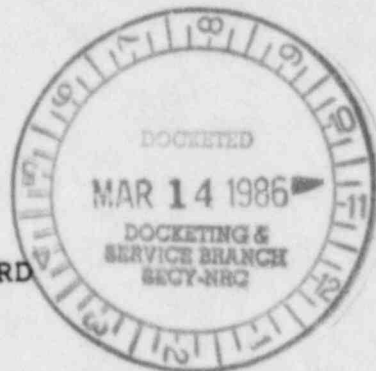


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



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

APPLICANTS' MOTION FOR SUMMARY
DISPOSITION ON ISSUE F

I. Motion

Pursuant to 10 C.F.R. § 2.749, Applicants hereby move for summary disposition of Issue F. As set forth below and in the attached Affidavit of James E. Geiger (Affidavit), HL&P's Quality Assurance (QA) program for operation of STP satisfies the requirements of 10 C.F.R. Part 50, Appendix B (Appendix B), and CCANP has raised no genuine issue of material fact with respect to Issue F. A statement of material facts as to which there is no genuine issue to be heard is attached. Accordingly, Applicants are entitled to a decision in their favor as a matter of law.

II. Legal Standard for Summary Disposition

10 C.F.R. § 2.749(a) provides that any party to an NRC proceeding may move for a decision in its favor on any issue in the proceeding. The motion may be accompanied by supporting

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affidavits, and must include a "short and concise" statement of the material facts which it contends are not in dispute. 10 C.F.R. § 2.749(a).

Any party opposing the motion must provide a similar statement identifying the material facts which it believes are in dispute, and any facts not controverted by the party opposing the motion "will be deemed to be admitted." Id. Furthermore, the opposing party may not rest upon "mere allegations or denials," but must provide "specific facts showing that there is a genuine issue of fact." 10 C.F.R. § 2.749(b). "[C]onclusions of law will not suffice [and] the opposing party's facts must be material [and] substantial, not fanciful, or merely suspicious." Gulf States Utilities Co. (River Bend Station, Units 1 & 2), LBP-75-10, 1 NRC 246, 248 (1975). If the filings submitted, including relevant discovery responses and affidavits, show that "there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law," then the presiding officer "shall render the decision sought." 10 C.F.R. § 2.749(d). 1/

Summary disposition pursuant to section 2.749 is analogous to summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974). Its

1/ Partial summary disposition may also be granted. See e.g., Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-114, 16 NRC 1909, 1913-18 (1982).

purpose is not to deny a litigant the right to a full hearing on legitimately disputed issues of material fact, but instead to avoid "unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues" Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980). Thus, summary disposition is used to dispose of meritless contentions and to avoid squandering the limited resources of the adjudicatory board and the parties to the proceeding.

III. Argument

A. No Genuine Issue of Material Fact
Remains to be Litigated Concerning
HL&P's QA Program for the Operation of STP

In the Board's Second Prehearing Conference Order (December 2, 1980), the Board admitted Issue F for litigation in this proceeding. 2/ Issue F states:

Will HL&P's Quality Assurance Program for
Operation of the STP meet the requirements of
10 CFR Part 50, Appendix B?

There is no dispute that HL&P's QA program for operation of STP will meet the requirements of 10 C.F.R. Part 50, Appendix B. The attached affidavit of James E. Geiger, HL&P's Manager of Nuclear Assurance, and CCANP's answers to the Appli-

2/ Litigation of Issue F was deferred until Phase III by the Board's Fourth Prehearing Conference Order (December 16, 1981).

cants' Eighth set of Interrogatories demonstrate that there is no genuine issue of material fact concerning HL&P's QA program for operations.

Section 17.2 of the STP FSAR addresses each of the eighteen criteria contained in Appendix B and explains how HL&P's QA program for the operation of STP will comply with them. Affidavit at ¶ 15 and Attachments A, B and C. The program will be implemented through the Operations QA Plan and detailed procedures governing the performance of quality related work. Id. at ¶ 2. The operations QA organization will conduct inspections, audits and surveillance, develop and review quality related documents and procedures, perform deficiency tracking and trending, review vendor quality programs, and otherwise monitor STP quality related activities. Id. at ¶¶ 5-9. The operations QA organization reports to a level of management which will provide for organizational independence in the performance of its functions (Id. at ¶ 3), and is structured so that all aspects of compliance to Appendix B will receive proper emphasis and attention (Id. at ¶¶ 5-9).

The QA organization for operation of STP will have a staff of 60 persons for two unit operation (Id. at ¶ 10), and the staff will have acquired considerable experience with plant equipment, personnel, requirements and procedures (Id. at ¶ 11). Personnel responsible for operations QA will be qualified to appropriate industry and regulatory standards. Id. at ¶ 13. Employees whose activities affect quality must receive appro-

priate QA training (Id. at ¶ 12), and persons performing activities requiring certifications are required to be qualified and certified on the basis of applicable industry standards and staff regulatory guidance (Id. at ¶ 13). As described in Section 17.2 of the FSAR, HL&P's QA program for operation of STP will meet all of the Criteria contained in Appendix B. The professional opinion of Mr. Geiger, who has substantial nuclear QA experience, is that the QA program for operation will meet the requirements of Appendix B. Id. at ¶ 16.

CCANP does not contest that the QA program for operation of STP satisfies the requirements of Appendix B. On the contrary, in its Answers to Applicants' Eighth Set of Interrogatories and Requests for Production of Documents (February 12, 1986) (CCANP Answers) at 1, CCANP states:

CCANP does not contend that the Quality Assurance Program for the South Texas Nuclear Project, as amended through Amendment 52 (November 15, 1985) and HL&P's letters to the NRC staff through January 10, 1986, will not fully satisfy the requirements of 10 C.F.R. Part 50, Appendix B or that any revisions or additions to such QA program are necessary in order to satisfy the requirements of 10 C.F.R. Part 50.

Accordingly, there is no genuine issue of material fact with respect to the adequacy of HL&P's QA program for operation of STP, and Applicants are entitled to a decision as a matter of law that the program will meet the requirements of Appendix B.

B. CCANP's Other Allegations are Unrelated to Issue F

Despite CCANP's admission that it does not contend that HL&P's QA program will not meet the requirements of Appendix B, CCANP seeks to litigate additional issues it asserts are raised by an anonymous phone call received by CCANP in October 1985. CCANP states that the anonymous caller told Mr. Lanny Sinkin that HL&P had conducted a program to detect illegal drug use or sale at STP, but that HL&P did not take appropriate action against all individuals implicated in drug sale or use. See CCANP Answer to Interrogatory 5. CCANP represents that this anonymous caller also told Mr. Sinkin that HL&P terminated many people implicated in drug sale or use during the investigation, but that HL&P did not terminate personnel who would have implicated members of the "Operations Group", and that no action was taken against "Operations Group" personnel implicated during the investigation "in order to protect members of the Operations Group". Id. Apparently by "Operations Group" (which is not a defined term at STP) CCANP means all persons who report to the Vice President-Nuclear Plant Operations. See CCANP Motion to Compel, (February 28, 1986) at 5.

CCANP contends that if these anonymous claims are true, they show "preferential handling" by HL&P of "members of the Operations Group implicated in the use and/or sale of drugs and of others who would have implicated members of the Operations Group in such sale and/or use" CCANP Response to

Applicants' Motion for Protective Order (February 28, 1986) at 2. CCANP claims that this "demonstrates a lack of character" on the part of the Applicants (Id. at 2), and that if true, the allegation of preferential treatment shows that "Applicants have failed to promptly correct a condition adverse to quality" (Id. at 3-4). CCANP further asserts that "if the Operations Group and those who might implicate the Operations Group received preferential treatment to prevent the Nuclear Regulatory Commission (either the Staff or this Board) from learning about illegal drug use and/or sale in the Operations Group, then the allegation . . . is even more serious. Such actions would serve as a predictor for the ASLB that Applicants will hide information about quality-related problems in the Operations Group from the NRC during operation of the Plant." Id. at 2-3. 3/ CCANP concludes that the "Applicants have failed to promptly correct a condition adverse to quality and directly linked to the operation of STNP," and claims that this constitutes a violation of 10 C.F.R. Part 50, Appendix B, Criterion XVI, 4/ which requires measures to be

3/ The claim that HL&P might have been trying to prevent the Staff or the Board from learning about illegal drug use or sale by members of the "Operations Group" was apparently not made by the anonymous caller (see CCANP Answer to Interrogatory 5), but is purely CCANP's own speculation.

4/ It was not until after CCANP received Applicants' February 18, 1986 Motion For Protective Order, which argued that character issues were outside the scope of Issue F, that CCANP first concocted its claim that its drug control program allegations showed a violation of Criterion XVI. Originally, when asked in the Applicants' Interrogatories to state any facts or reasons why HL&P's QA program for operations would not meet the requirements of Appendix B, CCANP
(footnote continued)

established for identification and correction of conditions adverse to quality. Id. at 3, 4.

In essence, CCANP seeks to litigate (and conduct extensive discovery on) the adequacy and implementation of HL&P's drug use detection program in effect in 1985. Such matters are irrelevant to the resolution of Issue F. Appendix B, and Criterion XVI in particular, do not require or provide criteria for licensee programs to control the use of drugs by nuclear plant employees, and the NRC Standard Review Plan, regulatory guides and referenced ANSI N45.2 and daughter standards providing guidance for implementation of Appendix B do not mention drug use. Affidavit at ¶ 14.

Appendix B seeks to assure quality through a system of planning, training, written procedures, inspections, audits and documentation. Many aspects of the management of a nuclear project are not part of this system. Among these are security, financial matters, scheduling, and many personnel matters. Some of these, such as plant security, are the subject of other Commission regulations; others are not. Similarly, there are a number of factors affecting personnel performance, such as morale, intelligence, loyalty, pride of accomplishment, etc., that are not governed by Appendix B. Control of alcohol and drug abuse are two of these.

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stated only that "HL&P lacks the character to implement said program." CCANP Answer to Interrogatory 4.

CCANP attempts to shoehorn its claims related to drug testing into the scope of Issue F by claiming that if these allegations are true, HL&P "failed to promptly correct a condition adverse to quality" in violation of Criterion XVI of 10 C.F.R. Part 50, Appendix B. CCANP's reasoning requires distortion of the plain meaning of Criterion XVI. That Criterion indeed requires the establishment of measures to assure identification and correction of conditions adverse to quality; however, not every miscellaneous problem related to construction or operation of a nuclear plant constitutes a "condition adverse to quality" as used in the Criterion. Criterion XVI states, in pertinent part:

Measures shall be established to assure that conditions adverse to quality, such as failures, malfunctions, deficiencies, deviations, defective material and equipment, and nonconformances are promptly identified and corrected.

(emphasis added). Obviously, the "conditions adverse to quality" which fall within the meaning of Criterion XVI are the types of problems intended to be identified by a QA program which satisfies all of the other requirements of Appendix B. Appendix B describes the plant systems, structures, components, or materials to which it applies and defines certain programs and activities that must be implemented with respect to them. The programs and activities required by Appendix B do not cover drug use (or sale) or management policies toward such use (or sale). ^{5/} See page 7,

^{5/} Of course, if a defect in a system, structure, component, or material covered by Appendix B or in the performance of
(footnote continued)

supra, and Affidavit at ¶ 14. QA programs adopted in accordance with Appendix B are simply not designed to detect drug use; thus, an alleged failure to detect or properly respond to drug use would not be a failure to promptly identify or correct a "condition adverse to quality" within the meaning of Criterion XVI. 6/

That drug control does not fall within the scope of Appendix B has also been implicitly recognized by the fact that the Commission has currently pending two proposed regulations that would explicitly address drug use by workers in operating plants. The first such rulemaking, the so called "fitness for duty" rule, was published for public comment in 1982. 7/ The proposed rule would require licensees of operating nuclear plants "to establish and implement controls designed to assure that personnel with unescorted access to protected areas are not under the influence of drugs or alcohol or otherwise unfit for duty." 47 Fed. Reg. 33,980 (August 5, 1982). This rule making has been under consideration for three and a half years without Commission

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activities governed by Appendix B were to result from any cause, including drug use, this would be a "condition adverse to quality" that a QA program meeting the requirements of Appendix B would be required to identify and correct.

6/ Because drug use control is not addressed by Appendix B, control of drug use is not part of HL&P's QA program. However, the Project has devoted substantial attention to controlling the use of illegal drugs. See Applicants Motion For Protective Order (February 18, 1986) at n. 4.

7/ "Personnel With Unescorted Access to Protected Areas; Fitness for Duty," 47 Fed. Reg. 33,980 (August 5, 1982).

action. In 1984 the Commission decided to defer adoption of a rule for two years to allow time for the industry to continue its initiatives addressed to such issues. 8/ SECY-85-21, at 1 (January 17, 1985).

The second such rulemaking is the proposed "access authorization" rule, 9/ under which licensees of operating plants would be required to have an access authorization program for individuals seeking unescorted access to protected areas and vital islands at nuclear power plants. This proposed rule has received intensive study by NRC. It was first proposed on March 17, 1977 (42 Fed. Reg. 14,880), was subsequently considered in a public hearing (RM-50-7), and a Commission decision was issued based on that hearing (CLI-80-37, 12 NRC 528 (1980)). This rule would require licensees determining whether to deny access, to consider, among other things, whether the individual is a "habitual user of a controlled substance ..." 49 Fed. Reg. at 30,733 (August 1, 1984).

The fact that the Commission is developing separate rules on drug use issues shows that it considers these issues to be outside the scope of Appendix B. The pendency of these

8/ The Commission also has under consideration a proposed Statement of Policy on fitness for duty that would continue to defer rulemaking on this subject and would, in fact, withdraw the proposed rule, permitting the industry to attempt to meet the objectives of the Policy Statement through voluntary programs. SECY-85-21 (January 17, 1985), Enclosure at 1, 3; see also SECY-85-21B (August 26, 1985).

9/ "Access Authorization Program," 49 Fed. Reg. 30,726 (August 1, 1984).

rulemakings also prevents litigation concerning the adequacy of HL&P's drug use detection program, thus precluding CCANP's proffered interpretation of Issue F as including such questions. It is well established that "licensing boards should not accept in individual license proceedings contentions which are ... the subject of general rulemaking by the Commission." Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85 (1974); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 816 (1981). In Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station) LBP-79-33, 10 NRC 821, 824 (1979), the licensing board stated that acceptance of a proposed contention, given an ongoing Commission rulemaking on the subject, would require it to evaluate the contention:

in the context of evolving regulatory standards, standards which will, when finally promulgated, be applied to this plant. Under the circumstances, our consideration of this contention, and our resolution of it, would be of limited utility. Further, it would need to be duplicated once the new regulatory standards are in place.

To the extent that CCANP seeks to interpret Issue F to include questions about the control of drug use, the reasoning of these cases is fully applicable to the present case. ^{10/} The Commission's standards governing programs for detection and handling of drug users are currently evolving in a number of generic forms (the two proposed rules as well as the Commission's

^{10/} It would also be applicable if CCANP had timely sought to raise a new contention on that subject.

proposed Policy Statement). Under the circumstances, it would be improper to permit litigation regarding such matters in an individual licensing proceeding. 11/

CCANP's attempt to litigate the adequacy of HL&P's drug abuse detection and prevention program under the guise of operations QA program issues employs logic which would unduly expand the scope of this licensing proceeding, and in particular Issue F. 12/ Following CCANP's reasoning, any problem arising at STP would be a "condition adverse to quality," and HL&P's actions in response to the problem would be a "predictor for the ASLB" about how Applicants will perform during operation of the plant; the Board would then be obliged to hear evidence on all such topics under Issue F. Such strained reasoning should not be allowed to balloon the legitimate scope of Issue F and associated

11/ Even if the Commission chooses to withdraw the proposed fitness for duty rule, should the Commission's Policy Statement continue to endorse voluntary industry efforts in lieu of new regulations, it would be improper to permit discovery and litigation on the issue.

12/ CCANP's claim that "if preferential treatment can be shown to result from a decision to protect the Operations Group from NRC scrutiny, then the matter is raised to the character level" (CCANP Response to Applicants' Motion for Protective Order at 4) amounts to an attempt, on the basis of malicious speculation, to reopen the record on the character issues closed by the Board in the Phase I PID (with the exception of Quadrex-related issues; see 19 NRC at 686,691) without meeting the stringent standards imposed upon parties seeking to reopen the record. As Applicants will be prepared to argue at the upcoming prehearing conference, CCANP cannot meet these standards. In any event, CCANP's claim does not convert these drug use allegations into an operations QA matter cognizable under Issue F.

litigation and discovery, particularly when CCANP itself has admitted that it has no contention that HL&P's QA program for operations will not meet Appendix B.

III. Conclusion

There is no factual dispute that HL&P's QA program for operations will meet the requirements of 10 C.F.R. Part 50, Appendix B. The Applicants' Affidavit and attachments thereto, along with CCANP's own interrogatory answers, demonstrate that no genuine issue of material fact remains to be litigated under Issue F.

In its interrogatory responses and other filings before the Board, CCANP claims that certain anonymous allegations about HL&P's drug testing programs should be litigated under Issue F. These issues are inappropriate for consideration under Issue F because:

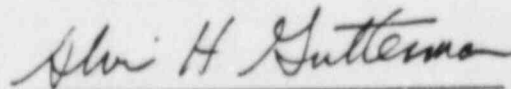
- 1) drug testing programs are not within the coverage of 10 C.F.R. Part 50, Appendix B, and therefore are not relevant to the resolution of Issue F;
- 2) the Commission, by rulemaking, is separately addressing these issues, thereby precluding their examination in licensing hearings;
- 3) the performance of HL&P in administering its drug testing programs can provide little if any insight into whether its QA program for operation of STP will meet the requirements of Appendix B; and

- 4) to allow CCANP to litigate these allegations under Issue F would effectively introduce a new contention into these proceedings without the showing required for introduction of a new contention.

Thus, the drug testing issues CCANP has raised are simply inapposite to the resolution of Issue F.

Accordingly, the Applicants are entitled to summary disposition in their favor on this issue.

Respectfully submitted,



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