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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'85 AUG -5 A11:00

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

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH
Docket Nos. 50-498 OL
50-499 OL

APPLICANTS' RESPONSE TO CCANP MOTION FOR
RECONSIDERATION OF ASLB RULING QUASHING SUBPOENA FOR
MICHAEL E. POWELL

I. Introduction

On July 18, 1985, the Applicants filed a motion to quash a subpoena for Michael E. Powell issued by the Licensing Board at the request of Citizens Concerned About Nuclear Power (CCANP). See "Motion of Applicants to Quash Subpoenas of Mr. Cloin Robertson, Mr. Jesse Poston and Mr. Michael Powell" (Motion to Quash). Among other reasons, Applicants sought to quash the subpoena for Mr. Powell on the grounds that the factual matters upon which Mr. Powell's testimony was sought were already part of the record and were uncontroverted and therefore that Mr. Powell's testimony would be, at best, cumulative. See Motion to Quash, pp. 8-9. Following oral argument by the parties, the Licensing Board decided to quash the subpoena for Mr. Powell. See Tr. 12966-79.

On July 23, 1985, CCANP served "CCANP Motion for Reconsideration of ASLB Ruling Quashing Subpoena for Michael E. Powell" (CCANP's Motion). CCANP offers two arguments in support of its claim that the subpoena for Mr. Powell should not have been quashed. The first states that Mr. Powell is needed to testify

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regarding Incident Review Committee (IRC) consideration of reporting Quadrex Report findings, particularly those related to computer code verification, and the second states that Mr. Powell is needed to testify regarding his competence to make reportability determinations. Each of these arguments is discussed below and shown to be without merit. Accordingly, CCANP's Motion should be denied.

II. CCANP's Request for a Subpoena of Mr. Powell to Testify on Matters Related to Quadrex Report Findings on Computer Code Verification

In its Specification of Testimony Sought from CCANP Witnesses, at 7, CCANP alleged that Mr. Powell would testify that "the IRC, in fact, only reviewed the notification decision made by Mr. Goldberg, not the entire report." In their Motion to Quash, Applicants demonstrated that all of the matters CCANP sought to prove through Mr. Powell's testimony are uncontroverted, and specifically listed those matters. One of the listed uncontroverted matters was "(6) neither the IRC, nor its individual members reviewed the Quadrex Report to determine its reportability, other than the three items which were reported to the NRC by Mr. Powell on May 8, 1981." See Motion to Quash, p.9. Based upon a memorandum dated May 12, 1981 from Mr. Powell to L. R. Jacobi, ^{1/} CCANP now alleges that the IRC considered several Quadrex findings related to computer code verification in addition to the one that was reported to the NRC. See CCANP's Motion, pp. 2-4. ^{2/} CCANP then states that it seeks to question Mr. Powell on this matter.

^{1/} This memorandum was provided to the Licensing Board and the parties by the Applicants as Document No. 23 in the Applicants' letter of April 19, 1985 to the Board.

^{2/} It is far from clear why CCANP believes this allegation is material to any of the issues in this proceeding. There is no issue in this proceeding regarding alleged IRC reviews of the Quadrex Report after May 8, 1981.

A motion for reconsideration should be dismissed if it does no more than repeat the arguments made previously. Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Since CCANP presented these same arguments in its oral argument ^{3/} on Applicants' Motion to Quash, no basis for reconsideration is presented by the CCANP Motion. Consequently, CCANP's Motion with respect to this matter can be denied on this basis alone.

Moreover, it is apparent that CCANP is either misreading or misrepresenting the May 12, 1981 memorandum from Powell to Jacobi which it cites as a basis for subpoenaing Mr. Powell. Contrary to the impression sought to be created by CCANP, the memorandum does not state or otherwise suggest that the IRC conducted a review to determine whether to notify the NRC of any findings in the Quadrex Report pursuant to 10 C.F.R. § 50.55(e). Instead, the memorandum only states that the NRC was notified on May 8, 1981 that a concern regarding computer codes was potentially reportable, and that several action items were discussed and assigned at a May 11, 1981 meeting of the IRC. These action items were necessary to resolve the problem with computer code verification and to make a final determination as to whether this item was reportable. In short, the memorandum does nothing more than reflect the IRC's practice for following up on potentially reportable deficiencies; it does not demonstrate that the IRC

^{3/} As one ground for reconsideration, CCANP asserts that "CCANP did not have an opportunity to clearly point out the unique, material, relevant, and admissible testimony CCANP sought from Mr. Powell" because of the "pressure" to complete arguments during the time available for the hearing. CCANP's Motion, p.1. However, contrary to CCANP's claims, CCANP did have an adequate opportunity to state its arguments, and it did so at some length in two pleadings and its oral argument at Tr. 12966-69, 12973-74, 12976-78. CCANP's subpoena for Mr. Powell was quashed not because it did not have an adequate opportunity to present its case but instead because the Board disagreed with the points being raised by CCANP. See Tr. 12975-78.

conducted a review to determine whether the NRC should be notified of any of the findings in the Quadrex Report.

Although CCANP argues in its motion that the May 12, 1981 memorandum shows that the IRC considered "several concerns", the memorandum states that "[t]he IRC was convened to evaluate an item" (Emphasis added). Indeed its title shows it addressed IRC Item #96. The "several concerns" were clearly several considerations involved in that one reported item, and any reasonable reading of the memorandum shows they are elements of an overall problem; i.e., that because the verification programs did not clearly show verification status, there was a possibility of inadvertent use of an unverified code in a safety-related application and that such use might result in an inadequate design. Obviously there would be no concern about the visibility of program status if there were no unverified programs. Neither would there be any concern about the visibility of program status if there were adequate controls to prevent inadvertent use of unverified codes in safety related applications. HL&P's May 8 report to NRC encompassed all of these aspects or concerns related to computer code verification. CCANP's attempts to correlate these three aspects of this item to three separate Quadrex findings is incorrect. Each of the three cited findings is related to all or part of the three concerns. However, since the HL&P telephonic report of May 8, 1981, encompassed all three concerns, there was nothing to report separately arising from findings 4.2.2.1(b) and 4.2.2.1(c). ^{4/}

In sum, the memorandum referenced by CCANP provides no basis for the subpoena of Mr. Powell. The memorandum does not state what CCANP implies that it states. Moreover, even if the memorandum did support CCANP's claims with

^{4/} It should also be noted that findings 4.2.2.1(b) and 4.2.2.1(c) are not among the findings which are at issue in this Phase II proceeding.

respect to the matters addressed in the memorandum it would not be relevant or material to the issues in this proceeding. Consequently, reconsideration of the Board's order quashing the subpoena of Mr. Powell based upon this memorandum is not warranted.

III. CCANP's Request for a Subpoena of Mr. Powell to Testify Regarding His Competence

For the first time in this proceeding, CCANP in its motion for reconsideration argues that the Board should subpoena Mr. Powell to develop a record on the competence of HL&P personnel currently charged with responsibility for ascertaining Section 50.55(e) deficiencies. See CCANP's Motion, pp. 4-5. This argument is objectionable for several reasons.

First, "[m]otions to reconsider should be associated with requests for re-evaluation of an order in light of an elaboration upon, or refinement of, arguments previously advanced" and "are not the occasion for 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). Since CCANP did not raise any question regarding the competence of Mr. Powell in oral argument before the Board or in its prior pleadings, it is foreclosed from doing so now.

Second, the Board has ruled that testimony of subpoenaed witnesses would be limited to the scope of testimony outlined in "CCANP Identification of Witnesses" (June 13, 1985) and "CCANP Specification of Testimony Sought from CCANP Witnesses" (June 26, 1985). See Tr. 11461, 12964-65. In neither document did CCANP seek to subpoena Mr. Powell to testify regarding his competence. Consequently, CCANP's arguments on this score are not an appropriate basis for reconsidering the Board's decision to quash the subpoena for Mr. Powell.

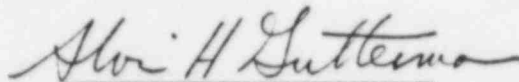
Finally, it may be noted that testimony on this matter would be cumulative of other testimony in this proceeding. The Applicants will be presenting

as a witness Mark R. Wisenburg who reviews all reportability determinations by the IRC and who has described HL&P's Section 50.55(e) procedure and the qualifications of the IRC members in his prefiled testimony. See "Testimony on Behalf of Houston Lighting & Power Company, et al., of Mark R. Wisenburg." Additionally, the NRC Staff "Testimony of H. Shannon Phillips on HL&P Reporting of Section 50.55(e) Matters" also addresses matters related to HL&P's competence in reporting deficiencies under 10 C.F.R. § 50.55(e). Since these individuals will address matters on which CCANP seeks testimony from Mr. Powell, any testimony from Mr. Powell would be cumulative and unnecessary.

IV. Conclusion

For the foregoing reasons, Applicants urge the Board to deny CCANP's Motion for Reconsideration of ASLB Ruling Quashing Subpoena for Michael E. Powell.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of "Applicants' Response to CCANP Motion for Reconsideration of ASLB Ruling Quashing Subpoena for Michael E. Powell" has been served on the following individuals and entities by hand delivery or deposit in the United States mail, first class, postage prepaid, as designated, on this 1st day of August, 1985.

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