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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 OL
	)	
(South Texas Project, Units 1 & 2)	)	

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

On February 28, 1986, Citizens Concerned About Nuclear Power (CCANP) moved for a fifth time to reopen the Phase II record, and further moved for the Board to order the production of documents that CCANP had an obligation to obtain in discovery. "Citizens Concerned About Nuclear Power, Inc. Motion to Reopen the Phase II Record: V and For Board Ordered Production of Documents" (hereinafter "Motion V"). CCANP predicates this motion on a portion of a deposition of Joseph W. Brisain of January 30, 1985, which was made public in May of last year. See Motion at 3-4. The Staff here opposes this fifth motion to reopen the record and CCANP's request that the Board order the production of documents. 1/

1/ It is noted that the Phase II hearing was already once reopened at CCANP's behest, and that it did not produce the documents it here says are pertinent at that hearing or at the original hearing, although it had the opportunity to do so.

DESIGNATED ORIGINAL

Certified By DSO-7 AB

I. Standards for Reopening

The Staff has addressed the legal standards for reopening the record in this case in response to two 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 November 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; See Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC ___, slip op. at 3-4, (issued January 30, 1986); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, at 338 (1978). CCANP has not met these standards.

II. Motion V to Reopen

An analysis of the standards to reopen indicates that the motion should be denied.

1. Timeliness.

CCANP does not dispute that its motion is untimely. CCANP Motion V at 9-11. It instead sets forth reasons such as a lack of resources or the voluminous nature of the documents available as to why it did not earlier find and introduce, if relevant, the subject material upon which it predicates its motion to again reopen the record. The Commission has spoken to these arguments in the context of a proceeding involving the submission of late filed contentions. In Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983), the Commission stated:

> We start with the basic principle that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation. See, e.g., Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897 (1982). And as a corollary, since intervenors have the option to choose the issues on which they will participate, it is reasonable to expect intervenors to shoulder the same burden carried by any other party to a Commission proceeding. While we are sympathetic with the fact that a party may have personal or other obligations or possess fewer resources than others to devote to a proceeding, this fact does not relieve that party of its hearing obligations. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981) ("Statement of Policy"). Thus, an intervenor in an NRC proceeding must be taken as having accepted the obligation of uncovering information in publicly available documentary material. Statements that such material is too voluminous or written in too abstruse or technical language are inconsistent with the responsibilities connected with participation in Commission proceedings and, thus, do not present cognizable arguments.

CCANP having failed in its responsibilities as a participant in Commission proceedings, cannot anymore use its own failure to produce the previously available evidence it believes of import as a basis to reopen the record, than the intervenor in the Catawba proceeding could have used previously available information as a basis for formulating new contentions. Under the reasoning of the Commission in Catawba, CCANP's excuses for failing to timely produce what it now maintains is relevant and material evidence are unavailing. 2/

2. Significance of the Issue 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 proffered material 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 Effects of the Board's Decision.

In Metropolitan Edison Co. (Three Mile Island Station, Unit No. 1), ALAB-774, 19 NRC 1359, 1357-60 (1984), the Appeal Board declined to reopen the record on an allegation that the licensee's failure to furnish the Licensing Board with a report relevant to matters under hearing ad-

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2/ Arguments as to the purported duties of Applicant in revealing diverse depositions in other litigation are not germane to CCANP's failure to seek to produce these materials at the earlier hearing.

versely reflected on the licensee's character. Although, agreeing that the report should have been furnished to the Licensing Board under the McGuire line of cases [3]; the Appeal Board concluded, particularly in view of the licensee's revelation of the existence of the report to the Staff, that no basis existed to reopen the record on the licensee's integrity.

Phase II of this hearing in July and August, 1985, and the reopened hearing in December, 1985, dealt with whether the failure to turn over the Quadrex Report adversely reflected on Applicants' character. [4] CCANP now seeks to have the record again reopened to again go into this subject on the basis of a small part of a deposition of Mr. J. Briskin that deals with the Quadrex Report and its commissioning. See Motion V at 5-6.

The Staff has taken the position, and this Board concluded, that Applicants had the obligation under the McGuire line of cases to have furnished the report to the Board early in Phase I hearings. See LBP-85-6, 21 NRC 447, 461-62 (1985). The issue remaining is solely the

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3/ See Duke Power Co. (McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625 (1973); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 NRC 1387, 1394 (1982).

4/ Contention 10 provided:

> The Quadrex Report was relevant and material to issues of character and competence addressed in Phase I of this proceeding and should have been furnished to the Licensing Board and parties shortly after its receipt by HL&P, under obligations imposed by the McGuire line of decisions. Failure to have furnished this Report reflects adversely on the character and competence of the Applicants and on their ability to manage the construction and operation of a nuclear power plant.

same issue as the one the Appeal Board declined to reopen the record upon in the Three Mile Island case, i.e., whether the failure to furnish the report to the Board adversely reflects on the licensee's or Applicants' character. No reason appears why the record here should be reopened once again on this issue.

Moreover, an examination of Mr. Briskin's statements, in view of the evidence already in the record concerning the revelation of the Quadrex Report. also shows that there is no reason to again reopen the record on this collateral issue. The principal item in Mr. Briskin's deposition which CCANP points to is the statement that:

> In October - either in October or shortly after Mr. Goldberg came on board, and we discussed the Show Cause and the ASLB Hearings that were planned for April of '81, Mr. Goldberg felt, at that time, that he was going to be on the stand before the ASLB and, at some point in time, he would, more than likely, be asked to testify as to his opinion of the quality of the design. And he felt that, in order to do that, he needed to bring in an outside consulting group who had the type of skills that could determine the quality of the design, and chose Quadrex. I don't know that he, personally, chose Quadrex, but Quadrex was chosen to investigate the design and to give him a report.

The testimony in the existing record is largely consistent with this statement of Mr. Briskin. Mr. Jerome Goldberg had testified that he was new to the project and wished to "benchmark" the engineering so he knew where to devote his attention. Tr. 15505, 15520 (Goldberg), Goldberg, Tr. 11491, at 4-5; 12761, 12763-64 (Sumpter). Thus, he decided shortly after he arrived on site to have a third party review of engineering. Id.; Tr. 15504 (Goldberg). He further testified that he knew that the hearings were coming up, that he might be called to testify, and that he

wanted to know the status and quality of engineering [5/] in the event he was asked questions on that subject at the hearing. Tr. 15553, 15507, 15517 (Goldberg).

There is no showing that Mr. Briskin, anymore than Mr. Saltarelli, had been privy to all the reasoning of Mr. Goldberg in commissioning the Quadrex study of Brown & Root's engineering, and there is no reason to again have hearings on this collateral issue. Mr. Briskin's lack of knowledge of the complete facts is highlighted by his recognition that he did not even know who chose Quadrex to perform the study. Motion V, attachment at 403-04; see also id. at 412, 397. In addition, the testimony of Mr. Briskin does not show that the Quadrex Report was commissioned for introduction into Phase I of these hearings, anymore than CCANP's two previous attempts in the Phase II hearings and the reopened Phase II hearings showed that purported fact. The testimony was solely that the study was performed to form a background for knowledge on the engineering of the project and as a background for testimony. When the examiner at the deposition sought to premise questions on a purported intent to introduce the study into evidence, an objection was made; and the examiner acknowledged that the premise of his question was not es-

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5/ At this time HL&P knew Brown & Root was having problems in areas, and Quadrex was told to particularly look at those areas. Tr. 15525, 15541, 12522-23, 11574-77 (Goldberg); Goldberg, ff. Tr. 11491, at 6; Stanley, ff. Tr. 13047, at 3; Tr. 13073 (Stanley); Tr. 15619 (Oprea).

tablished. Motion V, attachment at 4-5. [6/] Mr. Briskin then confirmed that it never was Mr. Goldberg's intent to have the Quadrex Report presented to the Licensing Board. Motion V, attachment at 5. Again the attempt to drag this proceeding into a side issue concerning what was the real reason for the Quadrex Report on known engineering problems should be rejected. [7/]

III. The Motion For Board Ordered Discovery

CCANP, having failed in its obligations to conduct discovery, now asks the Board to order Applicants to produce any material relevant to topics that were already the subject of litigation in this proceeding. See Motion V, at 19-20. Intervenors have the same burden as other parties

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6/ CCANP apparently seeks to have Applicants' attorney, Finis E. Cowan, testify on the basis of this exchange because this exchange showed his knowledge of "false testimony" on the reasons for commissioning the Quadrex Report. Motion V, at 20-21. First, the issue of what counsel knew is not pertinent to any issue herein, and this further attempt to bog down this proceeding by taking it into a morass of non-pertinent issues should be assiduously avoided. Moreover, the affidavit of Jerome Goldberg, upon which CCANP premises its allegations states that he "very likely mentioned to Mr. Saltarelli, as I had to others in 1980-81, that a side benefit of such a review would be that I would be better able to answer questions concerning STP engineering if they were raised in future ASLB hearings." "Applicants' Response to 'CCANP Motion to Reopen the Phase II Record: IV; For Discovery and to Suspend Further Activity in Phase III, Attachment A." Thus an examination of the whole affidavit, rather than the portion CCANP quotes, shows that CCANP's allegations of possible attorney misconduct are without any foundation.

7/ As we have previously emphasized, the record shows the Quadrex Report was commissioned to focus on engineering problems rather than to show that the South Texas Project was correctly engineered and designed. Tr. 11574-77, 15525, 15541 (Goldberg); Stanley, ff. Tr. 13407, at 3; Tr. 13073 (Stanley).

in NRC proceedings to uncover publicly available information pertinent to a proceeding. See Duke Power Co., (Catawba Nuclear Station, Units 1 and 2), 17 NRC at 1048. The failure of an intervenor to perform this duty may not be rewarded by ordering another party to search for material the intervenor did not find. 8/

Further, as we have shown in this and other pleadings, there is no cause to again reopen the record on the tangential issue of why the Quadrex Report was commissioned. As we have stated, the record plainly reveals that the Report was directed to looking at particular problems in Brown & Root engineering and design, and not to report good design and engineering which could be given to the Board in Phase I of these hearings. In sum, there is no cause to order Applicants to search the record for documents CCANP failed to look for in discovery.

IV. Conclusion

For the reasons stated above, CCANP's fifth motion to reopen the Phase II hearings and its motion for Board ordered discovery should be denied.

Respectfully submitted,

Edwin J. Reis

Edwin J. Reis
Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland
this19thday of March, 1986

8/ It is noted that: "A movant is not entitled to engage in discovery in order to support a motion to reopen." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-7, 21 NRC 1104, 1106 (1985). Nor is it permissible for a Board to engage in discovery to support a movant's motion to reopen the record. Louisiana Power & Light Co., CLI-86-1, slip op. at 6.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO CITIZENS CONCERNED ABOUT NUCLEAR POWER, INC. (CCANP) MOTION TO REOPEN THE PHASE II RECORD: V AND FOR BOARD ORDERED PRODUCTION OF DOCUMENTS" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 19th day of March, 1986.

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