

UNITED STATES OF AMERICA
RECEIVED NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
'83 AUG 33 AM 55

In the Matter of)

HOUSTON LIGHTING & POWER)
COMPANY, ET AL.)

Docket Nos. 50-498 OL
50-499 OL

(South Texas Project, Units 1)
and 2))

APPLICANTS' RESPONSE TO CCANP
MOTION TO REOPEN PHASE I RECORD

I. Introduction

By motion dated August 8, 1983, Citizens Concerned About Nuclear Power (CCANP) has requested that the Atomic Safety and Licensing Board (Board) reopen the record in Phase I of this proceeding, to admit into evidence certain documents relating to a 1980 NRC Office of Inspector and Auditor (OIA) investigation report and correspondence with the Department of Justice (DOJ) concerning certain allegations of record falsification by Brown & Root employees.* / The documents upon which CCANP bases its Motion do not justify a reopening of the

* / CCANP Motion to Reopen Phase I Record (August 8, 1983), (Motion). Applicants wish to point out that the documents upon which CCANP relies are disorganized, poorly labeled and incomplete. This has hampered Applicants' efforts to respond to CCANP's Motion.

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Phase I record in this proceeding.* / Accordingly, CCANP's Motion should be denied.

II. Argument

As the Board and CCANP have recognized, the proponent of a motion to reopen bears a heavy burden. Memorandum and Order (Denying CCANP's Motion to Reopen Record), (January 10, 1983) at 2 (Memorandum and Order); Motion at 5. Unless the proponent provides new and material factual information relating to a significant safety or environmental issue, the motion must be denied. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-34A, 15 NRC 914, 916 (1982); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 994-95 (1981). In addition, the new information "must have the potential of altering the result which would otherwise be reached." Memorandum and Order at 3. CCANP's Motion

* / Although CCANP requests a reopening of the Phase I record, it also argues that "the Board could accept this new evidence in Phase II. . . ." Motion at 7. CCANP's apparent belief that the Phase II proceeding provides an open-ended forum for the consideration of any information arguably related to the Phase I issues is erroneous. The Board has clearly stated that its findings on the Phase I issues are subject to modification based upon "the information in and reviews of the Quadrex Report." Fourth Prehearing Conference Order (December 16, 1981), at 5. As to all other aspects of matters considered in Phase I, the record is closed. Tr. 10,722.

fails to meet these well-recognized criteria.* /

CCANP seeks to reopen the Phase I record on the basis of documents in two general categories. First, it requests that the Board consider certain DOJ documents related to two incidents of document falsification by Brown & Root employees. Motion at 4.** / CCANP argues that the DOJ materials document for the first time in this proceeding, that criminal violations were committed at the South Texas Project (STP), and cites the DOJ's belief that the incidents were "merely symptomatic of an overall pattern of neglect" by HL&P and Brown & Root. Id.

* / CCANP argues that the information presented in its Motion is "qualitatively different" from prior evidence and that it "provides substantiation for a conclusion that [HL&P's] character failure is even more serious than the existing record reflects." Motion at 6, 7. CCANP fails to indicate precisely why the information it seeks to introduce is "qualitatively different" from first hand evidence already in the record (including I&E reports, and independent third-party analyses), and other evidence which has been subjected to cross-examination.

** / It is not at all clear that CCANP's argument on this point is timely. At least as early as April, 1981, when the NRC Staff filed its Phase I written testimony, CCANP was aware of the NRC's referral of the document falsification incidents to the DOJ, and that the DOJ had decided not to prosecute. See, Crossman et. al. ff. Tr. 10,010 at 15, 17. If CCANP believed that DOJ actions were relevant or material, it could have sought information from the DOJ on the subject or sought to cross-examine NRC witnesses. No such effort was undertaken. Furthermore, CCANP apparently received a copy of the FBI report upon which much of the OIA report is based as early as 1980. Applicants received a copy (pursuant to a FOIA request seeking documents transmitted to CCANP) and offered to transmit a copy to CCANP upon request. Tr. 335-37.

The incidents of document falsification,^{*/} the NRC's referral of those incidents to the DOJ for possible criminal prosecution, and the DOJ's subsequent decision not to prosecute, however, were all addressed in the Phase I hearings. See e.g., Crossman et al., ff. Tr. 10,010 at 15, 17; Tr. 10,099-100. The fact that the DOJ concluded that the actions of lower level employees constituted criminal violations^{**/} adds little to the existing record, and certainly does not represent new and material factual information. The Phase I record already describes not only the actions of such employees but also prompt remedial efforts by HL&P and Brown & Root. See generally Applicants' Proposed Findings of Fact and Conclusions of Law at 135. Furthermore, whatever may be the validity of the DOJ's belief regarding HL&P's and Brown & Root's responsibility for not preventing the incidents of falsification,^{***/} it is clear that such belief, as well, does not comprise new and material factual information.

^{*/} It is clear from the documents attached to CCANP's Motion (see letter Earl J. Silbert, Esq. to Lawrence Lippe (June 2, 1981, at 2)) that the incidents of document falsification considered by the DOJ were those addressed in NRC I&E reports 80-14 and 80-21, both of which were exhibits in the Phase I proceeding. See Staff Exhibits 60 and 67.

^{**/} Letter from Lawrence Lippe to J. W. Feeham.

^{***/} It should be noted that the DOJ did not obtain any information from HL&P or Brown & Root, and relied solely on information provided by the NRC in formulating its opinion.

In Diablo Canyon, 13 NRC 903, the Appeal Board denied a motion to reopen the record on the basis of a new U.S. Geological Survey (USGS) seismic report. The Appeal Board noted that, although the USGS report provided new seismic analyses, it was based upon records and data which were in existence during the prior seismic hearings and which "were or might have been addressed at [those] hearing[s]." Id. at 994. Thus, although the USGS report was relevant to the issues before the Appeal Board, "the subject matter [the report] addresse[d] was thoroughly litigated... albeit on the basis of analyses supplied by other qualified experts." Id. at 995. Accordingly, the absence of any new and material factual information required that the motion to reopen be denied.

Similarly, the incidents of document falsification addressed by the DOJ were considered in the Phase I hearings, and thus, the factual information upon which the DOJ relied in forming its views were fully explored. As a result, the DOJ related documents do not warrant reopening the Phase I record.* /

* / The inappropriateness of reopening the record based upon the DOJ materials is buttressed by the fact that the DOJ recognized that the incidents of falsification involved "two lower level employees," and by its recognition of HL&P's efforts to rectify the DOJ's concerns. Letter from Julian Greenspun to Earl J. Silbert, Esq.

CCANP also seeks to reopen the record to admit into evidence a 1980 OIA investigation report addressing allegations of QC inspector intimidation and document falsification.*/ A review of the OIA report itself reveals that it addresses, almost exclusively, the allegations and factual matters covered at length in the Phase I proceeding. Although CCANP selects a number of specific aspects of the OIA report which it believes are "of importance to the Board's decisions in Phase I," none of the matters identified warrants reopening the Phase I record. Motion at 4.

First, CCANP cites several statements from the OIA report in which it speculates regarding the potential results of additional investigations or the alleged causes of the concerns addressed in Phase I. (CCANP items 1, 2 and 4). Id. at 4-5. None of these statements represents new and material factual information. Each is based upon OIA's subjective analysis of essentially the same allegations and factual matters addressed during the Phase I hearings. As such, they do not warrant reopening the Phase I record. Diablo Canyon, 13 NRC at 994-95.

*/ CCANP argues, in part, that certain "introductory" materials related to the OIA report are "useful as background." Motion at 4, 6. Clearly such information could not possibly meet the criteria for reopening a hearing record, particularly where as here, that record has been closed for over one year and the Board has been preparing its decision for more than seven months. Memorandum and Order at 2.

Next, CCANP argues that certain interviews memorialized in the OIA report "appearing to be with personnel not interviewed as part of 79-19 or including information not contained in 79-19" warrant reopening the record. (CCANP item 3). Motion at 4. Clearly, the mere existence of additional interviews or information does not warrant such relief.*/
CCANP, however, cites as examples, a statement by one QC inspector which addressed QC inspector morale, and another statement from an inspector relating to card playing at the site. Id. at 4-5. These statements are merely cumulative, and provide no new and material information as to matters which were fully developed in the Phase I record. See generally, Applicants' Proposed Findings of Fact and Conclusions of Law at 46-54, 69-74, 267-73.

*/ In this regard, CCANP's Motion quotes a March 31, 1981 memorandum from the NRC General Counsel to Commissioner Bradford, in which the General Counsel indicates that the OIA report contains information not previously made available to the Board or the parties. Motion at 3. The implication CCANP appears to draw from the General Counsel's statement is that the OIA report is material and relevant to the Phase I issues, and that the General Counsel believed it should be provided to the Board and the parties. As indicated above, however, the mere existence of new information does not warrant reopening the record. In addition, rather than making a judgment regarding the relevance or materiality of the OIA report to the Phase I proceeding, it is clear that the General Counsel was merely indicating that there was no legal basis to withhold the report from the public. Id. Finally, it should be noted that the General Counsel's statement regarding the existence of "additional information" was made prior to the commencement of the Phase I hearings. Thus, he was obviously in no position to judge whether the information was or was not included in the Phase I record. Id.

Finally, CCANP supports its Motion with an allegation regarding "an altercation over quality" between a QC inspector and a Project Engineer, described in two memoranda attached to the OIA report. (CCANP item 5). Motion at 5. Although this specific allegation may not have been addressed in Phase I, it is evident that it does not substantially affect the extensive record compiled in Phase I on alleged harassment and intimidation of QC inspectors, and would not be sufficient to warrant reopening that record.*/

III. Conclusion

CCANP seeks to reopen the record on the basis of certain DOJ documents relating to incidents of document falsification which were fully addressed in the Phase I proceeding, and the OIA's report concerning matters which were the very subject of that proceeding. The DOJ's statement regarding the criminal implications of the falsification incidents and its views regarding HL&P's responsibility for those incidents fail to provide the Board with any new or material factual information.

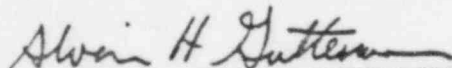
Similarly, the OIA report offers a number of speculations regarding the factual matters addressed in Phase I. CCANP has not called the Board's attention to any new and material

*/ In any event, the memoranda in question also indicate that prompt and appropriate disciplinary action was taken and that such action was deemed to be satisfactory by both the NRC Staff and the individual who made the allegation. Memoranda, R. E. Hall to File (March 14, 1979 and April 3, 1979).

factual information in the report, and none appears to exist.

It is clear that in light of the comprehensive record compiled in Phase I, CCANP has not offered any new information which has "the potential of altering the result which would otherwise be reached." Memorandum and Order at 3. In short, CCANP has failed to provide the sort of evidence which would warrant such "extraordinary action" as reopening the record in Phase I of this proceeding. Three Mile Island, 15 NRC at 915. Accordingly, CCANP's Motion should be denied.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response to CCANP Motion to Reopen Phase I Record" have been served on the following individuals and entities by deposit in the United States mail, first class, postage prepaid, on this 23rd day of August, 1983.

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