

RELATED CORRESPONDENCE

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'86 FEB 19 12:09

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF THE
DOCKET CLERK
BRUNNEN

In the Matter of)	
)	
HOUSTON LIGHTING & POWER)	Docket No. 50-498 OL
COMPANY, ET AL.)	50-499 OL
)	
(South Texas Project,)	
Units 1 and 2))	

APPLICANTS' MOTION FOR
PROTECTIVE ORDER

I. Motion

Pursuant to 10 C.F.R. § 2.740(c) Applicants hereby move the Licensing Board for a protective order directing that the Applicants need not respond to CCANP's Second Set of Interrogatories to Applicants (February 4, 1986) (Interrogatories), except for Interrogatories 12(a), (b) and (c), nor to CCANP's Second Request for Production of Documents (February 4, 1986) (Production Request). Both CCANP discovery demands are focused on matters which are not relevant to Issue F (the one remaining matter subject to discovery in this proceeding), and are not "reasonably calculated to lead to the discovery of admissible evidence." Accordingly, the discovery "should not be had". 1/

1/ Applicants Answers and Objections to CCANP's Second Set of Interrogatories, which is being filed concurrent with this motion, states additional objections to certain of the CCANP interrogatories which seek confidential information, are unduly burdensome or are otherwise inconsistent with the (footnote continued)

II. Argument

A. The Information Sought by CCANP is Neither Relevant Nor Reasonably Calculated to Lead to the Discovery of Admissable Evidence

With the exception of Interrogatories 12 (a), (b) and (c), 2/ all of the remaining Interrogatories and all of the Production Requests seek to require Applicants to provide information related to programs at STP to detect use or sale of illegal drugs and investigations of such alleged use or sale by persons employed on the STP. The information sought includes, among other things, the details of the Project programs (since January 1, 1984) to detect use or sale of illegal drugs, the names and addresses of those individuals given "lie detector" tests in connection with the investigation of alleged use or sale of drugs, the identities of individuals alleged to be "possibly" involved in the use or sale of illegal drugs, and a description of the actions taken with respect to those individuals found to have used or possibly to have used, or to have been "implicated at any time in the use and/or sale of illegal drugs".

(footnote continued from previous page)

Rules of Practice. In the absence of a CCANP motion to compel it does not appear to be necessary to seek consideration of such objections at this time.

2/ Applicants have answered Interrogatories 12 a, b and c, although their relevance to Issue F is far from clear.

The only remaining issue subject to discovery in Phase III is Issue F, admitted by the Board in its Second Prehearing Conference Order (December 2, 1980), at 5, and deferred until Phase III by the Board's Fourth Prehearing Conference Order (December 16, 1981) at 6. 3/ Issue F states:

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

Thus, Issue F relates to whether HL&P's QA program for operation of STP will meet the requirements of 10 C.F.R. Part 50, Appendix B (Appendix B). The extent to which HL&P's QA program for operation of STP will meet the specific criteria of Appendix B is an issue separate and distinct from the programs to detect use or sale of illegal drugs or allegations of such use or sale by Project personnel. Appendix B does not require, nor 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.4/

3/ Although the Board has requested both the Applicants and the Staff to update certain information in the record on other matters, discovery regarding such matters has not been authorized. Memorandum (Telephone Conference Call - January 28, 1986) (January 29, 1986).

4/ Although control of drug use is not part of the Project's QA program, it is nevertheless receiving substantial attention at the Project. As a result of allegations received last Fall that some Project employees used illegal drugs, HL&P adopted an enhanced drug abuse program. Where corporate policy previously prohibited being under the influence of
(footnote continued)

Furthermore, the system of managerial and administrative controls required to meet the Appendix B criteria does not include other elements that may be adopted by a utility to manage a nuclear project and, in particular, to detect and control drug use on the project. There are management considerations, not mentioned in Appendix B, that must be addressed to assure a well run project. Some of these considerations, such as a security program, are the subject of other Commission regulations; others are not.

Control of drug and alcohol abuse are two of a number of factors that affect worker performance, including morale, intelligence, loyalty, pride of accomplishment, degree of supervision, clarity and consistency of management policy, etc. Rather than attempting to assure quality through control of those two factors, Appendix B seeks to assure quality through a system of planning, training, written procedures, inspections, audits

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illegal drugs (as well as possession, use or sale of drugs) on HL&P property, the present program subjects to disciplinary action any Project employee who is found to possess, use or sell illegal drugs at any location, whether on or off HL&P property. Every new employee is given a chemical test (urinalysis) for drugs upon employment, all employees hired prior to adoption of the new policy are being tested to provide a baseline, and there will be continual random retests. This enhanced policy is in addition to programs providing for training of all personnel concerning drug abuse, instruction of supervising personnel in behavioral observation, establishment of a drug concern hotline and other encouragement to personnel to report any drug problems, periodic unannounced searches at gate and plant areas (include use of canine units), and other measures to prevent or investigate any drug concerns relating to Project personnel.

and documentation. It is undoubtedly true that during construction, for example, employee drug use affecting job performance must be prevented to obtain proper performance the first time, without excessive nonconformances, rework and repair. However, that does not lead to the conclusion that the issue of whether a QA program meets Appendix B encompasses questions about drug use by Project employees. CCANP's discovery demands regarding the STP drug control program seek information outside the scope of Issue F.

That Appendix B does not require a licensee to implement a program for control of drug use subject to NRC review and approval is 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. ^{5/} 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. 33980. This proposed rule has been under consideration for three and a half years without Commission action. In 1984 the Commis-

^{5/} "Personnel with Unescorted Access to Protected Areas; Fitness for Duty," 47 Fed. Reg. 33980 (August 5, 1982).

sion decided to defer adoption of a rule for two years to allow time for the industry to continue its initiatives addressed to such issues. 6/ SECY-85-21, at 1 (January 17, 1985).

The second such rulemaking is the "access authorization" rulemaking, 7/ 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. 14880 (1977)), 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)). The proposed access authorization 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. 30733.

The foregoing discussion demonstrates that Issue F addressing, as it does, solely compliance with Appendix B, does not encompass allegations regarding Applicants' programs to control drug use by Project employees. It should be noted,

6/ 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).

7/ "Access Authorization Program," 49 Fed. Reg. 30726 (August 1, 1984).

however, that even if the wording of Issue F was less clear as to its lack of applicability to matters relating to drug use, consideration of such matters under Issue F would be impermissible.

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 Company (Douglas Point Nuclear Generating Stations, 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. 8/ The Commission's standards governing programs for detection and

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

handling of drug users are currently evolving in a number of generic forms (the two proposed rules as well as the Commission's proposed Policy Statement). Under the circumstances, it would be improper to permit litigation regarding such matters in individual licensing proceedings and discovery on such matters should be prohibited. 9/

B. CCANP'S Interrogatory Answers Show that Its Interrogatories Are Not Related to Issue F.

In its February 12, 1986 answers to Applicants' Eighth Set of Interrogatories, CCANP admits that it does not contend that HL&P's QA program for operation of STP, as described in the FSAR and letters to the Staff, will not fully satisfy the requirements of Appendix B. Answer 1. It contends however that such program will not meet Appendix B "because HL&P lacks the character to properly implement said program." Answer 4. It purports to base such contention on an anonymous telephone call which alleged, inter alia, that members of the STP Operations Group were implicated in the use and/or sale of illegal drugs at STP, that personnel who would have implicated the Operations Group were not terminated in order to protect Operations Group personnel and that no action was taken against implicated members of the Operation Group. Answer 5.

9/ 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.

Presumably, CCANP's Interrogatories and Production Requests are intended to obtain information supporting those unsubstantiated allegations. However, whether or not such allegations would have provided appropriate basis for a new contention, 10/ they are not within the scope of Issue F and discovery relating thereto is not "reasonably calculated to lead to the discovery of admissible evidence" in the litigation of Issue F.

To the extent that CCANP is arguing that HL&P's alleged mishandling of "implicated" Operations Group personnel demonstrates a deficiency in character that indicates the QA program for operations will not be properly implemented (Answer 4), CCANP is attempting to create a far-fetched relationship to Issue F that has no bounds. Under CCANP's theory any alleged deficiency in HL&P's performance could be considered evidence of a deficiency in character that could be litigated in Phase III under Issue F. CCANP's argument simply attempts to avoid the specific limitations of the wording of the Issue. Issues A and B addressed the character and competence of HL&P to operate the STP in light of its actions during the construction phase of the Project. It was never the intent of the Board that, in considering Issue F, it would hear additional evidence regarding HL&P's previous performance not directly related to the QA program for operations.

10/ Applicants would have argued that they did not.

Although not explicitly stated in its responses to Interrogatories, CCANP may also be claiming that the continuing employment of "implicated" Operations personnel would evidence that such personnel would not properly implement the QA program for operations in accordance with Appendix B. See Answer 5. However, such information would not be relevant to Issue F and would not be admissible for a number of reasons. First and foremost, as discussed above, the control of drug use is not part of the activities required to meet Appendix B (Appendix B has its own requirements concerning the system of controls needed to assure proper implementation) and therefore even a deficiency in such drug control would not constitute a violation of Appendix B. Second, the Commission has pending two rulemakings relating to control of drug use and presently has no criteria applicable to such control. Therefore, not only would it be improper for a licensing board to consider such matters that are subject to generic rulemaking, but if the matter were to be litigated, there would be no available criteria by which a licensee's actions or lack of actions could be judged. Finally, Issue F deals with the future QA program for operations and all operations personnel will be subject to the current HL&P program for control of drug use, including, among other things, mandatory baseline chemical testing and random future chemical testing. Any alleged involvement with drugs in 1985, at least one and a half years before

commencement of Plant operations, would be much too remotely related to the implementation of the STP program during Plant operation. 11/

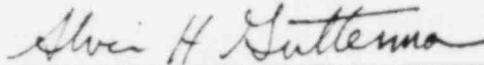
III. Conclusion

CCANP's Interrogatories (except Interrogatories, 12(a), (b) and (c)) and its Production Requests seek information that is

11/ Moreover, interpretation of Issue F as encompassing such remote matters as control of drug use would then require review of a number of complex legal questions. For example, there are a number of CCANP's interrogatories and production requests which would, in large measure, be inappropriate because they seek disclosure of (1) records of investigations (Production Requests 2-6) and details of HL&P's investigative procedures and techniques, (Interrogatories 6) the disclosure of which could impede future investigations; (2) records (Production Requests 2-6) and information about allegations and disciplinary action involving individual employees (Interrogatories 4h, 5, 8-11, 12d, 13-16), and other information the disclosure of which would constitute an invasion of the personal privacy of such individuals; and (3) records that contain the identities of confidential informants (Production Requests 4-6), the disclosure of which would jeopardize the success of Applicants' investigatory programs, including the SAFETEAM program. Some of these concerns are further identified in Applicants Answers and Objections to CCANP's Second Set of Interrogatories.

neither relevant to Issue F nor reasonably calculated to lead to the discovery of admissible evidence. Accordingly, the Board should enter an Order directing that the discovery not be had.

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(South Texas Project, Units 1)
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OFFICE OF LEGAL COUNSEL
DOCKETING & SERVICE
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answers And Objections To CCANP Second Set Of Interrogatories To Applicants" and "Applicants' Motion For Protective Order" have been served on the following individuals and entities by deposit in the United States mail, first class, postage prepaid, or by arranging for delivery as indicated by asterisk, on this 18th day of February 1986.

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