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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
Charles Bechhoefer, Chairman
Dr. James C. Lamb
Frederick J. Shon

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USNRC

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

Docket Nos. STN 50-498 OL
STN 50-499 OL

ASLBP No. 79-421-07 OL

June 24, 1985

MEMORANDUM AND ORDER
(Telephone Conference Call of June 21, 1985)

On June 21, 1985, the Licensing Board initiated a telephone conference call to discuss procedural steps to be taken as a result of the list of prospective witnesses filed by CCANP on June 13, 1985.¹ That list was comprised, for the most part, of various employees of HL&P and the NRC. Participating in the conference call, in addition to the three Board members, were Mr. Maurice Axelrad, for the Applicants (with Messrs. Jack Newman and Harold Reis present), Messrs. Ed Reis, O. Russ Pirfo, and B. Brown for the Staff, and Mr. Lanny Sinkin for CCANP.

The Board first subdivided the 25 listed witnesses into 4 categories:

¹ Obligations of various parties' representatives precluded the call from being placed several days earlier.

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1. Commissioner Thomas M. Roberts.
2. Various current NRC employees -- i.e., Messrs. Herr, Tapia, Phillips, Sells, E. Reis, Collins, Seyfrit, Gutierrez, Madsen, Driskill, Dirks, and Lieberman.
3. One former NRC employee -- Mr. Richard deYoung. (The Staff advised that Mr. deYoung is no longer employed by NRC in any capacity, including as a consultant.)
4. Other witnesses (for the most part, employees or former employees or agents of HL&P) -- Messrs. Jordan, Oprea, Goldberg, Frazar, Robertson, Powell, Newman, Gutterman, Axelrad, unnamed attorneys for Baker and Botts, and Poston.

The Board noted that, with respect to NRC employees, the special procedures of 10 C.F.R. § 2.720(h) would govern their being called as witnesses. (In this respect, the Board rejected CCANP's claim to the contrary, set forth in its June 13, 1985 filing.) Under those procedures, CCANP would have to make a showing of "exceptional circumstances," such as that a particular employee "has direct personal knowledge of a material fact not known" to witnesses designated by the Staff to address the issues in question. 10 C.F.R. § 2.720(h)(i).

The Board ruled that the foregoing procedures did not permit the Board to direct Commissioner Roberts to testify.² The rule itself bars the testimony of both the "Commissioners and named NRC personnel" (other than those officially designated by the Staff). The "exceptional

² CCANP seeks the testimony of Commissioner Roberts "regarding representations made to him on February 21, 1982 by Mr. Jerome Goldberg concerning the nature of the Quadrex Report and the reasons for its commissioning, representations which CCANP contends were false and misleading and represented further evidence of HL&P's intent to deceive the NRC regarding the report."

circumstances" exception applies only to "named NRC personnel". In the Board's view, this exception is narrower than the prohibitions of the rule and does not extend to Commissioners. Thus, the general bar for Commissioners in the rule remains in effect.

The Board accordingly denied CCANP's request for Commissioner Roberts to appear as a witness.³ We indicated we would advise Commissioner Roberts of this ruling.

As for the other witnesses, the Applicants pointed out that CCANP had failed to supply subpoena requests by June 14, 1985, as it was required to do by our Sixth Prehearing Conference Order, dated May 17, 1985. CCANP pointed to its uncertainty as to whether a subpoena would be necessary for certain witnesses, as set forth in the cover letter to its June 13, 1985 list of witnesses. It regarded its June 13, 1985 submission as a request for subpoenas where necessary. We determined that CCANP's submission should be treated in that fashion. We also expressed the view that CCANP's submission was sufficient to establish "general relevance" for the purposes of issuing a subpoena to non-Staff personnel. See 10 C.F.R. § 2.720(a).

The Applicants took the position that, by June 26, 1985 (the filing date for all testimony), CCANP should be required to spell out the information which each witness on its list was being relied on to supply

³ Given this ruling, we need not discuss whether CCANP has set forth "exceptional circumstances" for Commissioner Roberts to testify.

-- in the nature of an offer of proof. The Staff went further and suggested that CCANP file by June 26, 1985 each question CCANP intended to ask each witness and the expected response. In addition, the Staff would have CCANP file a statement of exceptional circumstances with respect to various named NRC personnel.

The Applicants also expressed the desire not to have to file written motions to quash various subpoenas. In lieu thereof, they suggested oral argument at the conclusion of their case on the necessity for the various witnesses to appear on behalf of CCANP.

CCANP opposed the Applicants' and Staff's proposals because of the lack of time (three working days) to prepare the statements or questions. It acknowledged, however, that it would be able to state by June 26 the particular information which it sought to elicit from non-Staff witnesses (i.e., its direct case).

Based on a lengthy discussion, and giving reasonable consideration to the views of all parties, we ruled as follows:

1. The Board will issue subpoenas for the appearance of all non-NRC named witnesses who are not already scheduled to be witnesses -- i.e., Messrs. Robertson, Powell, Newman, Gutterman, Axelrad, Poston, and deYoung.

2. By June 26, 1985, CCANP shall file a statement of what it intends to prove -- i.e., its direct case -- through the testimony of all non-NRC employees on its list (including Mr. deYoung and HL&P witnesses already scheduled to testify), together with some identification of why it expects each witness to so testify.

3. By July 3, 1985, CCANP shall file its statement of exceptional circumstances for calling named NRC personnel. This statement must include the particular unique information which the NRC employee is said to possess, why it cannot be obtained from already designated NRC witnesses, and its relevance to the points which CCANP is seeking to establish (i.e., to CCANP's direct case).

4. By July 3, 1985, CCANP shall also advise us whether the prefiled testimony of witnesses scheduled to appear is broad enough to permit CCANP to attempt to elicit through cross-examination the information it seeks to establish (as indicated in its earlier June 26 filing).

5. By July 3, 1985, the Applicants and Staff (and CCANP if it wishes) shall file statements concerning the permissibility and need (if any) for calling various parties' attorneys as witnesses (some of whom are included in CCANP's witness list).

6. All of the foregoing filings shall be by hand delivery or express mail (except for communications to Judge Lamb, which shall be filed by first class mail).

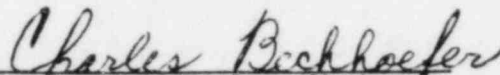
7. The Applicants (or other representatives of witnesses) need not (although they may) file written motions to quash the outstanding subpoenas. The Board will hold oral argument with respect to whether subpoenas should be quashed. Such argument will be scheduled during the forthcoming hearing sessions, prior to the completion of hearings on July 19, 1985, whether or not the Applicants' witnesses have concluded their testimony at that time. At that argument, the Board will also

consider, inter alia, the showing of "exceptional circumstances" for NRC personnel previously filed by CCANP.

At the end of the call, the Board denied a request by the Applicants to shorten a previously scheduled limited appearance session to accommodate the schedule of one of their witnesses.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 24th day of June, 1985