 10 C.F.R. § 2.752(c).

that these [Quadrex perceived] problems [at STP] will not recur at Allens Creek." (Order, p. 3; see also p. 6). The Board further noted in an Order dated April 8, 1982, that "it considered as only marginally relevant the reason(s) why the Quadrex Report was not brought immediately to our attention and why it was not referred to during the October, 1981 hearings." (Order of April 8, 1982, p. 7). Mr. Doherty interpreted these two Board orders as "opening the door" to unlimited inquiry into the specific deficiencies highlighted in the STP Quadrex Report and the timing of that Report's disclosure to the NRC and the Licensing Board. Mr. Doherty prepared for the April 12th hearing under this impression. His impression of the scope of the hearing was wrong and the Board properly limited his cross-examination on numerous occasions at the hearing. (See e.g., Tr. 21688, 21696, 21727, 21834).

Through this motion, Mr. Doherty claims that he misunderstood the scope of the further hearing and, therefore, this motion to reopen should be considered timely because the issues he seeks to raise were subsequently explicitly ruled to be outside the scope of the hearing. However, this argument on timeliness ignores the fact that the issue regarding the Applicant's ability to comply with 10 C.F.R. § 50.55(e) could have been raised in a timely fashion by Mr. Doherty as we discussed earlier. The fact that he might have believed that the hearing had been reopened to consider the matter now raised is immaterial. The basis of motions to reopen a record must be new facts -- not a misinterpretation of prior Board orders. A contrary ruling would give a party a ground to reopen a record and expand contentions each time it is dissatisfied with rulings

on the scope of a hearing, and vitiate the Commission's regulations requiring the early setting of contentions and issues to be litigated. See 10 C.F.R. §§ 2.714 & 2.714(a).

Finally, Mr. Doherty has alleged that because the Board limited inquiry at the hearing into matters pertaining to 10 C.F.R. § 50.55(e) deficiencies, he must necessarily raise this issue anew through this motion after the hearing. However, this allegation is also without merit because it ignores the fact that the Board did allow quite extensive cross-examination into areas pertaining to HL&P's ability to comply with 10 C.F.R. § 50.55(e). (Tr. 21557-75; 21835-43).

In summation, with respect to the factor of timeliness, the record in this proceeding discloses that not only could the issues sought to be admitted have been raised earlier, but, in fact, the Board did allow examination into matters pertaining to 10 C.F.R. § 50.55(e) deficiencies at STP. The facts surrounding this motion show that Mr. Doherty was given ample opportunity to set forth issues regarding the STP Quadrex Report. Based on Mr. Doherty's motions, the Board issued two orders prior to the hearing delineating the issues to be heard and the proper scope of the hearing. If Mr. Doherty was confused with regard to the Board's January 28, 1982 Order, he should have filed a motion for reconsideration or clarification of that order within the time period prescribed by the Commission's regulations. See 10 C.F.R. § 2.752(c). He did not do so. Under these circumstances, this belated motion is certainly not timely.

2. Significant Issues.

The most important factor in assessing a motion to reopen is whether the issues sought to be litigated are significant new issues. Vermont Yankee, supra. There can be no doubt that an Applicant's ability to recognize and assess design deficiencies and its integrity with respect to disclosure to the NRC are significant and serious issues. However, Mr. Doherty has failed to provide any basis to support an allegation that HL&P does not possess the ability to assess such deficiencies and that disclosure to the NRC was improper under 10 C.F.R. § 50.55(e). In fact, Mr. Doherty is merely arguing that although he is not certain whether the STP Quadrex Report concluded that there were any 10 C.F.R. § 50.55(e) deficiencies, the fact that the "Applicant found so little reportable material" calls into question "its competence to comply with the intent of this important safety related regulation." (Motion, p. 4.)^{3/} In other words, Mr. Doherty is only speculating that the STP Quadrex Report probably uncovered some design deficiencies that should have been reported under 10 C.F.R. § 50.55(e). HL&P's failure to report these deficiencies, Mr. Doherty reasons, is because it lacks the technical ability to do so.

As indicated earlier, Mr. Doherty shoulders a heavy burden to show that this record should be reopened to litigate these issues. His speculation on these issues does not meet the burden necessary to demonstrate that the issues are significant and serious.

^{3/} The STP Quadrex Report did not make any conclusions on whether design deficiencies should be reported under 10 C.F.R. § 50.55(e). (Tr. 21562, 21573)

3. Change Outcome of Proceeding

The final factor to be considered in a motion to reopen is whether a different result might be reached if the newly proffered material is considered. Mr. Doherty has made no argument on this factor. However, the Staff submits that consideration of the proffered issues would not change the outcome of the proceeding for several reasons. First, there is no evidence to suggest that the STP Quadrex Report uncovered any unreported 10 C.F.R. § 50.55(e) deficiencies. (See Tr. 21562, 21573).^{4/} Secondly, there is no evidence in this motion or on the record to suggest that HL&P lacks the technical capability to recognize and assess design deficiencies highlighted by the Quadrex Report. (See HL&P's Supplemental Findings of Fact on TexPirg Additional Contention 31, Technical Qualifications, ¶ 314C, dated April 21, 1982.) Finally, there is no evidence to suggest why any perceived design deficiencies at STP would have any bearing on the issue of whether HL&P is technically qualified to design and construct Allens Creek. Although it could be argued that HL&P's alleged inability to recognize, assess, and report design deficiencies at STP does have some relevance to its ability to do these things with respect to Allens Creek, Mr. Doherty has not, and probably cannot, demonstrate that HL&P was not technically qualified to undertake the review and reporting requirements required by 10 C.F.R. § 50.55(e).

^{4/} This lack of potentially reportable deficiencies has been confirmed to some degree by the independent preliminary assessment conducted by Bechtel of the STP Quadrex Report. (See Tr. 21568-69).

B. Standards to File Late Contention

Mr. Doherty's motion seeking admission of Contention 58 after the record of this proceeding has been closed must also be measured against the provisions of 10 C.F.R. § 2.714(a)(1) for non-timely petitions to intervene. In essence, a late-filed contention is considered the same as an untimely petition to intervene and will not be entertained absent a determination by the Board that the contention should be admitted based upon a balancing of the following five factors:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Furthermore, the burden of establishing the requisite "good cause" and the weight to be accorded to the other factors rests with the petitioner. See 10 C.F.R. § 2.723; 10 C.F.R. § 2.714(a)(1); Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

Initially, the Staff would note that if a party cannot meet the requisite burden to reopen a record to litigate a new issue, it would follow that the party would not be able to provide "good cause" and establish the necessary weight to tip the balance in favor of admitting a

late-filed contention. Thus, the Staff believes that the standards to reopen a record are controlling and it should be unnecessary to rehash those same arguments with respect to a late-filed contention. However, we have found no case law to give guidance as to which standard is controlling and, in the absence of such, our assessment of the Section 2.714(a)(1) standards is set forth below.

As indicated earlier, Mr. Doherty asserts that he misunderstood the Board's order with respect to the scope of the April 12th hearing and the Board's position on the scope did not become clear until the hearing. Therefore, he believes good cause exists to file this late contention. For the reasons that the Staff advanced in Section A(1), supra, we submit that Mr. Doherty's assertions do not provide "good cause." In essence, Mr. Doherty had ample opportunity to raise these belated issues and did not do so. He should have asked for reconsideration or clarification of the Board's orders rather than wait until the record was closed, and then attempt to reopen the proceeding.

With respect to the other four factors listed above, Mr. Doherty basically asserts that (1) this proceeding is the only available forum for determining whether Applicant should receive a construction permit, (2) absent the admission of this new contention, the record will be seriously flawed, (3) he has already been recognized as representing an independent viewpoint, and (4) the primary responsibility for delay rests with the Applicant. (Motion, pgs. 9-11.)

The Appeal Board in a recent Allens Creek decision (ALAB-671, March 31, 1982), underscored the fact that a petitioner's burden on the Section 2.714(a) factors is a heavy one particularly "where not merely

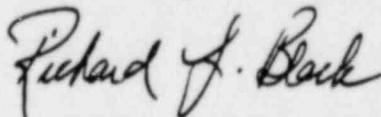
trial preparation but also the hearing itself has already taken place by the time the belated petition is received." (Slip op., p. 5-6.) With this advice in mind, the Staff submits it is clear that the above assertions tendered by Mr. Doherty fall far short of not only negating the lack of "good cause", but also weighing in favor of admission of the late contention. The only factors that could possibly be weighed in Mr. Doherty's favor are (ii) -- the availability of other means to protect his interests -- and (iv) -- the extent to which the petitioner's interest will be represented by existing parties. However, these factors are not directly relevant here because Mr. Doherty did have an opportunity to request further evidence and cross-examine on Quadrex related matters. On the other hand, certainly the admission of this issue would broaden the issues and delay the proceeding and it is questionable whether Mr. Doherty's participation could assist in developing a sound record particularly in light of his inexperience and lack of expertise in design and engineering and other related areas.

In sum, a balancing of the five factors of 10 C.F.R. § 2.714(a) weigh against the late admission of these contentions. Good cause has not been established for this late filing and because the potential for delay with respect to the issuance of an initial decision is significant and serious, the Licensing Board should deny the motion based on the requirements of 10 C.F.R. § 2.714(a).

III. CONCLUSION

Based on the foregoing discussion, the Staff submits that this motion meets neither the standards applicable to reopen the record nor the standards applicable to admit a late-filed contention. For these reasons, this motion must be denied.

Respectfully submitted,

A handwritten signature in cursive script that reads "Richard L. Black".

Richard L. Black
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of May, 1982.

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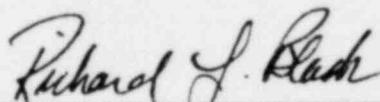
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