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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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 FOR RECONSIDERATION

Introduction

On March 8, 1985, Citizens Concerned About Nuclear Power (CCANP) moved the Appeal Board to reconsider its Decision dated February 6, 1985 (ALAB-799). 1/ By its March 12 Order the Appeal Board requested responses from the other parties. Applicants oppose CCANP's Motion. The Motion does not identify any mistake of law or fact in ALAB-799 and does not, therefore, present any basis for reconsideration. It is a mixture of reiteration of arguments previously made and presentation of new issues not raised in CCANP's Appeal Brief, 2/ neither of which is an appropriate basis for reconsideration. Accordingly, the Motion should be denied in all respects.

1/ CCANP Motion for Reconsideration (March 8, 1985) (Motion).

2/ CCANP Brief on Appeal from Partial Initial Decis. (July 8, 1984) (Appeal Brief).

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Argument

A. The Appeal Board's Decision Was Not Premature

CCANP first asks the Appeal Board to withdraw the determinations it reached "on the character standard and the due process question" as premature. Motion at 1-3. There is no merit to this request. The Appeal Board fully considered the extent to which a decision was appropriate at this stage of the proceeding (ALAB-799, slip op. at 6-8), and CCANP has not identified any matter of fact or law not properly considered by the Board in determining to resolve those specific matters. The matters decided by the Appeal Board were ripe for decision, and there are overwhelming reasons for deciding them at this time. Moreover, their prompt resolution is fully consistent with the Commission's directive that the issues be considered on an expedited basis.

The standard applicable to consideration of a licensee's character and competence, including whether and in what manner remedial measures are to be considered, is a legal question that has been fully briefed and argued. The Appeal Board's affirmation that the Licensing Board had properly determined the applicable standard assures that Phase II of the proceeding can proceed without any concern that the wrong standard is being applied. Furthermore, if the Appeal Board had

disagreed with the standard formulated and applied by the Licensing Board, failure to act at this time would have unnecessarily protracted an already lengthy proceeding.

In essence, it appears that CCANP's principal concern is that the Appeal Board did not "address" the question of a character standard to CCANP's satisfaction, rather than the timeliness of the decision. Motion at 2. However often CCANP may repeat its argument that the Licensing Board and Appeal Board should go beyond the needs of the particular proceeding to develop broad standards for character and competence determinations, the fact remains that both Boards have made rulings that fully encompass that issue in this proceeding and nothing more is required.

CCANP's argument that consideration of the due process question is premature is even more tenuous. The Appeal Board was fully able to evaluate whether the procedural and evidentiary rulings complained of by CCANP were erroneous, or had any prejudicial effect, in light of the extensive evidentiary record compiled in Phase I. Moreover, if any prejudicial error had been perceived, it would have been important to so determine at this time in order to avoid any unnecessary decisional delay later.

As the Appeal Board has noted, considerable time and effort went into the briefing and argument of this appeal. ALAB-799, slip op. at 7-8. That effort was expended because CCANP sought to have the matters discussed above considered on appeal, and because it did not previously suggest that such

consideration would be premature. Not only is it important that such effort not be wasted, but the Appeal Board properly chose to resolve, at this time, matters which were ripe for adjudication and as to which any error by the Licensing Board would have required prompt remedial action.

B. The Appeal Board Properly Considered the Standards for Character and Competence

CCANP argues next that the Appeal Board misconstrued its "alternative" argument on the consideration of Issue A by the Licensing Board. Motion at 3-4. This alternative argument, CCANP contends, is that "CCANP was entitled to an opinion on Issue A, an opinion the ASLB simply did not render." Id. at 4. The Licensing Board's March 14, 1984 Partial Initial Decision (PID) did explicitly address Issue A in the manner sought by CCANP, and, in any event, there is no merit to CCANP's legal position.

The PID explicitly ruled on Issues A and B. As discussed in Applicants' Response to CCANP, Inc., Brief on Appeal From Partial Initial Decision (August 13, 1984) at 18-21, the Licensing Board separately considered and decided Issue A, except to the limited extent reserved to Phase II. 19 NRC at 681-94. The occasional mention of remedial measures in the discussion of Issue A was consistent with the thrust of that issue. The Licensing Board did not consider the effectiveness of remedial measures in its discussion of Issue A. Id.

Moreover, as the Appeal Board found, "remedial measures are an essential component of any analysis of character and competence" (ALAB-799, slip op. at 16 (footnote omitted)), and "the clear import of [NRC] decisions is that remedial efforts are relevant to determining whether applicants should be permitted to obtain or retain licenses." Id. It necessarily follows from this holding that the Licensing Board was not obliged to address separately the hypothetical question of whether license denial would have been appropriate but for the remedial measures. Therefore, there would be no benefit in performing the analysis CCANP seeks, i.e., to determine whether the Licensing Board appropriately addressed remedial measures in its discussion of Issue A.

C. The Appeal Board Should Not Reconsider Its "Due Process" Rulings

At pages 4-20 of its Motion, CCANP reiterates and expands on its contention that it was denied a fair hearing by the Licensing Board.

CCANP's Motion does not purport to identify any error of fact or law in the Appeal Board's decision. Neither does it identify any newly discovered evidence. In most instances, CCANP is simply attempting to make arguments or provide citations it failed to include in its original Brief. 3/ Such efforts are not

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3/ CCANP implies that the Appeal Board was inconsistent in chastizing CCANP for its failure to limit the length of its Brief while, at the same time criticizing CCANP for not providing an adequate basis for its attack on 35 unidentified rulings. Motion at 5-6. CCANP obviously misses the

appropriate in a motion for reconsideration.

A motion for reconsideration that merely presents arguments "similar to arguments previously . . . presented" provides no basis for reconsideration. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5-6 (1980). Neither is it appropriate to seek reconsideration based on an "entirely new thesis." Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 790 (1981); see also Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-477, 7 NRC 766, 768, 770 (1978). As one court has put it, motions for reconsideration "are not intended to be utilized to relitigate old matters nor to allow a party to present his case under a new theory; these motions are designed to correct manifest errors of fact or law or as vehicles to present newly discovered evidence." Milwee v. Peachtree Cypress Inv. Co., 510 F.Supp. 284, 289-90 (E.D. Tenn. 1978), aff'd 644 F.2d 885 (6th Cir. 1981).

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basic point. It was CCANP's responsibility to brief its exceptions cogently and succinctly. Its current Motion is, in a number of instances, a transparent attempt to expand upon its Appeal Brief with new arguments and record citations, and to once more evade the limitation on the length of its Appeal Brief.

1. CCANP's Arguments That Are Not Supported by Record Citation Should be Ignored

Although CCANP contends that "the detail provided [in its Motion] are by no means exhaustive of the support in the record for CCANP's position . . ." (Motion at 6), there is no reasonable means by which this unsupported assertion can be tested. A review of the specific instances that CCANP does cite is all that could be required to resolve its claims. Moreover, a full review of the record, such as CCANP advocates, would not support its position. The transcript of this proceeding runs over 10,000 pages, largely consisting of the intervenors' cross-examination of witnesses for Applicants and the NRC Staff. No material evidence proffered by intervenors was excluded. CCANP's citation to a few isolated instances in which it did not get its way is in no way indicative of unfairness. A review of each instance, as discussed below, shows that the Licensing Board's rulings were proper.

2. Scheduling of the First Week of Hearing

CCANP's claims regarding the scheduling of the start of the evidentiary hearing (Motion at 6-9) were fully addressed and rejected in ALAB-799, (slip op. at 27-29), and CCANP has not raised any basis for reconsideration. Indeed, CCANP apparently concedes that the Licensing Board's ruling "may not rise to the level of reversible error . . . ." Motion at 7. This concession is not surprising.

The schedule CCANP complains about represented a one week delay from the schedule discussed by the parties (including CCANP counsel) at the Second Prehearing Conference (Tr. 320-22), and adopted by the Licensing Board in its December 2, 1980 Second Prehearing Conference Order. There the Licensing Board stated:

> [i]n view of the Commission's emphasis upon an expedited hearing, we expect the parties to adhere to the foregoing schedule as closely as possible. Modifications will not be granted absent a strong showing of good cause.

Second Prehearing Conference Order (December 2, 1980) at 7. This order was entered six months before the May evidentiary hearing. At the third prehearing conference, the Licensing Board properly weighed CCANP's request for extension against the desire of the Commission for an expedited hearing, the availability of Board members, and the desires of other parties. Tr. 358-396. The Board was not obligated to reschedule the hearing for CCANP's convenience. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539, 552 (1975).

In addition, CCANP's claim that it was prejudiced by the schedule is baseless. At the one hearing session CCANP cites, it was represented by experienced counsel, and there is no reason to speculate that it would have been better represented by its pro se first year law student representative. 4/

4/ In the course of its scheduling argument, CCANP asserts that its counsel filed a motion objecting to the use of witness panels and prefiled testimony, citing Tr. 983. Motion at 8. There was no such motion. The comment of CCANP counsel at Tr. 983 related to the timing of when intervenors must identify their witnesses and file testimony, not use of

3. CCANP Was Given Ample Opportunity for Discovery

In ALAB-799 the Appeal Board found that CCANP's complaint about the adequacy of its opportunity for discovery "must fail," in part because CCANP failed to provide an adequate basis for its complaints and failed to cite the request for extension it claimed was denied by the Licensing Board. ALAB-799, slip op. at 30. CCANP now cites a document styled "CCANP Motion For Leave to File Motion Out of Time To Compel NRC Staff to Provide Information", dated March 16, 1981. Motion at 9.

That document did not seek a general extension of the time for discovery. Its one limited objective was the discovery from the NRC Staff of the identities of confidential informants. That CCANP request was, in fact, granted by the Licensing Board, which directed the Staff to provide the information sought by CCANP. Memorandum and Order (March 24, 1981) at 1. However, the Appeal Board reversed the Licensing Board because the requested information was privileged. ALAB-639, 13 NRC 469 (1981). Thus, the cited motion could not serve as support for CCANP's claim. 5/

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panels or written testimony by other parties. See Tr. 982. Moreover, later in that same session the Board noted that it had "ruled on all the motions" and there was no disagreement from any party. Tr. 1043.

5/ Although CCANP cites the alleged illness of its counsel, it fails to note that it had two co-counsel in the time frame at issue. Notice of Appearance of Betty Wheeler and Tim Hoffman (November 14, 1980). Were both ill? For what period? Why did those counsel never submit a statement or even withdraw their appearances?

Moreover, CCANP still has failed to explain why the year of discovery prior to the appearance of the 1980-81 CCANP counsel was not, in itself, sufficient opportunity for discovery.

4. The Limitation on Duplication in the Cross-examination of Mr. Goldberg Was Appropriate

CCANP's Motion raises for the first time a complaint about a ruling on the scope of cross-examination of Mr. Goldberg. Motion at 10-11. Since this complaint was not properly raised in CCANP's Appeal Brief, and thus was not considered by the Appeal Board in ALAB-799, it may not be raised in a motion for reconsideration. Summer, 14 NRC at 790; Wolf Creek, 7 NRC at 768, 770.

Even if the issue had been timely raised, however, CCANP's complaint is without basis. The evidentiary ruling CCANP cites sustained objections to one specific question posed by CCANP counsel. Mr. Goldberg was asked what "advancements" resulted from the study of structural dynamics analysis by the Stone & Webster division he headed in 1975-77. Tr. 1174-75. The question plainly sought immaterial information, was unduly broad and was cumulative of extensive testimony about Mr. Goldberg's professional experience. See e.g., Tr. 859-61, 910-37. The Licensing Board exercised proper discretion in sustaining the objection. See Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 316 (1978).

While its Motion is not clear, perhaps CCANP complains less about this specific ruling than about the subsequent requirement for cross-examination plans. Motion at 10. The Licensing Board's concern about possible duplication of cross-examination between the two intervenors began much earlier than the question at Tr. 1175. See Memorandum and Order (August 3, 1979), at 9. Whether or not duplication occurred in the cross-examination by CCANP and CEU counsel, a requirement of cross-examination plans was clearly within the discretion of the Licensing Board. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981). The Appeal Board fully considered and rejected CCANP's argument to the contrary (ALAB-799, slip op. at 22-23) and CCANP has failed to cite any matter of fact or law not properly considered by the Appeal Board in connection with that ruling.

5. There Were No Undue Limitations on CCANP's Cross-examination of NRC Staff Witnesses

At pages 11-15 of CCANP's Motion, it revisits the portion of the transcript in which CCANP counsel cross-examined the second panel of NRC Staff witnesses. CCANP begins by describing its counsel's efforts "to probe the basis for an NRC Staff panel's opinion on the ultimate issue of character," and by alleging that that examination was hampered by "totally specious objections." Motion at 11. It acknowledges, however, that CCANP counsel "was . . . allowed to ask the very questions it started

to ask, the witnesses were responsive and the record [was] as clear as it would have been without all the intervening objections." Id.

CCANP next objects that its counsel was not permitted to engage in a line of inquiry related to the "importance" of HL&P's alleged "failures." Id. at 12-14. The Appeal Board reviewed the portions of the transcript cited by CCANP in this regard and concluded that CCANP was not prejudiced. ALAB-799, slip op. at 24 n. 61.

CCANP complains, however, that the witnesses had already indicated that HL&P was not "grossly negligent" and that, therefore, the Board's suggestion to return to that concept and abandon its usage of the term "importance" would have resulted in a "meaningless" inquiry. Motion at 13. CCANP states that the purpose of its inquiry was to probe the basis for the Staff witness' opinion "that HL&P had not been grossly negligent." Id. Nothing prevented CCANP's counsel from inquiring why specific incidents were not evidence of gross negligence, or to otherwise explore in greater depth the bases for the Staff's opinion in that regard. Thus, the Appeal Board correctly concluded that CCANP was not prejudiced by the Licensing Board's restrictions on this line of inquiry.

At pages 14-15 of its Motion, CCANP "characterizes" its overall effort to cross-examine the Staff witnesses on the bases for their conclusions regarding HL&P's character and competence, but fails to identify any specific facts or opinions it was not

permitted to elicit. In any event, each of the transcript citations upon which CCANP relies in this portion of its Motion was "carefully reviewed" by the Appeal Board, which found no reversible error. 6/ ALAB-799, slip op. at 25.

Thus, CCANP has failed to demonstrate that prejudicial error was committed in the context of its examination of the Staff witnesses and no basis for reconsideration has been provided. 7/

6. The Other Board Rulings Cited by CCANP Were Proper

CCANP complains that the Licensing Board denied it subpoenas to obtain the testimony of the Texas Attorney General on an alleged attempt by HL&P to intimidate him, and that it denied a subpoena to obtain testimony of a journalist on CCANP's

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6/ At page 15, CCANP asserts that the Licensing Board made a statement which the Appeal Board "recognized as mischaracterizing the record." In fact, the Appeal Board's comment cited by CCANP (App. Tr. 89) did not refer to the Licensing Board statement. The Licensing Board commented that CCANP's cross-examination utilized the alleged hazards of nuclear power as an assumption, not that CCANP attempted to prove that nuclear power is hazardous. Tr. 9981-83. Thus the Appeal Board's comment does not reflect on the Licensing Board's statement.

7/ At pages 15-16 of its Motion CCANP introduces, for the first time, a series of citations to the transcript purporting to show "unacceptable" objections by Applicants' counsel. It is not apparent that any ruling below is being questioned by CCANP. Without responding to each citation, we note our general disagreement with CCANP's characterizations and CCANP's failure to raise any issue related to these pages of the transcript in its Appeal Brief. In Applicants' view, CCANP's citations to the objections to cross-examination reflect more on the cross-examiner than on the counsel raising the objections and certainly have no bearing on CCANP's claim of unfairness.

allegation that HL&P attempted to intimidate him into not publishing an article about the South Texas Project. Motion at 17. 8/ Neither complaint was made in CCANP's Appeal Brief and thus neither can be addressed on reconsideration. Summer, 14 NRC at 790; Wolf Creek, 7 NRC 768, 770. Similarly, CCANP's claim that the Board improperly excluded questions on an alleged HL&P attempt to prevent funding of intervenors and alleged interlocking between the Boards of Directors of HL&P and its contractor, Brown & Root (Motion at 17), were not raised on appeal and may not be raised on reconsideration. Id.

Moreover, there was no foundation for any of these allegations, 9/ the allegations were not material to any matter

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8/ CCANP also suggests that the Licensing Board manifested prejudice by stating it "had no intention of considering [license] denial . . ." citing Tr. 1000. Motion at 16. There was no such statement. In a discussion of whether the Licensing Board would lose jurisdiction to reopen discovery after it decided Phase I, Staff counsel noted that Phase I would not be dispositive of the license application and the Licensing Board Chairman agreed. Obviously, no view on the outcome of Phase I or the hearing was expressed.

9/ CCANP is wrong in its assertion that the Licensing Board announced an intention to question an HL&P witness about the Brown & Root Board of Directors. Motion at 17-18. In discussion concerning its sustaining an objection to a question about the ownership of Halliburton, the Board mentioned its plans to question Mr. Oprea. Tr. 3987. The apparent intent was that the Board would question Mr. Oprea about how HL&P selected Brown & Root as architect-engineer for the Project. Id. The Board did so. Tr. 5406-14. CCANP did not choose to cross-examine Mr. Oprea about the Board of Directors of either HL&P or Brown & Root. Its attempted recross-examination on this subject was without foundation and properly ruled to be outside the permissible scope of recross. Tr. 5530-32.

at issue in this proceeding, and the Licensing Board's ruling was, in each instance, within the broad discretion of a Licensing Board to control a proceeding. See Marble Hill, 7 NRC at 316.

CCANP also complains about the Licensing Board's denial of a motion to sequester witnesses presented as a panel. This ruling was not questioned in CCANP's Appeal Brief, and thus cannot properly be raised in a motion for reconsideration. In any event, the Licensing Board's ruling was proper and was not prejudicial to CCANP.

As its final point CCANP protests "the calling of a surprise witness." Here again the matter was not raised in CCANP's Appeal Brief and is not properly within the scope of a motion for reconsideration. Moreover, there was no surprise witness. At the November 1980 prehearing conference, the Licensing Board had expressed a desire to hear from several persons who had been the subject of CCANP allegations, including Mr. Duke. Tr. 340-41. Mr. Duke's written testimony on other matters was served on the parties by Applicants on April 21, 1981. No one should have been surprised when the Licensing Board decided to ask Mr. Duke questions about CCANP's allegations when he appeared on June 24, 1981. Tr. 6317-18. In addition, the Licensing Board announced its decision to ask its questions a day in advance, allowing intervenors an extra day to prepare before their cross-examination. Id. It should also be noted that the only other evidence in the record on this CCANP contention was

fully consistent with Mr. Duke's testimony, so there could have been no prejudice to CCANP. PID, 19 NRC at 823-24 (and portions of the record cited therein).

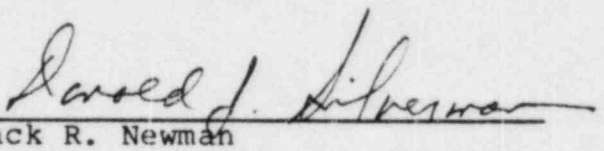
Thus there is no basis for CCANP's claims that it was prejudiced by alleged improper rulings of the Licensing Board. CCANP's claims that these rulings had a "cumulative effect" and formed a "pattern of abuse" (Motion at 20) are similarly without basis. Certainly the examples CCANP relies upon, even if any of them represented error, could not be viewed as a "pattern". The various portions of the record cited by CCANP are a few rulings unconnected by time or subject matter, over the course of a lengthy hearing. While the rulings cited by CCANP were all correct, and in any event, were not prejudicial, even if they represented errors, they would not constitute an adequate basis for condemning the overall conduct of a Licensing Board over the course of some 43 days of hearing.

Conclusion

CCANP's Motion fails to identify any appropriate basis for seeking reconsideration of ALAB-799. The matters raised were either properly considered by the Appeal Board or were not

raised in CCANP's Appeal Brief. Accordingly the Motion should be denied i all respects.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response to CCANP Motion for Reconsideration" have been served on the following individuals and entities by deposit in the United States mail, first class, postage prepaid, on this 18th day of March, 1985.

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