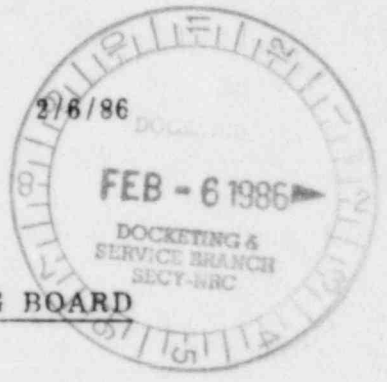
980

2/6/86



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

10C

NRC STAFF RESPONSE TO CITIZENS CONCERNED ABOUT NUCLEAR POWER, INC. MOTION TO REOPEN THE PHASE II RECORD: IV; FOR DISCOVERY AND TO SUSPEND FURTHER ACTIVITY IN PHASE III

On January 17, 1986, the Intervenor, Citizens Concerned About Nuclear Power, Inc. (CCANP), moved again to reopen the Phase II record in this proceeding, asked for discovery, and a suspension of further activity in Phase III. "Citizens Concerned About Nuclear Power, Inc. Motion to Reopen the Phase II Record: IV; for Discovery and to Suspend Further Activity in Phase III" (hereinafter "Motion IV"). CCANP seeks the reopening of the record, and further discovery, chiefly on the basis of three documents submitted with Motion IV.

These proferred documents consist of certain portions of a deposition taken of Eugene A. Saltarelli of Brown and Root (B&R) during the STP partners litigation with B&R in July 1984 (Documents 1 and 3 of Motion IV) and a memorandum overview of STP Engineering prepared by Mr. Saltarelli in late 1980 or early 1981 (Document 3 of Motion IV). In addition to asking that the aforementioned documents be admitted into evidence, CCANP asks for a new hearing where the testimony of Mr.

D50

Eugene Saltarelli, Mr. Lauren Stanley and Mr. Jack Newman would be taken, and, presumably, any other purportedly relevant information CCANP might acquire through further discovery might be introduced. For the reasons stated herein, the Staff opposes Intervenor's motion.

I. STANDARDS FOR REOPENING

The Staff has addressed the legal standards for reopening the record in this case in response to two other recent motions to reopen by CCANP. See "NRC Staff Response to CCANP Motion for Production of Documents, Reopening the Record, Admission of New Contention, and Discovery" at pp. 3-4 (filed October 15, 1985); "NRC Staff Response to CCANP Motions to Reopen the Phase II Record: II & III" (filed Nov. 5, 1985); see also Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-85-45, 22 NRC 819, 822 (1985); LBP-85-42, 22 NRC 795, 798-99 (1985); LBP-85-19, 21 NRC 1707, 1720 (1985); LBP-84-13, 19 NRC 659, 715-21 (1984).

As the instant CCANP motion itself recognizes, the standards applied to such motions to reopen are well-settled: the motion must be timely; it must address a significant safety (or environmental) issue; and it must demonstrate that a different result is likely to be reached had the newly proffered information been considered earlier. Metropolitan Edison Co. (Three Mile Island, Unit 1), CLI-85-2, 21 NRC 282, 285 n.3, reconsideration denied, CLI-85-7, 21 NRC 1107 (1985); see also LBP-85-42, 22 NRC at 798-99 (1985). As this Board has pointed out, in LBP-85-19, the proponent of a motion to reopen the record bears a heavy burden. 21 NRC at 1720; Kansas Gas and Electric Co. (Wolf

Creek Generating Stations, Unit 1), ALAB-462, 7 NRC 320, at 338 (1978). CCANP has not met these standards.

II. THE MOTION TO REOPEN

An analysis of the applicable standards in the context of the current motion compels a denial of that motion.

1. Timeliness - Intervenor's motion is untimely. CCANP's attempt to explain why this motion could not have been filed earlier is specious at best. The motion states that CCANP received "only partially identified" portions of a transcript and memorandum on December 13, 1985. Motion IV, at p. 4. It goes on to state that CCANP "initiated research" to identify and locate the full documents, but was only able to do so after January 14, 1986. Id. Intervenor -- without stating any specifics -- ascribes its failure to get this information earlier to a locked room at the Texas court and the past holiday season.

Even assuming that CCANP's delay from December 13, 1985, until it filed its motion to reopen on January 17, 1986, should be excused (or ignored), the larger issue of why once the protective order entered in the B&R litigation was lifted in May 1985, CCANP did not then acquire and produce this material is not explained by Motion IV. That is the relevant time frame which should be considered. CCANP offers only its weak assertions with regard to the delay since December 13, 1985; no explanation of the larger delay is found in Motion IV. Parties to an adjudicatory hearing are under an obligation to use their best efforts to discover relevant information and present it to the Board in accordance with the hearing schedule. Metropolitan Edison Co. (Three Mile Island

Nuclear Station, Unit No. 1), LBP-81-59, 14 NRC 1211, 1498 (1981); see also Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

CCANP apparently concedes that Motion IV is untimely when it states that given the "gravity" of the issues, "the timeliness criteria [sic] is of little significance" and that it will not even argue the timeliness of this motion. Motion IV, at 17-18. CCANP maintains that once it learned of the material in question (on December 13, 1985) it moved quickly to bring the material to the attention of the Board. That may be true, however, it does nothing to explain why Intervenor could not have acquired or produced the material long before it finally did "learn" of it last month.

2. Significance of the Safety and Environmental Issued Involved - As it has in the past, CCANP casts its motion as addressing a serious safety issue. The Staff does not dispute that HL&P's probity and character are important matters. However, the fact that a movant seeks to address a significant safety issue is only one of three standards that must be met to reopen the record. As stated above, the test of timeliness is not met and, as discussed in the next section, CCANP has not met the standard of demonstrating that the profferred material (Documents 1-3 of Motion IV) would affect the Board's decision, either in regard to HL&P's probity or in regard to the impact of the Quadrex Report.

3. The Likely Effect on the Board's Decision - As was the case with CCANP's previous motions to reopen (see e.g., "CCANP Motion to Reopen the Phase Record: II," filed October 17, 1985), the instant

motion is founded on the presumption that the Quadrex Report was strongly adverse to the "licensability" of the South Texas Project, giving Applicants a powerful motive to withhold the report from the NRC Staff and Licensing Board. However, the overwhelming weight of the evidence of record is to the contrary; the Quadrex findings that were not reported under 10 C.F.R. §50.55(e) were not reportable. See "NRC Staff's Proposed Findings of Fact and Conclusions of Law," filed Nov. 19, 1985, at 32-113. The nonreportability of the vast majority of these Quadrex findings, in fact, stands unchallenged by CCANP's submitted Proposed Findings in Phase II. See Id. at C.5, p. 34-35; D.2, p. 62-63. 1/

The statements in Mr. Saltarelli's deposition have far less significance than CCANP would give to them. The issue here is not

---

1/ At p. 8 of its Motion IV CCANP refers to a meeting between Brown & Root personnel and the Quadrex Corp. reviewers in April, 1981, dealing with the Quadrex report which HL&P purportedly declined to attend because reportable deficiencies might be discussed. However, at the same time HL&P was meeting with Quadrex to discuss its report including the deficiencies found, and particularly asked Quadrex to categorize and separately identify matters potentially reportable under 10 C.F.R. §50.55(e). Goldberg, ff. Tr. 11491, at 9-16; Tr. 11645-45, 11658-60 (Goldberg); Sumpter, ff. Tr. 12699, at 9-10; Stanley, ff. Tr. 13047 at 5; Tr. 13137-40, 13143, 13149-51 (Stanley); Ex. 58. Quadrex did not believe it had sufficient information to make a judgment as to the potential reportability of matters it was discovering at that time. Stanley, ff. Tr. 13047, at 5; Tr. 11645 (Goldberg). In the same period HL&P also alerted the NRC project manager that the Quadrex Report might generate 50.55(e) reports to the NRC. Goldberg, ff. Tr. 11491, at 49; Sells, ff. Tr. 15190, at Statement p. 1. No matter why HL&P may have declined to attend the mid-April B&R - Quadrex meeting it is clear that in the period HL&P was not insulating itself from finding out about reportable deficiencies in the

(FOOTNOTE CONTINUED ON NEXT PAGE)

what Mr. Saltarelli might have been told or perceived as the purpose of the Quadrex study, but whether HL&P's failure to inform the Licensing Board of the study, at the start of Phase I of these hearings, so reflects on HL&P's character as to prevent it from receiving a license. CCANP conjectures that the Quadrex Report was commissioned to be introduced into evidence during Phase I of these hearings to show the quality of the design of the South Texas Project, but was supressed when it turned out negatively. CCANP Motion IV at 14-16, 24-25, 29. It states that the record should be reopened because Mr. Saltarelli's statements, upon which it bases its latest motion to reopen, support these conjectures. Id. First, as we have indicated, the Quadrex Report was not adverse to licensing the South Texas Project and the motive CCANP infers for HL&P hiding the report from the Board does not exist. Moreover, an examination of Mr. Saltarelli's testimony lends no credence to CCANP's conjectures about the Report being commissioned for introduction into evidence in the proceeding, and then being suppressed. Mr. Saltarelli stated in his deposition:

> As I said, my understanding was that Mr. Goldberg wanted an independent review, other than HL&P and Brown & Root, to given him an assessment of the adequacy of the design as done by Brown & Root so that when he got up on the witness stand to the ASLB and they started questioning him whether he was comfortable with this design, he would be in a position to say, gee,

---

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

> South Texas Project, and was making preparations to report them to the NRC. It was not abdicating knowledge or responsibility in regard to the Quadrex Report it had, itself, commissioned.

> I had a third party look at it and they think it's great or they think it's got these problems. That was his explanation to me.

CCANP Motion IV, Document 1 at 620; see also id. at 615-16.

Nothing in Mr. Saltarelli's statements indicates that HL&P originally intended to introduce the Quadrex Report into evidence in Phase I of these hearings. All evidence in the record, and it was extensive, was that the study was commissioned to gain a knowledge of Brown & Root's engineering work on the South Texas Project and not for evidence in Phase I of this proceeding. See e.g. Goldberg, ff. Tr. 11491, at 4-6; Tr. 15504-08, 15520, (Goldberg), Tr. 15621-24, 15605 (Oprea); Tr. 15399-401 (Jordan); Tr. 12761, 12763-64, 15697-98 (Sumpter). 2/

Mr. Goldberg testified, upon CCANP's cross-examination, of his efforts in gaining the necessary cooperation of Brown & Root so that the Quadrex study could be performed, and that he viewed as a "side-benefit" of the study the information it would give him to answer possible Board questions on design or engineering at the hearing. He testified:

> As a matter of related interest, when I, in my mind, was convinced that a review was useful and needed, I realized that that would not in itself be a very popular subject with Brown & Root.

2/ CCANP conjectures that the Quadrex Report was commissioned with the purpose of providing positive evidence in Phase I of the proceedings is further belied by the fact that Quadrex was directed to areas of known engineering difficulties and areas where Brown & Root was believed to be experiencing problems. Tr. 11574-77, 15525, 15541 (Goldberg); Stanley, ff. Tr. 13047, at 3; Tr. 13073 (Stanley); Tr. 15619 (Oprea). If it had been commissioned for introduction into evidence to show the overall quality of design it would not have been directed to highlighting problems that HL&P knew it needed to face.

> They were trying to get on with the engineering of the project and any time you undertake to review an activity, you do tend to impact it in some fashion, going around and asking people questions about what are you doing and how are you doing it, does distract them from the actual performance of their work.
>
> So Brown & Root would have to be a cooperative partner in this review and I did, in fact, contact their engineering personnel, their person in charge was a Mr. Saltarelli. I persuaded and persuaded Mr. Saltarelli saw the wisdom of that review as it would serve to help him get a good handle on the status of engineering as well as myself and I'm sure Mr. Saltarelli really then in turn went about the business of discussing it elsewhere within the Brown & Root organization and I suspect there could have been dialog between other levels of Brown & Root management and Mr. Oprea.
>
> * * *
>
> Q Do you remember conveying to Mr. Barker that one of the reasons the Quadrex report would be useful was to provide you with a basis for answering questions in the licensing hearing?
>
> A I may well have shared that thought with him, yes, certainly as a side benefit.

Tr. 15534-35; see also Tr. 15504-08, 15578 (Goldberg). Accepting Mr. Saltarelli's statements as true does not alter the credibility of HL&P's witnesses' testimony in Phase II, when they testified that the Quadrex study was not commissioned to supply evidence of good design of the South Texas Project at Phase I of the hearing, but to benchmark the design work so HL&P could get on with the project; and that Mr. Goldberg believed a "side-benefit" of the study was the help it would

give him to better prepare him for possible Board questions on engineering at the hearing. Tr. 15504-05, 15506-08, 15517, 15520, 15535, 15553-56, 15561, 15569-70 (Goldberg).

Mr. Saltarelli's deposition does not lend any credence to a conjecture concerning a supression of evidence, and the question of what Mr. Saltarelli might have been told, even if it be viewed as in conflict with the evidence in record on the purpose of the Quadrex, is too collateral to the issues herein as to lead to a reopening of the record. 3/

With respect to the assertions at pp. 9-10, 15 of Motion IV that Mr. Saltarelli's deposition testimony supports the reportability of the Quadrex generic findings, even the most casual reading of the material indicates that in Mr. Saltarelli's view the Quadrex generic findings were "totally ill-founded" and were "on the border of irresponsibility". See CCANP Motion IV, Document 1, at 624-28. The Saltarelli statements do nothing to support CCANP's contention as to the reportability import of those generic findings. Mr. Saltarelli's statements support the opposite view, already of record, that the generic findings were not reportable

---

3/ For similar reasons the record should not be reopened to receive Documents 2 and 3 attached to CCCANP Motion IV. Questions involving Brown & Root's engineering and performance are no longer germane as Brown & Root is no longer a contractor, and Mr. Saltarelli's opinion on the issues involved in Phase I of the hearing is too collateral to lead to another reopening of the hearing.

Similarly no basis exists to reconsider denial of admission of Document 4 attached to CCANP Motion to Reopen the Phase II Record: II, November 4, 1985. CCANP has shown no reasons in this latest motion why the denial of admission was improper or how circumstances have changed to now lead to its admission. See Memorandum & Order, LBP-85-45, NRC 819, 826 (1985).

under 10 C.F.R. 50.55(e). See id. at 632-33, 636. Mr. Saltarelli's clear and unambiguous deposition testimony is that the generic findings should not to be accorded any weight as to the licensability of the plant. Any fair reading of that deposition testimony shows that Mr. Saltarelli viewed CCANP's position that the generic findings should have been reported as untenable.

Similarly, CCANP's allegations (Motion IV at 8) that Mr. Saltarelli may have complained to Mr. Goldberg with regard to Dr. Sumpter's purported involvement in the Quadrex Review cannot provide any basis to reopen the record. The fact that Mr. Goldberg then directed Dr. Sumpter to detach himself from the review lends support to the HL&P stated intent that the review be independent. See Staff Proposed Findings of Fact, B.5, at 12. The fact that Mr. Goldberg discouraged involvement -- according to Mr. Saltarelli's deposition -- is evidence that HL&P wanted "hands-off" not the opposite, as CCANP argues. In addition, how these aspects of the conduct of the Quadrex Review are relevant or material to the Phase II issues before the Licensing Board is not explained by the Intervenor. There is no reason to call Mr. Saltarelli on the basis of his deposition or other documents produced in the Brown & Root - HL&P litigation.

In addition to seeking to reopen the record to have Applicants produce Eugene Saltarelli to testify on the above matters, CCANP states that it also seeks to reopen the record to have Applicants produce

Lauren Stanley and Applicants' attorney, Jack Newman, for testimony. Motion IV at 21-22. 4/

CCANP seeks to recall Lauren Stanley on the conjecture that "his affidavit [of December 12, 1985] raises the possibility that he ... is guilty of perjury". Motion IV at 21-22. In that affidavit Mr. Stanley averred that the purpose of the Quadrex review was to obtain an independent view of Brown & Root engineering and not as preparation for the Phase I hearing. Mr. Stanley previously testified in a like manner in this proceeding:

> The purpose of the Quadrex review of B&R engineering was to evaluate B&R's engineering activities as they might reflect on B&R's ability to complete the plant in an efficient and orderly way. Quadrex was asked to make this evaluation by reviewing selected aspects of B&R's engineering response to issues that were known to present difficulties to the nuclear industry as well as those areas in which HL&P believed that B&R was experiencing problems. Based on this information, Quadrex found indications of potentially weak areas and identified these to HL&P so that they would inquire further into the specific details and characterizations regarding each issue.

Stanley, ff. Tr. 13047, at 3. CCANP's had an opportunity to cross-examine him on these matters. CCANP's bare allegation that there is the "possibility" that Mr. Stanley may have committed perjury in his affidavit does not provide any basis to call him to testify again, let alone to reopen the record.

4/ Mr. Saltarelli and Mr. Stanley are not the Applicants' employees and Applicants do not have the burden of calling them.

Lastly CCANP asks that the hearing be reopened to obtain the testimony of Applicants' attorney, Jack Newman. The inappropriateness of calling counsel, absent extraordinary circumstances, has been dealt with many times in this proceeding. This Board has ruled that an attorney will only be called where he has some factual knowledge not possessed by others. LBP-85-19, 21 NRC 1707, 1718 (1985); see also Tr. 11456, 14817-23. Here CCANP's basis for wishing to have Mr. Newman testify is not that he has unique factual knowledge, but that Applicants' senior management gave factual information in the hearing that it wishes to test by examining Applicants' counsel. This is the antithesis of calling an attorney to provide unique factual knowledge. This Board has previously ruled that it will not require attorney Newman to testify on the revelation of the Quadrex report as it had heard from other witnesses produced by Applicant on the subject. Id. CCANP has shown no cause to have the record reopened to require attorney Newman to testify.

In sum, CCANP's motion to reopen the record is not timely, and CCANP has not shown any further examination of witnesses it seeks or any of the material it proposes to submit would affect the Board's decision in respect to any of the significant issues in this proceeding. The standards for reopening the record have not been met and the motion must be denied.

III. THE MOTION FOR DISCOVERY

On the basis of the "new documents" attached to Motion IV, CCANP also requests a ninety-day discovery period to explore aspects of

Mr. Saltarelli's involvement with Quadrex and the engineering efforts at STP. Without explanation as to why such discovery was not sought during the appropriate time allotted for such efforts in the Phase II hearing schedule, CCANP attempts to bootstrap its way into creating at best another three-month delay on the basis of its questionable "new" evidence. Even assuming, arguendo, that the new material met the standards for reopening the record and was admitted, such a result does not compel, or even suggest, that a new discovery period be established. Intervenor's arguments are a transparent attempt to start over Phase II so that it might pursue a different angle and conduct the discovery it failed to perform last time. This request should be summarily denied.

IV. THE ROLE OF APPLICANT'S COUNSEL

While professing not to be doing so, Intervenor continues its unsupported attack on Applicant's counsel. Motion IV, at 5, 20-21, 22-23. With only the benefit of rank speculation, CCANP attempts to ascribe conspiratorial and perjurious motives and actions to the utility's lawyers. Such assertions are no more supported by the documents attached to the instant motion than they were supported previously. As the Board has cautioned CCANP before, there is no place for such allegations in this proceedings. See LBP-85-45, ?? NRC 819, 827-28 (1985).

V. SUSPENSION OF PHASE III ACTIVITIES

If its motion to reopen and for discovery is granted, CCANP asks that all activities for Phase III (particularly discovery) be suspended. Having failed to demonstrate the need to reopen or for further

discovery, this request for suspension should also be denied. In addition to the foregoing reason, CCANP asserts somewhat vaguely that it may wish to seek a new contention with regard to the Operations Group at the STP; consequently, it asks for a suspension on that basis as well. There is no support for a stay in these premises even if Intervenor were ultimately successful in meeting the factors in 10 C.F.R. 2.714(a) for admission of a late-filed contention. See Pacific Gas and Electric Co. (Diablo Canyon Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364 (1981). The request for suspension of Phase III should be denied.

VI. CONCLUSION

For the reasons stated herein, Intervenor's fourth Motion to Reopen Phase II, for Discovery, and to Suspend Activities in Phase III should be denied.

Respectfully submitted,

Oreste R. Pirfo

Oreste Russ Pirfo
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 6th day of February, 1986