

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'83 JUN -6 A11:36

## BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CITIZENS CONCERNED ABOUT NUCLEAR POWER (CCANP)  
SUPPLEMENT TO MARCH 18, 1983 MOTION  
FOR NEW CONTENTION

## I. INTRODUCTION

On March 18, 1983, CCANP filed its motion seeking admission of a new contention concerning Houston Lighting and Power Company's lack of financial qualifications to safely construct and operate the South Texas Nuclear Project. The motion also sought a waiver of 10 C.F.R. Section 50.33(4), exempting regulated electric utilities from financial qualifications review.

On May 11, 1983, the Atomic Safety and Licensing Board issued its Memorandum and Order permitting CCANP to respond to the Applicant's and NRC Staff's opposition to the motion. This supplement is pursuant to that Memorandum and Order.

CCANP wishes to make clear in the record that CCANP objects to the rule itself. CCANP fully expects the federal courts to strike down the rule in *New England Coalition on Nuclear Pollution v. Nuclear Regulatory Commission*, No. 82-1581 (D.C. Cir. 1982). Should the rule be struck down, there would be no need for a waiver under 10 C.F.R. Section 2.758; the contention would be admissible as it stands. CCANP realizes that this

proceeding is not the appropriate forum to challenge the rule. Therefore, CCANP argues, as if the rule were valid, that special circumstances exist which warrant admitting the March 18, 1983 contention on financial qualifications to this proceeding.

## II. DISCUSSION

The objections to CCANP's motion for a new contention fall into three categories: alleged failure to show special circumstances warranting an exception to the rule; alleged failure to meet the five part balancing test for late contentions; and failure to file the affidavit required by 10 C.F.R. Section 2.758.

### A. Grounds for Waiver of the Rule

The NRC Staff claims that CCANP must demonstrate a factual link between HL&P's financial qualifications and decreased safety at STNP in order to show special circumstances warranting an exception to the current financial qualifications rule. Staff at 8. This claim is based on an erroneous interpretation of the basis for the rule change. The Commission did not repudiate the position that there could be a link between safety and financial ability, as the Staff seems to think. Staff at 7. Instead, the Commission found that the existing financial qualifications review did not help identify health and safety concerns regarding utility operated nuclear power plants because prudently managed, regulated utilities are almost guaranteed sufficient revenues to enable them to meet their financial needs; in other words, the question of a link between safety and financial difficulty would never come up because the utility would never be in financial difficulty. 46 Fed. Reg. 41788.

The Commission noted that most utilities responded to financial difficulties by cancelling or postponing their plants - "actions not inimical to public health or safety." 47 Fed. Reg. 13751. A utility that persisted in the construction of a nuclear plant even when the cancellation of the plant is called for by the economic conditions facing the utility would be acting outside the normal bounds the Commission expected to be observed by such utilities. CCANP contends that current conditions call for the cancellation of STNP, but Houston Lighting and Power is determined to continue the project for reasons of its own.

Furthermore, if the Commission had found that there was no link between financial qualifications and safety, it would have eliminated the review for all applicants. Instead, the Commission retained the review for non-utility applicants having neither "a regulated status nor authority to set their own rates for electric service." 46 Fed. Reg. 41788.

There is also the lengthy discussion of the Commission's reasons for pressuring electric utilities to be able to finance their activities. 46 Fed. Reg. 41788.

Finally, even while adopting the rule, the Commission made it clear that under certain circumstances, financial qualifications review would be appropriate, either under the general power of the Commission to compel additional information or through a 10 C.F.R. Section 2.758 waiver of the new rule.

Such an exception to the rule is appropriate when the general presumption underlying the rule is no longer correct or the rule should not be applied in a particular case because in the particular case the rule does not serve its intended

function.

CCANP contends that the ability of Houston Lighting and Power to raise the necessary funds to safely complete and operate STNP is now in question. HL&P will have to seek money in an investment community which no longer favors investment in nuclear power plants. The imminent default at WPPSS, the cancellation of nuclear power plants throughout the nation, the poor operating record of nuclear plants, and numerous other factors have combined to create a perception in the investment community that nuclear plants represent an unacceptable risk as an investment. The investment climate is deteriorating steadily and is on the verge of a crisis which threatens HL&P's ability to raise the capital to safely complete and operate STNP. CCANP contends that the deterioration creates conditions which did not apply at the time the rule was adopted, that the financial adversity facing nuclear utilities in the national marketplace for securities is qualitatively different from the difficulties existing at the time the Commission adopted the rule for which CCANP seeks a waiver.

CCANP further contends that the consequences of the recent Public Utility Commission's sanctions for mismanagement and the City of Austin suit for a refund of its investment in STNP and other remedies will make it almost impossible for HL&P to finance<sup>1</sup> the construction and operation of STNP. CCANP Motion 3-10.

---

1. At the most recent stockholder meeting of Houston Industries, the parent company of HL&P, a stockholder with 1,000 shares introduced a resolution calling for STNP to be shut down while numerous independent reviews were conducted. The resolution received approximately 3 million votes representing almost 7% of

\*\*\* footnote continued next page \*\*\*

The Applicants argue that the PUC actions and the Austin lawsuit do not constitute special circumstances warranting a waiver of the rule because the Commission "explicitly addressed" HL&P's financial circumstances in the comments to the rule change. App. at 5. The Commission's comments, however, were made almost a year before either the PUC ruling or the lawsuit; the comments cannot possibly be viewed as encompassing the potential effects of these two new events.

In addition, the Commission's presumption that its inspection and enforcement efforts will be sufficient to protect the public health and safety is not warranted in this case.

First of all, the assumption makes no sense. A proceeding on the application for an operating license is predictive. One of the best predicting inquiries is the enforcement history of an applicant (assuming for the moment a competent and honest NRC enforcement effort). While NRC enforcement efforts might catch and correct safety violations resulting from financial pressures, the ASLB certainly should look closely at such violations and the linkage to financing revealed by such violations and determine whether the violations and financial outlook for the applicant indicate a likelihood that similar violations will occur during the operating phase. The presence of an effective NRC inspection and enforcement effort is irrelevant to deciding what should be

-----  
\*\*\* footnote continued from previous page \*\*\*

the votes cast. Since 13% of the shares voting abstained, management received only 80% of the vote for their position in opposition to the resolution. Given the usual ability of corporate management to control 95% or more of the votes on a resolution such as this one, the vote at the Houston Industries meeting reflects a remarkably high lack of confidence in STNF among Houston Industries stockholders.

considered in an operating license proceeding.

This particular assumption reveals part of the problem the NRC created for itself with this rule. Logically, the NRC could argue there is no need to inquire into the technical qualifications of an applicant or into the character of an applicant because if technical competence or character are lacking, I&E will catch the violations which result. With this reasoning, there would be precious little for an ASLR to consider, except perhaps the question of whether the NRC inspection effort was adequate.

Putting the rationality of the assumption aside, the assumption cannot be made in this proceeding. Both the Applicants and the Staff cite the Commission's comments with respect to inspection efforts at South Texas as supporting their argument that inspection and enforcement efforts will be adequate. App. at 6; Staff at 10.

CCANP can only conclude that on the occasion of the Commission's comments, the NRC Staff did not adequately inform the Commission or deliberately misled the Commission as to the effectiveness of the NRC inspection and enforcement effort at STNP. Without the pressure brought on the NRC by CCANP and CEU, both on their own and in cooperation with national media and the FBI, the Director of Inspection and Enforcement would never have ordered a special investigation to be conducted primarily by inspectors from outside Region IV, a special investigation which resulted in the Order to Show Cause of April 1980.

One need look no further than Staff Exhibit 32 in Phase I of this proceeding wherein the conclusion is reached that the

Applicants are successfully preventing acts of intimidation aimed at QC inspectors. Staff Ex. 32 at 7 (numbered 3), item 1. This investigation took place in September 1979, two months before the outside investigation found extensive evidence of continuing intimidation of QC inspectors.

If the Board so desires, CCANP can produce extensive evidence regarding the compromised investigation of the Hayward Tyler Pump Company which has already led to a number of Congressional hearings and a call for disciplinary action to be taken against top personnel at the Region IV NRC office. CCANP can also provide the Board with extensive documentation of incompetence bordering on corruption in the NRC investigations surrounding the Comanche Peak project, another Region IV responsibility. Rather than burden this supplement with hundreds of pages of exhibits, however, CCANP merely argues that there is at least a *prima facie* case from what the Board already knows to conclude that Region IV may not on all occasions be the most effective of watchdogs.

CCANP contends that financial pressure will increase HL&P's propensity for failing to conform to NRC rules and regulations. If the ASLB agrees, the ultimate decision on licensing might well be affected (assuming *arguendo* that the Board has not already decided on license denial based on the record in Phase I). Financial qualifications review is necessary in order to determine whether such violation will be likely to occur, so that appropriate action, including denial of the operating license, may be taken to protect public health and safety. A waiver should be granted under the existing circumstances.

## B. Factors Favoring Admission of the Contention

Both the Applicants and the Staff argue the new contention should not be admitted because CCANP has not met the five factor balancing test of 10 C.F.R. Section 2.714(a)(1). CCANP contends, however, that the balancing of the five factors weighs in favor of admitting the new contention.

### 1. The contention was filed on time.

Both the Staff and the Applicants argue that the information upon which the contention is based is not new information. First, they argue that the general economic conditions for the nuclear industry have been known for some time. Second, they argue that CCANP should have attempted or has attempted to raise the various elements supporting the contention before.

CCANP contends that while the general economic conditions for nuclear investment deteriorated over the last five years, the deterioration is accelerating and a crisis is imminent. Furthermore, the evidence supports a prediction that the general economic climate for nuclear investment will continue to deteriorate. As argued above, CCANP contends these conditions are qualitatively different from those considered by the Commission. They are also qualitatively different from anything the nuclear industry and their captive utilities have ever experienced. This qualitative difference constitutes part of the special circumstances which led to the filing of the new contention.

The NRC Staff makes the rather disingenuous argument that because CCANP knew in November 1981 that the City of Austin had hired lawyers to prepare litigation against HL&F, CCANP should have raised the litigation/financial qualifications issue at that

time. Staff at 3, note 3. But, of course, hiring a lawyer does not guarantee a suit will be filed and until the suit is filed there can be only the most speculative attempt to assess the remedy the plaintiff will seek or the potential damage to the defendant. Had CCANP tried to raise the potential law suit as impacting the financial qualifications of HL&P in November 1981, the NRC Staff would surely have argued prematurity and a failure to show adequate reason for waiver of the rule.

Similarly the NRC Staff would hold CCANP responsible for not raising the PUC hearing as an issue when it commenced, as opposed to when a decision was reached. Staff at 3, note 3. The NRC Staff would hold CCANP responsible for not raising the hearing examiner's report rather than waiting for a final PUC ruling. Id. The NRC Staff would hold CCANP responsible for not speculating in August of 1982, prior to any PUC ruling on who would pay the cost, as to what the financial impact of cancelling the Allens Creek Nuclear Project would be. Id. Finally, the NRC Staff takes the position that the Commission's questioning of HL&P's character and competence should have triggered a motion for a new contention on financial qualifications. Id.

CCANP trusts the Board perceives these NRC arguments as frivolous, contrary to law and logic, and make weight.

As to prior attempts to introduce the PUC actions into the record, CCANP did attempt to reopen the record of Phase I to introduce the PUC rulings as evidence of the character and competence of HL&P. The motion for a new contention brings together synergistically the forces of the national nuclear economy, the PUC order, the Austin lawsuit, and HL&P's financial

condition as creating a financial situation threatening the public health and safety. That one element among these forces was offered in an entirely different context is irrelevant to the timing question raised by the motion for a new contention.

The motion was filed on time, particularly once consideration is given to the time needed to research the history of the rule in order to argue for a waiver.

2. No other means exists to protect CCANP's interests.

The Staff mischaracterizes CCANP's "central concern" as the "financial health (or asserted lack thereof) of HL&P" and argues that CCANP should bring this matter before the Public Utility Commission of Texas. Staff at 7. The PUC does not have jurisdiction over the safety of the South Texas Nuclear Project. This jurisdiction is vested in the NRC. Only the NRC has the power to deny HL&P an operating license. Protecting the public health and safety is CCANP's "central concern," rather than HL&P's financial condition. For that reason, CCANP has come to the ASLR to seek license denial.

The Applicants argue that CCANP's concerns relate to HL&P's ability to finance construction of STNP and that they are therefore not proper in an operating license proceeding, i.e. there is no interest to be protected.

CCANP's motion is not limited to concerns in the construction phase alone. The construction and operation phases are not independent of each other and their interaction makes the Applicants' position inappropriate. This project is only one third complete. If financial pressures lead the Applicants to do less than excellent work in completing the project, the

likelihood of poor performance of the plant during operation is created.

Financially, the FUC's refusal to include substantial costs of construction in the rate base would put financial pressure on HL&P throughout the operating period, possibly resulting in the plant not being shut down for necessary and even crucial repairs, as a recent NRC investigation concluded took place at Three Mile Island prior to the March 1979 accident.

Since no other party has raised these concerns and since the concerns are of relevance to the operating license decision, this factor weighs in favor of admission of the new contention.

3. CCANP will assist in the development of a sound record.

The Applicants and Staff argue that CCANP has not demonstrated that it has any special knowledge that will be useful in developing the record. App. at 9; Staff at 4. This Board rejected a similar argument as irrelevant when CCANP first applied for intervenor status. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2). LBP-79-10, 9 NRC 452, 459 (1979).

CCANP contends that based on its prior participation and the

2. CCANP does not yet have a reference on this investigation whose results were announced during the past ten days. As the story was relayed by the media, an NRC investigator concluded that data on overheating in the Three Mile Island plant was falsified with the knowledge of management in order to avoid the expense of shutting down the plant to make repairs. Should this report be accurate, then the event stands as proof of the need for financial qualifications review generally for electric utilities and as support for the argument that the NRC inspection effort cannot detect violations caused by financial pressures. When combined with the information flowing from the Zimmer plant about the cut backs on Quality Assurance made by the utility in response to financial pressures, the news from Three Mile Island confirms the error of the rule and the need for each ASLB to be prepared to waive the rule when circumstances call for doing so.

information already supplied in support of the motion for the new contention, the Board can have confidence that CCANP will contribute to the development of a sound record.

This factor favors admission of the new contention.

4. See CCANP Motion at 16.

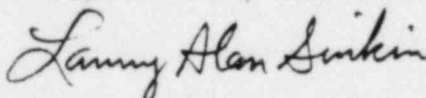
5. See CCANP Motion at 17.

The five factors of 10 C.F.R. 2.714(a)(1) all weigh in favor of admission of the contention.

### III. Conclusion

Having demonstrated adequate grounds for a waiver of the rule on financial qualifications review and being favored by the balancing test for late filed contentions, CCANP is entitled to have its motion for a new contention granted.

Respectfully submitted,



Lanny Alan Sinkin  
Counsel for Intervenor  
Citizens Concerned About  
Nuclear Power, Inc.  
2207 D Nueces  
Austin, Texas 78705  
(512) 478-3290

Dated: May 30, 1983