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UNITED STATES OF AMERICA 4/30/85
NUCLEAR REGULATORY COMMISSION
BEFORE THE NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

In the Matter of

HOUSTON LIGHTING AND
POWER COMPANY, ET AL.
(South Texas Project,
Units 1 and 2)

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Docket Nos. 50-498 OL
50-499 OL

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Citizens Concerned About Nuclear Power, Inc. (CCANP)
Petition for Review of ALAB-799

1. Procedural Background

On March 14, 1984, the Atomic Safety and Licensing Board (ASLB) in this proceeding entered its Partial Initial Decision (PID), LBP-84-13, 19 NRC 659, based on the record compiled in Phase I.

CCANP appealed the PID to the Atomic Safety and Licensing Board (ASLAB). See Citizens Concerned About Nuclear Power, Inc. (CCANP) Brief on Appeal from Partial Initial Decision dated July 8, 1984. [Hereinafter "CCANP Appeal Brief"].

On December 18, 1984, the ASLAB held oral argument on the pending CCANP appeal.

On February 6, 1985, the ASLAB issued its Decision, ALAB-799.

On March 8, 1985, CCANP filed its Motion for Reconsideration of ALAB-799.

On April 10, 1985, the ASLAB denied CCANP's Motion for Reconsideration.

Pursuant to 10 C.F.R. Section 2.786, CCANP files this motion for Commission review of ALAB-799.

II. Discussion

The ASLAB Decision is a relatively narrow decision on only

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two discrete issues:

Did the ASLB apply the correct standard when measuring character and competence?

Did the ASLB demonstrate bias or commit procedural error in the conduct of the Phase I proceeding?

As to all other issues of fact and law, the ASLAB concluded:

"Because the record on issues of character and competence remains open and the Board's findings are expressly subject to change, we cannot reach any appellate determinations on the merits of the ultimate issue of HL&P's fitness to operate the plant. Perforce, we do not examine the numerous factual findings or inferences that undergird a board's conditional conclusions." ALAB-799 at 7.

A. The Character and Competence Standard

The Commission itself introduced the issues of character and competence into this proceeding. CLI-80-31, 12 NRC 281, 291 (1980).

The ASLB responded by adopting a new set of issues to be heard. Second Prehearing Conference Order dated December 2, 1980. One of the new issues was Issue A which states:

"If viewed without regard to the remedial steps taken by HL&P, would the record of HL&P's compliance with NRC requirements ... be sufficient to determine that HL&P does not have the necessary managerial competence or character to be granted licenses to operate STP?"

Intervenors sought reformation of the ASLB's order regarding the new issues and, when it became clear the ASLB was not going to grant Intervenors' request, Intervenors jointly filed an appeal of the ASLB's determination of how the Commission's directive would be incorporated into this proceeding. Notice of Appeal and Request for Directed Certification served March 16, 1981. The crux of the Intervenors' appeal was that the ASLB was not following the Commission's directive to determine whether the

allegations of Intervenors, if proven, should result in denial of the operating licenses.

The ASLB formally denied Intervenors' request in part by reiterating its position that the failure of the Applicant "would be sufficient for denying a license only if it were shown that the considerations giving rise to it are uncorrectable." Third Prehearing Conference Order (Including Summaries of Subsequent Telephone Conference Calls) dated April 1, 1981 at 9.

The ASLB denied Intervenors' appeal on the basis that they appeal was a request for "discretionary interlocutory review" which did not meet the standards for interlocutory review. Memorandum and Order, ALAB 637 dated April 16, 1981 at 4-5.

The hearings proceeded on the issues as accepted by the ASLB. The Partial Initial Decision purports to enter findings and render an opinion on those issues.

In its appeal of the PID, CCANP argued that precisely the potential prejudicial error addressed in its March 16, 1981 Notice of Appeal - that the past acts of the Applicants would not be considered as an independent and sufficient basis for license denial - had become a reality in the PID. Specifically, the ASLB never answered the question posed by the Commission whether the past acts of Applicants constituted an independent and sufficient basis for denial of the licenses, rendering an opinion instead which included remedial measures as part of Issue A. See CCANP Appeal Brief at 1-12; Appendix 3.

The Appeal Board did not recognize clearly the essence of CCANP's point on appeal. In their Decision, the ASLB stated:

"In the first place, the Commission stated only that

abdication of responsibility or knowledge could prove disqualifying, not that such a result must or would follow. We believe that the Commission's language reflects an explicit judgment that the allegations, if proven, need not automatically dictate denial of a license." ALAB-799 at 3 (emphasis added).

CCANP's position in that mandatory denial was not and is not the point. The Commission stated:

"[W]e expect the Board to look at the broader ramifications of these charges in order to determine whether, if proved, they should result in denial of the operating license." CLI-80-32, supra at 292. (emphasis added).

It is precisely the failure of the ASLB to consider whether the past failures of the Applicants without regard to any later remedial measures should result in denial that stands as the core of CCANP's appeal on this point.

The ASLB took the position that a totality of failures, other than perhaps failures which are composed of deliberate false statements to the Commission, cannot be considered independent of corrective action in order to determine if those failures constitute a ground for license denial. If this view prevails within the NRC, then essentially a license application by other than a chronic liar would never be denied on the basis of lack of character or competence, even if there were extensive evidence of very serious failures to perform. It would not matter how egregious those failures were, as long as corrective measures were taken subsequently. This possibility makes Commission review of the character issue standard as decided by the ASLB and upheld by the ASLAB an important matter of both law and policy.

B. Alleged Bias and Procedural Error

A major portion of CCANP's appeal addressed the due process

violations CCANP contended were extensive in Phase I of this proceeding. See CCANP Appeal Brief at 56-76; Citizens Concerned About Nuclear Power, Inc. (CCANP) Motion for Reconsideration dated March 8, 1985 at 5-20. [Hereinafter CCANP Motion for Reconsideration]. CCANP's complaint is best summarized by CCANP's statement that:

"A party cannot be asked to continually run a gauntlet in order to make its case. Such a demand is itself reversible error and should be so recognized by the ASLB." CCANP Motion for Reconsideration at 20.

CCANP objected to many difference procedural rulings entered by the ASLB, including scheduling without regard for Intervenor conflicts, inadequate discovery provided, limitations or threats of limitations on cross-examination, and toleration of constant baseless and harassing objections many of which were upheld.

The Appeal Board in fact recognized that one section of the transcript particularly emphasized by CCANP demonstrated "how a hearing should not be conducted ... a monument to how a licensing proceeding should not be run" Appeal Tr. at 67-68. This observation alone should meet the threshold test for Commission review.

Obviously, the Commission is bound to conduct all of its proceedings in a manner which respects the due process rights of all parties. In one sense, there is a special obligation to protect the rights of Intervenors. Operating under tremendous constraints in both resources and personnel (Applicants and NRC Staff, to the contrary, being funded publicly), Intervenors are already at a severe disadvantage in NRC proceedings. For an ASLB to compound those difficulties by consistent arbitrary and

erroneous rulings which repeatedly frustrate an Intervenor's ability to build a record supporting the Intervenor's position cannot be tolerated by the Commission.

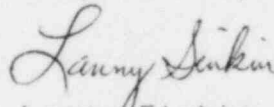
Finally, Intervenor historically have exposed conditions at numerous plants, including South Texas, which led to major corrective action. If the Commission, as appears to date, is not going to deny licenses but rather only require corrective action, then Intervenor should be treated as tantamount to an additional arm of the Commission, identifying and calling attention to where such corrective action is necessary. Protecting the due process rights of Intervenor enhances the chances that Intervenor will perform this invaluable function.

The due process questions raised by CCANP, therefore, raise significant issues of fact, law, and policy which the Commission should address.

III. Conclusion

For the above and foregoing reasons, CCANP urges the Commission to accept this petition for review of ALAB-799.

Respectfully submitted,


Lanny Sinkin

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Dated: April 30, 1985
Washington, D.C.

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I hereby certify that copies of CITIZENS CONCERNED ABOUT NUCLEAR POWER, INC. (CCANP) PETITION FOR REVIEW OF ALAB-799 were served by hand delivery (*) or deposit in the U.S. Mail, first class postage paid to the following individuals and entities on the 30th day of April 1985.

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