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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)	Docket Nos. 50-498 OL
COMPANY, ET AL.)	50-499 OL
)	
South Texas Project,)	
Units 1 and 2)	

APPLICANTS' RESPONSE TO CCANP'S
MOTION TO ADOPT CONTENTIONS
OF INTERVENOR CEU

I. Introduction

By letter dated June 14, 1982 Intervenor Citizens For Equitable Utilities (CEU) and Houston Lighting and Power (HL&P), jointly requested that the Atomic Safety and Licensing Board (Board) permit CEU to withdraw from this proceeding. At the hearing session on June 15, 1982 the Board approved CEU's withdrawal. Tr. 10384. Citizens Concerned About Nuclear Power, Inc. (CCANP) thereafter sought to adopt CEU's contentions and was granted until July 12, 1982 to file a motion for that purpose. Tr. 10669-70; Memorandum, at 3 (June 24, 1982). The Board subsequently granted CCANP's unopposed request for an extension of time to file its motion until August 2, 1982.

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Order (July 9, 1982).^{*/} On July 30, 1982 CCANP served its Motion To Adopt Contentions Of Intervenor Citizens For Equitable Utilities (Motion), seeking to adopt CEU contentions 4-8 as admitted by the Board in its August 3, 1979 Memorandum and Order.

CCANP makes no effort to justify its adoption of CEU's contentions under applicable NRC standards and instead, seems to assume that it is entitled to adopt those contentions, three years after they were admitted, by simply requesting to do so. Since, as we demonstrate below, CCANP has failed to make the showing necessary to permit its adoption of CEU's contentions, its Motion must be denied.

II. Argument

CCANP's Motion is governed by the standards applicable to late petitions for leave to intervene and late-filed contentions. Those standards are set forth in 10 CFR § 2.714(a)(1) and require a showing of good cause as well as a balancing

^{*/} At the hearing CCANP was also given until July 12, 1982 to indicate which if any of the proposed "American Bridge" contentions, first filed by CEU and later co-sponsored by CCANP, it still wished the Board to rule upon in light of the removal of Brown & Root from the Project. Tr. 10669-70; Memorandum, at 3-4 (June 24, 1982). This deadline also was extended until August 2, 1982. Order (July 9, 1982). Since CCANP has not filed any request to pursue the "American Bridge" contentions within the extended deadline established by the Board, those contentions are no longer under consideration for admission.

of four additional factors.* /

Application of Section 2.714(a)(1) is not affected by the fact that the contentions are those of a withdrawing participant. In Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977), the Appeal Board addressed a situation very similar to the one in question here. There, the State of Louisiana (State), participating as an "interested State" pursuant to 10 CFR § 2.715(c), advised the Appeal Board that it would no longer participate in the proceeding. Shortly thereafter, a petitioner filed a late petition for leave to intervene in an effort to "substitute itself" for the State and "to pursue the same issues which that participant had advanced." Id. at 795. Because it

* / Section 2.714(a)(1) specifically requires a balancing of the following 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.

The statement of consideration explaining Section 2.714(a)(1) makes clear that that provision must be applied in ruling upon the admissibility of late-filed contentions as well as late intervention petitions. 43 Fed. Reg. 17798 (1978). See also, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2) CLI-81-5, 13 NRC 361 (1981); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-24; 12 NRC 231 (1980). Thus the application of Section 2.714(a)(1) is clearly not restricted to the introduction of new parties to a proceeding.

intended to adopt the issues developed by the State and to take "the case as it [found] it," the petitioner argued that it need not demonstrate good cause for its failure to file in a timely fashion. Id. In rejecting this argument, the Appeal Board held that all late petitions must address the requirements of Section 2.714(a)(1) "no matter whether intervention is being sought on a substitution basis or, instead, for some other reason." Id. at 796.

In an effort to demonstrate good cause for its late petition, the petitioner stated that it had been "lulled into inaction by the State of Louisiana." Id. In rejecting this argument, the Appeal Board quoted Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 645 (1977), a case in which a petitioner sought late intervention because she had relied on the State of South Carolina to protect her interests and had become dissatisfied with the quality of that representation:

That explanation . . . will not carry the day. It is not claimed the State undertook to represent the interests of the petitioner specifically, as opposed to the public interest generally. This being so, [the petitioner] assumed the risk that the State's degree of involvement in the proceeding would not fulfill her expectations. And a foreseeable consequence of the materialization of that risk was that it would then no longer be possible to undertake herself the vindication of her interests.

Several other cases have arrived at similar conclusions in analogous circumstances. In Consolidated Edison Co.

(Indian Point Station, Unit No. 2), LBP-82-1, 15 NRC 37 (1982), petitioners for late intervention had believed that certain issues would be considered in another, related proceeding. In rejecting the petitioners' attempt to demonstrate good cause, the Board stated:

Just as a petitioner may not rely upon its interests being represented by another and then justify an untimely petition to intervene on the other's withdrawal from the proceeding [citing River Bend and Cherokee], a petitioner may not rely on the pendency of another proceeding to protect its interests and then justify its late petition on that reliance when the other proceeding fails to encompass petitioner's interests.

Id. at 39-40. See also South Carolina Electric and Gas Co.

(Virgin C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887 n.4 (1981). In Easton Utilities Comm'n v. AEC, 424 F.2d 847, 852 (D.C. Cir. 1970), the court, in affirming the denial of a late intervention petition stated:

We do not find in statute or case law any ground for accepting the premise that proceedings before administrative agencies are to be constituted as endurance contests modeled after relay races in which the baton of proceeding is passed on successively from one legally exhausted contestant to a newly arriving legal stranger.

Thus the case law demonstrates that a showing of good cause will be required before a petitioner can substitute itself for an existing party based upon the latter's withdrawal or the former's dissatisfaction with the quality of its

representation on the issues in question. The cases also demonstrate that the simple assertion that a petitioner had relied upon another party to protect its interests will not establish good cause for a late filing. This conclusion is not affected by the fact that CCANP is an existing party in this proceeding. CCANP had ample opportunity to seek to join in sponsoring CEU's contentions when they were first proposed and chose instead to rely on CEU, if indeed, CCANP even perceived an interest in those contentions at all.*/

CCANP's Motion is the first indication that it has ever had an interest in litigating CEU contentions 4-8. As such, it was incumbent upon CCANP to come forward and make a showing that its adoption of those contentions at this stage in the proceeding is justified based upon the relevant criteria.**/ This it utterly failed to do.

*/ On at least one occasion, CCANP affirmatively demonstrated its recognition of the fact that it had to co-sponsor contentions if it wished to protect its perceived interests. In its letter to the Board dated September 21, 1981 CCANP joined CEU in sponsoring the then proposed "American Bridge" contentions.

**/ Unlike Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521 (1979), where the Appeal Board indicated that an intervenor or petitioner cannot anticipate the objections that may be made to its proffered contentions and therefore is entitled to file a response to those objections when proffered, CCANP, in this case, clearly had the burden of coming forward in the first instance with a showing that application of the factors set forth in Section 2.714(a)(1) justified its adoption of CEU's contentions. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350 (1980).

No effort was made by CCANP to demonstrate good cause for seeking to adopt these contentions now, after a history of disinterest. Its Motion states only that "CEU has already met the standards of specificity and established a sufficient basis" for these contentions. Although that was a prerequisite for their admission three years ago, it is wholly irrelevant to whether CCANP is entitled to adopt the contentions now. CCANP's allegation that the contentions relate to "potentially serious health and safety problems" is similarly irrelevant. No contentions are admitted unless they relate to health and safety or environmental matters within the Commission's jurisdiction. Such admissibility, however, does not mean that an intervenor can adopt them as a matter of right years later.*/

Having failed to make any showing of good cause, CCANP's burden with respect to the other criteria of Section 2.714(a)(1) is even greater. West Valley, supra; Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976). The Board's consideration of whether other means are available to protect CCANP's interests and the extent to which other parties will protect those interests should bear little weight when the Board takes into account CCANP's prior opportunity to demonstrate that it had

*/ CCANP's additional self-laudatory claim that it "considers itself obligated to pursue these questions" may purport to explain its motivation, but it neither demonstrates good cause nor relates to any of the applicable criteria.

an interest in CEU contentions 4-8 and its failure to protect that interest in a timely fashion. Furthermore, there is no reason to believe that CCANP's adoption of CEU contentions 4-8 will reasonably assist in developing a sound record.* Finally, CCANP's adoption of CEU's contentions will obviously broaden the issues and although the resulting delay may not be ascertainable with precision, the mere possibility that extensive delay may not result is not a sufficient basis for granting CCANP's Motion. River Bend, supra, 6 NRC at 798.

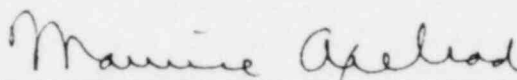
III. Conclusion

CCANP's effort to adopt CEU contentions is not significantly different from attempts by late intervention petitioners to substitute themselves for withdrawn or unsatisfactory parties. In each of these cases, the entities in question have, by inaction, undertaken the risk that their interests

*/ In this regard Applicants note that the Board has expressed some interest in hearing testimony on the issue of hurricane wind loading (CEU contention 4). Tr. 10670-71. On this or any other contention which the Board determines to constitute a "serious safety, environmental, or common defense and security matter," it may of course, exercise its sua sponte authority by setting forth the basis for its determination pursuant to 10 CFR § 2.760a. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614 (1981). However, such authority is to be used with discrimination, particularly when there is every reason to believe that the matters involved are receiving or will receive careful attention from the NRC Staff outside of the adjudicatory proceeding. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station), CLI-82-20, ___ NRC ___ (1982) (reversing the Licensing Board's decision to admit sua sponte eight new contentions). See also, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-12, ___ NRC ___ (1982) (denying the Appeal Board authorization to hear certain matters sua sponte).

would not be adequately served by the existing participants on the issues in question. CCANP has at no time prior to the instant Motion expressed any interest in the CEU contentions at issue here and its Motion fails to set forth a single basis upon which the Board may find that CCANP's delay in evidencing an interest in those issues was justified. As a result, CCANP's Motion to adopt CEU's contentions should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that "Applicants' Response to CCANP's Motion to Adopt Contentions of Intervenor CEU" and "Notice of Appearance of Donald J. Silverman" have been served on the following individuals and entities by deposit in the U.S. Mail, first class, postage prepaid on this 13th day of August, 1982.

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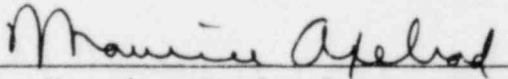
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