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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 CO.)	Docket No. 50-498
(South Texas Project, Units 1)	50-499
and 2))	
)	

CITIZENS FOR EQUITABLE UTILITIES
PREHEARING BRIEF

As a result of the substantiation and the admission by the applicant of extremely serious allegations of misconduct and management failures by Houston Lighting and Power Co. and its prime contractor, Brown and Root, the Commission on September 22, 1980, directed this Licensing Board to expedite aspects of the operating license hearing related to quality control issues and "to issue an early and separate decision on this aspect of the operating license proceeding." Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 292 (1980). In order to consider the proper scope of this proceeding and to develop a framework for determining the significance of the evidence to be presented, the Licensing Board asked the parties to brief the question of the definition, scope, and significance of "basic competence and character" of the applicant, as that language is used in the Commission's Order. As discussed below, the

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language and background of the Commission's Order and the relevant case law establish the following points that govern the Licensing Board's consideration of these issues and of the evidence that will be presented:

- (1) In order to obtain an operating license, Houston Lighting and Power must prove that it has the basic competence and character necessary to operate the plant safely and in compliance with NRC regulations.
- (2) The issue of competence and character hinges on the question of whether HL&P has demonstrated that it can be relied upon to manage the facility in a manner that will assure the protection of the public health and safety and compliance with the Commission's regulations.
- (3) HL&P is responsible for the actions of its contractors. Any evidence of violations, misconduct, or failures by Brown and Root or any other contractors would support a finding that HL&P does not have the competence and character necessary to obtain an operating license. Any evidence of HL&P knowledge of and inability to control or prevent such violations, misconduct, or failures would be particularly probative.
- (4) The Board's ultimate decision requires a predictive evaluation that must be based on HL&P's actions to date.
- (5) HL&P's actions prior to the Commission's Order can form an independent and sufficient basis for revoking the construction permit or denying the operating license, regardless of any commitments or promises that HL&P may have made to correct its failings.
- (6) Any evidence that indicates that the kind of actions and failings that gave rise to the stop work order have continued since HL&P committed to take corrective action or since the Commission's Order was issued is particularly probative in establishing that HL&P does not have the basic competence and character to qualify for the issuance of an operating license.

The operable language of the Commission's Order, which the Board has asked us to analyze, follows:

The history of the South Texas Project -- at least 12 separate NRC investigations over a 2-1/2 year period, resulting in conferences with the licensee, several prior items of non-compliance, a deviation, five immediate action letters, and how (sic) substantiated allegations of harassment, intimidation and threats directed to QA-QC personnel and apparent false statements in the FSAR - is relevant to the issue of the basic competence and character of Houston. Central to that issue are two questions: Whether the facts demonstrate that the licensee has abdicated too much responsibility for construction to its contractor, Brown and Root, Inc., and whether the facts demonstrate an unacceptable failure on the part of Houston to keep itself knowledgeable about necessary construction activities. Either abdication of responsibility or abdication of knowledge, whether at the construction or operating phase, could form an independent and sufficient basis for revoking a license or denying a license application on grounds of lack of competence (i.e., technical) or character qualification on the part of the licensee or license applicant. 42 U.S.C. 2232a. In large part, decisions about licenses are predictive in nature, and the Commission cannot ignore abdication of responsibility or abdication of knowledge by a license applicant when it is called upon to decide if a license for a nuclear facility should be granted.

We believe that the above issues relating to technical competence and to character permeate the pleadings filed by Citizens. They do deserve a full adjudicatory hearing, as they will no doubt get in the operating license proceeding, and they do deserve expeditious treatment because they could prove disqualifying.

12 NRC at 291.

Although the point is well established, it must be emphasized that HL&P, as the owner of the facility and the licensee, "bears the full responsibility for the design, procurement

and construction of the facility." Virginia Electric and Power, Co. (North Anna Nuclear Power Station, Units 1 and 2), LBP-77-68, 6 NRC 1127, 1152 (1977). Further, on the specific point of quality assurance as it relates to reactor operation, 10 CFR 50.34(b)(6)(ii) requires that HL&P, as the licensee, use managerial and administrative controls to assure safe operations. The issue here is whether HL&P's utter failure to meet that standard and fulfill its management responsibilities establishes that it is not qualified to operate the South Texas Project. Its failure to assert effective control over its prime contractor is at the very core of that issue.

Although the issue of possible remedies is somewhat premature, it has a bearing on the Board's interpretation of the Commission's mandate since the Board must determine a remedy based on the evidence that it receives. The most obvious remedy is to rule that HL&P is not qualified to operate the facility and to deny the operating license. CEU believes that such a ruling may be required, in which case responsibility for the facility would have to be transferred to one of the other members of the ownership consortium, or the facility would have to be sold in order to assure its completion. Since that would be a drastic remedy and could cause the project to fail, which CEU does not believe to be in the public interest, other remedies should be considered if they are consistent with the record. In particular, since the bulk of the evidence will serve to demonstrate the misconduct and incompetence of

Brown and Root, it appears likely that at least part of the appropriate remedy would be to disqualify Brown and Root from further participation in the project. In the context of findings related to the competence and character of HL&P, that remedy would reflect a finding that it had not been able to control the particular contractor because of the egregious and pervasive nature of the contractor's misconduct and incompetence. Stated differently, it may be the combination of HL&P and Brown and Root that is the problem. If HL&P's management capabilities are substantially strengthened, and Brown and Root is replaced with another contractor free of similar charges, the project might be able to proceed without a change in ownership. With Brown and Root, however, there will be no basis for knowing whether the plant is safely constructed, and we could only expect the existing intolerable situation to continue.

DISCUSSION

Any analysis of "the issue of the basic competence and character of Houston" must begin with the language of the Commission Order itself. In fact, the mandate of the Commission's Order is remarkably clear and requires little elucidation. The relevant authorities serve only to confirm what the Commission has already clearly stated.

The facts with respect to two central questions will determine whether HL&P is qualified to receive an operating license. Those questions are:

1. Whether the facts demonstrate that Houston has abdicated too much responsibility for construction to its contractor, Brown and Root, Inc.
2. Whether the facts demonstrate an unacceptable failure on the part of Houston to keep itself knowledgeable about necessary construction activities.

The only points that are not clearly defined in those two questions are (1) how much abdication of responsibility is "too much," and (2) what constitutes "an unacceptable failure." These are clearly the areas in which judgment must be exercised. While the Commission has provided little guidance on where a line should be drawn, it is clear that the Commission believes that a line must be drawn somewhere when there is evidence of abdication of responsibility or failure to maintain knowledge about construction activities. That is particularly true where, as here, the facts demonstrate a persistent pattern of violations of NRC requirements and QA/QC procedures by the prime contractor.

In addition, there is no question that these failures at the construction stage would form an independent and sufficient basis for revoking the construction permit or denying the operating license. The grounds would either be a lack of technical competence on the part of Houston to understand and control the operations for which it is responsible, or a lack of "character qualification" as indicated in such non-technical areas as lack of management control and lack of adequate commitment to assuring the public health and safety and compliance with Commission regulations. Finally, the

Commission emphasized that the Licensing Board must make a predictive ruling on these questions, and that prediction must be based on the available facts.

The only area in which the Commission's Order remains somewhat unclear is in the definition of "character." Reference to the first sentence of the language quoted above and to the show cause order which led to the Commission's mandate provides nearly explicit guidance on this point. Matters of concern to the Commission were the history of harassment of quality control personnel, serious failures in the quality assurance system, continuing violations of Commission regulations, and the lack of management capability to remedy these deficiencies. In this context, the character of Houston Lighting and Power is determined by examining whether the company, either knowing or unknowingly, permitted these conditions to exist and failed to take action to prevent them in the future. While the evidence gathered prior to the show cause order and the Commission's decision presumably could be enough to sustain a decision adverse to HL&P, certainly any evidence of continuing failures after the show cause order and after the Commission's decision, by which point HL&P was thoroughly on notice of its obligations, would be conclusive on the point.

In similar circumstances, the Atomic Safety and Licensing Appeal Board provided guidance that is applicable here. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-106, RAI-73-3, page 182 (1973), involved a challenge to a

construction permit on the ground that the quality assurance program had not been shown to meet the Commission's requirements. Emphasizing that the existence on paper of a QA program is not enough, the Appeal Board stated,

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. And, if the inquiry leads it to conclude that the record does not permit an affirmative finding on that score, it then becomes the Board's responsibility to take whatever action is required - including possibly the outright denial of the construction permit - to provide some measure of assurance that there will not be an improperly constructed facility which might present safety problems.

The inquiry which the Board must make is not necessarily resolved by a determination of whether, in a broad sense, the applicant and its architect-engineer are "technically qualified." A demonstration that technical qualifications do exist does not necessarily provide reasonable assurance that the QA program described in the PSAR will be faithfully fulfilled. To the contrary, as important as qualifications may be, of no less significance is the matter of managerial attitude. Unless there is a willingness -- indeed, desire -- on the part of the responsible officials to carry it out to the letter, no program is likely to be successful.

Id. at 184.

Recently, the Atomic Safety and Licensing Board has emphasized that the burden of demonstrating managerial competence is even greater in the operating license phase than it is in the construction permit phase of the proceeding. In Carolina Power and Lighting Co., (Shearon Harris Nuclear

Power Plant, Units 1, 2, 3, and 4), LBP-79-19, 10 NRC 37 (1979), the Board stated,

Management capability to safely operate a nuclear plant is a different consideration. The staff has not been able to devise a method for evaluating nuclear power plant safety performance so that it can be measured against specific standards. The qualifications for operating a plant are largely functional in nature compared to the discreet engineering disciplines used in construction (such as mechanical, electrical, civil, seismic). Quality assurance criteria are not so precise. Unlike construction, mistakes in actual operation may not be detected at specified inspection hold points. Technical qualifications and reliable safety performance, independent of NRC instructions, are much more important in operation because of the inherent seriousness of operational error. We regard plant operation to require a greater showing of technical qualification and management capability compared to plant construction. Therefore operating experience is very important to our consideration.

Id. at 42 (Emphasis supplied).

Based on NRC precedents alone, therefore, HL&P's "character" depends in large part on whether it has demonstrated a desire to implement its quality assurance program and otherwise to control the construction of the facility. Since the standard for obtaining an operating license is even greater than that for construction of the facility, if HL&P has failed to demonstrate that desire and that capability in the course of construction, it cannot demonstrate the "character" required by the Commission to qualify for an operating license.

Cosmopolitan Broadcasting Corp. v. FCC, 581 F.2d 917 (D.C. Cir. 1978), which was cited by Commissioners Gilinsky and Bradford in their additional views, 12 NRC at 294,

provides a distinct parallel to the case at hand.^{1/} There, an FCC licensee sold virtually all of its broadcast time to "time brokers" who provided the programming and sold commercials. This programming, much of which was in foreign languages that were not known to the licensee, resulted in charges of promoting a lottery and false and misleading advertising. In addition, the licensee was charged with improper logging, failure to meet filing requirements, and inadequate record-keeping. Since licensees had an affirmative duty to control all of their programming, the FCC denied the license renewal on the ground that the licensee had abdicated its independent responsibilities by merely acting as a clearing house for the sale of broadcast time. In particular, the FCC ruled that the licensee had relinquished its own responsibility to the time brokers and had "failed to maintain effective supervisory procedures to ensure familiarity with the content of WHBI's foreign language programming." Id. at 921. In affirming the FCC's decision, the D.C. Circuit noted that although a number of violations of Commission regulations had occurred, the significant point was not the seriousness of the violations themselves, but that "they were probative of an underlying abdication of licensee responsibility." Id. at 927.

^{1/} While only Commissioners Gilinsky and Bradford specifically concurred in the additional views, there is no reason to believe from the statements of Commissioners Hendrie and Ahearne that they consider the non-NRC precedents cited in the additional views to be irrelevant.

Similarly, here, the seriousness of each particular violation is not the major issue in determining character. Rather, the point is that the violations occurred at all, and that Houston Lighting and Power was unable to prevent them from occurring even after it had learned of the types of practices involved. Although direct evidence of misconduct or failures by HL&P personnel or management is certainly relevant to the question of corporate character, it is not necessary to a determination that HL&P's character is such that it cannot obtain an operating license. Just as the D.C. Circuit has provided guidance on the substance of the character issue, so it has established that the history of an applicant's operations is the determining factor in deciding whether a particular license may issue. In United Broadcasting Co. v. FCC, 565 F.2d 699 (D.C. Cir. 1977), cert. den., 434 U.S. 1046, the Court upheld an FCC refusal to renew a broadcasting license, stating,

In our view, the long history of persistent violations of those rules was a sufficient reason for disqualification.

Certainly the same would apply here. See, also, Regler v. Village of Riverside, 28 Ill. 2d. 142, 190 N.E. 2d 706, 711 (1963).

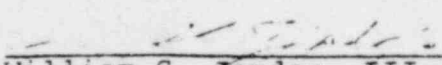
The real issue in this case is where the line is to be drawn in determining whether a company is qualified to operate a nuclear power plant, and what remedy is appropriate to assure that the plant is constructed and operated safely.

It is instructive to compare the potential impact of the decision before this Licensing Boarding with that of the decisions reached by the FCC. Although the granting of a broadcasting license hardly involves a threat to the public safety, the FCC did not hesitate to deny a license where the history of the applicant's operations demonstrated that it had failed to fulfill its responsibilities to control its own programming and had permitted persistent violations of the Commission's regulations. Here, failures by the licensee could result in extreme threats to the public health and safety and in enormous economic cost to the ratepayers of Houston Lighting and Power if the plant is not properly constructed and then not properly run. As the applicant, HL&P bears an extremely heavy burden to demonstrate its character and competence.

Presumably, HL&P met this burden to the satisfaction of the Commission when it was granted its construction permit. The course of construction of this project has totally undermined the basis for that original judgment. Accordingly, Houston Lighting and Power must now make a showing that is substantially greater than simply providing a plan or stating an assurance that it will behave properly in the future. Rather, it must establish through specific evidence grounds upon which it can be found that HL&P can be relied upon to act in the future in a manner that is completely

different from its actions to date in failing to meet its responsibilities for the construction of the South Texas Project.

Respectfully submitted,



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CERTIFICATE OF SERVICE

 I hereby certify that copies of the "Citizens for Equitable Utilities Prehearing Brief," have been hand-delivered and mailed, postage pre-paid, this 6th day of May, 1981, to the following:

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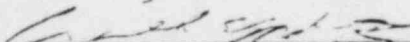
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