

816

DOCKETED
OCT 16
10/14/85
85 OCT 17 10:49

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of ()
()
HOUSTON LIGHTING AND () Docket Nos. 50-498 DL
POWER COMPANY, ET AL. () 50-499 DL
(South Texas Project, ()
Units 1 and 2) ()

CCANP MOTION TO REOPEN THE PHASE II RECORD: III AND FOR DISCOVERY

On October 12, 1985, CCANP received the document attached hereto as Exhibit 1. This document appears, from its style and the draft form and notes at the back, to be Mr. Charles Thrash's notes of the meeting held by HL&P senior management on the morning of September 12, 1981 to discuss evaluations of the contractors bidding to replace Brown and Root (B&R) and to express preferences among those contractors.

This document clearly fell within the discovery set forth in the Board's Memorandum and Order (Explanation of Ruling on CCANP Motion to Reopen Phase I Record) dated June 18, 1985. At page 34 of the Order, the Board included as matters to be produced by Applicants, the following:

"copies of internal documents or other records (in any form, including drafts), or correspondence or other communications with outside persons (including but not limited to consultants), concerning (1) the decision to seek replacement of and, thereafter, to replace B&R, including the dates when those decisions were made. ... These records should cover the time frame from April 1, 1981 through September 24, 1981"

This document was not, however, produced by Applicants. See Letter from Jack R. Newman to the Board dated July 2, 1985 and accompanying documents.

DS03

In addition, CCANP directs the Board's attention to the relevance of this document to the issue of the role played by Applicants' counsel in the removal and replacement of B&R. This issue arose after a filing by CCANP created a question in the minds of the Board whether Mr. Jack R. Newman may have participated other than as counsel in the removal and replacement process. The Board ultimately decided to accept Applicants' portrayal of Mr. Newman's role as "remaining within the boundaries of providing legal advice." See Memorandum and Order (Explanation of Ruling on CCANP Motion to Reopen Phase I Record), LBP-85-19 dated June 18, 1985 at 13 - 14. Applicants seek a Board finding confirming the Board's earlier decision. See App. FDF IX.33 at IX-22.

The document proffered in this motion clearly demonstrates that Mr. Newman did provide his overall assessment of which contractor was preferable (as opposed to confining himself to licensing and contractual issues), that besides Mr. Newman only Mr. Goldberg and Mr. Oprea offered such an assessment, and that Mr. Newman offered his assessment in the context of a management meeting convened for the purpose of making a decision on which contractor would be recommended to the partners. This evidence, confirms Mr. Goldberg's testimony at the Public Utility Commission of Texas, CCANP 90 at 1357 - 58 and supports the proposition that Mr. Newman acted as other than legal counsel in this process.

Of far greater importance, the central issue in this proceeding is the character of the Applicants. In its Partial Initial Decision, the Board said that the most important measure

of character would be

"whether HL&P made material false statements or omissions and whether it addressed questions propounded by the Staff, the parties, and us with candor." PID at 20.

Furthermore, the Board agreed with CCANP

"that there may be some character defects that are so serious that they are in fact uncorrectable, at least in the absence of a radical change in the control of [the] corporation." [footnote omitted] One of these defects might be evidenced by an intentional lack of truthfulness or candor condoned by management. As we have observed, the Commission in CLI-80-32 emphasized the importance of truthfulness and candor, and it explicitly pointed out that a lack of truthfulness or candor could prove disqualifying. [cite omitted] Further, the Commission cited cases suggesting that willful misrepresentations to the Commission, or representations made with disregard for their truth, could be grounds, without more, for license denial. [footnote omitted]." PID at 23 (emphasis in original).

This document proves that Mr. Newman was indeed present at the HL&P meeting on the morning of September 12, 1981, contrary to the sworn testimony of Mr. Jordan. Tr. 11981, L.25 - 11982, L.7; 11983, L.7 - 10; 12163, L.25 - 12164, L.3. ^{*/}

*/ CCANP recently moved to reopen the Phase II record to admit evidence on a similar point. See CCANP Motion for Board Ordered Production of Documents, To Reopen the Record, For New Contention, For Discovery, and For Extensions of Time dated September 30, 1985 at 15-16.

In response to this part of the recent CCANP motion, Applicants argued that Mr. Newman was not part of the "decision-making team" and offered as substantiation these same citations to Mr. Jordan's false testimony to show Mr. Newman was not even present at the crucial final meeting. See Applicants' Response in Opposition to CCANP Motion Dated September 30, 1985 dated October 10, 1985 at 16-17, particularly the sentence "Indeed, neither the chronology entry cited by CCANP nor any other entry refers to the meeting on the morning of September 12, 1981, when the decision to select Bechtel was made by Mr. Jordan. (Tr. 11981, 11983, 12163-64)." at 17 (Gutterman).

At the same time, however, Applicants proffered a proposed finding of fact to the contrary. See App. FOF IX.28 at IX-17. This proposed finding states that "HL&P counsel" was present at the decision-making meeting on the morning of September 12, 1981. Since there is no testimony in the record that would suggest this
**** continued on next page ****

This document also proves Mr. Newman was a key participant in that decision-making meeting, contrary to the sworn testimony of Mr. Goldberg. Tr. 12677, L.15 - 18, but confirming Mr. Goldberg's earlier sworn testimony at the PUC of Texas offered as impeachment evidence by CCANP. See Tr. 12464, L.20 - 12466, L.14; 12472, L.1 - 12481, L.21; CCANP Ex. No. 90.

The existence of this document raises other, equally serious questions about the role of Applicants' counsel in this proceeding. The proffered document is quite similar to other documents produced by Applicants in response to the Board ordered discovery cited above. See Letter from Jack R. Newman to the Members of the Board dated July 2, 1985 and accompanying documents 17 (CCANP Ex. No. 83) and 18 (CCANP Ex. No. 120). There is little question that Applicants should have treated the attached document in a similar fashion, i.e. produced it.

More disturbingly, the latest document is numbered 81001 through 81004, preceded by a hand written "D". CCANP Ex. No. 83

**** continued from previous page ****

"counsel" was anyone other than Mr. Newman and since the proposed finding cites "Tr. 12613-14 (Goldberg)" wherein Mr. Goldberg testified that Messrs. Jordan, Oprea, Goldberg, and Newman met on the morning of September 12, 1981, the proposed finding clearly conveys that Mr. Newman was present at that meeting.

This same proposed finding cites "Tr. 12164 (Jordan)" wherein Mr. Jordan talks about the meeting in question. But the proposed finding fails to cite Tr. 12163, L.25 - the last line on the previous page - wherein Mr. Jordan testifies that Mr. Oprea and Mr. Goldberg were the participants with him in that meeting and does not mention Mr. Newman. This omission suggests the author was well aware of Mr. Jordan's testimony to the contrary.

In essence, Applicants' have impeached Mr. Jordan by their own proposed finding of fact. But such a proposed finding is not evidence. While the testimony of Mr. Goldberg is fairly persuasive that Mr. Newman was present at this meeting, and that Mr. Jordan, therefore, testified falsely on this point, the exhibit attached hereto, as a contemporaneous record of the event, is far better evidence and far more explicit on the point in question than Mr. Goldberg's testimony.

documents the meeting on the afternoon of September 12, 1981 and is numbered 81005 through 81011, preceded by a hand written "E". The obvious implication of the numbering is that these two documents were kept sequentially in Applicants' files.

CCANP awaits a plausible explanation for why the document attached hereto as Exhibit 1 was not produced, particularly in light of the obvious implications of this document regarding the role of Applicants' lead counsel, Mr. Newman.

This document (as well as Applicants' own proposed finding cited above) raises a profound concern as to why Mr. Newman, who conducted the cross examination of Mr. Jordan, made no effort on redirect to have Mr. Jordan correct testimony about Mr. Newman's presence and role on the morning of September 12, 1981. Mr. Newman clearly knew this testimony was in error, that Mr. Newman's participation was the point of error, and that Mr. Newman's particular role in this decision was not a matter of great importance to his client's position before the ASLB. False testimony, however, is a matter of grave importance to the determination of whether his client will receive an operating license or not. CCANP awaits an explanation from Mr. Newman on his conduct in this matter before seeking any further action of the Board. See 10 C.F.R. Section 2.713.

CCANP contends this motion meets the standards for reopening the record.

Regarding the timeliness criterion, CCANP argues that since Applicants were under an obligation to provide this document to the Board and parties prior to the commencement of Phase II hearings, CCANP cannot be faulted for its unavailability during

the hearings. In addition, CCANP is providing this document within a week of its receipt and interrupting its work on CCANP's Proposed Findings of Fact and Conclusions of Law to do so.*/ Given the Applicants' clear obligation and the short period since its receipt by CCANP, the filing of this motion to reopen is timely.

As this document calls into question the veracity of Applicants' senior management officials, there is no question as to it raising a significant safety issue. This document also constitutes a challenge to the integrity of the hearing process in light of the actions of Applicants' counsel.

If the Board intended to rely on the current record to agree with Applicants' portrayal of Mr. Newman's role in the replacement of Brown and Root, See Memorandum and Order (Explanation of Ruling on CCANP Motion to Reopen Phase I Record), L&P-85-19 dated June 18, 1985 at 13 - 14; App. FOF IX.33 at IX-22, this document would change that finding.

If the Board intended to rely on the current record for a finding that there was no need to reverse or modify the Board's Phase I findings on Applicants' honesty and candor, the proffered evidence would change that finding.

If the Board intended to opine as to the behavior of Applicants' counsel in this proceeding, the proffered document

*/ CCANP notes for the record that the preparation and production of the CCANP Motion to Reopen the Phase II Record: II and the CCANP Motion to Reopen the Phase II Record: III and For Discovery took approximately five working days. CCANP does not, at this time, seek an extension of time for filing its proposed findings of fact and conclusions of law. Should a need for additional time arise as the deadline draws closer, however, CCANP will remind the Board and the parties of the time needed for these two motions and seek an appropriate extension.

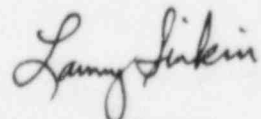
may influence that opinion.

For the above and foregoing reasons, CCANP moves the Board to reopen the record to admit the document attached hereto as Exhibit 1.

CCANP also seeks general discovery regarding this document. Among other things, CCANP moves the Board to permit CCANP to explore the methods employed by Applicants to produce documents in response to the Board's discovery order of June 18, 1985; the persons involved in implementing said methodology; the location and handling of the attached document during the implementation of said methodology; the reason the attached document was not produced; the knowledge of HL&P management personnel regarding the existence of this document; the knowledge of HL&P counsel regarding the existence of this document; the authoring of Applicants' Response in Opposition to CCANP Motion Dated September 30, 1985 at 16 - 17 dated October 10, 1985; and the authoring of Applicants' Proposed Finding of Fact IX.28.

CCANP urges the Board to extend this right to discovery to all parties, i.e. to the NRC Staff and the State of Texas as well as CCANP.

Respectfully submitted,



Lanny Sinkin

Representative for Intervenor,
Citizens Concerned About
Nuclear Power, Inc
3022 Porter St., N.W. #304
Washington, D.C. 20008
(202) 966-2141

Dated: October ¹⁶/~~14~~, 1985
Washington, D.C.

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of ()
)
 HOUSTON LIGHTING AND (Docket Nos. 50-498 OL
 POWER COMPANY, ET AL.) 50-499 OL
 (South Texas Project, ()
 Units 1 and 2) ()

CERTIFICATE OF SERVICE

I hereby certify that copies of CCANP MOTION TO REOPEN THE PHASE II RECORD: III AND FOR DISCOVERY were served by hand delivery (*) or deposit in the U.S. Mail, first class postage paid to the following individuals and entities on the 16th day of October 1985.

Charles Bechhoefer, Esquire
 Chairman
 Atomic Safety and Licensing Board
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555

Dr. James C. Lamb, III
 Administrative Judge
 313 Woodhaven Road
 Chapel Hill, North Carolina 27514

Frederick J. Shon
 Administrative Judge
 U. S. Nuclear Regulatory Commission
 Washington, D.C. 20555

Mrs. Peggy Buchorn
 Executive Director, C.E.U.
 Route 1, Box 1684
 Brazoria, Texas 77422

William S. Jordan, III, Esq.
 Harmon, Weiss & Jordan
 2001 S Street, N.W., Suite 430
 Washington, D.C. 20009

Pat Coy
 5106 Casa Oro
 San Antonio, Texas 78233

Ray Goldstein
 1001 Vaughn Bldg.
 807 Brazos
 Austin, Texas 78701

Lanny Sinkin

 Lanny Sinkin

Brian Berwick, Esquire
 Asst. Atty. Gen.
 State of Texas
 Environmtl. Protection
 P. O. Box 12548, Capitol Sta.
 Austin, Texas 78711

Oreste Russ Pirfo, Esquire
 Office of the Exec. Leg. Dir.
 U.S. Nuclear Regulatory Comm.
 Washington, D.C. 20555

Maurice Axelrad, Esquire
 1615 L Street, NW, Suite 1000
 Washington, D.C. 20036

Melbert Schwarz, Esquire
 Baker and Botts
 300 One Shell Plaza
 Houston, Texas 77002

Atomic Safety and Licensing Bd.
 U.S. Nuclear Regulatory Comm.
 Washington, D.C. 20555

Atomic Safety and Licensing
 Appeal Board
 U.S. Nuclear Regulatory Comm.
 Washington, D.C. 20555

Docketing and Service Section
 Office of the Secretary
 U.S. Nuclear Regulatory Comm.
 Washington, D.C. 20555

1 At 9:00 a.m. on September 12, 1981 Messrs. Jordan, Oprea, Goldberg, Newman and Cowan and the writer met in the 25th floor conference room at Houston Lighting & Power Company to review the presentation that was to be made by HL&P during the afternoon to the other STP participants.

2 Mr. Goldberg began by presenting a series of slides that would be shown during the afternoon. The slides were as follows:

3 The first two slides compared personnel by name in the eleven key slots for Bechtel, Ebasco and Stone & Webster and the total resources of each organization and the places where different types of work would be done by each. Mr. Goldberg explained that the Westinghouse turnkey proposal was not responsive to the Company's request for proposals and, therefore, had been disregarded.

The next slide concerned logistics.

4 The next slide showed proposed staffing levels at various stages of the work over the next year for each of the three organizations.

5 The takeover experience of each of the organizations was compared on the next slide.

6 Planning, scheduling and cost estimate projections were next compared, Bechtel expecting to complete this work in nine months, Stone & Webster in ten months and Ebasco in six months (again indicating, according to Mr. Goldberg, that Ebasco simply did not understand the scope of the work required).

7 The final slides compared the takeover strategies of the three bidders. Each would be willing to work as a consultant to HL&P during the time required to phase out the existing contractor and phase in the successful bidder. Mr. Goldberg explained that the construction of safety-related work will cease during the transitional period and that "construction", as it is used on the slides, will consist of rework, maintenance of equipment already delivered, etc.

8 At 10:15 Mr. Newman began a discussion of licensing problems attendant upon the proposed change. He felt that there was an 80% chance that a CP amendment would be required for the change of engineers (if a CP amendment is not required, an amendment of the PSAR would be the only required action). If a CP amendment is required, Mr. Newman felt that there are two possible forks in the regulatory road:

9 Fork 1. The NRC would require that a notice be issued and that a hearing be held on the question of "significant hazards". If this occurs, which Mr. Newman felt he had to give a 50-50 likelihood, a hearing could take as long as a year to complete but in view of the transition that would be required in engineering at the site this may not represent much time lost.

10 Fork 2. No notice or hearing - time much shorter.

11 At 10:25 Mr. Newman passed out and discussed the "implementing actions" schedule sheet, which discussion continued until 10:40.

12 At 10:40 Mr. Oprea asked Mr. Cowan to discuss the right of the Company, under its contract with Brown & Root, to make the proposed change. Mr. Cowan cited Section 3.4 of the contract and advised Mr. Jordan that there was no legal problem in the Company's doing what it wanted to do in reducing Brown & Root's scope.

13 Messrs. Goldberg, Newman and Oprea thereupon, at 11:00 a.m., gave their individual assessments of the relative merits of the several contractors, which assessments were as follows:

14 Mr. Goldberg expressed the view that if the Company were starting from scratch he would choose Bechtel but this job is not starting from scratch. He felt that the Stone & Webster plan for sorting out the present difficulties is best and that Stone & Webster is offering the best people. He expressed the opinion that Bechtel would be better in Phase B and that a panacea would be to have Stone & Webster do Phase A and Bechtel do Phase B but that can't be done. Considering all factors, he favored Stone & Webster.

15 Mr. Newman said that he leans toward Stone & Webster on a close call but recognizes that the job may overtax Stone & Webster. He concluded by saying that either Bechtel or Stone & Webster was a good choice.

16 Mr. Oprea expressed the opinion that Stone & Webster is very impressive technically and that he was concerned somewhat about Bechtel's work "packages". He concluded that in his opinion it was almost a tie between Bechtel and Stone & Webster but he felt that the edge had to go to Bechtel.

17 A discussion of these views followed until noon when the meeting was adjourned for lunch.

081002

Re: Discussions amc STP participants
regarding replacement of Architect/
Engineer and Construction Manager

September 22, 1981

18 At 9:00 a.m. on September ²²20, 1981 Messrs. Jordan, Oprea, Goldberg, Newman and Cowan and the writer met in the 25th floor conference room at Houston Lighting & Power Company to review the presentation that was to be made ^{by H&P} during the afternoon to the other STP participants.

19 Mr. Goldberg began by presenting a series of slides that would be shown during the afternoon. The slides were as follows:

20 The first two slides compared personnel by name in the eleven key slots for Bechtel, Ebasco and Stone & Webster and the total resources of ^{each} the organization and the places where different types of work would be done. ^{by each.} Mr. Goldberg explained that the Westinghouse turn-key proposal was not responsive to the Company's request for proposals and, therefore, ^{had} ~~was~~ been disregarded.

21 The next slide concerned logistics. The next slide showed proposed staffing levels at various stages of the work over the next year for each of the three organizations.

22 ^{The} take-over experience of each of the organizations was compared on the next slide.

23 Planning, scheduling and cost estimate projections were next compared, Bechtel expecting to complete this work in nine months, Stone & Webster in ten months and Ebasco in six months (again indicating, according to

081003

23 Mr. Goldberg, that Ebasco simply did not understand the scope of the work required).

24 The final slides compared the take-over strategies of the three bidders. Each would be willing to work as a consultant to HL&P during the time required to phase out the existing contractor and phase in the successful bidder. Mr. Goldberg explained that the construction of safety-related work will cease during the transitional period and that "construction", as it is used on the slides, will consist of rework, maintenance ^{of} equipment already delivered, etc.

25 At 10:15 Mr. Newman began a discussion of licensing problems attendant upon the proposed change. He felt that there was an 80% chance that a CP amendment would be required for the change of engineers. If a CP amendment is required, Mr. Newman felt that there are two possible forks in the regulatory road:

CP
amendment
required
by
NRC
would
only
be
issued
(
other).

26 Fork 1. The NRC would require that a notice/^{be issued} and ~~just a~~ hearing be held on the question of "significant hazards". If this occurs, which Mr. Newman felt he had to give a 50-50 likelihood, a hearing could take as long as a year to complete but in view of the transition that would be required in engineering at the site this may not represent much time lost.

Fork 2. No notice or hearing - time much shorter.

27 At 10:25 Mr. Newman passed out and discussed the "implementing actions" schedule sheet, which discussion continued until 10:40.

28 At 10:40 Mr. Oprea asked Mr. Cowan to discuss the right of the Company, under its contract with Brown & Root,

D 81003A

28 to make the proposed change. Mr. Cowan cited Section 3.4 of the contract and advised Mr. Jordan that there was no legal problem in the Company's doing what it wanted to do in reducing Brown & Root's scope.

Goldberg
Messrs. ~~Spence~~, Newman and Oprea thereupon, at 11:00

29 a.m., gave their individual assessments of the relative merits of the several contractors, which assessments were as follows:

30 Mr. Goldberg expressed the view that if the Company were starting from scratch he would choose Bechtel but this job is not starting from scratch. He felt that the Stone & Webster plan for sorting out the present difficulties is best and that Stone & Webster is offering the best people. He expressed the opinion that Bechtel would be better in Phase B and that a panacea would be to have Stone & Webster do Phase A and Bechtel do Phase B but that can't be done. Considering all factors, he favored Stone & Webster.

31 Mr. Newman said that he leans toward Stone & Webster on a close call but recognizes that the job may overtax Stone & Webster. He concluded by saying that either Bechtel or Stone & Webster was a good choice.

32 Mr. Oprea expressed the opinion that Stone & Webster is very impressive technically and that he was concerned somewhat about Bechtel's work "packages". He concluded that in his opinion it was almost a tie between Bechtel and Stone & Webster but he felt that the edge had to go to Bechtel.

33 A discussion of these views followed until noon, when the meeting was adjourned for lunch.

D 81001