



## II. BACKGROUND

This Board initially admitted eight contentions in August, 1979 which were sponsored by CEU or CCANP.<sup>2/</sup> Contentions 1 and 2 allege various construction deficiencies and were jointly sponsored by CCANP and CEU.<sup>3/</sup> CCANP sponsored Contention 3, which alleges features were not incorporated in the design to prevent excessive pressure in the reactor pressure vessel. CEU sponsored Contentions 4 through 8. These contentions basically allege an: inadequate design with respect to wind loading (CEU Contention 4); inadequate treatment of bioaccumulation of radionuclides in aquatic organisms (CEU Contention 5); inadequate calculations of radionuclides deposition rates (CEU Contention 6); inadequate water supply for the cooling ponds (CEU Contention 7); and inadequate emergency plan (CEU Contention 8).

On June 15, 1982, CEU pursuant to its own request was granted leave to withdraw from this proceeding. Tr. 10,384. CEU withdrew only after participating in various settlement negotiations with Houston Lighting and Power (HL&P). It appears that one result of these negotiations is that HL&P allowed CEU to participate in its annual QA audit.<sup>4/</sup>

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<sup>2/</sup> Houston Lighting and Power Company, et al. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439 (1979); Memorandum and Order, August 3, 1979.

<sup>3/</sup> These contentions, together with certain Commission issues, have been the subject of protracted Board hearings during 1980 through 1982.

<sup>4/</sup> See letter to the Board from William S. Jordan, III and Jack R. Newman dated June 14, 1982; a letter from Don D. Jordan, Chairman and Chief Executive Officer of Houston Lighting and Power Company to Peggy Buchorn, Executive Director, Citizens for Equitable Utilities, dated June 10, 1982 and a letter from Peggy Buchorn, Citizens for Equitable Utilities to Don D. Jordan, Chairman and Chief Executive Officer of Houston Lighting and Power Company, dated June 11, 1982.

After granting CEU's request to withdraw from the proceeding, this Board allowed CCANP an opportunity to file a motion setting forth reasons why it should be granted permission to adopt any of CEU's former contentions.<sup>5/</sup> By motion dated July 29, 1982, CCANP moved the Board to permit it to adopt all five contentions previously submitted by CEU. CCANP made no showing in this filing why the Board should permit such a wholesale adoption of CEU's abandoned contentions. Instead, CCANP merely made the bold assertion that it considered itself obligated to pursue what it viewed as potentially serious health and safety problems to a satisfactory resolution.

### III. DISCUSSION

#### A. Applicable Legal Principles

When a party is dismissed or withdraws from a hearing the presumption is that its contentions are similarly removed from the proceeding. Texas Utilities Generating Company, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111 (1981). In an operating license proceeding such as the instant case, contentions are not cognizable issues before a board independent of their sponsoring intervenor unless the board finds the existence of a serious safety, environmental, or common defense and security issue independently warranting the exercise of its sua sponte authority under 10 C.F.R. § 2.760a. Id. at 1112-1113.

The Appeal Board has also determined that if an intervenor withdraws from a proceeding, an individual not previously a party cannot

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<sup>5/</sup> Tr. 10,669-10,670; Memorandum (Memorializing Certain Rulings Announced During Evidentiary Hearing Sessions of June 15-17, 1982) June 24, 1982 at 3-4.

assume the withdrawn party's contentions without satisfying the requirements under 10 C.F.R. § 2.714(a). Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 795 (1977). The Appeal Board in River Bend reasoned that a newcomer to a proceeding who simply seeks to substitute itself for a prior participant in the proceeding and to pursue the same issues which the former participant had advanced should not be excused from the "good cause" pleading requirements of 10 C.F.R. § 2.714. The Staff submits that the same reasoning should apply in situations such as here, where one intervenor seeks to substitute itself as the sponsor of all the contentions initially sponsored by a withdrawn intervenor. In essence, there must be some sound reason to permit the substitution. As stated in River Bend:

If, in the circumstances of the particular case, there is a sound foundation for allowing one entity to replace another, it can, of course, be taken into account in the making of the "good cause" determination. Id. at 796.

As stated above, CCANP's attempt to adopt contentions of a withdrawn intervenor must be considered as a submission of late-filed contentions. Accordingly, the admissibility of these contentions must be judged by a balancing of the five factors listed in 10 C.F.R. § 2.714(a)(1)(i-v) of the Commission's regulations. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364 (1981); 10 C.F.R. § 2.714(b). The five factors set forth in this section which must be considered as a precondition to admitting any late contention are:

1. Good cause, if any, for failure to file on time.

2. The availability of other means whereby the petitioner's interest will be protected.
3. The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
4. The extent to which the petitioner's interest will be represented by existing parties.
5. The extent to which the petitioner's participation will broaden the issue or delay the proceeding.

To facilitate a board in weighing these five factors, it is incumbent upon the proponent of a late contention, in this case CCANP, to address each of the five factors in its motion for new contentions and to affirmatively demonstrate that, on balance, its contentions should be admitted as matters in controversy. See Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980); cf. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975); Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-682, 11 NRC 239, 241-42 (1980); Virginia Electric and Power Company (North Anna Station, Units 1 and 2), ALAB-289, 2 NRC 395, 398 (1975); Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 388-89 (1976).

B. Application of § 2.714 to CCANP's Motion

At the onset it should be stressed, contrary to the above legal requirements, CCANP in its pleading has not even addressed the five factors of § 2.714 let alone met a burden imposed by that regulation and applicable NRC case law. Rather, CCANP rests its motion on the mistaken belief that it may simply adopt the abandoned contentions of CEU because

it perceives an unarticulated safety concern in each of them. CCANP's argument in support of its adoption of these former contentions consists solely of an assertion that each of the five contentions relate to potentially serious health and safety problems which should be satisfactorily resolved in the context of an operating license proceeding.<sup>6/</sup> CCANP has therefore not sustained its burden of evaluating the abandoned contentions against each of the five factors of 10 C.F.R. § 2.714. Notwithstanding this failure, the Staff will consider the relevant factors to determine if there is a sound reason to permit the substitution of parties on these contentions.

i. Good Cause

The sum and substance of CCANP's justification to adopt CEU's former contentions at this time is simply that the sponsoring intervenor has withdrawn from the proceeding. This is not unlike the intervenors in River Bend who asserted that they were "lulled into inaction" by the representation of their interests by an existing party. See River Bend, 6 NRC at 796-797. This justification was dismissed by the Appeal Board because it believed that contentions should not be passed like "batons" in "relay races" from "one legally exhausted contestant to a newly arriving legal stranger." Ibid., citing Easton Utilities Commission v. AEC, 424 F.2d 847, 852 (1970). Although CCANP is not a newly arriving

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<sup>6/</sup> The Staff acknowledges that since CEU already met the standards for specificity and basis for litigating its contentions while it was a party, their admissibility based on these pleading requirements is not in issue. Rather, what is in issue is whether CCANP has met the burdens imposed upon it by § 2.714 to assume sponsorship of CEU's former contentions.

party to this proceeding, it surely has to provide some justification for not asserting an interest in or adopting these contentions at an earlier time. Since contentions can be withdrawn, settled through negotiations, or dismissed through summary disposition, a party assumes the risk that another party's prosecution of a contention may not protect its interest or objectives in that contention. A foreseeable consequence of that risk is that it would no longer be able to pursue the vindication of its interests. Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 645 (1977). CCANP must be assumed to have foreseen the risk and consequences of noninvolvement as a party to the contention. This being so, good cause for adoption of the withdrawn contentions is not present under these circumstances-- particularly, when no good cause justification has been proffered.

ii. Availability of Other Means To Protect Interest

The Staff submits this is an important factor in the disposition of the instant motion inasmuch as alternate, more efficient, means exist to protect CCANP's interest in the resolution and disposition of CEU's former contentions short of litigation. CCANP, without specification in its motion, has expressed a concern that there remains potentially serious health and safety problems at the South Texas Project. All CCANP need do is identify the specific unresolved safety concerns embodied in any of CEU's former contentions and present them to the NRC Staff for consideration and resolution. This would be a preferable means to protect CCANP's asserted interest in these matters in light of the fact that to date CCANP has had neither the financial resources or technical expertise to contribute to

the presentation of evidence during litigation. Cf. Cincinnati Gas and Electric Co., et al. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-20, Slip. Op. (July 30, 1982). Be that as it may, without identification or specification of the concrete, litigable interests that CCANP may have in these subject matters, it is impossible to judge whether litigation of these concerns would be the most efficient means to resolve CCANP's interests. This factor should thus weigh heavily in denying the admissions of any further contentions.

iii. Development of a Sound Record

CCANP has demonstrated no unique capability to develop these contentions and promote the development of a sound record. In its motion it cites no expertise or particular knowledge of the subject areas represented by CEU's former contentions 4 through 8 and thus has utterly failed to explain how it, as the new sponsoring party of these contentions, will develop the record. In the absence of any explanation, this factor must be weighed against the admission of any of CEU's former contentions because the hearing record would merely reflect Staff and HL&P positions which would appear in public documents such as the FSAR, ER, FES and SERs.

iv. Broaden Issues or Delay Hearings

The admission of any of the proposed contentions will inevitably broaden the issues currently before this Board. Since the close of Phase I and the withdrawal of CEU, the only contention remaining to go to hearing from the original eight is Contention 3. CCANP has offered no explanation relative to how it will develop the former CEU contentions in a manner justifying the inevitable delay. See, section iii, supra. In

addition, CCANP has offered no explanation as to why its general concerns over the subject matter embodied in CEU's former contentions cannot be resolved by the Staff after CCANP particularizes those concerns. Accordingly, this factor weighs against the admission of each of the former CEU contentions.

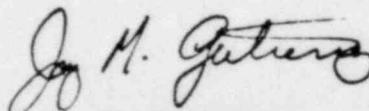
v. Representation By Existing Parties

Obviously, until CEU's withdrawal CCANP's alleged interest in these contentions was represented by CEU. However, CCANP has made no showing why its interest will not be represented by the standard technical review all applicants for an operating license are subjected to by the NRC Staff. In addition, assuming the standard review process does not cover a particular concern CCANP may have, it has not shown why the Staff's inspection and investigation programs will be inadequate to assure its concerns are resolved. Until this showing is made, this factor weighs against the admission of any of CEU's former contentions.

IV. CONCLUSION

For the reasons aforesaid, the NRC Staff submits that a consideration of the five factors of 10 C.F.R. § 2.714(a)(1)(i-v) weigh against the admission of any of CEU's former contentions as new CCANP sponsored contentions. Accordingly, the Staff submits CCANP's motion should be denied.

Respectfully submitted,



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Dated at Bethesda, Maryland  
this 18th day of August, 1982.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
HOUSTON LIGHTING AND POWER COMPANY, ) Docket Nos. 50-498  
ET AL. ) 50-499  
(South Texas Project, Units 1 & 2) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO CCANP'S MOTION TO ADOPT THE FORMER CONTENTIONS OF CEU" 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 18th day of August, 1982:

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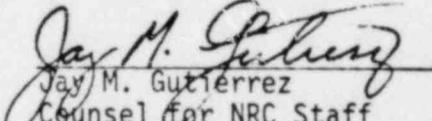
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