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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'86 MAR 17 P3:28

In the Matter)	
)	
HOUSTON LIGHTING & POWER)	Docket Nos. 50-498 OL
COMPANY, <u>ET AL.</u>)	50-499 OL
)	
(South Texas Project, Units 1)	
and 2))	

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

APPLICANTS' RESPONSE TO
"CITIZENS CONCERNED ABOUT NUCLEAR POWER, INC. (CCANP)
MOTION TO REOPEN THE PHASE II RECORD: V AND
FOR BOARD ORDERED PRODUCTION OF DOCUMENTS BY APPLICANTS"

I. INTRODUCTION

By Motion dated February 21, 1986,^{1/} (sic) CCANP has again requested that the Phase II record be reopened, this time to admit excerpts from a deposition given by Mr. Joseph W. Briskin on January 30, 1985, in the litigation between the owners of the South Texas Project (STP) and Brown & Root, Inc. (B&R). Although CCANP raises a number of arguments, its principal claim appears to be that this new documentation supports CCANP's position as to the purpose for the hiring of the Quadrex Corporation and as to all of the implications that allegedly flow from CCANP's position. Motion at 3-4.

1/ Citizens Concerned About Nuclear Power, Inc. (CCANP) Motion to Reopen the Phase II Record: V and for Board Ordered Production of Documents by Applicants. Although the Motion is dated February 21, 1986, it was served on February 28.

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CCANP contends that the Board "would be justified in simply admitting the new documentation" and in issuing a decision disqualifying Applicants' senior management without additional hearings. Id. at 22. Alternatively it requests that the documentation be admitted in the record, Applicants be ordered to produce additional documentation and that additional hearings be scheduled in Phase II. Id.

As explained below, it is Applicants' position that the information contained in the excerpts from Mr. Briskin's deposition is consistent with the extensive and uncontroverted evidence in this proceeding and would not alter the result that the Board would reach in its absence.^{2/} CCANP's speculative arguments lack any merit, as is further demonstrated by the attached affidavit of Mr. Briskin.

^{2/} The Motion is also untimely. As the Board is well aware from previous pleadings, CCANP did not exercise its discovery rights in 1983 and 1984. At that time, if it thought such matters to be of significance it could have filed interrogatories requesting information as to individuals with whom Mr. Goldberg might have discussed the Quadrex Report or taken depositions of individuals who served as officials of HL&P during the relevant time frame. Moreover, although Mr. Briskin's deposition was among those not filed with the Court and thus did not become publicly available in May 1985, it has been among the materials available to Mr. Sinkin in Austin since September 1985. The Board should not countenance CCANP's continuous reliance on the "gravity" of the issues as a crutch for its failure to conduct discovery or review available materials in timely fashion.

Accordingly, CCANP's Motion does not warrant reopening the Phase II record,^{3/} and that relief, as well as all other relief sought by CCANP in its Motion, should be denied.

II. ARGUMENT

Although CCANP restates its argument in various ways throughout the Motion, and at times adds some collateral arguments, the principal thrust of its claim appears to be that the Briskin deposition "represents a third and independent source of support for CCANP's contention that the Applicants testified falsely regarding the purpose for commissioning the Quadrex investigation."^{4/} Motion at 14.

^{3/} Since the legal standards applicable to a motion to reopen have been iterated many times in the responses of Applicants and the NRC Staff to CCANP's previous motions to reopen and the Board's rulings thereon, they will not be repeated here. The Commission has recently alluded again to the hearing burden placed upon a movant seeking "to justify reopening a closed record," in a decision which also reiterated that a movant is not entitled to engage in discovery in order to support its motion. Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 2), CLI-86-1, 23 NRC ___, slip op. at 6 (January 30, 1986).

^{4/} The first two alleged sources of "support" were Mr. Thrash's notes of the Management Committee meetings, which were the subject of the reopened hearing on December 5 and 6, 1985, and excerpts from the deposition of Mr. Saltarelli and an exhibit thereto, which were the subjects of CCANP's fourth motion to reopen. The lack of support for CCANP's position in those materials have been dealt with at length in the pleadings of Applicants and the Staff and need not be repeated here. See Applicants' Proposed Findings of Fact for Reopened Phase II Hearing (December 13, 1985); NRC Staff's Supplemental Proposed Findings of Fact and Conclusion of Law on the Reopened Phase II Hearing Record With Regard to Contention 10 (December 13, 1985); Applicants' Response to "CCANP Motion to Reopen the Phase II Record: IV; for Discovery and to Suspend Further Activity in Phase III" (February 3, 1986); and NRC Staff Response to CCANP Motion to Reopen the Phase II Record: IV, for Discovery and to Suspend Further Activity in Phase III (February 6, 1986).

Since this principal argument is wholly without merit, Applicants will not burden the Board with laborious responses to each of CCANP's collateral arguments.

Mr. Briskin's deposition indicates that he was not involved in the selection of Quadrex to perform a study; that the study "was not handled on the project," but was handled by Dr. Sumpter; that he had only a general understanding of the Quadrex methodology; that he was not involved in the study, except peripherally; that he was not familiar with the technical issues identified by Quadrex; and that he had very little discussion with Mr. Goldberg "on the whole subject of the Quadrex Report . . ." CCANP Document 1 at 403-09, 412. See also Attachment A (Briskin Affidavit) at ¶7.

In response to questions as to his understanding of Mr. Goldberg's motivation in commissioning the Quadrex study, Mr. Briskin denied that it was "Mr. Goldberg's desire that he would have an independent review of the design that he could present to the ASLB,"^{5/} but stated instead that Mr. Goldberg's "view was that he would have an independent review of design made so that he could state an opinion on the quality of the design should he be asked by the

^{5/} Although CCANP quotes extensively from Mr. Briskin's deposition (Motion at 5-6), it fails to quote, or to even mention, Mr. Briskin's denial.

ASLB." CCANP Document 1 at 411 (emphasis added); see also id. at 402-03.

This statement is fully consistent with the Phase II record. In Mr. Goldberg's testimony on July 12, 1985, after explaining his need, as the vice-president of engineering as well as construction, for the Quadrex study he explicitly pointed out that "certainly as a side benefit, had any questions surfaced [at the licensing hearings] regarding any probing issues on engineering, I would have considerably more information than I might otherwise have had without that review."^{6/} Tr. 11583-84. Each of the witnesses who testified on this point at the reopened Phase II hearings recalled that the possible use of the Quadrex information to answer potential questions on engineering, if they arose at the Phase I hearing, was perceived only as an incidental benefit of the review by Mr. Goldberg. See, e.g., citations to testimony of Messrs. Thrash, Goldberg, Oprea, Barker and Sumpter in Applicants' Proposed Findings of Fact for Reopened Phase II Hearing (December 13, 1985) at ¶¶10, 26. See also Affidavit of Loren Stanley (December 12, 1985) at 2.

Mr. Briskin's deposition, in fact, importantly corroborates the previous record. He explicitly states that -- con-

^{6/} In the Motion, CCANP implies that Applicants concocted its position concerning the "side benefit" of the study, "[w]hen faced with the evidence in Motion II." Motion at 14. CCANP conveniently ignores that, as shown in the text above, Mr. Goldberg had consistently explained his position in those terms well before CCANP filed its Motion II on October 16, 1985.

trary to an often-voiced CCANP argument -- the Quadrex review was not commissioned to affirmatively submit evidence to the Board, but only that the information would be useful if questions were raised by the Board.

CCANP argues, however, that since the reference to this possible use of the Quadrex information at the hearings was "the only reason for the study recorded in Mr. Briskin's sworn deposition" it constitutes "conclusive proof that the major purpose (and certainly far more than a 'side benefit') of the Quadrex investigation was to prepare information for expected questioning in the 1981 Phase I licensing hearing and that Applicants, therefore, considered the matters to be studied by the Quadrex Corporation to be relevant to the Phase I hearing" Motion at 14-15.

CCANP's speculation is wholly unwarranted. In view of Mr. Briskin's acknowledged lack of involvement in Applicants' commissioning, conduct and review of the Quadrex study, and his limited communications with Mr. Goldberg on the subject of the Quadrex study, there is no reason to expect that Mr. Goldberg would have provided him with a detailed explanation of his reasons for undertaking the study. In fact, since the reference to the Quadrex study recalled by Mr. Briskin arose in the context of a discussion of the forthcoming ASLB hearings (CCANP Document 1 at 403),

it would not be surprising if Mr. Goldberg mentioned only the "side benefit" of the study without going into the more basic reasons he had in mind. Nevertheless, as noted in Mr. Briskin's affidavit, it was his general understanding that "the primary purpose of the Report was project-related, that is, to assess the adequacy of B&R's engineering and its status. This was of greater importance than just helping Mr. Goldberg to answer questions if asked." Attachment A (Briskin Affidavit) at ¶8.

Moreover, the fact that Mr. Goldberg thought that questions on engineering might be raised by the Board does not indicate that he believed such questions related to the Phase I issues. As Mr. Goldberg has previously explained, his previous experience indicated that a Hearing Board had wide latitude as to the questions it might ask and that therefore the questioning could extend to matters beyond the pending issues, such as engineering at STP. Tr. 11582-84, 15506-08, 15523, 15551-53 (Goldberg); see also Tr. 15589-90, 15594-95, 15623 (Oprea), Tr. 15399 (Jordan). Although Mr. Briskin was involved in the preparation of evidence for the Phase I hearing and was familiar with the plans to provide evidence through the consultants who reviewed the Show Cause Order items, he was not aware of any discussion of conducting the Quadrex review to develop

information relating to the issues to be heard by the Board.^{7/}
Attachment A (Briskin Affidavit) at ¶11.

CCANP also accuses Applicants of deliberately misleading the Board "regarding Applicants' view of the seriousness of the Quadrex findings." Motion at 4; see also, id. at 18. CCANP does not spell out a coherent argument on this subject within the Motion. However, it is apparently based upon Mr. Briskin's testimony that at a dinner meeting in the summer of 1981, Mr. Goldberg expressed concern about the quality of B&R's engineering and about whether the Project would be licensed if B&R continued as A/E, and that such concern was based in part upon the views of Mr. Robertson and, perhaps, upon the Quadrex Report. Motion at 5.

CCANP ignores that Mr. Briskin was referring to a discussion where Mr. Goldberg expressed concern about B&R's "ability to complete the project and support Construction, and discussing the possibility of having to replace Brown & Root as the engineer -- architect/engineer." CCANP

^{7/} CCANP also cites the portion of Mr. Briskin's deposition stating that he had supposed that the Quadrex Report would be "submitted" to the Board as back-up for Mr. Goldberg's testimony. Motion at 5. As Mr. Briskin's affidavit makes clear he meant "backup" only in the sense that Mr. Goldberg would know the information and could rely on it to answer any questions he was asked. He did not mean to convey that he expected the Report to be given to the Board or the NRC. Attachment A (Briskin Affidavit) at ¶9. He was not aware of any consideration of submitting the Report to the Board. Id., at ¶11.

Document 1 at 397-98. The record is clear that in the summer of 1981 Mr. Goldberg and other HL&P officials had concerns about the effectiveness and technical adequacy of B&R's engineering efforts which led to B&R's replacement. See, e.g., testimony cited in Applicants' Proposed Findings of Fact and Conclusions of Law-Phase II (September 30, 1985) at ¶¶IX.18, IX.22. Although Mr. Briskin's testimony does not add anything to the existing record, CCANP may be implying that Mr. Briskin's reference to a concern about "quality" of engineering is inconsistent with the previous extensive testimony that the Quadrex Report did not deal with satisfaction of QA requirements and did not -- except as reported to the NRC -- identify significant QA problems. However, nothing in Mr. Briskin's deposition would indicate that he was referring to QA problems. His affidavit confirms that he did not have QA problems in mind, but was referring to a "concern that required engineering analyses had not yet been performed and engineering problems had not yet been solved so as to assure that the Project could be completed smoothly"^{8/} (Attachment A (Briskin Affidavit) at

^{8/} Although the term "quality assurance" is consistently used to refer to compliance with the requirements of 10 CFR Part 50, Appendix B, the looser term "quality" can have a variety of connotations and is not uniformly given the same meaning by all individuals. Every witness in this proceeding, including particularly Mr. Stanley, agreed that Quadrex was not asked to evaluate B&R's design or QA procedures against Appendix B and did not do so, and that the Quadrex Report did not generally identify QA problems. See, e.g., evidence cited in Applicants' Proposed Findings of Fact and Conclusions of Law-Phase II (September 30, (Footnote 8 continued on page 10.)

¶6); and that at no time did anyone suggest to him that the Quadrex Report identified any significant QA problems not reported to the NRC (Id. at ¶10).

Thus, CCANP's Motion offers no basis for questioning the uncontroverted testimony in Phase II hearings and in the reopened proceeding regarding the purpose of the Quadrex study or why it was not mentioned in the Phase I hearings, and no evidence upon which the Board might alter the decision it would otherwise reach on such questions. Accordingly, the motion to reopen the Phase II record, as well as the alternative relief sought by CCANP, should be denied.

III. CONCLUSION

CCANP's fifth motion seeks to reopen the Phase II record based upon its speculative arguments regarding a deposition given in another proceeding by an individual who had no significant role in, or knowledge of, the commissioning, conduct or review of the Quadrex study. Relying upon its speculations, CCANP repeats endlessly accusations of "material false statements and omissions" (Motion at 1), "intentionally false or misleading testimony" (id., at 1, 4, 11, 13, 15, 17, 18), deliberate withholding of the existence and substance of the Quadrex Report (id., at 1, 12), "existence of a conspiracy" (id., at 4, 8, 11,

8/ (Footnote continued from page 9.)
1985) at ¶¶II.25-II.26, II.28, III.5, III.17, VII.3-VII.4, IX.6-IX.9, IX.36, IX.39, IX.42; Applicants' Reply to Proposed Findings of Fact and Conclusions of Law Submitted by the Other Parties-Phase II (November 27, 1985) at ¶¶RII.71-RII.72, RIII.2. That Mr. Briskin, or others, occasionally used the term "quality" in referring to problems of technical adequacy or engineering effectiveness is not relevant to any matter at issue.

13, 17), "lack of character" (id., at 4, 17, 19) "deliberate misrepresentations of the truth" (id., at 7, 15) "hiding of information" (id., at 11), obstruction of the NRC (id., at 11, 17, 18), "misrepresentations" (id., at 15, 16, 17) and "dishonesty" (id., at 15).^{9/}

^{9/} CCANP's Motion also accuses Applicants' counsel of being aware that senior management was testifying falsely and of making no effort to correct the testimony but instead filing a pleading embracing it (Motion at 7-8). As explained at length above, Mr. Briskin's deposition is fully consistent with the previous testimony of HL&P's senior management. It is also fully consistent with Mr. Goldberg's affidavit attached to Applicants' response to CCANP's fourth motion to reopen, the apparent basis for CCANP's new accusation. See Motion at 20-21. In that document, Mr. Goldberg describes the Project-related advantages of third party assessments discussed with Mr. Saltarelli; states that he very likely mentioned "that a benefit of such a [third party] design review would be that I would be better able to answer questions concerning STP engineering if any were raised in future ASLB hearings," and, in response to CCANP's allegation of an "overall litigation strategy," reaffirms the Project-related motivation for the review by stating that "[n]either the Quadrex review nor the NUS work was performed in order to prepare for the ASLB hearing" Goldberg Affidavit at 1-2. Applicants have tried to avoid exacerbating the situation by not responding to CCANP's attacks on counsel. However, we must now bring to the Board's attention that CCANP has once more ignored the Board's previous admonishments and stepped over the line demarcating acceptable pleadings by engaging in reprehensible ad hominem attacks.

(Footnote 9 continued on page 12.)

The Board has already expressed its "displeasure at the unfounded and reckless allegations which CCANP has made against Applicants' counsel" and has deferred its ruling on Applicants' complaint of such allegations against HL&P management officials until its issuance of its Phase II Partial Initial Decision. Memorandum and Order (CCANP Motions II and III to Reopen Record), LBP-85-45, 22 NRC 819, 827 (November 14, 1985). The reckless personal charges in CCANP's Motion, which we have shown to be utterly without merit and totally uncalled for, are equally deserving of the Board's consideration in determining whether sanctions against CCANP are appropriate and required.

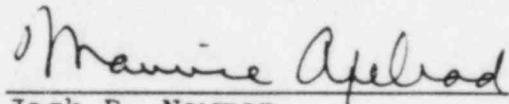
The deposition upon which the instant Motion is based is consistent with Applicants' prior testimony, cumulative of other information already in the record and insufficient to modify the determinations the Board would otherwise reach in its absence.

9/ (Footnote continued from page 11.)

CCANP's allegations of violations of the McGuire rule (Motion at 11,21) also appear to be predicated on its accusations of false testimony. Obviously Applicants' counsel would have obligations to the tribunal if it were aware of false testimony, although such obligations would clearly arise under ethical codes applicable to the conduct of attorneys rather than under CCANP's novel views on the McGuire rule. However, in the instant Motion, as in the case of CCANP's fourth motion to reopen (see Applicants' Response to "CCANP Motion to Reopen the Phase II Record: IV, for Discovery and to Suspend Further Activity in Phase III." (February 3, 1986) at 2, n.2), CCANP's speculation of false testimony was totally without basis, and neither an ethical problem nor a McGuire question was remotely involved.

For the reasons set forth above, CCANP's Motion should be denied and the Board should take such action as it deems appropriate in dealing with CCANP's continued ad hominem attacks on Applicants' witnesses and counsel.

Respectfully submitted,



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