

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



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

APPLICANTS' MEMORANDUM OF LAW  
ON ISSUES CONCERNING COMPETENCE AND CHARACTER

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APPLICANTS' MEMORANDUM OF LAW  
ON ISSUES CONCERNING COMPETENCE AND CHARACTER

Introduction

Houston Lighting & Power Company (HL&P), Project Manager for the South Texas Project, acting on behalf of itself and the other Applicants, the City of San Antonio, Texas, acting by and through the City Public Service Board of the City of San Antonio, Central Power and Light Company and the City of Austin, Texas, respectfully submits this Memorandum of Law, in accordance with the Board's request at the Third Prehearing Conference, to address the issues in this proceeding relating to managerial competence and character. (Tr. 559, 657-660).

HL&P believes that the hearing record will plainly establish that it possesses the requisite competence and character to qualify for an operating license, but it has not endeavored to argue the matter here. Rather, this pleading is limited to a discussion of the primary legal authorities pertinent to the question before the Board -- the

standards by which an applicant's managerial competence and character should be evaluated.\*/

The managerial competence and character issues in this proceeding are framed in the issues adopted in the Board's Second Prehearing Conference Order. The principal relevant issues are reiterated in the margin below.\*\*/ They present

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\*/ The Board, of course, has noted other issues for consideration in this hearing, including whether there is reasonable assurance that construction practices will conform to 10 C.F.R., Part 50, Appendix B (1980) and to the construction permits, but the legal standards relating to these issues are relatively straightforward. HL&P accordingly has focused in this pleading on the primary issues articulated by the Commission in its Order of September 22, 1980, i.e., managerial competence and character. See Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 291-92 (1980).

\*\*/ 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, including:

- (1) the statements in the FSAR referred to in Section V.A.(10) of the Order to Show Cause;
- (2) the instances of non-compliance set forth in the Notice of Violation and the Order to Show Cause;
- (3) the extent to which HL&P abdicated responsibility for construction of the South Texas Project (STP) to Brown & Root; and
- (4) the extent to which HL&P failed to keep itself knowledgeable about necessary construction activities at STP,

be sufficient to determine that HL&P does not have the necessary managerial competence or character to be granted licenses to operate the STP?

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?

to the Board, and their resolution turns upon, two basic questions:

- (1) What are the basic legal criteria for evaluating "managerial competence" and "character" in an operating license proceeding?
- (2) How should those criteria be applied in the context of an inquiry into alleged abdication of responsibility and knowledge, non-compliances, and alleged false statements in the FSAR?

We endeavor in this Memorandum to answer these questions.

I.

The Basic Criteria for Evaluating an Operating  
License Applicant's Managerial Competence and Character

A. Managerial Competence

The term "competence," employed by the Commission in CLI-80-32, does not appear in the relevant provisions of the Atomic Energy Act or in NRC regulations, but appears to be encompassed within the basic qualifications section of the Act, Section 182. It is apparent from the tenor and context of the Commission's Order that the Commission intended "competence" to relate primarily to management's ability and capability to operate a plant safely, i.e., "managerial competence" as reflected in the issues admitted by the Board.

The criteria for determining whether an applicant possesses the management capability to operate a reactor are qualitative, not quantitative:

A determination on this subject must  
be subjective and judgmental and each  
utility must be evaluated individually.  
The best test is a functional one.

Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), LBP-79-19, 10 NRC 37, 41 (1979), modified, ALAB-557, 11 NRC 18, reconsideration denied, ALAB-581, 11 NRC 233, further modified, CLI-80-12, 11 NRC 514 (1980); accord Consolidated Edison Co. (Indian Point Station, Unit 2), ALAB-188, 7 AEC 323 (1974).



The functions of operating plant management may be basically described as:

- (1) to create and maintain a uniform and affirmative attitude toward safety;
- (2) to allocate authority and responsibility; and
- (3) to assure, through full understanding and communication, that the components of the applicant's organization coordinate effectively.

Niagara Mohawk Power Corp. (Nine Mile Point, Unit 2), LBP-74-43, 7 AEC 1046, 1071 (1974); accord, Washington Public Power Supply System (WPPSS Nuclear Projects No. 1 and No. 4), LBP-75-72, 2 NRC 922 (1975); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), LBP-74-64, 8 AEC 339, affirmed, ALAB-232, 8 AEC 635 (1974).

Managerial competence is assessed in terms of the ability and capability of an applicant's management to perform these functions.<sup>\*/</sup> Obviously these criteria are not and cannot be precise. Among the factors which have been considered in other cases are development of necessary procedural systems to effectuate proper management supervision, Grand Gulf, supra, 3 AEC 339; maintenance of an adequate

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<sup>\*/</sup> This assessment encompasses the extent to which management is committed to carrying out its QA/QC programs. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-106, 6 AEC 182, 184 (1973) ("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 . . . . 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."); Consolidated Edison Co. (Indian Point Station, Unit 2), ALAB-188, 7 AEC 323 (1974).

organizational framework, id. at 349, Shearon Harris, supra, 10 NRC 37; the experience and capability of applicant's technical staff, id.; the retention of a third-party consultant to assist with planning and implementation of the quality assurance program, Commonwealth Edison Co. (Zion Station, Units 1 and 2), LBP-73-35, 6 AEC 861 (1973), affirmed, ALAB-226, 8 AEC 381 (1974); accord Consumers Power Co. (Midland Plant Units 1 and 2), LBP-74-71, 8 AEC 584 (1974), affirmed in pertinent part, ALAB-283, 2 NRC 11 (1975), and in every case of which we are aware, the nature and adequacy of remedial measures taken by applicant in light of past deficiencies or problems, e.g., Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), LBP-77-68, 6 NRC 11 27 (1977), reaffirmed, LBP-78-10, 7 NRC 295, affirmed, ALAB-491, 8 NRC 245 (1978); Zion, supra; Duquesne Light Co. (Beaver Valley Power Station, Unit 1), LBP-76-3, 3 NRC 44 (1976), modified, LBP-76-23, 3 NRC 711 (1976), affirmed, ALAB-408, 5 NRC 1383 (1977); Indian Point, supra.

B. Character

As in the case of "managerial competence", neither the Atomic Energy Act and its legislative history nor NRC regulations purport to define the scope of inquiry into an applicant's "character." Nor have NRC licensing decisions sought to define specific criteria. Instead, those decisions have considered issues related to "character" as a part of the overall comprehensive review of an applicant's record,

as an NRC licensee, truthfulness, and commitment to safety which is undertaken in NRC licensing determinations. This has in fact been the approach utilized in a number of operating license cases which have involved allegations of past misconduct and challenges to applicant's character.\*/

As noted in the statements of additional views in CLI-80-32, "character" is also an issue in licensing cases before the FCC; indeed the Communications Act formed part of the model for the Atomic Energy Act. 12 NRC at 294 n.1. The competence and character of broadcasting licensees have been considered by FCC in a number of cases, all of which have reviewed the totality of the circumstances concerning licensee's application in order to address the question of how the applicant would be likely to operate in the future.\*\*/

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\*/ E.g., Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), LBP-77-68, 6 NRC 1127 (1977), reaffirmed, LBP-78-10, 7 NRC 295, affirmed, ALAB-491, 8 NRC 245 (1978); Commonwealth Edison Co. (Zion Station, Units 1 and 2), LBP-73-35, 6 AEC 861 (1973), affirmed, ALAB-226, 8 AEC 381 (1974); Consolidated Edison Co. (Indian Point Station, Unit 2), ALAB-188, 7 AEC 323 (1974); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), LBP-76-3, 3 NRC 44, modified, LBP-76-23, 3 NRC 711 (1976), affirmed, ALAB-408, 5 NRC 1383 (1977). See also the Decision on the Hearing on Order to Show Cause in Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-74-71, 8 AEC 584 (1974), affirmed in pertinent part, ALAB-283, 2 NRC 11 (1975).

\*\*/ This includes the two cases noted by the Commission in the principal opinion, FCC v. WOKO, 329 U.S. 223 (1946) and Leflore Broadcasting Co. v. FCC, 636 F.2d 454 (D.C. Cir. 1980) and the two cited in the statements of additional views: Cosmopolitan Broadcasting Corp. v. FCC, 581 F.2d 917 (D.C. Cir. 1978) and United Broadcasting Co. v. FCC, 565 F.2d 699 (D.C. Cir. 1977) cert. denied, 434 U.S. 1046 (1978). affirming per curiam Applications of United Television Co., (WFAN-TV) 55 F.C.C. 2d 416 (1975). It also includes the FCC's recent decision in Applications of RKO General, Inc. (WNAC-TV), 78 F.C.C. 2d 1 (1980), appeal pending, Nos. 80-1696, 80-1697, 80-1698 (D.C. Cir., filed June 24, 1980).

The decisions, both in NRC licensing cases and in cases before the FCC, illustrate quite clearly that, while the results of a "character" assessment turn on the individual facts at hand, that assessment is based largely on one primary criterion -- whether the applicant or licensee can be reasonably relied upon to carry out its programs in accordance with its representations. Under the decisions this entails a review of the following criteria: (1) applicant's attitude toward safety and compliance with applicable regulations -- is applicant committed or indifferent? (2) applicant's veracity -- is applicant untruthful? (3) remedial measures -- has applicant sincerely sought to correct known deficiencies and to ensure that his future performance will as much as possible conform to Commission standards?\*/

The decisions of the Interstate Commerce Commission and the Civil Aeronautics Board also are instructive. These agencies, like the NRC and the FCC, assess the character (and the managerial competence) of applicants seeking permits to engage in regulated activities having safety and public interest implications. Applicants before these agencies

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\*/ As we shall see, remedial measures have been considered in every case of which HL&P is aware. See pp. 11-28, infra.

must establish their "fitness" to qualify for a certificate of authority. The ICC has described this inquiry in terms which make it plain that these agencies, too, subscribe to the above criteria:

The determination as to whether an applicant has sustained its burden of establishing its fitness must be made upon a full consideration of the nature and extent of the violations committed by applicant, the mitigating circumstances, if any, shown to exist and to have existed, whether applicant's conduct represents a flagrant and persistent disregard of the provisions of the act and of its certificates, whether applicant has made a sincere effort to correct past mistakes, whether applicant is willing and able to comport in the future with the statute and the applicable rules and regulations of the Commission.

Miller Transfer and Rigging Co., Extension of Metal Lathes,  
125 M.C.C. 538, 543-44 (1976).<sup>\*/</sup>

While we have separated "managerial competence" from "character" above for purposes of explication, the Commission in CLI-80-32 spoke in terms of "the issue of basic technical competence and character," associating the two qualifications together, and this approach is reflected in the formulation of Issues A and B. In the final analysis, the two concepts are mutual complements which have meaning only in relation

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<sup>\*/</sup> See Tennessee Cartage Co., Extension - Georgia, 128 M.C.C. 819, 821 (1978); Johnny Brown's, Inc., Extension - Winchester, Va., 111 M.C.C. 905 (1970). The CAB's practice is in accord. E.g., Great Lakes Airlines, Inc. v. CAB, 294 F.2d 217 (D.C. Cir. 1961); Transatlantic Route Proceeding and Supplemental Renewal Proceeding, 72 C.A.B. 216 (1977); Capitol Airways, Inc., Interim Certificate, 37 C.A.B. 82 (1962).



to each other: the question of whether there is reasonable assurance that an applicant is capable of operating safely is not meaningfully answerable independent of the question of whether it can reasonably be relied upon to carry out its planned safety programs.

II.

The Standard By Which Managerial Competence  
and Character Should Be Evaluated in the Context  
of an Inquiry into Alleged Abdication of  
Responsibility and Knowledge, Non-Compliances  
and Alleged False Statements in the FSAR

Having set forth the basic criteria for assessing managerial competence and character generally, we now examine more specifically how those criteria should be applied in the context of an inquiry, like the one embodied in this case,<sup>\*/</sup> into alleged abdication of responsibility and knowledge, non-compliances, and the alleged inaccuracy of certain statements in the FSAR. In this manner we endeavor to determine below the legal standards for evaluating "managerial competence and character" which should govern in this proceeding.

A. Alleged Abdication of Responsibility  
and Knowledge

1. Case Law

In CLI-80-32, the Commission stated that central to the issue of managerial competence and character are two questions: "whether the facts demonstrate the licensee has abdicated too much responsibility to its contractor, Brown & Root, Inc., and whether the facts demonstrate an unacceptable

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<sup>\*/</sup> As previously noted, this Memorandum examines only the legal questions before the Board and does not attempt to discuss the specific facts here involved, including those that would disprove the allegations.

failure on the part of Houston to keep itself knowledgeable about necessary construction activities." 12 NRC at 291. The manner in which these questions should be addressed and the legal standards by which they should be evaluated are clearly illustrated in several major NRC operating license decisions, as well as in several decisions of the FCC.

One such case is Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), LBP-77-68, 6 NRC 1127 (1977), reaffirmed, LBP-78-10, 7 NRC 295, affirmed, ALAB-491, 8 NRC 245 (1978). North Anna involved an application by VEPCO for a license to operate its North Anna Units 1 and 2. The decision turned in large measure on the QA/QC issues raised by the history of VEPCO's performance, both in the construction of the North Anna units and in the operation of its existing Surry units -- issues which required the Board to evaluate management competence, commitment, and truthfulness in the face of allegations of past misconduct.

In that case the nature of the problems VEPCO had encountered were severe; on four occasions, the Commission had levied civil penalties against VEPCO. Two involved recurrent lack of management controls in meeting quality assurance criteria and security measures at Surry (including some 158 non-compliances from 1970-77, one of which the NRC Staff found may have contributed to the death of two VEPCO employees). 6 NRC at 1140-41. The other two penalties arose

out of construction of the North Anna units themselves: for the first, VEPCO was found to have made seven material false statements relating to the presense of a suspected geologic fault at the North Anna site, 6 NRC at 1143-44; for the second, a comprehensive NRC investigation substantiated a number of allegations regarding deficiencies in construction, id. at 1145.

The Licensing Board found that virtually all of these problems in VEPCO's operating and construction history stemmed primarily from lack of proper management and from abdication of responsibility and knowledge to contractors:

The record of non-compliances and civil penalties shows, and Mr. McGurn [VEPCO's Chief Executive Officer] agreed, that VEPCO management has erred in the past. To the Board it appears that those errors stemmed primarily from lack of appreciation of the effort, discipline, and aggressive management that are required to design, build and operate power plants in accordance with the high standards that must be applied to nuclear plants. There is evidence that VEPCO management has relied too much on its contractors to discharge their responsibilities with a minimum of supervision by VEPCO. Also the Staff has had to take extraordinary measures, such as civil penalties and special meetings with management, to ensure that VEPCO's upper management fully comprehended the promptness and extent of action that would have to be taken in order to comply with regulatory requirements.

6 NRC at 1150-51 (emphasis added).

In dealing with this situation, the Licensing Board first focused on each type of construction and operating deficiency in turn, endeavoring to assess their safety significance, if any,

and to satisfy itself that none significant to safety was incapable of adequate remedy. In the second phase of its inquiry it turned its focus to remedial measures implemented by VEPCO to prevent recurrence in the future and the commitment with which those measures were undertaken. Particularly relevant is the Board's focus on VEPCO's response to the construction QA/QC deficiencies which led to its fourth civil penalty. That response, in essence, was to re-organize and revitalize construction management at North Anna, in part to obviate the abdication of responsibility and knowledge problems discovered by the Staff.

Though not condoning the fact that "extraordinary measures" had been required to obtain management attention, and while criticizing VEPCO for having "lagged in upgrading its management to provide the leadership and control that the Commission finds necessary," the Board found that the measures implemented by VEPCO reflected both the requisite qualifications and commitment. 6 NRC at 1151. The Appeal Board affirmed.

Another operating license case which addresses the issue of abdication of responsibility and knowledge -- and employs the same approach as North Anna -- is Commonwealth Edison Co. (Zion Station, Units 1 and 2), LBP-73-35, 6 AEC 861 (1973), affirmed, ALAB-226, 8 AEC 381 (1974). The Appeal Board, after summarizing the history of applicant's activities, stressed its concern over "[t]he indifference displayed by applicant to its QA responsibilities . . . ." 8 AEC at 400. This failure



of responsibility was reflected in the "recalcitrance" with which applicant conformed to Appendix B, and in serious deficiencies in the welding activities of one of applicant's contractors.

As in North Anna, the approach adopted by the Appeal Board in Zion was: first to consider the safety significance of the deficiencies and the adequacy of the applicant's corrective measures -- it was found that the deficiencies could be and had been remedied safely -- and second, to review the applicant's remedial efforts to prevent recurrence and to ensure overall QA/QC conformance during operation. 8 AEC at 395-400.

The approach utilized in North Anna and Zion was also followed in a third operating license case, Duquesne Light Co. (Beaver Valley Power Station, Unit 1), LBP-76-3, 3 NRC 44, modified, LBP-76-23, 3 NRC 711 (1976), affirmed, ALAB-408, 5 NRC 1383 (1977). During construction of Beaver Valley 1, applicant apparently committed a large number of recurrent QA violations which were corrected slowly and only after discovery by NRC inspectors. The Licensing Board expressed concern over "the degree to which Applicants relied on NRC inspections to assure quality . . ." -- an implied abdication of knowledge (and possibly responsibility, as well). 3 NRC at 49. The Licensing Board divided its inquiry into two phases: the first directed to determining whether construction

had proceeded in a manner which would assure safety and the second aimed at "establish[ing] whether the history of the program suggests that it was founded upon corporate behavior of the sort that gives assurance of quality in carrying out future operation of the plant." 3 NRC at 54.

In the first phase of its analysis, the Board assured itself the deficiencies were corrected. In the second it then dwelt on their causes -- found to be largely a lack of training and organization -- and the steps taken to prevent the recurrence of this situation in the future. These steps included retention of an outside consultant to audit applicants' contractors, increased training and education programs, and organization changes designed to improve applicants' reaction time to announcement of nonconformances. 3 NRC at 51. The license sought was granted, and the Appeal Board affirmed.

Though not a decision on an operating license, the Licensing Board's opinion in Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-74-71, 8 AEC 584 (1974), affirmed in pertinent part, ALAB-283, 2 NRC 11 (1975), arose in circumstances which make it instructive. During construction of the Midland plant the Director of Regulation issued an Order to Show Cause directing Consumers to demonstrate why its construction activities should not be suspended on grounds of deficiencies in its QA program. In the course of construction permit proceedings for the Midland plant, Consumers had experienced what the Appeal Board described as a "surfeit"

of quality assurance difficulties involving the failure of Consumers and its contractor to observe required procedures. Consumers had endeavored to make various changes in its programs, during a period of construction suspension, designed to delineate more specifically the responsibilities among Consumers and its contractors and to improve the interfaces between them. 8 AEC at 594. The Order to Show Cause arose when after issuance of the construction permit, those difficulties continued.

As in North Anna, Zion, and Beaver Valley 1, the Licensing Board focused first on the safety significance and correctability of these past deficiencies and then upon the measures employed by applicant and its contractors to improve supervision, assign responsibility, and assure future conformance to the fullest extent reasonably possible.

The Staff had required Consumers to demonstrate that the QA program had been analyzed for programmatic shortcomings and that the corrective actions would be sufficient. This done, the Staff indicated to the Licensing Board that the QA deficiencies had been satisfactorily resolved, and the Board so found. 8 AEC at 600.

The Board then went on to examine whether, in light of the history of the project, it could satisfy itself that there was "a reasonable assurance such implementation [of effective QA/QC remedial measures] will continue . . . ." To answer this question the Board focused on Consumers' management, and reviewed the organizational changes Consumers

had instituted in order to delineate responsibility for QA procedures and improve supervision. The Board noted with approval Consumers' retention of an outside consultant to examine its re-organized QA program and commended Consumers' later acceptance of recommendations issued by a consultant on specific technical problems. After a comprehensive review of Consumers' QA program and its interface with its contractor, the Board found that construction should be permitted to continue, and the Appeal Board concurred.

The cases discussed above illustrate how the issue of abdication of responsibility and knowledge has been considered in the pertinent nuclear licensing cases. In each of these cases applicants with severe QA/QC problems during construction -- often characterized as stemming from abdication of responsibility and/or knowledge -- by revitalizing their QA/QC organization, taking numerous remedial measures, and responding in detail to Staff investigations, have been able to establish that satisfactory QA/QC procedures could be implemented for operations. While the Licensing Boards recognized that no QA program, no matter how detailed, could foreclose the possibility of errors, it was held that the steps taken, combined with continued Staff review, provide reasonable assurance that the QA program would be responsibly implemented in the future.

The consistent thread of analysis in the NRC decisions is also followed in the decisions of the FCC. The FCC decisions, however, provide examples of circumstances in which abdication

of responsibility or knowledge has been found, upon review of the total circumstances of the case, to form "an independent and sufficient basis" for revocation or denial of a license application. The kinds of circumstances in which such a result might be appropriate are illustrated in the two FCC cases cited in one of the separate statements contained in CLI-80-32: <sup>\*/</sup> Cosmopolitan Broadcasting Corp.

v. FCC, 581 F.2d 917 (D.C. Cir. 1978), and United Broadcasting Co. v. FCC, 565 F.2d 699 (D.C. Cir. 1977) Cert. denied, 434 U.S. 1046 (1978), affirming Applications of United Television Co. (WFAN-TV), 55 F.C.C. 2d 416 (1975). <sup>\*\*/</sup>

In Cosmopolitan Broadcasting, the FCC had denied renewal of a radio license on grounds of abdication of responsibility and knowledge. FCC policy obligates licensees "to choose independently all programming for broadcast, in light of the tastes and ascertained needs and problems of the community." 581 F.2d at 921. Cosmopolitan had "relinquished virtually all control" of broadcast time on its station to time brokers, and their customers, flagrantly violated numerous FCC rules. The FCC found these violations to be the result of Cosmopolitan's total abdication of responsibility.

In contrast to the NRC cases discussed above, Cosmopolitan apparently neither appreciated the nature and significance

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<sup>\*/</sup> The decisions in these FCC cases show clearly that in using the phrase "separate and independent basis" (12 NRC 291) the Commission did not intend that the trier of fact ignore any aspect of the circumstances of the case (e.g., any remedial measures adopted by an applicant).

<sup>\*\*/</sup> 12 NRC at 294. The separate statement in CLI-80-32 cites only to the D.C. Circuit's decision in United Broadcasting Co., a one paragraph per curiam affirmance of the FCC decision cited above. Id.



of its errors nor endeavored to implement any effective measures to remedy them. It disingenuously argued instead that its existing "monitoring system" fulfilled its obligations, a system the Court found to embody manifest deficiencies.<sup>\*/</sup>

In United Broadcasting, supra, the FCC denied the renewal application of licensee WOOK on the grounds of abdication of knowledge and gross misconduct. WOOK's facilities had been used largely for sham religious programming wherein various "ministers" provided their listeners with advice on how to win at the numbers game. Three-digit "scripture" citations were recommended to listeners, and "contributions" were solicited from those who won money betting on these citations in the numbers lottery. 55 F.C.C. 2d at 417-18. In addition to this patently unlawful (and immoral) activity, WOOK had engaged over the years in persistent violations of FCC technical rules. Id. at 424-25.

After receiving notice of these broadcasts from the Commission, WOOK first asserted a freedom of religion argument, later purported to prohibit broadcast of three-digit recommendations, then failed to do so -- all while at the same time contending it had no knowledge of the numbers game aspects of its broadcasts. Even when WOOK at last purported to try, mid-way through the renewal proceeding, to remedy these practices, "its belated efforts were ineffective" and the Commission concluded

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<sup>\*/</sup> Despite Cosmopolitan's total abdication of responsibility, and its utter failure to attempt any effective remedial measures the Court remanded the case to the Commission. It found that the FCC had not given due regard to the one mitigating factor plausibly argued by Cosmopolitan -- that its foreign language programming possessed special merit and filled a unique need in the community.



that WOOK had "displayed [a] 'callous disregard' for its listening audience." Id. at 422. Likewise, though WOOK purported to retain an expert consultant to help supervise its technical affairs, when the expert died he was not replaced for three years, and "responsibility for overseeing WOOK's technical operations was left to an untrained employee. . . ." Id. at 424. In short, the United case embodies not so much an abdication of responsibility and knowledge as contempt for them altogether.\*/

The FCC cases discussed above sharply illustrate the differences between cases in which license applications have been granted, despite significant allegations of abdication of responsibility or knowledge, and cases in which such abdication is so complete and attempts at mitigation are so lacking or ineffective that the totality of

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\*/ The FCC's recent decision denying license renewal in Applications of RKO General, Inc. (WNAC-TV), 78 F.C.C. 2d 1 (1980), appeal pending, Nos. 80-1696, 80-1697, 80-1698 (D.C. Cir., filed June 24, 1980), is also instructive. In that case the Commission found, among other things, that RKO had willfully filed with the Commission false Financial Reports regarding its trade and barter transactions, and had persistently violated Commission trade and barter rules, all owing to "a lack of supervisory control and a lack of concern for compliance with the Commission's rules . . ." and "a general lack of candor . . ." involving top management.

circumstances warranted denial.<sup>\*/</sup> In Cosmopolitan, supra, the abdication of responsibility was "virtually total;" in United it was in addition literally criminal. In the above cited NRC cases while there may have been findings that management has relied too much on the construction skills of its contractors or the investigative skills of the NRC, the applicant has generally acknowledged its responsibility and sought to improve its own supervision and its contractors' performance. Indeed, North Anna, Beaver Valley and Midland management undertook major remedial efforts, including management and staff re-organization, reflecting the commitment of top-level management to meet regulatory requirements. These efforts demonstrate what is lacking in the FCC cases. In Cosmopolitan, United, and RKO, supra, remedial measures have varied from indifferent to inconsequential. And while top-level management there had been directly involved in persistent derelictions of responsibility, they have been absent from any corrective endeavors.

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<sup>\*/</sup> This Board in its Second and Third Prehearing Conference Orders ruled, and the cases discussed above confirm, that in assessing whether alleged abdication of responsibility may be an independent and sufficient basis for denying a license application, the trier of fact must review the totality of the circumstances. Indeed, as the Board cogently pointed out (Second Prehearing Conference Order at 4, n.2), the authorities cited by the Commissioners in CLI-80-32 (Cosmopolitan Broadcasting Co. v. FCC, 581 F.2d 917 (D.C. Cir. 1978) and Atlantic Research Corp., ALAB-594, 11 NRC 841 (1980)), stress the totality of a licensee's operation and the importance of matters which may mitigate the significance of adverse findings concerning prior practices. In fact, we are not aware of a case in which the total situation, including the applicant's planned remedial measures and all mitigation factors has ever been sustainably neglected. Accord Applications of RKO General, Inc. (WNAC-TV), 78 F.C.C. 1, 105 (1980) appeal pending, Nos. 80-1696, 80-1697, 80-1698 (D.C. Cir., filed June 24, 1980) ("the Commission normally assesses any evidence in mitigation of any wrongdoing committed by the Licensee.") and each of the authorities discussed in the text above.

Finally, these NRC and FCC cases are different in another important respect. The FCC cases all involve license renewal applications, where the licensee's record directly reveals his operating performance. This is not true in most of the NRC decisions -- operation of a plant is quite different from constructing it.<sup>\*/</sup> Thus in an operating license proceeding an applicant's remedial measures and its plans for future operation have a special significance not present in FCC cases.

In all of the "abdication" cases, however, both NRC decisions and others, the analytical approach to the "competence and character" issue has been the same: the inquiry involves the significance and correctability of past deficiencies, the adequacy of any remedial measures taken by the applicant and the assurance that the applicant will endeavor to carry those measures out.

## 2. Legal Standards

As the case law in the preceeding section makes clear, any determination as to "competence and character" based on alleged abdication of responsibility or knowledge or other alleged misconduct turns on an evaluation of the totality of the circumstances under scrutiny. It is only after an evaluation of the applicant's overall conduct, that a judgment may be

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<sup>\*/</sup> Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), supra, 6 NRC at 1135 ("the technical qualifications required to operate a nuclear power plant differ in many respects from those required to design and construct such a plant."); Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), supra, 10 NRC at 42 ("The qualifications for operating a plant are largely functional in nature compared to the discrete engineering disciplines used in construction ...").

drawn as to whether the applicant has so failed in its previous obligations to the agency that there is absent reasonable assurance that it has both the capability and the commitment to discharge its obligations as the holder of an operating license.

The legal standards which emerge from the authorities discussed above are perhaps best expressed as a sequence of questions:\*/

- (A) Are the problems, if any, caused by the instances of abdication of responsibility or knowledge of safety significance?
- (B) If so, are they correctable?
- (C) What are the remedial measures under taken by applicant (1) to remedy specific deficiencies, or (2) to improve its lines of responsibility, and are they likely to be effective in the operating of the plant?
- (D) Is there reasonable assurance that applicant is committed to carrying out those measures?

Since questions (C) and (D) -- concerning the adequacy of remedial measures and assurances for the future -- involve a "predictive judgement," they of course must be assessed with the realization that:

[N]o quality assurance program, however thorough, can guarantee that there will be no errors in design and construction, or failures of equipment or misoperation in a nuclear plant.

Consolidated Edison Co. (Indian Point Station, Unit 2, ALAB-188, 7 AEC 323, 335 (1974)). Given the thousands of people involved

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\*/ Factors pertinent to resolution of these questions are identified below.

in a nuclear project, the potential always will exist for some individuals to engage in unprofessional conduct no matter how faithfully a QA/QC program is implemented. Some deficiencies are inevitable in the best attainable QA/QC program; the object of a program is to keep those deficiencies as small as reasonably possible and to respond promptly to correct deficiencies and prevent their recurrence.

In the course of evaluating the totality of the circumstances involved, the Licensing Boards in North Anna, Zion, Beaver Valley Unit 1, and Midland predicated their decisions in significant part on the following factors:

- (1) the degree to which responsibility and knowledge were relinquished;
- (2) whether deficiencies that resulted therefrom can be corrected safely;
- (3) the willingness of applicant to admit its need to improve;
- (4) the willingness of applicant's management to undertake re-organization and revitalization as may appear necessary;
- (5) whether top management is specifically involved in remedial measures;
- (6) whether third-party consultants have been asked to help suggest improvements;
- (7) the nature and comprehensiveness of remedial measures including (a) plans for the future, (b) delineation of responsibilities among the applicant and its contractors; (c) improved lines of communication; (d) and responsiveness to concerns of the Staff.

Finally, as is evident, the standards and factors set forth above confirm this Board's ruling in its Second and Third



Prehearing Conference Orders that:

[T]he Atomic Energy Act and NRC regulations contemplate that operating license determinations must be based on predictive findings whether an applicant will comply with applicable requirements. Further, where past deficiencies are demonstrated, an applicant is permitted to attempt to demonstrate whether (and how) those deficiencies have been or will be remedied.

Second Prehearing Conference Order at 4. See, e.g., 10 C.F.R. §§50.40, 50.54(e) and (f), 50.55(e) (1980); 10 C.F.R. § 2.201(a) (1980).<sup>\*/</sup>

B. Non-Compliances

The issues as framed by this Board envision that in addition to investigating the extent, if any, to which HL&P has abdicated responsibility or knowledge concerning construction activities, inquiry will be made during the hearing regarding "the instances of non-compliance" set forth in the Notice of Violation and Order to Show Cause. Because the cases discussed above concerning abdication of responsibility and knowledge also encompass the treatment of non-compliances resulting therefrom, the legal standards embodied in those cases apply, with little change, to an analysis of non-compliances stemming from other causes.

First there must be a determination as to whether the non-compliance is of safety significance and is correctable.

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<sup>\*/</sup> As the Board cogently pointed out (Second Prehearing Conference Order at 4, n.2), the authorities cited by the Commissioners in CLI-80-32 (Cosmopolitan Broadcasting Corp. v. FCC, 581 F.2d 917 (D.C. Cir. 1978) and Atlantic Research Corp., ALAB-594, 11 NRC 841 (1980)), stress the totality of a licensee's operation and the importance of matters which may mitigate the significance of adverse findings concerning prior practices. The cases discussed in the text above underscore this emphasis.



Second, if the deficiencies are correctable, inquiry then turns to whether applicant's remedial measures are adequate. This two step inquiry has been applied in every operating license case of which HL&P is aware,<sup>\*/</sup> and has also been applied in a number of cases which, though preliminary to the operating license stage, considered QA non-compliances during construction in situations where they were relevant to applicant's ultimate managerial competence and character.

E.g., Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-74-71, 8 AEC 584 (1974), affirmed in pertinent part, ALAB-283, 2 NRC 11 (1975); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-76-36, 6 AEC 929 (1973), affirmed in pertinent part, ALAB-248, 8 AEC 957, 973-74 (1974)).

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<sup>\*/</sup> This inquiry was described in Zion, supra:

To whatever extent there may not have been compliance with Appendix B, the deciding issue [concerning the QA deficiencies in the course of construction] is the question of whether any such non-compliance has resulted in uncorrected or uncorrectable situations that prevent making the necessary findings requisite to the issuance of an operating license.

Commonwealth Edison Co. (Zion Station, Units 1 and 2), LBP-73-35, 6 AEC 861, 892 (1973), affirmed, ALAB-226, 8 AEC 381 (1974). To the same effect are Consolidated Edison Co. (Indian Point Station, Unit 2), ALAB-188, 7 AEC 323 (1974); Dusquesne Light Co. (Beaver Valley Power Station, Unit 1), LBP-76-3, 3 NRC 44 (1976), modified, LBP-76-23, 3 NRC 711 (1976), affirmed, ALAB-408, 5 NRC 1383 (1977).

This is the same approach that has been employed by the ICC and the CAB in cases wherein license applications have been challenged on the grounds of past non-compliances. For example, in Armoured Carrier Corp. v. United States, 260 F.Supp. 612 (E.D.N.Y. 1966), an ICC grant of authority to operate as a common carrier of commercial documents was affirmed despite a Commission finding that the applicant had engaged in knowing and willful unauthorized operations in five Wisconsin counties during each of the preceding four years. The Court noted that the Commission had fully considered the applicant's past misconduct, but had properly found that the totality of the circumstances, including the applicant's management reorganization, established the requisite fitness. The Court explained:

The corporation is a form of business enterprise in which change of management and improvement in systems and controls may result in a radical change in the corporate capability to perform its operations . . . . The argument that past willful violations should, per se, bar grant of authority in the present and for the future is one that looks backward and appears transfixed. Examination of the past should only be useful in assessing the prospective conduct of the applicant.

260 F.Supp. at 615. Accord, Tennessee Cartage Co., Extension - Georgia, 128 M.C.C. 819, 821 (1978); Great Lakes Airlines, Inc. v. CAB, 294 F.2d 217 (D.C. Cir. 1961).

C. The Statements in the FSAR Referred to in Section V.A. (10) of the Order to Show Cause

We now turn to the standards which govern the scope of inquiry into the statements in the FSAR referred to in the Order to Show Cause, specifically the statements in Section V.A. (10) relating to the backfill testing activities.

Though we discuss the pertinent law in some detail below, HL&P believes that this discussion is for the most part academic. The FSAR, in accordance with the Standard Review Plan (NUREG 75/087), described the requirements (specifications) being applied to the inspection and testing of backfill placements. No question has been raised about the accuracy of that description. As the hearing record will show, there were isolated instances where personnel did not precisely adhere to those requirements, but these do not involve "false statements in the FSAR." Analysis has shown that none of those deficiencies had technical significance. However, HL&P has amended the FSAR to reflect that there was not precise adherence to the requirements. Thus, the situation simply involves conduct of a nature strikingly different from that which has been involved in cases where alleged (or proven) "false statements" have been deemed a significant factor for consideration.

1. Applicable Law

Section 186(a) of the Atomic Energy Act, 42 U.S.C. § 2236, subjects any license issued under the authority of the

Act to possible revocation "for any material<sup>\*/</sup> false statement in the application . . . ." The Commission in CLI-80-32 opined "that initial license applications or renewal applications may also be denied on this ground . . . ." 12 NRC at 291, n.4.

The seminal case concerning the construction of Section 186 is Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, modifying ALAB-324, 3 NRC 347 (1976), affirmed as modified sub nom; Virginia Electric and Power Co. v. NRC, 571 F.2d 1289 (4th Cir. 1978). There VEPCO was found to have made material representations violative of Section 186. The test of "materiality" was expressed by the Commission in North Anna as follows:

Materiality depends upon whether information has a natural tendency or capability to influence a reasonable agency expert.

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<sup>\*/</sup> Legislative history reveals that the Joint Committee inserted the "materiality" requirement of Section 186 into the "false statements" sections of proposed H.R. 8862, 83d Cong., 2d Sess. and S. 3323, 83d Cong., 2d Sess. -- which would have permitted license revocation "for any false statement in the application" -- after it received testimony sharply criticizing the proposed language for the breadth of its terms and for creating the risk that licenses would be revoked for relatively trivial violations. See Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2) ALAB-324, 3 NRC 347, 353-4 modified, CLI-76-22, 4 NRC 480 (1976), affirmed as modified sub nom., Virginia Electric and Power Co. v. NRC 571 F.2d 1289 (4th Cir. 1978).

4 NRC at 491. Materiality<sup>\*/</sup> is a function of the degree of the discrepancy involved, its timing, i.e., whether it has arisen at a stage of the proceeding in which it is amenable to correction (4 NRC at 492), and whether it has been corrected within a time frame which allows the Staff adequately to perform its functions.<sup>\*\*/</sup>

It is instructive to note how the NRC licensing decisions have treated even materially false statements. We turn first to the decision on VEPCO's application for a license to operate the North Anna plant. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), LBP-77-68, 6 NRC 1127 (1977), reaffirmed, LBP-78-10, 7 NRC 295, affirmed, ALAB-491, 8 NRC 245 (1978). While the Licensing Board opined

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<sup>\*/</sup> In FCC v. WOKO, Inc. 329 U.S. 223, 227 (1946), which involved an applicant who had intentionally and "systematically" deceived the FCC for approximately twelve years, the Supreme Court opined:

The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as material and persuasive ones.

Under this view, where deliberately deceptive false statements are involved, such statements have a bearing on "character" and the materiality vel non of the statements goes to the weight they are to be accorded in the evaluation process.

<sup>\*\*/</sup> This latter proposition was stated by the Appeal Board and affirmed by the Commission. 4 NRC at 492.

that VEPCO's misconduct was serious, it noted that: (a) VEPCO had eventually apprised the Staff of the material not disclosed to the Commission; (b) it did not intend to deceive the NRC; (c) the violations did not suggest a deficiency in VEPCO's management system which might bring into question its ability to fulfill management responsibilities; and (d) the Commission had already indicated that license revocation was too drastic a sanction. 6 NRC at 1144. Accordingly the Board did not "feel those past VEPCO transgressions" provided any basis for denying an operating license.<sup>\*/</sup>

In Shearon Harris, supra, a misleading designation in the PSAR of the CP&L Brunswick plant concerning the qualifications of plant managers was deemed "important" by the Licensing Board, which was particularly troubled by CP&L's lack of any justification for the misleading statement and by its failure, after being apprised of it, to take any action to amend it. The Licensing Board suggested that improvements be made in management organization to forestall repetition of such conduct, but in no way suggested that this incident might provide a predicate for license denial.

Both North Anna and Shearon Harris demonstrate the standards by which false statements, if proven, are assessed in competence and character cases. First, do they reveal a willingness to deceive the Commission? Second, do they reveal an internal management deficiency, and if so, is there reasonable assurance that this can be ameliorated? The North

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\*/ The Commission, in affirming the Appeal Board's decision on sanctions, noted that "[a]s to the inappropriateness of license revocation . . . this is still a case where intention to deceive was not shown. . . ." 4 NRC at 492, n.12.



Anna and Shearon Harris decisions indicate that license denial is inappropriate absent willful and materially false statements.

In contrast to North Anna and Shearon Harris, those cases before the AEC and the FCC in which license denial have been supported on the grounds of false statements have involved: (1) a number of flagrant, and willful misrepresentations; (2) recurring over a considerable time period; and (3) intended to conceal from the Commission facts the applicant did not want known. E.g., Hamlin Testing Laboratories, Inc., 2 AEC 423 (1964) (repeated untruthful and deceptive statements to the Commission and its inspectors to conceal numerous safety violations); FCC v. WOKO, Inc., 329 U.S. 223, 225 (1946), (deliberate concealment "for many years and in many applications" and in sworn testimony, of information required by FCC regulations); Applications of RKO, General, Inc. (WNAC-TV), 78 F.C.C. 2d 1 (1980) appeal pending, Nos. 80-1696, 80-1697, 80-1698 (D.C. Cir., filed June 24, 1980) (persistent and deliberate misrepresentations and concealment continued for over four years and coupled with blatant misconduct in other areas). See also Coastwide Marine Disposal Co., 1 AEC 581 (1960); X-Ray Engineering Co., 1 AEC 553 (1960).

In a footnote in CLI-80-32, the Commission, citing to Leflore Broadcasting Co. v. FCC, 636 F.2d 454 (D.C. Cir. 1980) indicated that there "perhaps" might be circumstances in which denial of a license could be warranted on the basis of false statements which were, though not willful, made with

"disregard" for their truth or falsity. 12 NRC at 291, n.4. Leflore, however, was not such a case. There an FCC licensee applying for renewal made extensive "deliberate misstatements" intended to conceal information from the FCC. On appeal the Court based its affirmance on the fact that the agency's findings established the necessary fraudulent intention. 636 F.2d at 462. The Court went on to say, philosophically, that "it may suffice to show nothing more than that the misrepresentations are made with disregard for their truth," but this statement is really little more than dictum about a possibility. In every relevant decision of which HL&P is aware, it has been held that false statements must not only be persistent and serious but must reflect a deliberate intention to conceal before they may warrant license denial.

## 2. Legal Standards

In sum, the extent to which any alleged false statement has any bearing on an applicant's "managerial competence and character" is governed by the answers to the following questions:

- (1) Is the statement "false" within the meaning of the Atomic Energy Act; if so:
- (2) Is the falsity "material;"
- (3) Was it intended to deceive;
- (4) Is it isolated, or is part of a systematic pattern of falsehoods designed to deceive the agency; and
- (5) Does it stem from a management deficiency which cannot be corrected with reasonable assurance?

III.

Conclusion

The criteria for evaluating managerial competence and character to operate a nuclear plant are, to be sure, qualitative rather than quantitative. However, Licensing Boards of this Commission have addressed those criteria in a number of cases.

These decisions have reviewed the QA/QC issues in controversy and the programs and remedial measures planned by the applicant, and have endeavored to make a predictive judgement as to the applicant's qualifications. The legal standards for making that judgment have been set forth above. HL&P believes that the hearing record will demonstrate that under these standards it possesses the requisite competence

and character to operate the South Texas Project safely and to be granted the requested Operating Licenses.

Respectfully submitted,

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
HOUSTON LIGHTING & POWER	)	Docket Nos. 50-498 OL
COMPANY, <u>ET AL.</u>	)	50-499 OL
	)	
(South Texas Project,	)	
Units 1 and 2)	)	May 1, 1981

CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicants' Memorandum of Law on Issues Concerning Competence and Character have been served on the following individuals and entities by deposit in the United States mail, first class, postage prepaid, on this 2nd day of May, 1981.

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A handwritten signature in cursive script, reading "Alvin H. Guttermann", written in dark ink.

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Alvin H. Guttermann