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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
Charles Bechhoefer, Chairman
Dr. James C. Lamb
Frederick J. Shon

In the Matter of	Docket Nos. STN 50-498 OL STN 50-499 OL
HOUSTON LIGHTING AND POWER COMPANY, ET AL.	ASLBP No. 79-421-07 OL
(South Texas Project Units 1 and 2)	March 28, 1986

SEVENTH PREHEARING CONFERENCE ORDER
(Motions to Reopen Phase II Record; Issues for Phase III)

On March 21, 1986, pursuant to notice,[1] and in accordance with 10 CFR § 2.752, the Atomic Safety and Licensing Board held the seventh prehearing conference in this operating license proceeding. The conference was held in Bethesda, Maryland. Participating were representatives of the Applicants, the Intervenor (Citizens Concerned about Nuclear Power, Inc. (CCANP)) and the NRC Staff. Following is a description of the matters discussed and rulings rendered.

1 Notice of Prehearing Conference, dated February 12, 1986 (51 Fed. Reg. 6054 (February 19, 1986)).

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A. Motions to Reopen Phase II Record

The Board first posed certain questions, and heard argument, concerning CCANP's fourth and fifth motions to reopen the Phase II record (Tr. 15715-53). The questions related to the substance of the material proffered as well as the timeliness of the motions. We have reached no decision on those motions. However, we have determined not to reject the motions on timeliness grounds. Accordingly, our rulings will depend on whether we believe the material proffered would affect the result which we otherwise would reach on Phase II issues.

B. Phase III Issues

The issues currently open for consideration in Phase III are Issue F (QA program for operation), an update of our ruling in our first Partial Initial Decision (LBP-84-13) on Issue C (organization and personnel for operations), and limited aspects of Contention 4 (to the extent it questions the adequacy of construction to withstand hurricanes). We have thus far authorized Phase III discovery only with respect to Issue F.

CCANP has currently raised only one question for Phase III litigation. It asserts that HL&P's program for control of drug use has been preferentially administered. Specifically, CCANP alleges that many personnel found to be using or selling illegal drugs have been terminated, whereas others who are members of HL&P's "Operations Group" have not been terminated. Further, that some who have been found to have been involved in the use and/or sale of illegal drugs have not been terminated because they might implicate members of the "Operations

Group." As a result, according to CCANP, HL&P's management has demonstrated a lack of character which disqualifies it from operating a nuclear plant. See CCANP Answers to Applicants' Eighth Set of Interrogatories and Requests for Production of Documents, dated February 12, 1986, at answer (5).

1. CCANP asserts that this issue is covered by Issue F, which inquires whether the QA program for operation complies with 10 CFR Part 50, Appendix B.[2] CCANP submits that the alleged preferential treatment represents a violation of Criteria II and XVI of Appendix B. It filed a number of discovery requests with the Applicants, based on the allegations falling within the scope of Issue F. The Applicants declined to answer most of the interrogatories and to produce any of the documents requested. Their reasoning was set forth in their Motion for a Protective Order, dated February 18, 1986, supplemented by their Answers and Objections to CCANP Interrogatories, dated February 18, 1986, and their Response to CCANP's Second Request for Production of Documents, dated March 6, 1986. For its part, CCANP responded to the Applicants' motion and also filed motions to compel with respect both to its interrogatories and document requests. See response dated Feoruary 28, 1986 and motions dated February 28, 1986 and March 21, 1986.

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2 Issue F, which was derived from the Commission's ruling in CLI-80-32, 12 NRC 281 (1980), reads: "Will HL&P's Quality Assurance Program for Operation of the STP meet the requirements of 10 CFR Part 50, Appendix B?" Second Prehearing Conference Order, dated December 2, 1980 (unpublished).

The Applicants advanced several arguments to support their objections to most of CCANP's discovery requests. They primarily asserted that a drug control program is not a QA requirement under 10 CFR Part 50, Appendix B, and that NRC has never considered such a program to be part of its QA requirements. The Applicants cited two pending rulemaking proceedings--one dealing with "fitness for duty" (47 Fed. Reg. 33980 (Aug. 5, 1982)) and the other with access authorization for personnel requiring unescorted access to special nuclear material (49 Fed. Reg. 30762 (Aug. 1, 1984))--as evidence that NRC has no current requirement for a drug control program. Accordingly, they considered the effectiveness of the implementation of such a program as beyond the scope of Issue F and discovery related thereto as not relevant to an issue in controversy. The Applicants further claim that the two pending rulemaking proceedings deprive us of jurisdiction to consider drug control issues.

CCANP asserted that a drug control program is required by the terms of 10 CFR Part 50, Appendix B, Criteria II and XVI, as well as by the generalized introductory language of Appendix B. Tr. 15783-85; CCANP Response to Applicants' Motion for Protective Order, dated February 28, 1986, at 3-4. In any event, CCANP asserts that its allegations do not attempt to challenge the adequacy of a drug control program as such but, rather, the character of the management officials administering the program and implementing HL&P's QA program for operation. CCANP views Issue F as encompassing the adequacy not only of the QA program but also of its likely implementation.

Prior to the conference, the Staff had not taken a position on these issues, since it does not normally inject itself into discovery disputes between other parties. At the conference, however, it took a position on some of the broader aspects of the questions raised by the dispute. The Staff took the position that CCANP's allegations did not fall within Issue F. It agreed with the Applicants that Appendix B includes no requirement for a drug control program--evidenced both by past Staff implementation practices and by the pendency of the rulemaking proceedings.

The Staff expressed the view that, if considered at all, the allegations would have to be regarded as a new, late-filed contention (Tr. 15780). In that connection, the Staff disagreed with the Applicants' position that the pendency of the two rulemaking proceedings deprives us of jurisdiction to consider drug control issues under any context (Tr. 15833-36).

2. Based on the arguments of all the parties, we ruled that consideration of drug control issues is not barred generically by the pending rulemaking proceedings. We also ruled that CCANP's allegations did not fall within Issue F. Tr. 15888-89.

On the generic question, only the fitness-for-duty rulemaking bears directly on requirements for a program to control drug use. (The access authorization rulemaking bears on the qualifications of particular individuals to have unescorted access to areas in which are found quantities of special nuclear material.) The fitness-for-duty rulemaking has in effect been suspended, to permit industry to

experiment with programs to control drug use on an ad hoc basis. That is not the situation in which the generic bar to litigation of issues considered in rulemaking was intended to apply. This rulemaking is not likely to lead to the adoption of definitive standards for drug control programs in the near term. Under these circumstances, examination of the adequacy of the ad hoc programs is clearly permissible--either by the Staff, or through adjudication of appropriately raised and presented contentions.

Beyond that, in neither rulemaking did the Commission explicitly bar the litigation of drug control issues. In the situation presented here, such an explicit bar would have been necessary to preclude litigation of drug issues under existing standards--which would amount to an ad hoc examination of drug control practices to ascertain whether a "reasonable assurance" finding can be made under 10 CFR § 50.57(a). See Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 585 (1982); id., LBP-82-118, 16 NRC 2034, 2037-39 (1982), and authorities discussed. Nor does this situation involve an impermissible attempt to litigate a question under standards proposed by a pending rulemaking, as was the case in Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-79-33, 10 NRC 821, 824 (1979), one of the authorities relied on by the Applicants.[3]

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3 The Appeal Board's later observations on the effect of a pending rulemaking on another issue in the same Sacramento Municipal

(Footnote Continued)

As for whether the allegations with respect to implementation of the drug program fall within Issue F, we read this issue as broad enough to encompass both the description and the implementation of the QA program for operation. For, as the Appeal Board long ago observed,

> No QA program is self-executing. Thus, irrespective of how comprehensive it may appear on paper, the program will be essentially without value unless it is timely, continuously and properly implemented. This being so, it seems to us to follow that it is not enough for a licensing board to satisfy itself that, if implemented, the program described in the PSAR will adequately protect the health and safety of the public. At least where, as here, there has been a legitimate question raised in the course of the proceeding, the board must go on to inquire into whether there is, in fact, a reasonable assurance that the applicant and its architect-engineer will carry out the program in accordance with its terms.

Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-106, 4 AEC 182, 184 (1973).

(Footnote Continued)
Utility District proceeding (ALAB-655, 14 NRC 799, 816 (1982)), also cited by the Applicants, are entitled to no precedential effect, since they resulted from the Appeal Board's sua sponte review of an issue not clearly within the scope of the proceeding. Cf. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, 3), ALAB-713, 17 NRC 83 (1983); General Electric Co. (Vallecitos Nuclear Center-Gereral Electric Test Reactor, Operating License No. TR-1), ALAB-720, 17 NRC 397, 402 n. 7 (1983).

We also disagree with the Applicants and Staff that all character questions in this proceeding were relegated to Issues A and B. Indeed, we have real doubt whether CCANP's current allegations would fall within the scope of those issues, even had they been able to be raised in Phase I.

Notwithstanding the scope of Issue F, however, we do not believe that it is broad enough to include the current drug allegations. Even though drug use might be perceived as falling within the generalized language of Appendix B, programs to control drug use have never been required under Appendix B. The circumstance that the Commission currently has under consideration two proposed rules which would encompass drug use is convincing to us that no such programmatic requirement currently exists--in Appendix B or elsewhere.

This does not mean that drug use or control issues cannot be litigated. We disagree with the Applicants' position that we can only litigate compliance with existing programmatic requirements. As the Staff observes (Tr. 15834), we have authority to explore certain "interstitial areas" between such requirements. Nevertheless, it is clear to us that drug use or control, and management attitude questions associated therewith, are not currently litigable under an issue which questions the structure and implementation of the QA program for operations.

For that reason, we ruled that CCANP's allegations do not fall within Issue F. We accordingly granted the Applicants' motion for a protective order and denied CCANP's motions to compel.[4]

3. We also explored whether CCANP's drug use allegations were properly within the scope of Issue C, which questions the adequacy of HL&P's program for operation of the STP.[5] Much of Issue C was litigated in our first PID (LBP-84-13), but only on the basis of the preliminary information then extant. We provided for an updating of this preliminary information.

At the conclusion of the conference, we had not reached a decision whether the updated portion of Issue C, as to which both the Applicants and Staff have filed affidavits, is broad enough to cover the allegations respecting the drug control program (Tr. 15888-89). We determined, however, that for the allegations to be litigated in any context--i.e., whether under Issue C or as a new late-filed contention--we would need more particularity as to the basis for the allegations. CCANP described its basis (under affidavit of its representative) as an anonymous telephone communication to CCANP's representative. CCANP

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4 On March 12, 1986, the Applicants filed a motion for summary disposition of Issue F. We understand that, since CCANP's drug claims are the only matter it wishes to litigate under Issue F, it will not respond to that motion. Unless we indicate otherwise by future Order, the Staff need not respond to the Applicants' motion.

5 In our Order (Response Dates for CCANP Motions), dated March 3, 1986 (unpublished), we advised the parties we would discuss this question at the prehearing conference.

advised that the informant did not wish his or her name to be identified. We ruled that, before we would authorize adjudication of the allegations in any context, we would require further particularization, such as the name of the individual, the foundation of his or her knowledge of the allegations and willingness to testify.

In reaching this determination, we took into account the requirement in 10 CFR § 2.714(b) that there be "bases for each contention set forth with reasonable specificity." The only basis provided thus far by CCANP--an anonymous telephone call to CCANP's representative--does not in our view constitute a reasonably specific basis upon which litigation may fruitfully be founded. As thus far framed by CCANP, the allegations, if accepted for litigation, would constitute an unspecific and impermissible entree to a fishing expedition conducted through broad-ranging discovery of the type CCANP has already submitted to the Applicants. The NRC regulatory scheme requires more specificity prior to the initiation of such discovery.[6]

We indicated that we would provide a protective order for any such information, and that initially it need be furnished only to the Board (Tr. 15889, 15891-93, 15898). We ruled that this information, or other information providing more particularity to the

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6 In so holding, we are not evaluating the merits of an otherwise adequate basis, as precluded by Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

allegations and/or their source, should be furnished the Board by March 28, 1986 (Tr. 15894). Based on that information, the Board would decide whether the information was sufficient to initiate adjudication, either under Issue C or as a new contention. If we decided that further exploration of the allegations was warranted, we indicated that we would develop a protective order with respect to that information (as well as for much of the information which CCANP sought through discovery, to which CCANP offered no objection). We also indicated that, if we determined that the allegations could be litigated only as a new late-filed contention, we would provide CCANP an opportunity to address the factors of 10 CFR § 2.714(a) and other parties an opportunity to respond.

By telephone on March 25, 1986, CCANP advised that it would not reveal the name of its informant, even under protective order. It indicated that it would confirm this advice by letter. In view of this response, we decline to authorize discovery on, or further to entertain, CCANP's drug use allegations. We express no opinion as to whether those allegations fall within the scope of Issue C.

C. Other Procedural Rulings

In our Order (Response Dates) dated February 6, 1986 (unpublished), we provided that the Staff was to respond to the Applicants' affidavits on Contentions C and 4, respectively, by March 4, 1986, and that CCANP was to respond by March 18, 1986. Those dates were identified for the

purpose of providing the Staff two weeks' response time and CCANP an additional response period of two weeks.

With respect to Contention 4 (to the extent it raises hurricane design questions), the Staff filed its response on February 28, 1986. At the prehearing conference, CCANP advised that it had not filed, and did not intend to file, any response (Tr. 15905). Accordingly, the Board will complete its review of the motion for summary disposition of Contention 4 (insofar as it raises design questions) on the basis of the filed affidavits. As provided in our Sixth Prehearing Conference Order dated May 17, 1985 (unpublished), at p. 6, n. 6, we will not consider alleged construction deficiencies bearing upon STP's ability to withstand hurricanes until issuance of the Staff's Safety Evaluation Report (SER). Such issuance is currently scheduled for early April 1986 (Tr. 15905). As set forth in the Sixth Prehearing Conference Order, CCANP will have 30 days after release of the SER within which to file claims based on the SER concerning the adequacy of construction to withstand hurricanes.

With respect to Issue C, the Staff advised us on March 10, 1986, that it could not meet the previously prescribed date for filing its affidavit on Issue C. It estimated it could file such affidavit by March 17, and asked our approval of that schedule (which we hereby grant). The affidavit was in fact filed on March 14.

In seeking the revised schedule, the Staff noted that an extension of the Intervenor's time to respond to the Issue C affidavits would also be necessary. At the prehearing conference, however, the Applicants

(although not the Staff) took the position that any extension should apply only to new information appearing in the Staff's affidavit. (CCANP had not responded by March 18 to the Applicants' affidavit.)

At the conference, we determined that CCANP should have the benefit of both affidavits in determining whether litigable issues exist under Issue C, and that its time for responding to both affidavits should extend to April 2, 1986 (14 days following service of the Staff's affidavit) (Tr. 15900-02). Replies by the Applicants and Staff are to be filed by April 14 and 21, 1986, respectively (Tr. 15904). We advised CCANP that, in responding to the Issue C affidavits, it should not attempt to reargue its already asserted claim that the drug control issue falls under Issue C.

As a result of our ruling on CCANP's drug-control allegations, we cancelled the evidentiary hearing scheduled to commence on May 6, 1986, as well as the April 14, 1986 date for filing prefiled testimony, both of which were established by our Order dated November 18, 1985 (unpublished) (Tr. 15899, 15903-04).

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 28th day of March, 1986