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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'85 MAY 13 P2:55

In the Matter of)
)
HOUSTON LIGHTING AND POWER)
COMPANY, ET AL.)
)
(South Texas Project, Units 1)
and 2))

Docket Nos. 50-498 OL
50-499 OL

OFFICE OF SECRETARY
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APPLICANTS' ANSWER IN OPPOSITION TO
CCANP PETITION FOR REVIEW OF ALAB-799

I. Introduction

On April 30, 1985, Citizens Concerned About Nuclear Power, Inc. (CCANP) served its petition for review 1/ of ALAB-799, 2/ which affirmed, in part, the Atomic Safety and Licensing Board's (Licensing Board) March 14, 1984 Partial Initial Decision (PID) 3/ in the above-captioned proceeding. CCANP's Petition fails to demonstrate that ALAB-799 is erroneous with respect to an important question of fact, law or policy, and, accordingly, pursuant to 10 C.F.R. § 2.786(b) (1985), should be denied.

1/ CCANP Petition for Review of ALAB-799 (April 30, 1985) (CCANP Petition).

2/ Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360 (1985), motion for reconsideration denied on April 10, 1985.

3/ Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC 659 (1984).

II. Summary of Procedural History

A. The Commission's Directive and Licensing Board Action

In ALAB-799, the Atomic Safety and Licensing Appeal Board (Appeal Board) considered CCANP's appeal of the Licensing Board's PID covering "Phase I" of the South Texas Project (STP) operating license proceeding. In its PID, the Licensing Board addressed the "character and competence" of HL&P to receive operating licenses for the STP in light of, inter alia, the enforcement history at the STP.

The Licensing Board's consideration of HL&P's character and competence stemmed from the Commission's directive in Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 291-92 (1980). There, the Commission stated that the "history of the South Texas Project . . . is relevant to the issue of the basic competence and character of [HL&P]," and instructed the Licensing Board to conduct an "expedited hearing . . . [and] to issue an early and separate decision on this aspect of the operating license proceeding." CLI-80-32, 12 NRC at 291-92.

In response to the Commission's directive, the Licensing Board admitted six issues (Issues A-F) into the proceeding. PID, 19 NRC at 667. Among the issues admitted by the Board were the following:

CLI-80-32 Issue A:

If viewed without regard to the remedial steps taken by HL&P, would the record of HL&P's compliance with NRC requirements . . . be sufficient to determine that HL&P

does not have the necessary managerial competence and character to be granted licenses to operate the STP?

Id. at 726.

CLI-80-32 Issue B:

Has HL&P taken sufficient remedial steps to provide assurance that it now has the managerial competence and character to operate STP safely?

Id. at 772.

After extensive hearings encompassing over 10,000 pages of transcript, the Licensing Board concluded that:

HL&P is not now deficient in character and has not demonstrated character deficiencies which would warrant denial of operating licenses; and that HL&P's competence, while questionable . . . [at an earlier date] was not so deficient as to preclude, without more, the award of operating licenses. Moreover, that competence appears to have substantially improved.

PID, 19 NRC at 723. The Licensing Board also concluded, however, that its determinations on HL&P's character and competence were "preliminary" and "subject to the outcome of later phases" of the proceeding. Id. 4/

4/ The Licensing Board withheld its final determination on HL&P's character and competence pending consideration, in Phase II of the proceeding, of: (1) information regarding the implementation of the construction QA/QC program under Bechtel and Ebasco, the new contractors who replaced Brown & Root during the Phase I proceeding; and (2) certain questions arising out of a consultant's report on Brown & Root engineering work at STP. PID, 19 NRC at 697. See also, Fourth Prehearing Conference Order (December 16, 1981) at 4-5.

B. The Appeal Board's Decision

The Appeal Board in ALAB-799, recognizing that "[h]earings on some aspects of the competence and character issue . . . are not complete," concluded that it could not "reach any appellate determination on the merits of the ultimate issue of HL&P's fitness to operate the plant." ALAB-799, 21 NRC at 368-9. However, the Appeal Board also recognized that this is a "unique proceeding in which the Commission has specifically directed the Licensing Board to issue an 'early and separate' decision on the character and competence question . . . ," that questions regarding the applicable legal standard were "now amenable to resolution . . ." and that "early pronouncement on these questions . . . [would] be helpful to the parties and the Licensing Board in litigating Phase II of the case." Id. at 369-70. Accordingly, the Appeal Board reviewed and affirmed the legal standard applied by the Licensing Board. Id. at 385. The Appeal Board also reviewed CCANP's procedural claims and concluded that the Licensing Board had not committed prejudicial error. Id. at 376.

III. CCANP HAS FAILED TO DEMONSTRATE THAT THE APPEAL BOARD ERRED WITH RESPECT TO AN IMPORTANT QUESTION OF FACT, LAW OR POLICY

10 C.F.R. § 2.786(b)(1) (1985) provides, in part, that "a party may file a petition for review [of an Appeal Board decision] . . . on the ground that the decision . . . is erroneous with respect to an important question of fact, law, or policy." CCANP alleges that the Appeal Board's determinations

on: (1) the character and competence standard and; (2) the conduct of the Phase I proceeding meet these standards. Applicants address both claims below, and demonstrate that CCANP has failed to provide any basis for Commission review.

A. The Character and Competence Standard

The thrust of CCANP's argument on this aspect of the Appeal Board's decision is that the Licensing Board failed to consider whether "the past acts of the Applicants . . . [constituted an] independent and sufficient basis for license denial . . .," without regard to remedial measures, and that the Appeal Board erred in upholding the Licensing Board's determination in this regard. CCANP Petition, at 3. CCANP argues that if the view that corrective actions must be considered in assessing a licensee's character and competence "prevails within the NRC, then . . . [i]t would not matter how egregious . . . [prior] failures were, as long as corrective measures were taken subsequently." Id. at 4. As a result, CCANP asserts that "Commission review of the character issue standard . . . [is] an important matter of both law and policy." As shown below, however, the Appeal Board's decision is fully in accord with the Commission's directive to the Licensing Board in CLI-80-32 and applicable legal precedent. CCANP has not identified any error, let alone any important question of law or policy.

The Commission, in CLI-80-32, stated that "[e]ither abdication of responsibility or abdication of knowledge . . . could form an independent and sufficient basis for . . . denying a license application on grounds of lack of competence . . . or character . . ." (emphasis added). 12 NRC at 291. CCANP relies upon this language for its claim that remedial measures should not have been considered by the Licensing Board.

As the Appeal Board correctly recognized, however:

the Commission's language reflects an explicit judgment that the allegations, even if proven, need not automatically dictate denial of the license. Rather, the charges would bear on a predictive determination regarding the likelihood that the applicant could operate the plant safely and in conformity with Commission regulations. Such a determination would necessarily embrace an examination of remedial measures.

ALAB-799, 21 NRC at 372. While the Appeal Board acknowledged that the Commission "expected the [Licensing] Board to review whether HL&P's application may already have been irremediably tainted . . . ," it did not read CLI-80-32 to "circumscribe the matters the [Licensing] Board proposed to examine to exclude . . . remedial measures." Id. at 373. The Appeal Board then noted that under the very scheme of the Commission's regulations it is apparent that "remedial measures are an essential component of any analysis of character and competence." Id. at 374.

Furthermore, the Appeal Board properly concluded that the Licensing Board's interpretation of its mandate under CLI-80-32 was consistent with applicable precedent, which has

required "a review of the totality of circumstances in order to permit a reasonable prediction regarding whether an applicant can and will comply with . . ." applicable requirements. Id. at 374. ^{5/} Recently, the Commission has explicitly recognized this principle. In Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-02, 21 NRC 282, 286, n.5, (1985), the Commission concluded: "[w]hether there was one or many past improper acts [by the licensee], the issue today is whether adequate remedial steps have been taken to provide reasonable assurance that the plant can be operated safely." See also, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Units 1 and 2), CLI-85-04, slip. op., at 5, 21 NRC ____ (April 4, 1985).

In short, CCANP has failed to show that the Appeal Board erred with respect to an important question of law or policy. On the contrary, the Appeal Board's affirmance of the Licensing Board's decision was fully consistent with the Commission's CLI-80-32 directive, applicable precedent, and the Commission's regulatory scheme. CCANP has failed to identify any substantial basis for its claim that the Appeal Board erred, and thus its petition does not raise an important question of law or policy.

^{5/} The Appeal Board cited Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1169 (1984); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-283, 2 NRC 11, 20 (1974); and Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-722, 19 NRC 1193, 1206 (1984), for the proposition that "the clear import of . . . [its] decisions is that remedial efforts are relevant to determining whether applicants should be permitted to obtain or retain licenses." ALAB-799, 21 NRC at 374.

B. Alleged Bias and Procedural Error

CCANP also argues that "consistent arbitrary and erroneous rulings . . . " by the Licensing Board raise due process questions which represent "significant issues of fact, law, and policy . . .," and, therefore, merit Commission review. CCANP Petition, at 5-6.

The Appeal Board addressed each of CCANP's "due process" allegations and concluded:

we do not find any evidence of bias or any deprivation of constitutional or statutory rights as claimed by the intervenor. In any event, CCANP has not demonstrated that it was prejudiced by any of the Board's actions about which it complains.

ALAB-799, 21 NRC at 376.

The Appeal Board found, inter alia, that CCANP did not demonstrate substantial harm because of the Licensing Board's scheduling order (ALAB-799, 21 NRC at 380); it was "unable to conclude that the time allotted [for discovery] was inadequate" (id. at 380); CCANP failed to demonstrate that any harm befell it as a result of the Board's limitations on cross-examination (id. at 377); the objections to cross-examination questions that CCANP characterizes as "groundless and harassing" were related to CCANP questions that "were often broad, repetitious or unclear . . ." and CCANP did not demonstrate that it was prejudiced by any of the Licensing Board's rulings on those objections (id. at 378).

CCANP has failed to provide any basis for concluding that the Appeal Board erred in any of these conclusions. Instead, it simply argues broadly, and without citation, that there were due process violations. Obviously, the mere allegation that such violations occurred is grossly insufficient to demonstrate the existence of "an important question of fact, law or policy," let alone an erroneous determination with respect to such questions.

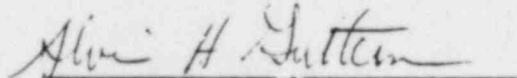
CCANP has failed even to allege that the Board's procedural rulings represent an "important matter that could significantly affect the public health and safety, . . . an important procedural issue, or . . . important questions of public policy." 10 C.F.R. § 2.786(b)(4)(i) (1985). Furthermore, to the extent the Appeal Board rulings are based on its resolution of factual issues, such resolution was neither "clearly erroneous" nor contrary to the resolution of that same issue by the Licensing Board, and Commission review would not be appropriate. 10 C.F.R. 2.786(b)(4)(ii) (1985). Thus, CCANP has failed to provide any basis for Commission review of the Appeal Board's disposition of CCANP's "due process" claims.

IV. Conclusion

CCANP's Petition fails to identify an error of fact, law or policy in ALAB-799, let alone a matter warranting Commission attention under Section 2.786. The Appeal Board's determination on the applicable legal standard was consistent with the Commission's directive in CLI-80-32, applicable precedent and

the Commission's regulatory scheme. No due process violation has been shown. Accordingly, CCANP's Petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Answer In Opposition To CCANP Petition For Review Of ALAB-799 have been served on the following individuals and entities by deposit in the United States mail, first class, postage prepaid on this 10th day of May, 1985.

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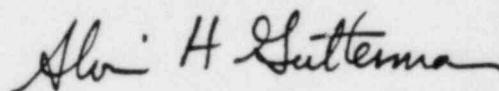
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