Lanny Sinkin, et al., vs. STNP

By Susan Reid

Austin

If the pre-hearing conference augurs things to come, the hearing before the Atomic Safety and Licensing Board (ASLB) to determine whether Houston Lighting and Power (HL&P) has sufficient "character and competence" to receive an operating license to run the South Texas Nuclear Project may drag on for months.

All parties met with the ASLB in Austin in mid-March to set ground rules. Three hours into the conference, when the only matter definitely settled was the opening date for the formal hearings, it was apparent that stamina may well determine the outcome. After the second marathon day, only the pressure of getting the Nuclear Regulatory Commission (NRC) staff on the last daily flight out of Austin for Washington finally brought the conference to a close.

The hearing will open in Bay City, the site of the incomplete nuclear facility, on May 12 at the local Holiday Inn. The three-member ASLB will spend the first few days listening to whatever local people want to say to them, and then the hearing proper will commence with HL&P putting on their witnesses, starting with Don Jordan, the company president.

Although any utility that wants to operate a nuclear power facility must obtain an operating license from the ASLB and ultimately from its parent organization, the NRC, this particular hearing is most unusual. HL&P's "character and competence" has become a serious issue because of the long record of construction problems that culminated in a $100,000 fine against HL&P in May, 1980, along with a virtual halt in construction for nearly six months.

According to an NRC order last September, a finding either that HL&P "abdicated too much responsibility for construction to its contractor, Brown and Root, Inc.," or that HL&P demonstrated "unacceptable failure" in not keeping itself knowledgeable about construction work "could form an independent and sufficient basis" for denying a license application. The order went on to say that these questions "deserve expeditious treatment because they could prove disqualifying" to HL&P in seeking an operating license.*

The Applicants

HL&P, the managing partner for STNP, is represented by tough Washington and Houston attorneys. Three were lined up at the pre-hearing conference table, with reinforcements in the audience. These lawyers have spent, by their own calculations, "hundreds and hundreds of manhours" preparing their case. Without a doubt, the HL&P legal cadre are able men — (no women in sight) — who know how to handle themselves in a hearing room.

One of the utility's hired guns, Jack Newman, the lead counsel for HL&P at the conference, seemed barely able to control his trigger-finger. He was filled with righteous indignation, and to hear his story, right and truth are all on the side of the utility. Newman did not hesitate to label the motions of Lanny Sinkin, who was representing Citizens Concerned about Nuclear Power (CCANP), as a "scam." Newman's voice frequently was aquiver with anger, and occasionally he punctuated his remarks with a fist slamming down on the table.

The intervenors, Sinkin with CCANP and Peggy Buchorn, who represents Citizens for Equitable Utilities, were not routed, but Newman and colleagues

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*Thus HL&P must demonstrate its "character and competence" in this early hearing. The licensing hearings proper will begin perhaps in another year.

achieved some strategic victories at the conference.

In the major HL&P coup, the ASLB ruled that corrective actions taken by the utility will be considered in determining the company's character and competence. As interpreted by ASLB chairman Charles Bechhoefer, this means that a showing of past infractions is not in itself sufficient basis to deny a license unless those problems were so basic as to be incorrectible.

The original NRC staff formulation of the issues soon after the September order did not admit corrective action into the consideration of character and competence, and Sinkin, in a motion filed just before the conference, strongly contested such admission. He posed the analogy from criminal law of a person who has robbed a bank: the question of guilt would be established by proving that the person had committed the act and would not be affected by later corrective action, such as returning the money after he was caught. The board did not buy this argument, and Sinkin served notice that he would appeal the point.

A second HL&P victory was the board's ruling that the intervenors, Sinkin and Buchorn, would be compelled to provide, under a protective order, the names of persons who have given them information on STNP construction and quality-control problems if they might use any of the information in cross-examination of HL&P's witnesses. Sinkin argued that intervenors should name only those people who would actually serve as witnesses for them. Under the protective order, the identities of sources could not be made public, but would be given to HL&P attorneys with the stipulation that the names not be passed on to HL&P or Brown and Root officials.

After the board issued its "order to compel" disclosing sources, Sinkin named Dan Swayze, former HL&P quality control inspector, Buchorn, and two sources that she had given him. He agreed to comply within the designated time, but Buchorn maintained that she would never reveal her sources — many of whom, she claimed, are still employed at the site and talk to her, sometimes weekly. She contended that a protective order would not be understood by current and future sources, and revelation of names by her would have such a "chilling effect" on sources that it would jeopardize her effectiveness in uncovering future construction problems.

Newman demanded that Buchorn be expelled from the case if she ignored the board's order. Bechhoefer agreed that failure to reveal sources will result in punitive action by the board, but he indicated that a "lesser remedy" might be taken.

Photo by Alan Pogue

Lanny Sinkin studying for his first-year law finals in Austin. The May hearing is timed exactly wrong for the principal figure in the opposition to STNP.

The third HL&P triumph was conveying a sense of great urgency to get on with the hearing. Newman pressed for an early-May beginning and for continuous meetings, including evenings and Saturdays, until the hearing is concluded. Sinkin, who is tied up with law school exams until May 14, objected to starting the hearing May 12, but Newman pressed on. "There have been a lot of evasions of this board," he said, "but we are ready to proceed." Accusing the intervenors of trying HL&P in the press, he said applicants want to get on with the case in the hearing room.

When the NRC staff joined Newman in pushing for May 12, Sinkin observed that he could "certainly understand the applicant's desire not to have CCANP represented at the hearings" and noted, "I am beginning to realize the depth of the staff's feelings" on this matter. He protested making scheduling decisions on the basis of speed rather than on developing the hearing record fully.

Newman's attempt to railroad the hearing through to an early completion is likely to be stymied, however, since conflicts in one or another of the ASLB members' schedules will force a recess in July and August. The two-month hiatus may well give the intervenors an opportunity to pull their case together.

The Intervenors

CCANP is a San Antonio-based anti-nuclear organization. Sinkin has come to the fore as its chief spokesperson. CEU is a state-wide group representing energy consumers in various forums, including the state public utility commission. As CEU's unpaid executive director, Buchorn does most of the work herself. She emphasizes that her organization is not against nuclear power, but is concerned to see that the facility is built and operated safely. Since Buchorn lives within 30 miles of STNP, she has a real stake in this goal.

In contrast to the array of legal talent amassed by HL&P, the intervenors did not have a single lawyer representing them at the conference. Sinkin, on spring break from his first year in UT law school, carried on the legal dialogue with occasional help from Buchorn. The major hurdle the intervenors faced was to demonstrate that they were still parties to the hearing.

Sinkin recited a litany of woes to explain missed deadlines in filing motions and witness lists, and Buchorn distributed a listing of her recent medical problems that prevented her from acting. Sinkin explained that CCANP's case was taken over last November by the Amarillo firm, Hofmann, Steeg, and Wheeler, and problems began when Wheeler was ill for a month. The firm also had other cases coming to trial, and Sinkin was notified in February that the firm could not prepare for the pre-hearing conference. He learned then that filing deadlines may not have been met. It was not until seven days before the conference that Sinkin got the files, and he reported working feverishly to prepare. The product of his work was a sheaf of motions and documents delivered to all parties at 10:30 p.m. the night before the conference.

HL&P attorneys vehemently contended that by missing the deadline to

name witnesses, the intervenors forfeited their right to put on their own case. The NRC staff also contended that the intervenors' motions were "untimely" and moved to strike them.

But the board was more sympathetic. Bechhoefer, speaking for the board, ruled that the intervenors could call witnesses and had ten days to file a list of people to be called.

The extension of time to develop their case was not the only victory for Sinkin and Buchorn. The board also ruled that the NRC staff must disclose, under protective order, the names of sources used in the NRC investigation that resulted in the $100,000 fine slapped on HL&P.

The NRC attorneys were no happier about divulging their sources than Sinkin and Buchorn had been. NRC attorney Edwin Reis maintained that both the staff and HL&P "would be strongly prejudiced if an order to compel" were granted at "this late date." Bechhoefer refused to budge, and he set out an extended timetable for the intervenors to submit the names of NRC sources they might call as their own witnesses. On April 3, the NRC appealed the board's order using much of Sinkin's and Buchorn's argument.†

The Board

The three administrative judges assembled from the Atomic Safety and Licensing Panel to make up the board that will serve for the duration of HL&P's hearing are lead by Charles Bechhoefer, an attorney and full-time NRC employee. James C. Lamb III, an environmental engineer from the University of North Carolina, and Ernest E. Hill, a nuclear engineer from the Lawrence Livermore Labs in California, are both part-time members of the panel from which the board is drawn. At least in the conference, Hill and Lamb were rarely heard. The trio spoke with one voice, and that voice was Bechhoefer's.

Although acknowledging that they should move with dispatch, the board appeared to be impelled less by speed than by thoroughness. They displayed a real interest in assuring that everything relevant to the case should get into the record.

The NRC staff's views did not entirely coincide with the board's. When asked by Bechhoefer, "Don't you think we have an obligation to develop a full record?" the staff reply was that the obligation was met by assuring that there were intervenors. The staff repeatedly joined the applicants in protesting any extra time for the intervenors to develop their case.

The board's major decisions at the conference were even-handed. In rejecting Newman's protest that board decisions would allow a "never-ending chain of delay," Bechhoefer replied that some delays were necessary because the "alternative is an incomplete record loaded by one side." Unless the board changes its *modus operandi*, it will see that both sides are on the public record — provided the understaffed intervenors have the stamina to make their case.

What's Ahead?

NRC precedent is clearly on the side of HL&P being granted its operating license at the end of these proceedings. To date no nuclear power facility has ever been denied an operating permit once the facility was constructed.

Although HL&P has been publicly rebuked and punished by NRC actions in 1980, the utility's chances of defending itself in the coming hearing were greatly improved by the board's decision that corrective actions taken after violations of NRC regulations were found will be considered in establishing HL&P's character and competence.

HL&P is out to prove that it cooperates with the NRC in every possible way. For example, Don Beeth, director of nuclear information for the company, said that it anted up the $100,000 fine without a court challenge. "We have to satisfy the NRC," says Beeth, "we can't fight them."

Sure there were some problems, Beeth allows. "No question but our quality-control program needed improvement." No question about some "holes in the paper work." But Beeth asserts that the quality-control program and record-keeping were adequate to ensure the health and safety of nuclear workers and the population at large. "The notion that we were rampantly riddled with construction flaws just doesn't hold water," he says.

Peggy Buchorn disagrees and says that the intervenors' contentions can be proved with the documents already in the hands of the NRC.

It remains to be seen whether the intervenors will try to make their case through cross-examination of HL&P and NRC witnesses or will call their own witnesses. Former quality control inspector Dan Swayze, who went public with his STNP criticism on CBS' "60 Minutes," is one witness both the board and the intervenors want to testify. The

†In one of the NRC staff motions in appeal, for instance, it was argued, "To require release of the names would be a violation of . . . pledges of confidence. More importantly, the Staff believes that forcing the Staff to reveal the names sought here, albeit under a protective order, would hinder its ability to conduct investigations and obtain vital health and safety information at this and other nuclear facilities in the future. Employees and others at these plants would be fearful of talking to NRC inspectors and investigators because their identity would be revealed, even in cases where they wished anonymity. If identified, they may be subject to physical, financial and social penalties in exchange for their cooperation with the NRC."

ASLB and the intervenors each would prefer that the other subpoena him. Sinkin says Swayze has been through enough abuse that he doesn't want to have anything to do with these proceedings, and the intervenors are reluctant to call a witness who doesn't want to be on the stand.

Beeth says Swayze doesn't have anything to tell. According to HL&P's nuclear information man, Swayze just "popped off and got a lot of media attention," but then when HL&P attorneys took his deposition, he "took back everything but his name." Sinkin says he was present during the taking of Swayze's deposition and Beeth's characterization of it is quite untrue.

Beeth and HL&P attorneys claim that the intervenors don't have a case, and at each turn in the conference they questioned whether intervenors were really parties in the proceedings.

As intervenors, Sinkin and Buchorn, representing their groups, are very much the underdogs with their lack of legal and technical expertise. But as one reporter whispered during one of Sinkin's legal arabesques, "Lanny is pretty good for a first-year law student."

There are a few advantages accruing to the underdog. Realizing this, Beeth approached a group of reporters and objected to the "assumption of ignominy on our part and assumption of goodness on their part." He contended that these assumptions "need to be reviewed."

The intervenors would probably be glad to trade in their underdog status for enough money to prepare and present their case. "We are sitting here at three tables," Sinkin said at the conference, "but we are not equal either in resources or powers."

If Sinkin can prepare his case while studying for his exams, if Buchorn remains a party in the case after her deadline passes for revealing her sources, and if both intervenors can maintain their endurance, this will be an interesting hearing that possibly could upset all the precedents in the granting of licenses to operate nuclear facilities. □