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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

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CITIZENS CONCERNED ABOUT NUCLEAR POWER, INC. (CCANP)
-----BRIEF ON APPEAL FROM PARTIAL INITIAL DECISION-----

Lanny Sinkin

Craig Jordan, Michael Hall,
Margaret Burns

Representatives for
Intervenor,
Citizens Concerned About
Nuclear Power, Inc.
114 W. 7th, Suite 220
Austin, Texas 78701
(512) 478-7197

Of Counsel: Robert Hager, Esquire
Christic Institute
1324 North Capitol Street
Washington, D.C. 20002
(202) 797-8106

June 24, 1984

8407090124 840624
PDR ADOCK 05000498
PDR
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Introduction

The Partial Initial Decision [hereinafter "PID"] under review in this appeal is the product of a very difficult and lengthy proceeding. Begun in 1978, ten years before the first unit of the South Texas Nuclear Project is due to go into service under the current schedule, this proceeding has become a trial by endurance for Intervenor Citizens Concerned About Nuclear Power, Inc. (CCANP).

After reviewing the PID of the Atomic Safety and Licensing Board [hereinafter "ASLB"] and considering whether to pursue this appeal, the main question was: Is it worth it?

That question was asked on a number of grounds. The first phase of this proceeding included hundreds of hours of preparation, 44 days of hearings, and hundreds of hours to do the findings and conclusions of law. The personal sacrifices required in terms of private life, career, income, and health were extraordinary.

In addition, there was never a feeling on CCANP's part that CCANP was getting a fair hearing from the ASLB. CCANP was constantly forced to go forward without adequate preparation; to travel to other communities to participate in hearings; to be the old shoe worried to death from three sides by the Board, the NRC attorneys, and the Applicants' attorneys (an image conveyed to CCANP's primary representative by a court reporter who transcribed much of the Phase I proceeding); and to contend with Board rulings demonstrating a bias toward the Applicants and hostility toward CCANP.

The PID is the culmination of that abuse. On first reading,

it was clear that the Board distorted the issues to be litigated in order to avoid a serious consideration of license denial. It was also clear that the Board had ignored the hundreds of hours of work CCANP had put into defining the major issue of corporate character and into evaluating the record in the light of that definition. Finally, it was clear that the Board had simply ignored key pieces of evidence and crucial arguments which did not fit into the Board's preconceived idea of how the opinion should turn out.

In the light of such an opinion from the ASLB after four years of work by CCANP, it was difficult for CCANP to consider an appeal within the NRC worthwhile. The task would be a major work of clarifying the many points at which the ASLB opinion is in error while also reviewing the record for purposes of documenting the due process violations rampant in this proceeding. CCANP had no enthusiasm for the prospect of going through with the appeal.

Upon further reflection, however, CCANP did decide to pursue this appeal. First and foremost, the NRC predicts 18,000 people would die immediately if the South Texas Nuclear Project were to have a core melt down and containment building rupture. For the sake of those 18,000 people, CCANP could not let the abusiveness of the NRC system to date prevent CCANP from taking every step to keep this poorly built plant from being turned on under the management of a clearly unqualified company.

CCANP was also shored up by the fact that the Appeal Board unanimously removed a judge from our proceeding for hostility toward CCANP. He was, however, put back on by a 3-2 vote of the Commissioners.

There is also the fact that the ASLB is using the PID to drastically limit the issues and concerns the Board is willing to consider in the next phase of the licensing proceeding. See Memorandum and Order (Ruling on CCANP Motions for Additional Discovery and Applicants' Motion for Sanctions) dated May 22, 1984 and CCANP's Motion for Reconsideration of that Memorandum and Order dated June 5, 1984. Apparently even if CCANP could prove in Phase II of this proceeding that Houston Lighting and Power permitted a chaotic and life threatening design and engineering process at the South Texas Nuclear Project, the Board would not consider changing its ruling in Phase I that HL&P has the necessary character to receive an operating license for a nuclear power plant.

Finally, there are other decisions by NRC boards, such as the Byron license denial, that indicate that it is possible within the NRC process for an intervenor to occasionally prevail, even if only for a time.

Given these considerations, CCANP set out to answer the PID and to demonstrate to the Appeal Board that not only was the PID in error and the proceeding itself abusive, but also that the operating license should in fact be denied.

CCANP respectfully suggests that the Appeal Board read CCANP's Findings of Fact and Conclusions of Law in their entirety before reviewing this appeal in order to gain a clearer idea of how CCANP approached the fundamental questions involved.

I. Issues

A. The central issues in this proceeding arise at the direction of the Commission.

As a direct result of an NRC Order to Show Cause (Staff Ex. 46) and Intervenor's response to that action, the NRC Commissioners issued a Memorandum and Order calling into question Houston Lighting and Power Company's [hereinafter "HL&P"] character and competence. CLI-80-32, 12 NRC 281, 291 (1980); See also PID at 3-4. A major decision facing the ASLB is what CLI-80-32 directed the ASLB to determine. There are significant differences of opinion between the ASLB and CCANP on the direction the Commission gave the ASLB.

The Commission said:

"Either 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 (i.e. technical) or character qualification" 12 NRC 281, 291.

Specifically, CCANP contends the ASLB must address the following questions:

- 1). What did the Commission mean by "independent and sufficient"? 12 NRC at 291.
- 2). What did the Commission mean by "competence"? *Id.*
- 3). What did the Commission mean by "character"? *Id.*

CCANP offers its own answers to these questions in both its Findings of Fact and Conclusions of Law and in this appeal.

- 1). The Commission intended the term "independent and sufficient" to mean that a major failure by the Applicants could be the basis for license denial regardless of any other failures, any record of good performance in other areas, or any remedial

measures Applicants might take after the major failure became known.

When the Commission wrote CLI-80-32, they were well aware that Houston Lighting and Power had undertaken remedial measures. See e.g. 12 NRC at 288. In fact, the Commission had read all the promises HL&P had made in response to the Order to Show Cause. Id. The Commission quotes from the Houston response a paragraph that is remarkably similar to Issue D in this proceeding, to-wit:

"These commitments, faithfully executed, provide assurance that the construction activities at STNP are, and will be, conducted in accordance with applicable requirements, and consistent with the public health and safety, and therefore should not be stopped." (emphasis added) 12 NRC at 288.

HL&P is clearly responding to the mandate of the Order to Show Cause to in fact show cause as to why the safety-related construction activities at the South Texas Nuclear Project should not be stopped. A decision to stop all safety related work at STNP would have been tantamount to suspending the construction permit. HL&P, in the quoted portion of their response is arguing the permit should not be suspended.

In demanding the response, rather than suspending the construction permit outright, the Director had made his decision on the appropriate remedial action for HL&P to take to correct the performance deficiencies. The Director was making no judgment on whether those deficiencies constituted an adequate basis for denial of the operating license.

Fully aware that HL&P was undertaking remedial measures, the Commission instructed the ASLB to consider whether the history of HL&P's performance warranted a decision at this point to deny the

operating license. Nowhere in its definition of what the ASLB is to look at does the Commission suggest that the remedial measures accepted by the Director are to be considered in evaluating whether the past performance constitutes a basis for license denial.

To the contrary, the Commission points the ALSB to the "history of the South Texas Project," a history the Commissioners outlined in terms of the violations of NRC regulations prior to and including those leading to the Order to Show Cause.

"The history of the South Texas Project - at least 12 separate NRC investigations over a 2-1/2 year period, resulting in conferences with the licensee, several prior items of non-compliance, a deviation, five immediate action letters, and [n]ow substantiated allegations of harassment, intimidation and threats directed to QA/QC personnel and apparent false statements in the FSAR - is relevant to the issue of the basic competence and character of Houston." 12 NRC at 291.

The Commission raised the question whether these violations constituted an unacceptable abdication of responsibility or an unacceptable failure to remain informed on the part of HL&P. Either of these failures is set out by the Commission as an "independent and sufficient" basis for license denial. 12 NRC at 291. See United Broadcasting Co., Inc. v. F.C.C., 565 F2d 699 (1977) cited in 12 NRC 281 at 294.

The Commission is clearly asking the Board to answer the question: Does the record of HL&P violations of NRC requirements up to and including the period of the Order to Show Cause investigation disqualify HL&P from being considered for a license to operate a nuclear power plant? (The hearing process extended the evidentiary period through mid-1982.)

To answer that question requires an evaluation of the behavior of HL&P which did not meet Commission requirements and of whether that behavior stands as a sufficient basis for denial of the operating license. This evaluation must be done without regard to what HL&P may have done later to remedy its problems.

2). The Commission intended the term "competence" to mean the technical skills of the work force. The Commission itself spoke of "competence (i.e. technical)." 12 NRC at 291. The plain meaning of the Commission's use and parenthetical explanation of this term is that the welders know how to weld, the concrete craftspeople know how to pour concrete, the engineers know how to engineer, the architects know how to design, the managers know how to set up a functional management structure, etc. These are, for the most part, the abilities to deal effectively with the fabrication and installation of materials or the proper calculation of physical forces or the proper rendering of drawings -- in other words, the effective manipulation of inanimate objects to achieve a particular goal of physical performance.

3). The Commission intended "character" to mean the performance of the Applicants outside the area of technical skill. This performance will emerge in the interrelationships among the people involved in the project and in the execution of tasks such as planning, communicating, and implementing programs. This performance will also reveal the values held by the Applicants during the performance of their duties.

3. The parties engaged in a lengthy dispute as to the intent of the Commissioners as expressed in 12 NRC 291.

The incorporation of the Commission's concerns into this proceeding set off a vigorous dispute which ultimately led CCANP to file an interlocutory appeal. See CCANP FOF 1.41. Since the ASLB denied the interlocutory appeal solely on the basis of its interlocutory nature, CCANP reasserts the same appeal now that there is a final order in Phase I, i.e. the PID. CCANP incorporates into this appeal by reference, therefore, all of the concerns and supportive material presented in CCANP's Notice of Appeal and Request for Directed Certification (March 22, 1981). CCANP seeks relief as set forth below at 106-107.

C. The PID ignores the issues as presented by the Commission.

The concerns leading to CCANP's interlocutory appeal referenced above were prophetic. The issues as CCANP perceived them to be presented by the Commission were mixed into a soup of irrelevant and extraneous matters, producing an opinion that provides no direct response to the Commission's charge.

1. Throughout the PID, the ASLB blurs the distinctions between the issues and the topics of concern, so that the Commission directive to consider whether there exist "independent and sufficient" grounds for license denial is avoided.

a. The ASLB offers a confusing presentation of the issues.

The confusion of the issues begins early.

"The central focus of our inquiry in this first phase of the proceeding has been the 'character and competence' of HL&P to build and operate the facility." (emphasis added) PID at 7.

This is an operating license proceeding only. The purpose of this proceeding is to predict whether they will operate the plant in conformance with NRC rules and regulations and in a manner designed to assure public health and safety. There is no inquiry

here as to their character and competence to build the plant. That was the inquiry in the construction permit phase.

In examining the issues, Issues A and B both say "operate" STP; neither includes "build". Issue C says "operate" and does not include "build". Issue D is the equivalent of a show cause hearing on why the construction permit should not be revoked.

Nowhere in CLI-80-32 does the Commission instruct the Board to inquire as to the need to revoke the construction permit. In fact, the Commission indicated to CCANP that a motion pursuant to 10 C.F.R. Section 2.206 to revoke the construction permit would most likely be a useless undertaking. 12 NRC at 290. Rather than a construction permit revocation, the Commission pointed to operating license denial as the appropriate alternative to early revocation of the construction permit. 12 NRC at 289. That the ASLB included Issue D in Phase I and wrote about Phase I as an inquiry into the character and competence of HL&P to build STNP are only reflections of the broader problem of the ASLB mixing issues together so that there is no clear distinction as to what the inquiry being made really is.

The "build" part of the ASLB's statement disappears in the remainder of the paragraph and would not be worth noting except that the Issue D focus distorts the Issue A inquiry. A concern with the continued building of STNP naturally leads to a close look at current conditions. The conflict is between the view that the purpose of the hearing was to examine past acts as a predictor of future performance and the view that the purpose was to examine past acts to see if they have been remedied. Firmly entrenched in the pursuit of the remedial approach, the Board

refused to consider the predictive value of past acts standing alone.

On the issue of competence, the ASLB says:

"Past incompetence is relevant, of course, to the extent it may be indicative of present incompetence. Thus, if HL&P has improved its competence, it is that improved state that is determinative." (emphasis added) PID at 22.

But, Issue A asks whether the level of incompetence found to exist in the past is indicative of irresponsible behavior in the future to such an extent that HL&P is disqualified. The only inquiry is how incompetent HL&P and its contractors were during the period set out in CLI-80-32, that is, the history of the South Texas project through the issuance of the Order to Show Cause. The Commission's "independent and sufficient" delineation of the question cannot be harmonized with an ever-changing "current" competence.

HL&P's current level of competence is only predictive of how HL&P will behave after others have exposed serious failures in HL&P's performance.

This ALSB determination of the relevance of past incompetence is a particularly clear example of how the Board distorted the issues being litigated. Under the Board's "How are they now?" standard, applicants could get away with almost anything as long as they cleaned up their act prior to the close of the licensing hearings. Under this formulation, there is no meaning to "past practices, in themselves," PID at 21, as a basis for any decision. The Board essentially abolishes Issue A on competence.

On the issue of character, the ASLB says:

"if an applicant, whose character may have been unsatisfactory in the past, demonstrates a reformed and adequate present character, then we may find that there is reasonable assurance that it will observe the Commission's health and safety standards." PID at 23.

The confusion continues. If the character was unsatisfactory in the past, i.e. not good enough to satisfy NRC requirements, does it matter how it changed? Is there a point where the past demonstrated character alone will be an independent and sufficient basis for denial? It does not appear that the ASLB considered such a possibility, i.e. Issue A was never considered in the writing of the opinion.

There is also the emerging critical distinction between predicting future performance based on corrective measures taken after being caught, as opposed to using past performance itself as the predictor of future performance. Here the Board seems to be saying that reformatory acts are a better predictor. But they are the worse of the two, resulting as they do from an outside intervention into the ongoing process of HL&P. Promises to behave after being caught are of less probative weight than the actual behavior prior to being caught.

At times, however, the ASLB appears to recognize the original issues as drawn. The Board refers to "all evidence of corrective measures taken by the Applicants (i.e., matters relevant to Issues B, C, D, and E)." PID at 21. The Board notes that "CLI-80-32 contemplated a determination whether past practices, in themselves, should result in a denial of the operating license application" *Id.* Finally, the Board at times grants that "Issue A questions whether HL&P's record of compliance with NRC requirements is so inadequate that we should

determine that HL&P does not have the necessary managerial competence or character to be granted licenses to operate the STP." PID at 30.

b. The confusion on the issues found in the PID results from an unwarranted and incorrect ASLB interpretation of both the law and the Commission's intent.

The ASLB takes the position that only immutable character defects could possibly constitute a basis for denying a license without consideration of remedial measures, that is, only if remedial measures were impossible would the ASLB truly entertain an Issue A decision. PID at 21-24; See also Third Prehearing Conference Order (Including Summaries of Subsequent Telephone Conference Calls) (April 1, 1981) at 9, 10-11.

CCANP's position is that certain failures of character or competence, whether subject to remedy or not, can serve as a basis for license denial. CCANP contends that this position is precisely the position of the Commission in CLI-80-32.

Violations of F.C.C. rules of technical operation are obviously subject to remedy, but it is precisely such violations the Commission cited as an example of what would constitute an independent and sufficient ground for license revocation or denial. *United Broadcasting Co., Inc. v. F.C.C.*, *supra.*, cited in CLI-80-32 at 294. Given the comparative dangers in operating a radio station and a nuclear power plant, the standard for a broadcast license must be lower than the standard for a nuclear plant operating license. If correctable violations can be a basis for denying a broadcast license, there is no rational basis for setting the standard lower for a nuclear plant license, i.e.,

that only irremedial defects are disqualifying.

The ASLB would have the mutability argument come in before the independent and sufficient determination is made, holding that only immutable defects could constitute an independent and sufficient basis. But that position is at odds with the position of the court in United Broadcasting, cited favorably by the Commission, and also certainly at odds with the plain meaning of CLI-80-32.

Abdication of responsibility and failure to keep informed can both be "remedied" under the ASLB approach to the issues; the applicants can henceforth assume and exercise responsibility and organize and implement a process whereby applicants remain informed. Since these two failures can be "remedied," the Board would not consider them "so serious that they are in fact uncorrectable, at least in the absence of a radical change in the control of [the] corporation." PID at 23.

The ASLB therefore would take the two inquiries the Commission considered "central" to the "independent and sufficient basis" for license denial question and permit Applicants to mitigate the effect of an adverse finding with evidence of remedial acts.

In narrowing the Issue A inquiry to uncorrectable defects and then indicating that only lack of truthfulness or candor would signal the possible existence of an uncorrectable defect, the ASLB is hardly allowing room for the "broader ramifications" of HL&P's acts that the Commission said should be examined as part of the character and competence inquiry. 12 NRC 291.

Furthermore, the ASLB is not really certain there are

immutable character traits. "One of these [uncorrectable] defects might be evidenced by an intentional lack of truthfulness or candor condoned by management." PID at 23. Given the ASLB's position that remedial measures can include "radical change in control of [the] corporation," even an "intentional lack of truthfulness or candor condoned by management" is in fact correctable by firing the manager who tolerated the dishonesty. See PID at 23. The Board would even consider the firing as possible proof of character. *Id.*

We, therefore, reach the point the ASLB was working its way toward. Only uncorrectable defects in character found in the past record of HL&P are disqualifying and since the ASLB is unable to identify what such a defect could be, there is no question of denying the license for lack of the necessary character, and there never has been since these hearings began. Issue A on character is, therefore, abolished by definition.

The ASLB holds that the Atomic Energy Act (AEA) and the Commission's Memorandum and Order require taking into account evidence of remedial acts. PID at 22. The Board seems to assert that Issue A is not only beyond the realm of possibility but also legally forbidden.

But as the ASLB recognized, the AEA says that only the information required by the Commission to be submitted need be considered. PID at 8, n. 8. The ASLB could have restricted its inquiry to the "independent and sufficient" formulation of the Commission, taken evidence on the past acts of non-compliance alone, and rendered an opinion on Issue A as incorporated

originally into this proceeding. Such a process would be acceptable under the AEA and conform CLI-60-32, 12 NRC 281.

As the Commission stated: "decisions about licenses are predictive in nature." 12 NRC at 291. Which is more predictive of future behavior: past, primarily self-regulated performance or corrective activities undertaken only after being caught performing improperly?

CCANP contends that its position on how the issues should be drawn and litigated more closely reflects the proper manner to conduct the inquiry in light of the responsibility and demands placed on the NRC by the AEA and in light of the intent of the Commission. The ASLAB will have to decide whether the position of CCANP or the position of the ASLB more completely fulfills the intent of Congress as expressed in the AEA and which more closely tracks the Commission's intent as expressed in 12 NRC 281.

c. Having erred in its interpretation of the law and the Commission's intent, the ASLB proceeded to render an opinion and make findings of fact on issues defined for the first time in the PID itself.

Issue A as originally accepted into these proceedings reads: "without regard to the remedial steps." But the PID says: "[Issue A] is derived from the Commission's instructions in CLI-60-32 and explicitly excludes from consideration the effectiveness of any remedial steps taken by HL&P." (emphasis added) PID at 30. Issue A, as the ASLB has changed it, would read: "Taking into account any remedial steps taken, but not their effectiveness" This formulation removes the distinction CCANP fought so hard to achieve in the prehearing conference where the issues were initially defined.

After redefining the major aspect of the issue, the ASLB proceeds to alter the subparts of the issue. PID at 31. The second subpart changes from the "instances of noncompliance set forth in the Notice of Violation and Order to Show Cause" to "the manner in which [HL&P] reacted to the noncompliances or nonconformances which occurred." (emphasis added) ¹ Id. See also ² PID at 38. Issue B begins to swallow Issue A.

Having blurred the distinction between Issue A and Issue B, the ASLB has trouble keeping the two apart, even in terms of the ASLB's new formulations. As part of its opinion on Issue A, the ASLB looks at whether the violations recurred after being addressed. The "manner in which HL&P responded" now includes how effective the response was - prevention of recurrence being one measure of effectiveness. But the ASLB said the consideration of Issue A "explicitly excludes from consideration the effectiveness of any remedial step taken by HL&P." PID at 30.

The mixing of the issues includes citing Issue B findings in support of the Issue A opinion.

"The circumstance that Messrs. Jordan and Corea attempted to improve their competence in QA matters, as in attending the Crosby College seminar (Finding 215), reflects favorably upon their character (as well as that of HL&P)." PID at 43-44.

Finding 215 is a finding on Issue B.

1. CCANP contends that this entire section of the opinion (ii), PID at 38-42, simply has no place in Issue A the way the Board has treated this subpart.

2. The Board also transforms the fourth subpart from "the extent to which HL&P failed to keep itself knowledgeable to "the degree to which [HL&P] attempted to stay informed." (emphasis added) PID at 31. The question is no longer how serious their failure to remain informed really was but rather how hard they tried to be informed whatever the result in terms of successfulness.

There are even parts of the Issue A opinion which incorporate evidence related to the eventual hiring of Bechtel and Ebasco.

"All witnesses addressing the programs (as they existed both before the Show-Cause Order and as subsequently modified) considered them as in compliance with applicable regulatory requirements, and we see no reason to disagree. (See, in particular, Findings 112, 143, 264, 268.)" PID at 47.

Findings 264 and 268 refer to the Bechtel and Ebasco programs.

Eventually, the ASLB returns to the "build" confusion, a confusion contributing to the mixing of Issues A and B.

"Although Issue A excludes consideration of corrective actions, we do not believe we can fairly evaluate HL&P's competence to complete and operate STP without taking into account the qualifications and experience of the personnel who actually will be engaged in those tasks." (emphasis added) PID at 49.

In the ASLB's Findings of Fact on Issue A, the presence of Issue B material is so pervasive that there are in fact almost no findings solely on Issue A. The Findings within Issue A that include Issue B evidence are:

35 ("ability of management to learn from [violations], the willingness and attitude of HL&P officials in responding to NRC observations and enforcement actions, and the promptness and nature of those responses")

38 (The finding is an early indication that this section is going to include findings regarding "response to the Order to Show Cause," "the organization and function of the Task Force ... that reviewed I&E Report 79-19 and the Show-Cause Order and developed the HL&P responses to it," "changes made in the STP administrative controls in response to the Show-Cause Order and changes in the STP QA program before and after issuance of the Show-Cause Order," etc.)

96 (Amaral's view of "steps to resolve the communications problem")

108 (Jordan's "sensitivity to the complexity of nuclear power plants has increased and now he spends more time on STP matters" and he "now spends more time reviewing various aspects of the STP [cite omitted]") (emphasis added)

110 (the "intensity" of Oprea's sensitivity had "increased since Investigation 79-19"; now he had "increased the frequency [of his site visits] to about once per week"; he uses these visits to collect information and demonstrate management visibility; and "[a]t the time of his testimony," he was spending full time on nuclear matters)

117 ("After 79-19, HL&P revised its auditing procedures to require direct observation of the work being performed"; a subsequent NRC investigation "concluded that HL&P had developed a matrix to assure that all procedures would receive proper consideration in planning audits"; and a still later NRC investigation found "HL&P actually was performing effective audits at the prescribed frequency.") Note: In the PID, the Board initially created the distinction that the taking of remedial measures would be examined in Issue A but their effectiveness would be the subject of the Issue B inquiry. But Finding 117 in Issue A includes an NRC investigation into whether the remedial measure was effective ("HL&P actually was performing").

120 ("The increasing HL&P involvement from late 1980 on was confirmed by Mr. Goldberg" [cite omitted])

121 (The entire finding deals with the reporting of noncompliances and the timeliness of corrective actions taken, not the substance of the noncompliances themselves)

125 ("HL&P's discharge of B&R and its replacement of that contractor with Bechtel and Ebasco" relying on the testimony of Goldberg)

127 ("At the time of Mr. Jordan's testimony in May, 1981," Jordan was involved in many meetings about STNP)

128 ("At the time of [Jordan's] testimony," he got a lot more reports and was more involved in STNP and "will continue to attend significant hearings and proceedings related to the project")

129 (Amaral concluded that the communications problem was solved by "HL&P changes in organization")

134 (Jordan "was deeply disturbed by the findings of Investigation 79-19, but felt that Company management appreciates the magnitude of the task at STP and is equal to it") (emphasis added)

136 (Jordan "concluded that HL&P had had a substantial team all along, but that the present (May, 1981) team was much larger and had more technical competence [cite omitted]" (emphasis added)

137 (Subsequent to 79-19, Oprea "recognized that there was a need to examine the QA program thoroughly to make certain that the requirements of Appendix B were fully recognized, understood and

embraced by all concerned"; "[i]n retrospect," he found the Order to Show Cause useful to HL&P)

139 (Oprea "testified that Bechtel and Mr. Amaral would have been brought in anyway" to investigate STNP and might have found what the NRC found only "at a slightly later date" [CCANP: conducting an investigation is itself remedial; the question is how bad are the things the investigation found, whoever conducted it?])

142 (After an outside audit recommended bringing in new personnel, "[t]hat was done"; this finding cites PID Finding 212 which is found in the section titled "Issue B: Adequacy of HL&P's Remedial Actions", PID at 184.) (emphasis in the original)

143 ("The modified program analyzed during a recent Bechtel audit did meet the requirements, including implementation, and could be classified as about the same as programs of other successfully constructed plants"; Amaral found some elements of the modified program "novel") Note: The Board again uses evidence of effectiveness ("including implementation") in Issue A)

144 ("HL&P instituted several changes in accordance with those recommendations, including transfers of some personnel to different positions and additional training of others" [cites omitted])

145 (Amaral was pleased with Oprea's "response to Bechtel input"; "[m]ost of Bechtel's recommendations had been implemented at the time of the hearing")

152 ("HL&P had shown a willingness to implement corrective actions")

153 ("Further, assuming implementation of the remedial steps ordered by the NRC and proposed by HL&P, the Staff believed that the STP would be in compliance with the NRC requirements for an operating license") (emphasis added)

156 ("Management had not been deceptive in any way during or after the inspection and was not unwilling to correct any deficiencies when pointed out")

158 (HL&P had a good attitude when being investigated by the NRC)

159 (After finding out that the NRC investigation was uncovering numerous serious deficiencies, HL&P asked for a meeting "in which it proposed corrective actions" including a voluntary cessation of complex concrete work)

160 (After being alerted to deficiencies by the NRC, HL&P hired consultants and made an unsuccessful attempt to investigate harassment of inspectors)

161 ("HL&P responses to essentially all NRC reports were responsible, good and cooperative, and were followed by

corrective actions"; corrective actions were taken "voluntarily" after pending enforcement action was known)

162 ("HL&P moved to improve the situation by shifting key Houston management personnel to the STP site on a full-time basis"; "subsequently" Oprea would stop by NRC's office to see if there were problems)

164 (the entire finding is about the resolution of discovered problems)

176 (HL&P "was not unwilling to correct deficiencies when identified"; HL&P "initiated action to correct deficiencies" before the NRC formally filed its enforcement action)

177 ("Upon consideration of all of the evidence, the Board finds that the instances of noncompliance set forth in the Notice of Violation and the Order to Show Cause are insufficient to determine that HL&P does not have the necessary character to be granted licenses to operate the STP," i.e. consideration of the evidence on remedial measures as well as evidence of past failures)

182 ("Moreover, where particular personnel proved inadequate to their assigned tasks, they were replaced or transferred to other tasks more suited to their capabilities. To that extent, HL&P took steps to mitigate the prime area of competence in which it was weak")

184 ("As set forth in Finding 96, HL&P recognized its lack of experience and the excessively long chain of command and took steps to remedy those deficiencies")

186 ("Through hiring of new personnel and organizational modification, however, HL&P took steps to alleviate these deficiencies")

187 ("Based on that evidence, the Board finds that the instances in which Houston management did not keep itself adequately knowledgeable reflect a defect in competence which, if not remedied, would raise serious questions of HL&P's eligibility for operating license; but that, taking into account the fact that corrective actions were taken (but without regard to the effectiveness of those corrective actions), the instances are insufficient in themselves to support a determination that HL&P does not have the necessary managerial competence or character to be granted licenses to operate STP")

By the time the Board finishes with redefining the issues and producing its opinion and findings, there is no meaning left to the "independent and sufficient" inquiry posed by the Commission.

d. CCANP's understanding and formulation of the issues is within the authority provided the NRC by Congress, preserves the intent of the Commission, and is called for in this case.

CCANP would first take all the noncompliances in the record and evaluate them both individually and as to their broader ramifications. Included in this analysis would be the questions regarding abdicating responsibility and staying informed. CCANP would specifically reject the ASLB's positions that only immutable character defects can produce license denial and that Issue A includes remedial acts but not their effectiveness. [To the extent that a remedial act failed to prevent recurrence of a violation or made the situation worse, that act would be another violation of NRC requirements material to the Issue A decision. See Appendix, Figure 11]

CCANP would then answer Issue A as it was originally incorporated into this proceeding. If the answer was "yes" to either the lack of character or the lack of competence, CCANP would end the inquiry.

If the answer was "no" to both the lack of character and competence, CCANP would then consider Issue B to see if the violations found not to be disqualifying on the whole had in fact been corrected and measures taken to prevent recurrence.

CCANP contends this process should have been a two step process with Issue A heard first and decided before Issue B was even considered. The ASLB's failure to adopt this process unduly burdened CCANP with having to prepare and cross-examine on the remedial acts which CCANP contends would never have been heard if a decision solely on Issue A had been rendered.

Given that the ASLB insisted the two issues be combined into one set of hearings, CCANP contends the ASLB erred in not providing a clearly distinguished opinion and findings of fact on each issue as originally admitted to the proceeding.

There is nothing in the AEA precluding the process as laid out by CCANP. The Congress gave the NRC broad discretion to determine how best to protect public health and safety. The exercise of this discretion in 12 NRC 281, wherein the Commission formulated their standard of an "independent and sufficient basis" for license denial, is well within the ambit of the AEA. Given the history of HL&P at STP, the Commission was justified in raising the possibility of an early license denial based on the lack of character and competence shown in the violations.

II. Competence

A. The ASLB's formulation of competence is far broader than the Commission envisioned.

In the absence of a clear definition of "competence," either from the statute or from previous cases, the ASLB begins with the plain meaning of the term. PID at 12-13.

The ASLB uses three lines of inquiry to evaluate Applicants' competence:

"(1) whether the applicant's staff and management have sufficient technical and managerial expertise and experience; (2) whether that staff and management are organizationally structured so as to permit and encourage the unhindered application of their expertise and experience; and (3) whether the applicant's programs and procedures require the application of that expertise and experience and are consistent with regulatory goals." PID at 46-47.

An immediate problem arises in the ASLB's measuring inquiry. Whereas the Commission said "competence (i.e. technical)," the

ASLB is using competence to include "technical and managerial."

By use of the term "management competence," PID at 13, the ASLB risks introducing confusion into the analysis. In fact, it appears that the ASLB is deliberately widening the competence inquiry to include elements far beyond the technical expertise of the applicant and its contractors. The "management competence" incorporated by the ASLB deals with such questions as the "sufficiency of staffing and resources, the quality of management, and the adequacy of organization of a utility." Id.

These elements only increase the confusion. The adequacy of the staffing level and of the resources brought to bear to achieve the project goal of a quality nuclear power plant do seem to fall into the technical competence area -- there must be enough technically competent people, as well as necessary resources for real technical competence to be present.

But the quality of management seems more likely to inform the inquiry into character than into technical competence. Unlike the Three Mile Island case, the Commission made a distinction in South Texas between character and competence -- "i.e. technical" -- which suggests that management competence is not a useful term for the inquiry mandated in this proceeding.

CCANP would separate the technical acts of management (e.g. structuring an organization), from the characteristics of management in action (e.g. foresight, perception, judgment, resolve, values, and integrity). Thus, whether HL&F knew how to set up an organizational chart for a complex construction project would be a technical question. Whether that organization in fact achieved its goals would be a character question, a question

relevant to the nature of the functioning organization as opposed to the credentials of the organization.

B. Using the ASLB's measurement of competence, Applicants demonstrated incompetence far more pervasively than the ASLB concluded.

The ASLB's measurement of competence, PID at 46-47, divides into seven parts:

- 1). Expertise
 - a). at the staff level
 - b). at the management level
- 2). Experience
 - a). at the staff level
 - b). at the management level
- 3). appropriate organizational structure
- 4). appropriate programs
- 5). appropriate procedures

In its opinion and findings, the ASLB concluded that the staff lacked experience; that management controls were not working at the field level; that top management lacked both expertise and experience in nuclear design, engineering, and construction; that the organizational structure did not permit information to reach those charged with acting to correct problems; that even if the information did reach the appropriate person, that person was incapable of understanding the information and acting upon it; and that procedures on the project were often inappropriate. ³ So of the seven items in the definition of competence, the only one possibly satisfied at STNP was "appropriate programs".

Returning to the definition of competence first accepted by the ASLB, PID at 12-13, CCANP finds the following:

1. "Functionally adequate" means knowing what to do and how to do it; this would apply to both HL&P and their contractors. At the time they began the South Texas Nuclear Project, was HL&P functionally adequate to supervise the design, engineering, and construction of a nuclear power plant? The ASLB concludes they were not, even well into the project.

2. Having "sufficient knowledge" means that if the task requires a particular knowledge, the person has that knowledge. The ASLB concluded that HL&P did not and could not adequately distinguish between a fossil and nuclear project. Since HL&P did not know the real difference, they lacked sufficient knowledge.

3. "Judgment" is one aspect of character in the CCANP analysis; it can be used to encompass the technical skill of being able to judge the competence of a contractor by observing the work performed by the contractor. HL&P was apparently unable to tell that B&R was incapable of performing the task of designing, engineering, and constructing a nuclear power plant.

4. "Skill" means having the technical ability to perform the particular duty. Skill was what HL&P lacked the most.

5. "Strength" does not seem to be applicable.

6. Each of these aspects of competence is task- or skill-specific - "as for a particular duty or in a particular respect."

There was not a single element of competence on which the record would support a finding that HL&P achieved that element at a satisfactory level of performance.

3. Contrary to the ASLB's representation that "[n]o party has raised any question with respect to the third line of inquiry," PID at 47, the third line includes procedures which came under extensive questioning, See CCANP PCF S.31, with even HL&P doubting the efficacy of their procedures.

C. The level of incompetence demonstrated by Applicants is an "independent and sufficient basis" for denial of the operating license.

The ASLB stated:

"We apply this definition [of competence] in accordance with the statutory mandate of Section 103 of the Atomic Energy Act, 42 U.S.C. Section 2133, that applicants be 'equipped to observe' *** [the Commission's] safety standards." PID at 13.

There is no question that the Applicants were not equipped to achieve the safety standards set by the Commission. There is a clear showing of widespread and in-depth incompetence on the part of HL&P and the contractor brought to the site by HL&P.

Having examined the definition of competence and taken the measure of Applicant's competence, the final step is to set the standard for competence. Using the scale from Appendix, Figure 2, CCANP would require a record of competence in the excellent range. Instead, we find a record in the poor to fail range.

The ASLB considered these deficiencies as possibly serious enough to warrant license denial, PID at 51, but refused to render an opinion on that issue without considering remedial steps taken by HL&P.

CCANP can without reservation conclude that the record of Applicants in the area of technical competence is so far below the standard of excellence that is required for operating a nuclear reactor, that a denial of the operating license is not merely warranted but required.

D. The record of Applicants' incompetence reflects on their character.

In a root cause analysis, as this case calls for, if enough symptoms are found at one level of the analysis, the analysis

moves to a higher more encompassing level. The ASLB appears to accept the idea that competence can be one element of measuring character. "[W]hether an applicant has developed technical ability may be relevant to and indicative of both its character and its competence." PID at 11.

But shortly thereafter, the ASLB appears to separate the two. "[W]e do not believe that character can be inferred from competence, or vice versa." Id. Here CCANP and the ASLB diverge. CCANP would infer from a finding of excellent character that the applicant had ensured that people with the technical expertise and experience necessary to build a high quality nuclear power plant were in place at all times. Or, to put it another way, a finding that technical competence was missing would preclude a finding that the necessary excellent character was present.

Denying the inference, the ASLB transfers the inquiry to remedial measures and the present state of competence. PID at 22.

CCANP, on the other hand, contends the inference needs to be examined and ruled upon. One good example supports the inference sufficiently for the transition to character to be made.

"What we fault them for is not their lack of awareness of details but their lack of understanding of the facts which they had before them. This represents in our view a defect in competence rather than character." PID at 43.

The top management was receiving from the project all the information necessary to know the project was in trouble but the top management did not have the ability to assimilate that information into a coherent message. This is a clear example of CCANP's perception category of character failures. The ASLB prefers to call this competence. The difference is that the ASLB looks at

the particular deficiency, e.g. a lack of perception, and calls the problem competence. CCANP looks at the cause for the lack of perception, e.g. the failure of the ASLB of Directors to put in place top management with adequate perception to perform a task which, if not performed well, could lead to major adverse health and safety consequences for the public, and calls the problem character.

As the licensing decision is predictive, CCANP would find this conclusion by the ASLB to be a prediction that when faced with a major complex task, HL&P will have in place people who lack the perception to know when something is going wrong. For an applicant seeking to operate a nuclear reactor, that prediction is disqualifying.

CCANP contends that Applicants' failure to have technically competent people in place at all levels of the project is a failure of character as well as technical competence. CCANP further contends that the ASLB could have reached a similar conclusion had it not ended its inquiry prematurely -- once the ASLB found inexperience, they stopped their analysis. CCANP proceeded to ask why the inexperience was there and whether its presence contributes to the character inquiry.

III. Inexperience

So much of the PID revolves around the ASLB's use of the term "inexperience" that a closer examination of the role this term plays in the ASLB analysis is necessary.

A. Inexperience was a significant characteristic of the STNP effort from its inception.

CCANP dealt with the inexperience concept in various ways in

its Findings of Fact. See e.g. CCANP FOF 2.34, 2.44-2.47, 3.1-3.12, 4.1-4.20. CCANP's fundamental response to the discovery of widespread inexperience at STNP was to question the commitments and competence of the HL&P Board of Directors and management.

The ASLB agrees that experience was a missing element of technical competence, PID at 49, but uses inexperience to build its argument that abdication of responsibility or failure to remain informed cannot constitute a basis for license denial. The ASLB finds that inexperience is the reason for Applicants apparent failures to exercise their responsibility and remain informed. But inexperience can be remedied, the ASLB found, so no fatal defect could possibly be found in this deficiency.

"Experience, by its very nature, however, is obtainable by several means, including the hiring of experienced personnel or even by the mere passage of time (i.e., the more time one spends on a project, the more experience one acquires)." PID at 49.

B. The ASLB uses "inexperience" too broadly and thereby fails to adequately explain Applicants' failures.

The PID explains almost every Applicant failure as resulting from inexperience. But some of these failures do not fit so easily into such an explanatory mold.

1. At the time the NRC finally discovered what was really going on at STNP, the key personnel for HL&P had been in place for years.

By the time special investigation 79-19 began in November of 1979, HL&P had been on the job for four years. There had been essentially no turnover in the top two HL&P managerial positions (Jordan and Oprea) nor in the key person responsible for Quality

4. The Board does accept evidence which argues against the inexperience conclusion. PID FOF 118.

FOOTNOTES CONTINUED ON NEXT PAGE

Assurance (Frazer). Hence, as far as becoming experienced by the "mere passage of time," the HL&P personnel were at the peak of their experience during 79-19, an experience that consisted of many years on the job. How does the Board explain the apparently major deterioration in performance at the project in 1979-80 as being a product of inexperience, if in fact time had passed and experience had been acquired?

2. Harassment of QC inspectors is not, contrary to the ASLB's position, explained by inexperience.

The ASLB's position is that:

"One of the most pointed reflections of HL&P's and B&R's lack of experience was the continuing re-occurrence of incidents of harassment of QC personnel by construction personnel. ... We view the existence of the incidents and of low QC inspector morale to be in part the result of lack of managerial experience with

FOOTNOTES CONTINUE FROM PREVIOUS PAGE

5. There is, however, the possibility that the management of HL&P in fact lied to the NRC about the qualifications of its personnel and its contractors. There must have been a showing of qualifications in order to receive a permit to construct STNP. Inexperience could then be the indicator of a defect even the Board might entertain as disqualifying. See PID at 23. Had CCANP known the record on inexperience would be so extensive, that this finding would play such a central role in the PID, and that the Board would adopt such a restrictive definition of disqualifying character defects, CCANP would have explored the record of the construction permit application during Phase I. As it is, the NRC commissioned such an exploration which concluded that inexperience was indeed a problem. SECY-84-124 (March 20, 1984) at A.21. The report concluded that the NRC failed to review the ability and experience of the Applicant and its contractor prior to the granting of the construction permit, Id. at A.23, but a full review of the construction permit application process might well find that HL&P presented its qualifications and the qualifications of its prime contractor in such a way that the NRC was misled as to the actual competence of the project team. Having recently received the NRC report, CCANP will soon be filing a motion to reopen the Phase I record to admit the report and the study upon which the report is based. The report did not limit its explanation of the problems at STNP to inexperience; "inadequate management support of quality" was also a major contributor. Id. at A.22

projects involving QA/QC requirements such as those attendant to nuclear construction. As various witnesses pointed out, clashes among construction workers (including QC personnel) are to some extent to be expected, given the nature of the work and the characteristics of persons engaged in it. But the continued reappearance of clashes and the persistence of low morale reflects management's inadequate experience in constructing facilities subject to nuclear QA/QC requirements." PID 48-49

HL&P knew that harassment of inspectors was one of the generic problems faced on large construction projects, so there is no real question of inexperience here. The Board would distinguish between QA/QC on any large construction project and on a nuclear project, but that distinction is not self evident. Inspecting concrete, welding, backfill, electrical conduit, etc. is commonplace activity on almost any large construction project and certainly on a large power plant construction project. The standards may be higher on nuclear construction and the inspection, and therefore, stricter, but the problem of inspector/constructor friction is still the same generic problem.

Furthermore, the Board takes the position that experience can come from work over time. Yet the height of QC harassment apparently came after years of management involvement in nuclear QA/QC, an involvement that management said increased significantly over time. See PID FDF 120.

The implication is either that management is not capable of learning from doing, or that management never took the problems at the project seriously enough to actually do something about them. Either conclusion supports license denial; neither is explained by inexperience.

3. Contrary to the ASLB's position, Applicants' long-term failure to take decisive action regarding the inability of

its prime contractor to perform is not explained by inexperience.

Early in the project, HL&P discovered that Brown and Root was not accurately representing its achievements and not performing anywhere near expectations.

"Mr. Jordan testified as to HL&P's expectation that around 50 percent of the design engineering work would have been completed at the time of NRC's award of the construction permit whereas, in fact, only about 8-9 percent of the engineering was actually complete at that time[cite omitted]. Moreover, given this notice, HL&P should have taken steps earlier than it did to correct the problems which were apparent [cite omitted]. Although this delay is perceived by CCANP as a product of deficient character [cite omitted], we find that it more credibly may reflect a facet of HL&P's inexperience. In our view, in the days prior to the Show-Cause Order, HL&P was not sufficiently knowledgeable to realize that major corrective actions were needed or to ascertain what those corrective actions should be." PID at 40-41.

First of all, the last sentence of the quoted statement from the PID speaks volumes about HL&P's failures. That sentence alone, in CCANP's view, could provide an adequate summary position for license denial.

The Board would attribute HL&P's failure to get B&R off the job to inexperience. But HL&P is one of the largest utilities in the country. They have plenty of experience in having contractors design and engineer a power plant.

Discovering that the engineering was only 8-9 percent complete may have been difficult for HL&P's inexperienced nuclear engineer. But once the knowledge of the incompleteness of the engineering became available, HL&P management could have taken appropriate action to get an architect-engineer who would know how complete the engineering was and who would then produce the necessary competent engineering in a timely fashion. There is

nothing uniquely nuclear about such a response. Instead, six years later B&R was still on the job and still suffering engineering productivity problems.⁶

4. The failure of HL&P to perform audits of B&R is not explained by inexperience.

The ASLB finds that

"at lower levels, HL&P did not exercise effective control prior to the Show-Cause Order in areas such as auditing (Finding 116). We attribute the lack of effective control to inexperience and excessively long chains of command rather than to abdication of responsibility." PID at 42-43.

As Finding 116 documents, during the investigation reported in I&E report 79-19, the NRC discovered that HL&P had "failed to perform semi-annual audits of B&R site organizations and procedures and annual audits of B&R construction site activities, as required by the PSAR and HL&P procedures."⁷

A complete failure by HL&P to perform a major activity is not evidence of a "lack of effective control" because it was HL&P, not B&R that was to perform the audits. What we have is nonperformance of an obligation by the Applicants, not lack of effective control over their contractor. Inexperience might lead to poor performance in the conduct of audits, but inexperience is not an explanation for a complete failure to even try to perform

6. The ASLB limits its finding of insufficient knowledge produced by inexperience to the period prior to the Order to Show Cause. The implication is that after the Order to Show Cause, HL&P somehow knew there was a need for corrective action. But the fact is that the Order to Show Cause did not deal with engineering productivity at all and B&R remained on the job as a- for seventeen months after the issuance of the Order to Show Cause.

7. The failure to perform these audits may in fact be a far more serious material false statement than reporting that a certain number of roller passes were made over backfill when in fact fewer passes were made. The audits were not performed at all.

the audits.

C. The ASLB failed to come to grips with the obvious implications of the "inexperience" conclusion.

Lack of experience is used throughout the Board's decision to shift the context of discussing the facts away from the issue of character and toward the issue of competence. Surely lack of experience leads to incompetence, as the record shows it did in this case. But lack of experience is itself a problem which reflects upon the character of the company going forward with a dangerous project without taking compensatory precautions. See CCANP FOF 3.5-3.6, 3.10.

The Board refuses to consider a long term lack of technical competence as representing a character failure. CCANP would cite a failure to put experienced people into critical jobs as evidence of a major character defect which can be analyzed first as a lack of foresight (planning for a job where in house experience is lacking), second as a lack of judgment (hiring the necessary experience), third as a lack of perception (recognizing when the personnel in place do not have the necessary experience, whether they appeared to when hired or not), fourth as a lack of resolve (removing people who are not performing for whatever reason, including inexperience), and fifth as a lack of values (going the extra mile in performance at all stages, because the project is a nuclear power plant).

At the roots of the inexperience found by the ASLB is an even more damning cause. One of the reasons given for Applicants' lack of experience is the problem of excessive turnover. PID FOF 105, 111. This is a problem which every corporation must address

if it occurs. No lack of experience with specifically nuclear projects can explain the failure of management to recognize high turnover rates as a problem.

More disturbing than one more instance where the ASLB improperly uses inexperience as an explanation for lack of competence, however, is the actual explanation provided by the PID, that cost and schedule considerations led to high turnover. PID FOF 105.

The Board completely fails to assess these findings as reflecting a fundamental value judgment by HL&P to choose financial values over the values required to build a safe nuclear plant. This value judgment goes to the core element of character required of a commercial nuclear licensee. If the NRC has one paramount criteria in selecting its commercial licensees, it must be that the licensees consistently give safety priority over profit. The single finding that HL&P tolerated the loss of experienced personnel to "more lucrative offers from other companies" is a finding of a fatal failure of values disqualifying HL&P from receiving a license.

IV. Character

This is the first NRC proceeding in which an ASLB has had to directly confront the issue of character. Character is one of the qualifications for an NRC license specifically established by the Atomic Energy Act. 42 U.S.C. Section 2232(a).

But this proceeding is the first in NRC history to directly address the statutory issue of character - the definition of character, the measurement of character, and the standard of character to be adopted by the NRC. PID at 12, note 13.

Before even beginning the hearings, the ASLB requested briefs from the parties on the concept of character. PID at 7-8, n. 6.

In its Partial Initial Decision, the ASLB devoted a separate section to the legal standards for determining character. See PID at 7-12, 15-25.

The decision in this case will have far reaching effects in setting forth for applicants, license holders, and the general public just what "character" means to the NRC and in establishing how that meaning will manifest itself in regulatory decisions.

As noted by the ASLB, all parties in this proceeding agree character is a "fundamental" requirement for a license applicant, PID at 8, and one of the central foci of this entire proceeding, PID at 7.

When the licensing proceeding is an inquiry into a fundamental requirement, then the inquiry should be both broad and in depth. A particular failure of an applicant becomes a vehicle for a retrospective probe into the nature of the failure, the importance of the failure, the unique or repeated nature of the failure, the failure as a symptom of a greater problem, and the greater problem as evidence of a failure to possess a critical component of character.

The question of whether the identified failure reaches back to the fundamental root needs to be asked. The root cause analysis is the major undertaking. Stopping too soon means that the fundamental inquiry never takes place. That is what the licensing board did when it stopped its analysis at inexperience and failed to ask whether the presence of pervasive inexperience

reflected on character.

Once the issue becomes either character or competence, something fundamental is at issue and the approach changes. The cases examining a lesser concept or a subpart of the general concept are not appropriate precedents, as they do not call for the examination of the "broader ramifications." If even one element of the fundamental requirements is missing, the implications for licensing are far greater than they are if an isolated violation occurs or a subpart of the general concept is impaired by several violations.

A. The ASLB formulation of the character issue ignores the commonly understood definition of character.

The ASLB begins its analysis of character by ostensibly accepting CCANP's assertion that the character issue in this case should be approached based on the commonly understood definition of character. PID at 15.

"Character is defined as 'a composite of good moral qualities typically of moral excellence and firmness blended with resolution, self-discipline, high ethics, force, and judgment.'" Id.

But after appearing to accept the various elements of that definition, the ASLB begins to carve most of them away.

"No trait should be considered, however, unless it is relevant to the construction or operation of a nuclear plant. Therefore, a trait should only be considered if it evinces a willingness and propensity, or lack thereof, on the part of an applicant to observe the Commission's health and safety standards." PID at 15-16.

The ASLB's "therefore" is not self-evident. The Board gives a definition that includes firmness, resolution, and force, but would have those equated with "willingness and propensity". Being "willing" or being "more likely than not" or "inclining toward"

is far less substantive than demonstrating firmness, resolution, and force.

"Moreover, we not believe it is practical or necessary to attempt to enumerate all relevant traits. Were we to undertake such an exercise, we feel it would serve only to replace one label, 'character,' with many; it would leave unresolved the factors determinative of each trait." PID at 19.

First of all, if the trait is relevant and it is not enumerated, there is a possibility that there would be no inquiry as to the presence or absence of that trait. The failure to make such an inquiry could result in granting a license to an applicant lacking one of the relevant traits of character. A potential for disaster would then exist.

Second, the definition of character quoted by the ASLB contains a finite number of traits to be considered. There is nothing impractical about using all of the elements in the definition.

Third, it is precisely by defining a word that we reach an understanding of the meaning of that word.

The ASLB is taking the position that there is no difference in treating character as one undividable concept and in treating it as composed of elements such as resolution, self-discipline, and high ethics. In order to understand, measure, and set a standard for character, CCANP contends that some attempt must be made to define its elements and to establish the factors determining whether those elements are present or not. The ASLB identified elements of the competence concept; there is no reason to avoid that same task in the character inquiry.

"What is necessary is a nexus of a particular trait to particular performance standards contemplated by the Atomic Energy Act or NEPA and NRC's implementing regulations and guides." PID at 19

From this statement it appears that the ASLB meant it was not necessary to enumerate all traits relevant to the measure of character as opposed to all traits relevant to character in the nuclear context. But surely the measurement of character in the nuclear context will be the broadest possible measure; the higher the risk if character is not present, the more breadth and depth should be devoted to the character inquiry. The stakes are hardly higher in any other activity. Furthermore, the ASLB does not indicate a single trait it considers irrelevant in the nuclear context, i.e. it does not go back to its adopted definition and rule out any of the elements as unnecessary in this inquiry.

The ASLB says it seeks only those traits with a nexus to some performance standard contemplated in the nuclear context. CCANP's position would be that traits relevant to measuring character and traits implied by the performance standards for the nuclear endeavor are identical. But assuming arguendo that there are some traits relevant to character but not to character in the nuclear context, the ASLB gives no guidance as to which are excluded.

B. After the ASLB rejection of the commonly understood definition, the ASLB engaged in an inappropriate search for relevant character traits.

The ASLB decided that it would "adjudge" the Applicants' character by considering those traits that are "naturally inferred" from the Applicants' performance. PID at 19.

"Therefore, we adjudge HL&P's character by consideration of its past and present performance, and

consider those traits, both positive and negative, that are naturally inferred therefrom." Id.

The ASLB decided to look at HL&P's actual performance and decide which traits were relevant by those traits, both negative and positive, that could be inferred from that performance.

This is backward. The ASLB had earlier stated that what was necessary was a nexus between a trait and a particular performance standard. Both of these are the abstracted, generalized concepts emerging from the term "character" and the nature of the nuclear endeavor. Neither the trait nor the performance standard is plant- or applicant-specific.

The purpose of this entire proceeding is to determine whether the character demonstrated by HL&P is the character to be expected from a nuclear power plant operator. The traits and the standards must therefore be treated as applicable throughout the industry; they must be standardized and transferable from applicant to applicant. To tie together character traits and performance standards is not the same examining specific acts in order to generate traits.

The ASLB's approach suggests that there is no generalized standard of character possible in the nuclear context. If so, then it will be hard to demonstrate that the nuclear licensing process is not capricious and arbitrary.

If there are generalized traits of character relevant to the nuclear context, then we must look to those traits and their definition, measure actual performance in the light of those traits, and decide if the measurements indicate performance up to the standard demanded in the nuclear context.

The refusal of the ASLB, at the start of its character analysis, to try to define character contributes to the overall impression that the ASLB's opinion did not approach the necessary level of inquiry into what character is, how it is measured, and what standard will be set for applicants for nuclear reactor operation licenses.

An inductive process can be used to identify character traits. CCANP derived its categories of character traits in part by examining the record. But the traits, their measure, and the standard thereby developed are still generically applicable in the nuclear context.

The fact that, by order of the ASLB, the parties briefed character as a concept prior to the taking of evidence is an indication that the ASLB initially recognized the generic nature of the inquiry.

Because the character inquiry is relatively unchartered, the ASLB looked for guidance from in the deliberations of other NRC licensing boards. PID at 19. But in looking to other boards, the ASLB is depending on Issue B-type "remedial" inquiries as precedents for this Issue A "independent and sufficient" inquiry.

C. The ASLB selected the four particular areas of Issue A inquiry as the performance areas to be examined for indicia of character traits, but then distorted those areas.

"In the present proceeding, the most significant character traits for us to evaluate are HL&P's truthfulness and candor, the manner in which it reacted to the noncompliances or nonconformances which occurred, its responsibility, and the degree to which it attempted to stay informed about STP." PID at 31.

These four elements are designed to track the four areas of particular inquiry in Issue A. See PID at 30-31. But the manner

in which HL&P reacted to noncompliances or nonconformances is already part of the remedial measures taken by HL&P, i.e. Issue B. Furthermore, a failure to react would simply be another noncompliance. HL&P's not committing this further violation should not be used as a key consideration in measuring its character.

As to attempts to stay informed, the Commission used a failure to keep informed standard, not a failure to attempt to keep informed standard. Formulating the issue as "attempt" allows the ASLB to give HL&P credit for efforts made, no matter how unsuccessful. However, the Commission formulation of "independent and sufficient" calls for an ultimate evaluation of the actual performance not HL&P's attempts to perform.

The ASLB mistakenly refers to these four elements as "character traits." Though HL&P responses to NRC enforcement actions and HL&P attempts to keep informed might indicate some character traits, they are not in themselves character traits.

D. The ASLB uses the four redefined areas of inquiry in a generally unsuccessful attempt to identify character traits, measure them, and judge them by the ASLB's standard.

1. Honesty and candor are generally recognized character traits, but the ASLB analysis of the evidence on these traits is inadequate and incorrect.

Honesty and candor are particularly appropriate in the nuclear context where a highly dangerous activity is regulated by an agency heavily dependent on the self-policing of the regulatee. CCANP included these concepts in its "integrity" section. See CCANP FOF 7.3-7.3.19.

a. The ASLB found that only deliberate and known false statements can reflect on character.

In their exploration of honesty and candor, the ASLB first looked at the alleged material false statements noted in the special investigation 79-19. PID at 32-33. In their analysis, the ASLB concluded that only if the false statements made were deliberately and knowingly made would their existence have implications for Applicants' character.

The ASLB, however, skipped a step in their analysis. Unintentional and unknown false statements do not reflect on honesty and candor, but they may well reflect on character by demonstrating carelessness. Such statements also diminish the value of honesty and candor if in all honesty an applicant readily provides the Commission with information which, unknown to the applicant, is false.

Evidence of unintentional and unknown false statements could lead to a conclusion that Applicants were careless in their representations to the Commission. CCANP contends such carelessness could in fact be a disqualifying character defect. One of the Commission's two grounds for denial specified in this case was failure to remain informed. 12 NRC at 291. Making false statements to the Commission unknowingly is surely an example of such a failure.

The evidence on the false statements at issue here is that HL&P did not know that the documentation prepared for the Commission did not reflect what was actually going on at the project. Perhaps the NRC investigative finding simply mischaracterized the deficiency. Simply finding a miscategorization, however, does not cure the deficiency. See PID FOF 15, 16, 21, 25, 32.

b. CCANP stands by its findings in its allegation that the Bechtel study on QA alternatives was a deception.

Ironically, CCANP engaged in the examination of background to the study in good part because the questions and concerns of the Chairman of the ASLB suggested that the study was less than an objective piece of work. See e.g. Tr. 2258 1 9-12, 2259 1 11-14, 2260 1 10-18.

The ASLB says it "need stress only that the study in question analyzed the five forms" suggested by the NRC Director of Inspection and Enforcement. PID at 35. Whether the five forms were analyzed is not the issue; limitations on which alternative could be selected is CCANP's concern. As CCANP findings demonstrate, had the criteria been objectively applied according to the analysis, a different alternative would have been selected.

When the ASLB says HL&P gave Bechtel a "blank check" to perform the study, Id., the Board cites a finding (201) which correctly notes that the blank check was for a study of the existing QA program undertaken in January 1980, not for the alternatives study responding to the April 1980 Order to Show Cause.

The fact that the NRC accepted the Bechtel study as satisfying the Order to Show Cause requirements, PID at 35-36, is irrelevant. The NRC did not conduct any investigation to see if the study was limited by prior conditions as to the alternative to be selected.

As far as Mr. Amaral being honest and forthright, Mr. Oprea was equally forthright in testifying that Bechtel was asked to

give consideration only to alternatives within the scope of B&R's contract. Mr. Amaral was in fact less than forthright in not responding directly to the Chairman's questions about why greater third party involvement was not recommended.

c. In dealing with CCANP's allegation of a false sworn statement by HL&P to the NRC, the ASLB distorts CCANP's position and ignores the evidence.

CCANP alleges Mr. Oprea filed a false sworn statement with the NRC. CCANP FOF 7.3.17.

"CCANP first claims that HL&P failed to meet a commitment made in response to the Notice of Violation. [cite omitted] ... The evidence cited by CCANP [cite omitted] indicates that HL&P failed to meet a deadline for taking certain actions with respect to HL&P's and B&R's audit programs, but we fail to see how it even suggests that there was any intent by HL&P to deceive NRC. Certainly the inspector responsible for I&E Report 80-18 did not perceive any. The statement cited by CCANP as being untruthful is HL&P's representation in its response to the Show-Cause Order that HL&P and B&R had substantially revised and improved their audit programs [cite omitted]. HL&P's representation is not inconsistent with the Staff's conclusion in I&E Report 80-18 that progress had been made [cite omitted], although certain details of that improvement set forth by the Applicants in the Show-Cause Order response may not have been completely accurate. Given CCANP's failure to raise the claim at a time when witnesses could have addressed it, we decline to consider it as affecting HL&P's character." (emphasis added) PID at 36-37.

There was no suggestion in CCANP's allegation that HL&P tried to deceive the NRC personnel in the field; the ASLB is knocking down a straw man they set up. The ASLB ignores the three specific representations CCANP called attention to, thereby making it appear that CCANP was challenging only the broad statement about revised and improved programs. The ASLB then acknowledges and immediately ignores Oprea's false statements that are at the core of CCANP's allegation.

There is also no reason for CCANP to call attention to everything being proven by the record while the record is being made. The evidence speaks for itself; the statements were false.

d. The ASLB analysis of the evidence supporting CCANP's final allegation in the integrity section is cursory and inadequate.

CCANP alleged there was evidence of inconsistent testimony by Mr. Jordan; the ASLB disagreed.

"The other claim by CCANP regarding HL&P's truthfulness and candor consists of alleged inconsistencies in Mr. Don D. Jordan's testimony concerning reasons for assigning Mr. Oprea full-time to the STP [cite omitted]. We do not regard the statements as necessarily inconsistent but only as elaborations of earlier statements." PID at 37

In fact, the statements are contradictory -- one statement is an assertion of a fact and the other is a denial of the same fact. Such statements are "necessarily inconsistent."

Furthermore, the importance of the inconsistency is in how the denial reflected Mr. Jordan's attempt to minimize the seriousness of the Order to Show Cause in one part of his testimony, while getting credit for being responsive to the NRC in other parts of his testimony. In other words, Jordan testified that the Order to Show Cause was not really serious (Jordan did not assign Oprea to STNP in response) but that HL&P is very responsive to NRC concerns (Jordan did assign Oprea to STNP in response to the OSC). Testimony based on what point is being made rather than on the truth is evidence of a lack of candor or truthfulness.

2. Having altered the second subpart of Issue A to focus on the responses to noncompliances rather than the noncompliances themselves, the ASLB fails to render an opinion on the character traits revealed in the noncompliances themselves.

When it changed the issue, the ASLB introduced confusion and misdirection into this inquiry.

"In terms of a character trait, the manner in which HL&P responded to noncompliances or nonconformances may be depicted as the willingness or desire of corporate officials to carry out a QA program 'to the letter.'" PID at 38 citing Consumers Power Company (Midland Plant, Units 1 and 2), 6 AEC 182, 184 (1973).

The ASLB finds that a willingness to respond to NRC notices of violations is probative of character. But willingness to respond to NRC violation notices is the minimum necessary to avoid having the project shut down involuntarily.

More importantly, the ASLB equates responding to findings of violations with showing a willingness to carry out a QA program to the letter. The presence of a violation shows that the QA program was in fact not carried out to the letter. A refusal to correct a violation would be a violation, so there is no probative evidence of anything other than a desire not to be found in further violation.

The ASLB cite to Midland demonstrates the false nature of the ASLB's characterization of this type of evidence. The Midland Board in fact said:

"The presence of police officers on the highways is, after all, not deemed to justify the issuance of a motor vehicle license to a person who does not offer a reasonable assurance that he both can and will comply with the traffic laws which those officers are charged to enforce." Midland, supra., at 184, note 7.

In other words, we cannot depend, as a basis for granting a license, upon the likelihood the Applicants will get caught if they commit violations of NRC requirements. Instead we must depend on them to carry out their program "to the letter" whether there is an enforcement presence or not. One formulation of this

approach is to look at a license hearing record, assume the NRC was not present during the period covered by that record, and decide whether the Applicants' record would support the granting of a license.

The Midland Board is arguing against precisely the kind of thinking that the ASLB in this proceeding engages in.

The ASLB directs attention to NRC cases where inquiries similar to (but not identical to) the character and competence inquiry in this case have been made. PID at 12 n. 13. From one of the cases cited:

"It is significant that management motivation is not one of the seven factors listed by NRR as having been used in evaluating CP&L management capability, although it may be subsumed in some of them. [cite omitted] NRR prefers to measure motivation by performance. Moreover, while motivation is an important factor, it is not an overriding one. [cite omitted]" Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), 10 NRC 42, FOF 51 (1979) (emphasis added)

CCANP would agree that motivation or willingness are necessary and that their absence would be a sign of a very serious character deficiency. But the fact that both technical qualifications and a desire to perform are present does not end the inquiry. Actual performance remains, and it must be analyzed. CCANP would agree with the Midland and Shearon Harris Boards that performance is the proper measure and that willingness is not an overriding factor.

A willingness to respond when caught is particularly lacking in probative value for character. The category hardly has the same value as honesty, candor, taking responsibility, and remaining informed.

When the NRC shows up at the door, there can always be a

sycophant in charge promising to take action whenever a violation occurs. But after the feds leave, the executive manager goes back to his office, issues a memorandum to a subordinate saying "I promised the NRC we would not violate their regulations again so go do something to see that we don't," and then spend his executive time folding and flying paper airplanes, with no effort to find out whether his memorandum produced the desired effect.

This type of approach is apparent in the actions of both Jordan and Oprea, who seem to feel that policy statements from top management will result in the successful implementation of a QA program and the building a safe plant. Or that having a subordinate tell Brown and Root to straighten up will result in Brown and Root straightening up because they have been told to.

Willingness and desire are measured by the amount of resolve, i.e. follow through. If there is little follow through, then protestations of, or even appearance of, willingness are superficial indications of character. The actual performance is a much more meaningful measure.

An example from the PID highlights how pernicious the ASLB's constant search for any sign of willingness can be.

"Where necessary, HL&P and B&R were also willing to hire consultants or subcontractors." PID at 47.

Yet, the most important focus of inquiry in this proceeding is the Quality Assurance/Quality Control program. In this area, HL&P hired a consultant to draw up the original program but did not hire a consultant to review the implementation of the program until 1980. CCANP called attention to this fact, CCANP FOF 3.10

and 8.61, but the ASLB chose to ignore that critical piece of evidence and find a willingness on the part of HL&P to hire consultants. This part of the ASLB's opinion reveals just how unimportant willingness can be when not accompanied by action and how focussing too hard on manifestations of willingness can lead to unsupportable conclusions.

At the same time, the ASLB does not rigorously examine the willingness concept. Since willingness carries such importance in the ASLB analysis and since experience is the most important area where the ASLB finds HL&P lacking, the ASLB should have found a major character defect in HL&P's unwillingness to spend the resources to bring top flight, experienced nuclear personnel into their organization and into their contractor's organization during the first five years of the project.

3. The ASLB's examination of "responsibility" ignores the relevant testimony and evidence.

The ASLB tries to portray HL&P as responsible at the top management level.

"We also agree with the witnesses for both the Applicants and Staff that, at least at upper management levels, HL&P did not abdicate responsibility to B&R for the QA/QC program (Findings 114, 118-120)." PID at 42.

In finding 114, it is the ASLB's position that top management was

"responsive and totally committed to quality assurance and quality control, but that their management controls down to the worker level were not working effectively."

But the evidence of Jordan's commitment to Quality Assurance and Quality Control is the very limited training he saw fit to give years after he took the position as CEO. The evidence of Oprea's commitment is the book learning he gathered. These limited

efforts to gain at least a superficial knowledge of what QA/QC is can hardly be characterized as total commitment, particularly in light of all of the evidence to the contrary.

Putting Frazer in charge of Quality Assurance and leaving him there long after his incompetence was manifest, more clearly illuminates the attitude of HL&P top management. The treatment of Goldberg compared to the treatment of Frazer in terms of access and position is evidence of the favored status of cost and schedule over quality. This emphasis was recognized in Finding 116 as one of the causes for the QA/QC failures.

The absence of any independent audits of the QA/QC program until 1980 is additional evidence of how important top management considered the program.

In response to the Order to Show Cause revelations of widespread deficiencies in the QA/QC program, top management referred to those deficiencies as a "few kinks in our armor." See CCANP FOF 5.33.

Which is the better test of management's commitment to QA/QC -- the public relations efforts to please the NRC when concerns surfaced or the realities of the day-to-day life of the plant where management failed to exercise effective control over the actual program. As Finding 114 itself states: "NRC holds HL&P responsible for development and implementation of a viable QA/QC program."

The fact that an NRC inspector "did not see any effort by the licensee or its contractors to orchestrate anything that would be anti-QA/QC", PID FOF 114, is cited by the Board as

evidence of management's commitment; CCANF would cite the presence of enough evidence suggesting the necessity of an investigation into a possible conspiracy as proof of management's lack of commitment.

By ignoring abdication of responsibility at the top, the ASLB more easily finds that there was no disqualifying abdication.

"Furthermore, particularly with respect to character, only a limited group of corporate employees may truly be regarded as exercising a sufficient degree of responsibility so as to be deemed to affect an organization's character." FID at 24.

But, if nothing else, a continual stream of unacceptable actions from the lower levels of an organization demonstrates an inability of the upper management to elicit loyalty, or at least quality work, from those for whom management is responsible.

There cannot be success at the top if there is failure at the bottom. When the Superintendent of the Quality Control force says that he operated within a system where quality was a "necessary evil," then the management of that system must be held responsible. See CCANF FOF 8.6 - 8.7.6.

In FID Finding 44, CCANF accepts the ASLB's description of the pyramidal structure of the Quality Assurance program. CCANF would only add to this finding a particular emphasis on the lowest level of the pyramid. Specifically, CCANF would include in the finding the following observation: The proper functioning of the lowest level of the pyramid is the most critical part of the program. If the detailed inspection program is functioning effectively, any failures in the upper part of the pyramid are minimized in their impact; if the detailed inspection program is

compromised, as by intimidation and harassment, the proper functioning of the upper levels will not necessarily rectify the problem of defects not reported in the first place. There is little credit for HL&P in having numerous QA personnel on the site, PID FOF 58, if at the same time B&R is understaffed with QC inspectors. PID FOF 59.

The most disturbing aspect of the ASLB's analysis is that the biggest failures were clearly at the top, where the management system was breaking down at the time the NRC finally stepped in. PID FOF 150.

To support the proposition that HL&P did not abdicate responsibility to HL&P, the Board cites the testimony of Jordan that "HL&P had assigned highly qualified personnel in large numbers to manage STP." PID FOF 118. If Mr. Jordan's testimony is good evidence to support a finding that HL&P did not abdicate responsibility, then that same testimony should be good evidence against a proposition that HL&P had a major problem of inexperience. Otherwise, Mr. Jordan's testimony would have to be read as saying that "highly qualified" did not include "experienced."

But if these "large numbers" of people were inexperienced in constructing nuclear facilities, then they were not, in fact, highly qualified, and assigning them to manage STP showed a failure by HL&P to demonstrate that it took responsibility for STNP.

The ASLB is also aware that the Applicants knew about and acted to cure their inexperience more than once. See CCANP FOF

3.5.

Finding 119 does not in fact support the ASLB's conclusion on responsibility. Amaral expresses his opinion that HL&P did not abdicate too much authority to B&R. Authority is a very different concept than responsibility. To give someone authority is to give them the power to conduct an activity. To give someone responsibility is to give them the ultimate oversight of that activity. In other words, HL&P could give B&R extensive authority to conduct the QA/QC program, but still should have retained the responsibility for assuring the program was in fact conducted effectively. Finding 119 is of no probative weight as to abdication of responsibility.

The ASLB conclusion that HL&P top management did not abdicate responsibility raises a whole new challenge to HL&P's competence and character. In Finding 120, the ASLB stresses that HL&P became "more involved in the project and more sensitive to the importance of its QA program." HL&P forced B&R to take actions and involved itself in more B&R decisions. All of these activities might be commendable, but in two very real senses they condemn HL&P by their praise. If HL&P was in fact more involved as the years went by and more sensitive to the importance of the QA program, then the totally unacceptable conditions found in 79-19 are more clearly the responsibility of HL&P and the QA deficiencies are even more serious in representing the best HL&P found necessary with its supposedly increased sensitivity. In other words, if HL&P was actually calling the shots and truly concerned about QA, then the violations documented in the Order to Show Cause are not evidence of an abdication of

responsibility. They are instead the results of precisely what we can expect to happen if HL&P does get involved and does take responsibility through "progressively closer supervision of the contractor" What happened in the building of STNP is then exactly what we can expect to happen with HL&P fully in charge of an operational STNP.

Furthermore, accepting HL&P testimony about greater involvement and sensitivity to QA only makes it that much more unacceptable that B&R remained on the job and that the ultimate removal of B&R had nothing to do with concerns about the quality of their work.

If on the other hand, we return to the ASLB position that inexperience was widespread, we find that upper management assigned people without experience in QA/QC to head the HL&P program. Of necessity upper management would have to rely on the contractor to assure implementation of the QA/QC program; the very selection of unqualified people for the HL&P QA/QC program is per se abdication of responsibility.

However the analysis is made, the record clearly supports a finding that HL&P either abdicated its responsibility or conducted the project in a totally unacceptable manner. While the ASLB would have the deficiencies in this area reflect only on competence, PID at 44, CCANP contends the character defects demonstrated in the area of responsibility are so substantial and so severe as to constitute an abdication of responsibility and an independent and sufficient basis for license denial on grounds of both competence and character.

4. In essence, the ASLB found that HL&P failed to keep informed, but that this failure was not a character defect.

"HL&P received a large quantity of information about the STP but was unable to assess the significance of much of it." PID at 44.

This conclusion is, of course, a classic example of what CCANP would call a lack of perception.

Once again the Board is giving credit for trying ("received a large quantity of information") rather than focussing on successful implementation ("unable to assess the significance"). This example highlights rather dramatically why CCANP objects so strongly to the extraordinary emphasis the Board gives to willingness. Imagine company management with numerous reports from operators on a problem which could lead to a catastrophic accident, but they are unable to understand the reports and authorize action to be taken to correct the problems and prevent the accident. Do we really care that much that the information reached the top, if the top is unable to assimilate and act upon that information?

The fact that the information reached the top may be to the credit of whoever set up the management organization but it has very little probative weight in deciding whether the company's license should be revoked or not.

If we are concerned with predictive evidence, the prediction to be made here is that HL&P will gather information relevant to serious problems, but it will be unable to assimilate and act upon that information. We can also predict that the corporate board will put into top management people without the necessary perception to recognize serious problems.

E. The ASLB disregarded CCANP's efforts to present a satisfactory model of character.

1. CCANP presented a model similar to the commonly understood definition.

CCANP proposed a set of character traits which are relevant to the operation of a nuclear power plant and which are relevant to an analysis of HL&P's conduct on the record here -- "foresight", "judgment", "perception", "resolve", "integrity", and "values." CCANP does not insist that these traits exhaust the list of relevant traits, but each item on the list is an essential trait. Significant failure to possess any one of these traits raises serious questions about HL&P's character.

The ASLB acknowledged that

"These traits are, of course, generally relevant to character. Indeed they closely track the definition of character which we have found appropriate." PID at 18.

The ASLB definition of character included some traits CCANP used: "firmness", "resolution", "self-discipline", and "force" all fall within CCANP's "resolve"; "high ethics" is within "values"; and "judgment" is a one of CCANP's traits.

All parties agree that "integrity", e.g. honesty and candor, is a character trait relevant to the licensing decision in the nuclear context.

CCANP adds two other traits -- "foresight" and "perception" -- which emphasize the quality of interactions with the outside world. While refusing to accept these categories, the ASLB appears to use them.

"Or, put another way by the Staff, B&R's serving as construction manager, architect engineer and constructor was a 'very ambitious program, especially when you don't have much experience' [cite omitted]." FID at 48 (an example of failed foresight).

"What we fault them for is not their lack of awareness of details but their lack of understanding of the facts which they had before them. This represents in our view a defect in competence rather than character." PID at 43 (understanding is a crucial element of perception).

The latter finding is a clear example of CCANP's perception category of character failures. The difference is that the ASLB looks at the particular deficiency, e.g. an inability to understand particular information, and terms the problem a question of competence.

CCANP looks for evidence of a character trait and finds the lack of perception. An analysis shows perception to be missing from a critical segment of the corporation, of long duration, and responsible for major flaws in the performance of the corporation. Given the severity of the lack of perception, CCANP concludes there is a character defect.

As a predictor of future performance of the would be licensee, this defect suggests that HL&F will put people in critical places who lack the perception to know what is going on, and will leave them there for a long time. The seriousness of this prediction in terms of potential health and safety danger to the public is sufficient for the evidence of this defect to provide an independent and sufficient basis for denying the operating license.

This is the type of analysis CCANP believes Congress envisioned in the Atomic Energy Act and that the Commissioners' envisioned in 12 NRC 291.

If for some reason CCANP is required to perform a remedial analysis of this defect, a possibility CCANP specifically rejects

since the defect was found to be severe enough to provide an independent and sufficient basis for license denial, CCANP then searches for the cause of this character deficiency. CCANP finds the cause of the deficiency to be the Board of Directors' failure to put in place capable managers and to exercise their oversight responsibilities.

If there have been no major changes in the composition of the Board of Directors and in the top management, CCANP would conclude that any remedial acts taken have been inadequate.

For each of its character traits, CCANP provided an analysis explaining the nexus of that trait to a character decision in the nuclear context. See CCANP FOF 3.1, 4.1, 5.1, 6.1, 7.1, 8.1.

2. The ASLB erred by refusing to consider CCANP's analytical model.

The ASLB rejected CCANP's character trait analysis, terming the traits set out by CCANP as

"so broad and ill-defined that analyzing them would give little assistance in providing answers to the questions raised by CLI-80-32." PID at 18.

The ASLB avoids using the CCANP analytical framework despite the fact that it closely tracks their accepted definition of character. The terms CCANP uses are no more broad and ill-defined than those of the dictionary adopted by the ASLB, e.g. "resolution", "self-discipline", "high ethics", "force", and "judgment". In fact, as noted above and by the ASLB the traits selected by CCANP closely parallel those of the definition accepted by the ASLB. To say that analyzing those traits would give the ASLB little assistance is to say either that we cannot define character with enough specificity to reach a conclusion on

whether the necessary character is present and therefore the entire inquiry proposed by the Commission is useless, or that the Board has in fact abdicated its responsibility to define, measure, and set a standard for character.

One reason that the ASLB rejected CCANP's analytical framework was that CCANP used the same facts to demonstrate more than one character trait.

"In that connection, we note that, in applying the facts of record to determine whether HL&P possesses the requisite character, CCANP has utilized many of the same incidents or events as examples of several of the traits it enumerates." PID at 19.

The ASLB suggests that using one incident to demonstrate more than one character trait is somehow not a legitimate approach. Yet surely the various elements of a given incident can illuminate more than one character failing. In its "honesty" and "candor" analysis, the ASLB did not hesitate to use one incident or event to demonstrate both these elements in one trait.

"We will recount just a few of HL&P's efforts which bear on its corporate character. As we have demonstrated, it has been open and above-board in its relationship with NRC." PID at 39.

Here we have the ASLB doing what it says is improper - using one event or series of events to prove more than one character trait. The ASLB has already used the supposed openness of HL&P to show its candor; now the ASLB wants to use the same openness to demonstrate a responsiveness when found in noncompliance which, for the ASLB is a separate trait. CCANP does not object to the ASLB using the same events to show more than one trait; CCANP merely asks that it be given the same opportunity.

Furthermore, the idea that one piece of evidence can be used

to prove only one proposition is clearly nonsense.

Having met the ASLB's criteria for identifying character traits relevant to this inquiry and having demonstrated support for the traits identified in the record, CCANP considers the ASLB to have been under an obligation to analyze any such trait brought to their attention.

F. Had the ASLB adopted an analytical framework truly relevant to the character decision in the nuclear context, the operating license would have been denied.

1. The ASLB standard for character is too low.

In summarizing the "facets of HL&P's character" which they find "pertinent" to the character inquiry, PID at 45, the ASLB reveals the standard for character it intends to apply.

- a. "HL&P has been open and candid with the NRC." PID at 45.

This one finding, if true, would have some probative value in concluding HL&P had the character necessary to receive a license to operate a nuclear power plant.

As noted above, p. 39 et seq., supra., CCANP challenges the ASLB's findings and conclusions on HL&P's honesty and candor. See also CCANP FOF 6.19-6.20.

CCANP contends the ASLB should have looked carefully at this finding in the light of the other ASLB findings. For the ASLB, the key HL&P defect in competence was inexperience, but HL&P denied in its testimony that inexperience was a problem. For the ASLB, I&E Report 77-19

"indicated substantial deficiencies in HL&P's construction quality assurance/quality control (QA/QC) program and cast serious doubt on HL&P's ability to manage construction of the STP." PID at 3.

But HL&P testified that these same findings were only minor problems.

The ASLB should be quoting Federal District Court Judge Miles M. Lord to HL&P:

"It is not enough to say, 'I did not know,' 'It was not me,' 'Look elsewhere.' Time and again, each of you has used this kind of argument in refusing to acknowledge your responsibility and in pretending to the world that the chief officers and directors of your gigantic multinational corporation have no responsibility for its acts and omissions." "A Plea for Corporate Conscience," Harper's, June 1984 at 13.

Rather than admonish HL&P, however, the ASLB turns to inappropriate sources to search for evidence of honesty and candor.

"It demonstrated those same qualities in its relationship with CEU (which resulted in CEU's withdrawal from the proceeding)." PID at 45.

As the ASLB stated, PID at 27, CEU's goal was the removal of Brown and Root. Once Brown and Root was off the project, CEU withdrew. Any openness and candor on the part of HL&P were irrelevant to the withdrawal of CEU. In fact, rather than merely withdrawing after achieving its goal, CEU extracted from HL&P, as the price of withdrawal, a promise to involve a CEU representative in regular quality assurance audits of the project. CEU also reserved the right to reenter the proceedings if, at a later date, it was unsatisfied with HL&P's performance.

b. Evaluating HL&P's responses to noncompliances and nonconformances, the ASLB reveals how low its standard is for finding the requisite character.

The breakdowns in the QA/QC program stand as perhaps the single most significant evidence of HL&P's failure to perform. Ignoring the violations themselves in favor of HL&P attempts to

respond to those violations, the ASLB concludes:

"It has done its best -- although not always with success -- to deal with the many QA/QC problems it faced." PID at 46.

The Board damns with faint praise. If the record of this proceeding reflects the best HL&P can do, then clearly denial is warranted. But is doing your best really a valid standard? In the future, will the character necessary to receive a license to operate a nuclear power plant be judged on the basis of the applicant corporation doing the best it can, whether that "best" is good enough or not?

The "manner in which [the Applicants] reacted to the noncompliances" is not a character trait at all; it is simply a series of actions which require analysis in terms of character traits. This analysis the ASLB fails to do. Instead, the ASLB is satisfied to simply rely on the fact that HL&P made changes in response to problems that it did not identify (perception) and that it did not solve those problems (resolve), e.g. "problems eventually resurfaced." PID FOF 59.

Rather than analyzing the relationship between the changes made and the elements of character, the ASLB is content to rely upon "willingness to remedy" and the "steps it took" without further analysis. PID at 43.

Again, willingness to remedy problems identified by the NRC says very little about the character of an applicant.

c. For the issue of abdication of responsibility, the ASLB sets a standard far below excellence.

The ASLB finds HL&P's abdication of responsibility not disqualifying because HL&P later involved itself more in the

STNP.

"Although it perhaps at first left too much responsibility to B&R, it remedied that situation and became more involved with the project." PID at 46.

This is an Issue B finding, i.e. after being found lacking in the area of assuming responsibility, the ASLB finds they have now assumed responsibility. The first part of the statement is, however, relevant to an Issue A conclusion: HL&P clearly abdicated too much responsibility to B&R.

Again the ASLB has ignored the implications of the abdication standing alone. The essential problem was that there was no one to help. HL&P hired B&R and assumed they would do the job because HL&P had no idea how. When B&R had trouble, there was no one they could turn to for assistance. The abdication is really a function of being unable to help. What good would it do for HL&P not to abdicate anyway, if all that would mean is that matters would get worse because HL&P involvement would be counterproductive? The ASLB ignores these issues in order to consider only the remedial acts.

"Responsibility" can be a character trait, but CCANP found it more useful to break this trait into several components including perception (the ability to stay informed), judgment (the ability to make appropriate decisions on the basis of the information received and the demands of the situation), and resolve (the ability (the ability to follow through on decision and make sure they are carried out)). CCANP showed that HL&P failed on all three counts.

The ASLB again relies upon "willingness to remedy," PID at 43, as a basis for now showing that HL&P took responsibility. The

ASLB also attributes any problems here, as elsewhere, to "inexperience" rather than to lack of character, without doing any analysis of whether inexperience itself is evidence of irresponsibility.

The ASLB standard is that an applicant willing to be responsible but unable to be, primarily because of inexperience, qualifies under an NRC standard of character. Such a standard is set far below the standard of performance CCANP contends is expected of a truly responsible applicant.

d. The ASLB found that HL&P failed to keep informed but that they tried.

"It also exposed itself to great quantities of project information, although it was not always sufficiently knowledgeable to react properly to that information." PID at 46.

The quantity of information tells us nothing about the quality.

More importantly, the inability to understand the information says far more about character than does the amount of information that HL&P exposed itself to.

To summarize the ASLB's findings on character:

- 1). Was HL&P honest and forthright? ASLB: Yes
- 2). Did HL&P respond to nonconformances and noncompliances when they arose? ASLB: Yes, but not always successfully.
- 3). Did HL&P abdicate too much responsibility to B&R? ASLB: Yes, but they later acted more responsibly.
- 4). Did HL&P attempt to keep informed? Yes, but mainly without success.

Even the ASLB findings on the issues as redefined by the

ASLB for purposes of the PID add up to what can be described at best as a fair-to-poor record. To conclude from these findings that

"HL&P has not demonstrated character deficiencies which would preclude the Applicants from being granted operating licenses for the STP," PID at 46,

is to set too low a standard for a nuclear licensee's character.

To even get HL&P that high on the scale required ignoring significant evidence and the implications of that evidence. A more realistic assessment using the ASLB-redefined issues is that HL&P's record was poor and precludes them from being granted an operating license for STNP.

2. A rigorous analysis of past acts as an independent and sufficient basis for license denial would produce a decision to deny.

If the acts of HL&P are not sufficient to provide a basis for license denial, then those acts will henceforth be available to other applicants who perform similarly to cite as precedent for non-denial. If it accepts the ASLB approach, the Commission will be moving along the path suggested by the Staff position that HL&P's performance was not so poor that they lacked the necessary character.

Trying to define what would in fact be conduct so poor as to require license denial is the "lowest common denominator" approach in contrast with emphasizing the level of excellence required which is the "highest common denominator" approach. The potentially hazardous technology at issue requires the highest common denominator approach.

The nuclear power industry is unique in that it has been

developed from a technology created by the federal government, and its authority is carved out of a government monopoly. It is unlawful to possess nuclear materials or equipment without a license from the federal government. The industry has been subsidized by the government. The federal government insures the industry and protects it against third party liability. Costs, even those which might result from the utility's negligence, are paid by utility ratepayers at regulated rates. The monopoly structure of the utility industry insulates the industry from competition.

Moreover, the social costs of the industry, for example the generation of long-lived highly dangerous and toxic wastes, are largely assumed by the government or are transferred to the victims of radiation. The virtual impossibility of proving causation of individual radiation injuries by any particular emissions from a nuclear power plant precludes tort liability from serving its traditional role of deterring health and safety violations.

Since even losses of the utility's own capital plant may be recovered through increased utility rates in a monopoly market, this potential deterrent to careless construction or operation of a nuclear power plant is also weakened.

These broader realities of the nuclear industry provide the context for this case. The lack of any other deterrent to careless practices in the nuclear industry places the full burden of deterrence upon the regulatory process presided over by the Nuclear Regulatory Commission. The ASLB in this proceeding has accurately described the fundamental objective of this regulation

as follows:

"our ultimate finding of fact must determine, *inter alia*, whether there is reasonable assurance that the Applicants will (i.e., have the character to) observe the Commission's health and safety standards." PID at 16.

The adequacy of the Applicants' character was drawn into question by events and investigations leading up to the Order to Show Cause. These hearings were held to determine whether there should be an early decision to deny the license in light of the Applicants' failure to satisfy NRC requirements. The issue most crucial to that determination was to be the Applicants' character.

The ASLB in this case has attempted to define for the first time the nature of the character traits necessary to receive an NRC license, and has attempted to apply its definition to the record of Applicants' performance. Though much of its analysis is useful, the ASLB ultimately failed to develop a model for analysis of corporate character sufficient to satisfy the Atomic Energy Act.

CCANP contends that the failure to develop such a model resulted from the ASLB avoiding in every way possible being brought to the point where license denial would have to be seriously considered. Apparently at the heart of the ASLB's aversion to confronting the ultimate possibility of license denial is the ASLB view of such a denial as punishment.

"Moreover, our role in this proceeding is not to punish an applicant for past infractions." PID at 22.

Rather than "punish" HL&P, the ASLB looks for an explanation or reason (e.g. inexperience), as well as repentance (e.g.

remedial acts), in order to forgive (i.e. not deny the license).

A natural result of this approach would be to focus on what happened after HL&P was caught, and not on the violations themselves.

CCANP contends that this ASLB view of its task is contrary to fact and law and that it led the ASLB to conduct the wrong kind of inquiry.

Treating denial of a license as punishment directly contradicts the basic law underlying NRC licenses, that they are not rights but privileges. It has been long established that no amount of investment in a nuclear power plant vests any right to a subsequent license. Power Reactor Development Co. v. Electricians, 367 U.S. 396 (1961). While this rule may be hard for some to accept, it is similar to other laws, such as strict liability, which exacts a high penalty from those who take the risk of engaging in a dangerous enterprise but fail to perform adequately.

Denial, however, is not a punishment. Denial of the license is denial of a privilege to an applicant who has been found unworthy.

CCANP's analysis starts from the assumption, supported by law, that a license is a privilege, not a right. The grant of this license requires a showing of good character, if that issue is first raised by sufficient facts. Once the licensee's character has been shown to be inadequate, a heavy burden falls upon the applicant to show that its character has not been so unsatisfactory that it is now disqualified. In making this

analysis, past established facts must be given greater weight than future untested assertions and promises.

By "punishment," the Board must mean lost investment resulting from the plant not going on line. Consideration by the ASLB of this investment is specifically forbidden. *Power Reactor*, supra.; See also 12 NRC 289; CCANF FOF 2.10.

The Applicants take the risk that their performance under the construction permit will lead the NRC to predict that they could not be trusted to protect public health and safety should they be given an operating license. The Applicants are given the opportunity to perform up to a certain standard and thereby to engender in the NRC confidence that their operating performance will be of an equally high character. If the Applicants' performance does not engender such confidence, then denying the privilege of an operating license is not a punishment; it is simply the Commission telling the applicants that they have been found to lack the necessary qualities to be given the privilege of operating a nuclear reactor. Why else would they be called "Applicants"?

Giving a license to operate a nuclear power plant is a tremendous responsibility. The operation of a nuclear power plant is a tremendous responsibility. The seriousness called for by the decision on licensing mirrors the seriousness of the danger if the decision is in error.

In analyzing the question of whether the privilege should be granted, the ASLB took an extremely lenient approach with the Applicant, an approach that was unwarranted by law. The PID's findings amount to little more than a holding of law that the

Applicants deserve a second chance. Such acts of mercy may be appropriate in the criminal courts where judges are given broad discretion to adjust punishments to take into account certain factors, such as rehabilitation since the time of the crime. But no such leeway is allowed in a nuclear power plant licensing proceeding.

The public who could be injured by an unqualified nuclear licensee is not given a second chance. The weight of this consideration must far outweigh the ASLB's sentiments of forgiveness which might otherwise be worthy in a criminal proceeding. If the privilege to operate a nuclear power plant is given based on some misplaced sense of compassion for the Applicants, thousands of lives could be lost. The only compassion that should be controlling here is a protector's compassion for these potential victims.

The ASLB's decision and its conduct of the hearings fully demonstrates the "promotional" attitude toward the nuclear industry for which the NRC has been repeatedly criticized. A record was presented to the ASLB which demonstrated a lack of character. With little analysis, the ASLB concluded that certain "remedial" actions, some of which were not even tested through the adjudicatory hearings, were sufficient to warrant immunity from the consequences of inadequate character.

In one sense the ASLB is correct. It's role is not to punish the Applicants, so neither is its role to consider mitigation to punishment.

In their findings of fact, CCANP has proposed a set of

character traits which are relevant to the operation of a nuclear power plant and which are relevant to an analysis of the Applicants' conduct shown on the record of this case. CCANP concludes that had the ASLB in Phase I of this proceeding conducted an inquiry into and reached a decision on the character of the Applicants in an appropriate analytical framework, the decision would have been to deny the application for the license.

V. Intervenor Contentions

In order to make maximum use of its limited resources in the areas of most importance, CCANP did concentrate on the central issue of character and did not present findings on most of the contentions.

The Board takes the position that the contentions for which CCANP did not submit findings could be treated as abandoned and that the Board has the discretion to make findings and conclusions on those issues anyway. PID at 67. The Board proceeds to render an opinion on all the contentions. PID at 67 et seq.

But the Board decided only to make findings and conclusions "narrowly" on each deficiency standing alone, i.e. not to decide "whether the deficiencies when aggregated, are indicative of an overall construction QA/QC program that is or was so defective that there can be no reasonable assurance that STNP has been constructed adequately and can be operated safely." PID at 66.

CCANP takes exception to the Board's refusal to consider now, if at all, the findings and conclusions on the individual contentions affect the overall judgment on Issue A. As the Board notes, "the specific allegations contained in Contentions 1 and 2

are pertinent to the CLI-80-32 issues on which the Board is charged with rendering an opinion by the Commission." Having decided in their discretion to make findings and conclusions on these contentions, CCANP contends the Board was then bound to incorporate those findings and conclusions into the findings and conclusions on Issue A.

The only reason for not incorporating these findings and contention would be that the particular deficiency identified in the contention had already been dealt with in the earlier parts of the opinion. There is no indication from the Board as to which of the contentions it considers to be previously dealt with in the opinion.

Also, since the Board exercised its discretion to make findings and conclusions, CCANP asserts its right to take exception to the findings and conclusions. In order to use its resources efficiently and concentrate on the most important contentions, CCANP will address only those contentions which it believe represent both significant evidence of character and/or competence and on which CCANP holds a divergent view from that of the Board.

A. Contention 1.1

CCANP agrees for the most part with the Board's findings regarding the substance of the contention. But CCANP takes exception to the Board's overall judgment of the importance of the contention and the testimony of the Applicants on this contention.

The Applicants constructed a major building one foot short of its designed length. PID at 67. As the Board notes, the

Applicants admitted that this error resulted from poor surveying practices and that there was no procedure for or inspection of actual surveys at the time the error was made. PID at 68.

The Applicants denied that the lack of an inspection procedure or of actual inspection violated 10 C.F.R. Part 50, Appendix B. Id. The Applicants took the position that such inspection was impractical. PID at 69. Finally, the Applicants contended that the only Appendix B requirements relevant to surveying were reviewing survey procedures, calibration of instruments, and annual audits of records. PID at 69, 71.

The Board properly rejected all of these positions. The Board found that Appendix B should not be applied narrowly but rather as requiring the inspection of the surveying of buildings. The Board rejected the Applicants "impractical" position, in part based on the fact the Applicants actually did set up an inspection program. PID at 69-71.

But having found that Applicants violated Criterion X of Appendix B, PID at 72, the Board immediately goes to the remedial measures adopted.

CCANP would go on to fit the contention findings and opinion into the issues. Under Issue A, CCANP would find that the total absence of any effort to verify a survey prior to construction is evidence of a negligent attitude. While this particular deficiency did not end up being safety-related, the Applicants still had to reengineer the penetrations into the building and design a new equipment layout. A simple common sense concern for costly errors would lead to an inspection process for such a potentially expensive error. Such a negligent attitude is

evidence of a lack of character.

Even accepting arguendo the Board's inexperience excuse, this deficiency has nothing to do with experience since B&R is one of the most experienced building contractors and HL&P is one of the largest utilities in the United States.

Furthermore, the Applicants' testimony denying that Appendix B required such inspections is at least one indication that throughout the project the Applicants interpreted Appendix B very narrowly.

Finally, the insistence as late as the hearings on the operating license that no such inspections were required by Appendix B is an indication that no true remedy of this situation ever took place. Adopting a procedure simply to satisfy the NRC while denying the underlying rationale for the procedure, i.e. the implementation of Appendix B, is evidence of a failure to truly remedy the deficiency.

B. Contention 1.2

The Board's findings and conclusions on the concrete voids are an excellent example of how the Board's use of the concept of experience is inappropriate. See PID at 74-75. The voids detected in the concrete containment walls occurred primarily in the upper portions of those walls after numerous similar lower pours had been completed, providing experience in just such pours.

Furthermore, the factors contributing to such voids were not uniquely nuclear factors, e.g. restricted access and visibility, insufficient vibration, equipment malfunctions, delays, fatigue, and inadequate lighting are potential problems in any complex concrete pour.

Finally, B&R is one of the largest constructors in the United States. Are we really to believe that they lacked the experience to pour a ten foot section of wall four feet thick, particularly since they had done so on this project numerous times prior to the pours containing voids?

The Board's inexperience excuse simply does not ring true in light of the evidence. A more logical explanation is that cost and schedule pressures produced conditions where actions were taken that would otherwise have been avoided and that these actions produced safety-related deficiencies in the work.

If Brown and Root was feeling cost and schedule pressures, those pressures were coming from the Applicants. That safety-related deficiencies resulted from such pressure is a reflection of the Applicants' lack of concern for safety compared to cost and schedule, a reflection on their values and therefore on their character.

The last two sentences of the opinion on this contention, PID at 74, should be read in the light of B&R's lengthy prior and on the job experience. CCANP would rephrase the conclusions to read:

An experienced constructor like Brown and Root would never have permitted a pour under the conditions reflected in this record had there not been cost and schedule pressures brought by the Applicants. Moreover, Brown and Root QC might well have prevented and/or caught such deficiencies had it not been for the translation of the Applicants' cost and schedule pressure through B&R construction to B&R QC.

C. Contention 1.7(a)

CCANP disagrees with the Board's approach to the function of QC inspectors. CCANP contends that if an inspector has a question

about whether a revised design was in fact approved by an appropriate engineer, that concern may well arise from the QC inspector's personal knowledge of other jobs or of previous parts of the same job. If there is any doubt, the QC should be allowed to eliminate that doubt. The Board saying that verifying design changes is the function of Design Engineering and not QC ignores the fact that what QC was trying to do was confirm that Design Engineering had in fact approved the design change. The evidence in the record supports that a memorandum was written to prevent QC inspectors from confirming that Appendix B had been complied with.

CCANP would find this contention to be confirmed and find a violation of Criterion I (in that the authority and organizational independence of QC was restricted) and Criterion III (in that when a question about design arose, the opportunity to assure proper design changes were being made was denied).

D. Contention 1.7(e)

The Board correctly finds that the "incidents of harassment of QC inspectors at STP were frequent enough to represent a serious indictment of B&R's managerial competence." The Board also finds correctly that:

"Although B&R (assisted by HL&P) took steps to eliminate the harassment, the record does not reflect whether, if it had remained on the project, B&R would likely have succeeded in doing so. The recurrence over the course of several years of incidents of harassment, notwithstanding attempts to eliminate them, create certain doubts in this regard."

The Board is concluding that all the corrective measure taken by B&R and HL&P to eliminate harassment and intimidation of inspectors were unsuccessful and would probably have continued to

be unsuccessful had Brown and Root remained on the job.

CCANP would consider this a devastating finding on Issue A, both for character and competence. Since the removal of Brown and Root had nothing to do with the quality of their performance, apparently the continuing harassment and intimidation of the inspection force was not a matter of sufficient concern for HL&P to fire Brown and Root, even though HL&P knew what was going on. HL&P's continued indulgence of B&R's violations of fundamental safety-related requirements is a character defect demonstrating a lack of values and lack of resolve.

The fact that HL&P could not get Brown and Root to effectively control harassment and intimidation of inspectors is highly probative evidence of a lack of competence on the part of HL&P (assuming we are using the Board's concept of competence, not just technical competence as the Commission used the term in CLI-80-32).

CCANP would find that the chronic and widespread intimidation and harassment violated not only Criterion II as the Board finds, PID at B2, but also Criterion I (failure to retain responsibility for the QA/QC program, failure to assure the establishment and implementation of an appropriate QA/QC program, and failure to ensure the authority and organizational independence of quality assurance inspectors), Criterion X (failure to establish and execute a program for inspection of activities affecting quality), and Criterion XVI (failure to take effective corrective action to prevent recurrence of intimidation and harassment of inspectors).

E. Contention 1.8(a) and (b)

"Moreover, the Applicants' unimpeached and uncontroverted testimony demonstrates that HL&P acted decisively and promptly to correct the access engineering problem." PID at 84.

In fact, just the reverse is true. The whole reason the allegations in I&E Report 81-28 arose was the failure of Brown and Root to respond to the repeated nonconformance reports of HL&P QA regarding access engineering. HL&P QA wanted to issue a stop work order on all Brown and Root work because HL&P had been unable to get B&R to respond to this concern.

F. Contention 1.8(c)

Contrary to the Board's position, the evidence demonstrates that the HL&P QA director made a statement in conflict with NRC requirements and then issued a clarifying letter after an NRC investigation began. See CCANP FOF 6.31.1.

G. Contention 1.8(d)

Contrary to the Board's position, the entire affair regarding the inspection process reveals that HL&P did not have available the procedures necessary to implement their QA program effectively and refused to permit the QA inspectors to use higher tier documents to do the job.

V. Issue B

CCANP, of course, contended that Issue B never belonged in this proceeding. Failing to win that argument, CCANP concluded that HL&P had not adequately remedied its lack of character and that HL&P's current competence was unknown. See CCANP FOF 10.0-10.32

A. The ASLB erred in treating the ending of B&R's involvement in STNP as a remedial act that supported a conclusion that HL&P had remedied its character deficiencies.

Repeatedly, the ASLB treats the removal of B&R as a dramatic remedial step by HL&P having great probative weight for both character and competence. The ASLB says the removal was the most significant response by HL&P to nonconformances and noncompliances, PID at 40, an "important step," Id., "the most extreme corrective action possible," Id., and "a testimony to [HL&P's] character." Id.

The ASLB earlier said:

"[A] [character] trait should only be considered if it evinces a willingness and propensity, or lack thereof, on the part of an applicant to observe the Commission's health and safety standards [footnote omitted]." PID at 15-16.

While the removal of B&R is not per se a trait, presumably the act of removal somehow demonstrated to the ASLB the presence of the willingness and propensity the ASLB is looking for.

A careful examination of the B&R removal leads to an opposite conclusion.

First of all, if B&R had stayed on the job, the ASLB says it would have considered license denial on competency grounds. PID at 51.

Second, it is important to note that HL&P fired B&R only from its position as architect, engineer, and construction manager. HL&P wanted B&R to remain as constructor and QA/QC. See CCANP FOF 6.32.

Third, HL&P took an inordinately long time to realize that B&R could not succeed as architect, engineer, and construction manager. See CCANP FOF 6.33.

Finally, the partial firing of B&R did not result from concerns about the quality of B&R's work, PID at 40, but rather from lack of productivity, PID FOF 125.

Given these facts, the removal of B&R in no way demonstrates a willingness and propensity to observe NRC regulatory standards.

B. The key management figures responsible for the failure of HL&P remain in place.

The problem for HL&P is at the top. Changing the prime contractor does nothing about the lack of ability at the top. Those who failed to perceive the inability of their previous prime contractor to achieve a quality plant are not fit to continue as the major supervisors of the construction.

More importantly, when the construction is finished, Bechtel and Ebasco will be gone. The decisions on continuing operation will be made by the same two top people who let the project get out of control in the first place. The selection of Bechtel and Ebasco to complete construction predicts nothing about operation when Houston Lighting and Power will be on its own.

To predict operations performance, we must look both at the performance of those who will be in charge of operation, i.e. Jordan and Oprea, and at the performance of those responsible for those in charge holding their position, i.e. the Board of Directors. What we find is that Jordan and Oprea failed miserably when it came to ensuring a quality plant was being built and that the Board of Directors failed to discipline or remove these two officers when their failing became a scandal. The failure to remove, discipline, or even give special instructions to Jordan and Oprea demonstrates the lack of any remedial action at all.

The prediction then must be that if HL&P is entrusted with the operation of STNP, Jordan and Oprea will probably let problems get out of control again and the Board of Directors will do nothing about it.

C. The remedial actions by top management indicate very little real change in their attitudes or expertise.

"The circumstance that Messrs. Jordan and Oprea attempted to improve their competence in QA matters, as in attending the Crosby College seminar (Finding 215), reflects favorably upon their character (as well as that of HL&P)." PID at 43-44.

Were this proceeding not such a matter of great seriousness, this finding by the ASLB would constitute an attempt at humor. The seminar proffered as evidence that Mr. Jordan sought out training in QA to improve his competence lasted precisely one day. See CCANP FOF 8.7.2. Rather than reflecting favorably on HL&P's character, this desultory swipe at gaining competence in QA is further evidence of a lack of concern for quality on the part of top HL&P management. That the ASLB would find this evidence convincing as even a remedial act is a clear indication of how anxious the ASLB is to find something to excuse HL&P's dismal performance.

VI. Due Process

CCANP contends that both in the PID and in the conduct of the proceeding itself, the due process rights of CCANP as an intervenor were systematically violated. These violations took the form of bias by the ASLB toward HL&P, hostility by the ASLB toward CCANP, and procedural error detracting from CCANP's right to a fair hearing and an opinion rendered on the issues as litigated and the evidence as admitted.

On the issue of bias, the finding is to some extent in the eye of the beholder -- certainly an advocate will be quicker to cry foul when on the losing end of a decision. CCANP can only highlight what it considers to be evidence of bias and leave to the objective judgment of the ASLB whether those instances are harmless differences of opinion or favoritism by the ASLB toward the Applicants.

A. In the opinion itself, the due process violations are evident.

1. The ASLB showed a clear bias toward HL&P.

The clearest bias in favor of HL&P was the manner in which the ASLB addressed the issues in this proceeding.

First, the ASLB severely narrowed the possible traits which could produce license denial (for competence, none; for character, immutable defects). Then the ASLB brought in remedial material at every opportunity while ostensibly making findings or conclusions on Issue A. These ASLB actions directed attention away from the serious violations committed by HL&P and into areas where HL&P looked better.

The ASLB also showed bias toward HL&P by using negative or neutral evidence as if it were favorable to HL&P.

The ASLB gives favorable credit in the character inquiry to HL&P because

"[d]uring NRC's 79-19 Investigation, after early preliminary reports of numerous nonconformances in many areas, HL&P began corrective actions well before the NRC had completed its investigation and issued its report." PID at 39.

HL&P was fully aware the NRC was finding noncompliances. Their actions were no more than an attempt to head off an enforcement

action they knew was coming. The ASLB is reaching out for actions with no real value in demonstrating good character and moving them to center stage.

The evidence surrounding the end of B&R's involvement in STNP is no credit to HL&P but the ASLB gives the event a major role in showing HL&P's good character.

When harassment becomes so bad that HL&P has to require B&R to adopt a special procedure for resolving disputes, not required at other nuclear plants, the adoption of the procedure is favorable in the ASLB view, rather than clear evidence of a breakdown more serious at STNP than at other plants. PID at 39.

Again, as in the removal of B&R, HL&P gets favorable treatment for letting things get so out of hand that only drastic action can correct them.

Sometimes the ASLB takes negative evidence and simply makes it disappear. Even though HL&P's failure to hire any consultants in the QA/QC area over a five year period constituted a major failing, the ASLB can still find that "[w]here necessary, HL&P and B&R were also willing to hire consultants or subcontractors." PID at 47.

There is a due process question involved in the ASLB's heavy reliance on inexperience for its opinion and findings. The Applicants, with the burden of proof, put on their case arguing that they had highly qualified people in charge of STNP. The Applicants in fact take that position throughout the proceeding. See PID FOF 118. When the ASLB finds inexperience as a major cause of the problems at STNP, the ASLB is finding that HL&P did not meet its burden of proof. But rather than follow a logical

progression from a failure to meet the burden of proof, the ASLB turns this failure into a success, i.e. assumes the testimony of the Applicants was simply in error as to their capabilities and excuses their performance on the basis of inexperience. CCANP was certainly not on notice that the ASLB intended to use inexperience in this manner. In fact, the logic of the Board's position is that CCANP should have proven that HL&P did in fact have highly qualified people (experience being part of their qualifications) in place at all times when things were going wrong at STNP. Reason dictates that CCANP could not possibly have known that such proof was required by the intervenor.

Finally, the ASLB takes all the evidence on how HL&P responded after being caught violating NRC regulations and elevates that evidence into a major positive character trait, an elevation unwarranted by the nature of this evidence. Furthermore, the ASLB treats this evidence as equally valuable to predict future performance as is the evidence of past acts not taken in response to an enforcement action. But the remedial actions the ASLB concentrates on are the equivalent of coerced actions, coming as they do in response to enforcement action. As such, these actions say little about the character of the actor.

2. The ASLB demonstrated repeated hostility toward CCANP's efforts.

The ASLB dismissed CCANP's extensive work on the definition of character as being "broad," "ill-defined," and of "little assistance." PID at 16.

The ASLB criticized CCANP for using one piece of evidence or one event to illuminate more than one character trait.

The ASLB repeatedly distorted CCANP's actual position in order to make CCANP appear more rigid or in order to avoid the full implications of CCANP's arguments.

"But if by this claim CCANP means to assert -- as we believe it does -- that attempts to achieve quality should not be taken into account in evaluating character (irrespective of the degree of success of those attempts), then we must demur from that position. In our view, attempts to achieve quality are pertinent to character." PID at 41.

The CCANP findings cited by the ASLB just before this statement do not support the ASLB's characterization of CCANP's position.

First of all CCANP is answering a position asserted by the Staff, a very broad position that trying manifests good character. CCANP FOF 2.17 specifically rejects a willingness to implement corrective actions as irrelevant and argues that a show of willingness cannot excuse violations of NRC requirements; 2.19 demonstrates that the broad use of the term willingness is not helpful to the analysis; 2.27 looks for trying "in ways pertinent to relevant qualities of character"; 2.29 states that "[m]ore than mere gestures that can be cited as 'trying' are necessary to reflect good character"; 2.42 expressly rejects the position that there must be a lack of trying in order "to reject an application on character grounds." From these citations, it should be clear that CCANP never said "attempts to achieve quality should not be taken into account." The ASLB is merely discrediting a position CCANP did not take. This is part of an ASLB pattern of making CCANP appear more doctrinaire and rigid in its positions than CCANP really is. CCANP agrees that attempts to achieve quality provide circumstantial evidence of values and are therefore relevant to the character inquiry.

"For example, the record citations [by CCANP] which are said to demonstrate a lack of familiarity with details on the part of Messrs. Jordan and Oprea do in fact reflect that neither office was aware of every single project detail. Nor would we expect them to be. In our view, both of them have been exposed to a level of detail commensurate with their corporate positions [cite omitted]." PID at 43.

The record citations cited, i.e. CCANP FOF 5.24.[1] - 5.24.8, do not support the conclusion that CCANP's position was that Jordan and Oprea should have been "aware of every single project detail." This is a deliberate distortion by the Board of CCANP's position; the ASLB can look at the citations and decide whether CCANP has identified the type of information Jordan and Oprea should have known.

"The gist of CCANP's claim is that HL&P never really perceived the difference between building a nuclear and a fossil-fired plant and, for that reason, was unable to deal successfully with the QA/QC requirements inherent in constructing a nuclear plant." PID at 45.

In fact, while spending some time on the lack of a nuclear versus fossil fuel perception on the part of HL&P, CCANP stated:

"While obviously of great importance, HL&P's failure to adequately distinguish between fossil and nuclear plants is only one in a long series of failed perceptions." CCANP FOF 5.20

CCANP then proceeded to document many of those other failed perceptions, almost all of which are generic, i.e. not related to the fact that a nuclear plant was being built, such as the need to continually use strong words to get the attention of the contractor, the need for a special dispute resolution procedure, and the high turnover of contractor supervisors. CCANP pointed to these as problems of HL&P unrelated to whether they knew they were building a nuclear plant or not. For the ASLB's purpose of using inexperience to excuse practically everything, it was

useful to characterize a major finding of CCANP as the "gist" of CCANP's position, since HL&P is clearly experienced in hiring a contractor to build a large power plant and, therefore, experienced in the types of problems that arise on any large construction project, whether nuclear or not. The ASLB can then credit CCANP's observations as "well founded" but then sweep them away with the lack of experience broom.

3. The ASLB committed numerous procedural errors in its opinion and findings that denied CCANP's due process rights.

First and foremost, the ASLB approach to this proceeding as a "punish or forgive" question colored the entire record and the PID.

The ASLB never provided a clear explication of the standard that would be used to judge character.

The ASLB made numerous conclusions contrary to the evidence.

"Here, however, the record shows that the history of nonconforming or noncomplying conditions (including the incidents of harassment) was caused not by a lack of corporate character but, instead, by inexperience on the part of both HL&P and its contractor, B&R." PID at 40.

The record evidence is in fact to the contrary on the issue of intimidation. HL&P knew from direct experience that on large construction projects such friction generally occurred. CCANP FOF 3.5.

The ASLB decided that for purposes of the character analysis in this proceeding, the parties and ASLB would analyze only character traits that have a nexus to a particular nuclear performance standard and that are reasonably inferable from the record. The ASLB, therefore, should have rendered an opinion and made findings on the CCANP traits or explained why any particular

trait lacked the appropriate nexus or was not properly inferable from the record.

The ASLB rejects a major analysis by CCANP regarding the preconditions on the Bechtel study of HL&P's possible QA organizational options for HL&P. The ASLB states:

"They [the CCANP allegations] are based on statements out of context and, in fact, amount to a distortion of the record when viewed as a whole." PID at 35.

There is no explanation as to which statements are taken out of context or how the record as a whole is distorted. It is impossible for CCANP to appeal this attack when no specifics are given.

This same statement shows hostility toward CCANP. For the "most important" item, we would expect the ASLB to give a detailed reason for rejection rather than a thin blanket dismissal. CCANP spent a great deal of time piecing together the proof of this allegation. Just like CCANP's work on defining corporate character in the nuclear context, the ASLB ignores CCANP's work on showing a deliberate deception of the Commission by the Applicants.

B. The ASLB failed to accord CCANP its procedural rights under the Administrative Procedure Act, NRC regulations, and the Fifth Amendment.

1. CCANP was entitled to the procedural rights granted by Section 554 of the Administrative Procedure Act.

Operating license proceedings are governed by Section 554 of the Administrative Procedure Act (APA). 5 U.S.C. Section 550 et seq. Section 554 governs any adjudication required to be "on the record." An operating license proceeding is an "on the record" hearing as that phrase is used in Section 554(a). Although

Section 189(a) of the Atomic Energy Act does not use those exact words, straight-forward analysis compels this conclusion.

It is well settled that no great magic resides in the phrase "on the record." Instead, the applicability of Section 554(a) turns on the substantive nature of the hearing Congress intended to provide. Seacoast Anti-Pollution League v. Costle, 572 F2d 872, 876 (1st Cir. 1978). Congress certainly intended licensing hearings to be held pursuant to Section 554 of the APA. Although the Atomic Energy Act does not elaborate on the type of hearing required prior to the issuance of an operating license, the legislative history of Section 189(a) states that the procedures required by the APA should be used. Since an operating license hearing is clearly adjudicatory, and since Section 554 is the sole APA provision concerning the procedures to be used in an adjudication, Congress could only have intended that operating license proceedings be governed by Section 554.

In any case, the NRC has, as a matter of practice, traditionally conducted its hearings as "on the record" hearings. An "on the record" hearing has been defined as one in which the parties have the right to know and to meet the evidence upon which the decision-maker will base its conclusions. Long Island Railroad Company v. U.S., 318 F.Supp 490 (E.D.N.Y. 1970). NRC regulations clearly contemplate such a hearing. Parties have the right to introduce all relevant evidence, and all decisions must be substantially supported by the record. 10 C.F.R. Section 2.743(a). Having already conducted this hearing without prior notice that existing practice would not be followed, the NRC would now be estopped from characterizing this hearing as not "on

the record." City of West Chicago v. NRC, 7 F2d 632 (7th Cir. 1983).

a. The ASLB's bias in favor of the Applicants and hostility towards CCANP deprived CCANP of the impartial hearing required under the APA.

The conduct of these hearings is further evidence of bias in the panel. APA Section 556(b) requires the employees participating in decisions such as this one to conduct their functions impartially. CCANP challenged Judge Hill for bias. The Atomic Safety and Licensing Appeal Board voted to remove Judge Hill from the panel in this case. Although the Commission reversed at decision, CCANP contends that the presence of Judge Hill on this panel infected this proceeding with incurable bias. Only if CCANP prevails in its position, i.e. the license is denied, would this taint be harmless error. CCANP is the only remaining party to the Phase I proceeding prejudiced by the conduct of the hearings.

It would be unwise to examine the record in this case without being mindful of the relationship between bias and the manner in which these hearings were conducted. Many of the panel's rulings can be explained in no other way. As the actions of the ASLB are exposed in the course of this appeal, it should be clear that this hearing was not conducted impartially as required by Section 556(b).

b. The ASLB used time pressures to prevent CCANP from completing sufficient cross-examination to fully disclose material evidence.

Section 556(d) provides that parties are entitled to such cross-examination as may be required for a full and fair disclosure of the facts. This right is limited only to the extent

that the cross-examination becomes irrelevant, immaterial, or unduly repetitious. Failure to allow relevant, material, non-repetitious cross-examination is grounds for reversal, if the failure is prejudicial. See NLRB v. Burns, 207 F.2d 434 (8th Cir 1953).

At Tr. 5060, the ASLB required CCANP to supply a cross-examination plan. The ASLB announced that it would cut off cross-examination at the end of what they considered to be reasonable time. Clearly, this is a purely arbitrary limitation which has nothing to do with the only acceptable criteria for limiting cross-examination: irrelevancy, immateriality, or repetitiousness. Even if the ASLB was basing its decision to cut off cross-examination on these criteria, the proper sanctions would be to strike the improper questions, rather than to entirely deprive a party of its rights to proper cross-examination.

The ASLB actually forced or threatened to enforce this method of time limitations on several occasions. See Tr. 6818, 9482, 9917. Even if it had not ever carried out its threat, it would be grounds for reversal. Conducting cross-examination in such an oppressive atmosphere, could only have been impaired the effectiveness of CCANP counsel. Assuming arguendo that the measure did expedite the hearing, it could only do so by impermissibly abridging CCANP's right to careful cross-examination. Having no permissible benefit, and imposing needless burdens on cross-examining counsel, even if never actually enforced, this measure would be contrary to the APA policies of free admission of evidence.

On the occasions when the ASLB actually cut off cross-

examination, CCANP was attempting to probe critical areas of testimony. The ASLB's refusal to allow this probing prejudiced CCANP's efforts to bring relevant material evidence into the record. CCANP contends that the attitude of the ASLB encouraged the Applicants to engage in delaying objections in order to force CCANP to decide between introducing evidence and conducting cross-examination. See [CCANP] Motion to Resume Cross Examination (dated July 15, 1980).

Furthermore, the ASLB has threatened to use similar impermissible limitations on CCANP's cross-examination in the future. PID at 100. The ASLB criticized CCANP for not filing many proposed findings on technical issues which were the subject of extensive cross-examination. Because CCANP did not file as many findings as the ASLB would have liked, the ASLB threatened to limit CCANP's future cross-examination. *Id.*

This threat is impermissible for the same reasons that the ASLB's previous threat, Tr. at 5060, was impermissible. It is all the more onerous since it was the ASLB that originally encouraged CCANP to concentrate its findings on those issues it felt were most important. Tr. at 10656-57; PID at 29.

The ASLB's threat during the hearings, Tr. at 5060, and the resulting limitations on CCANP's cross-examination severely prejudiced CCANP's ability to build a complete record. The new threat made in the ASLB's PID indicates that the ASLB will continue to abridge CCANP's rights in the future.

c. The ASLB improperly limited CCANP's cross examination for reasons which having no basis in law.

The ASLB sustained objections to CCANP's questions because

they made assumptions as to what the witnesses testimony would be, Tr. at 9773-74, because the ASLB felt some questions were too broad, See e.g. Tr. at 9374, and because the ASLB did not like the wording of some questions, Tr. 9837-39, 9914. These errors were not isolated incidents but rather occurred between transcript pages 9326 and 9914, a period of roughly three days of hearings.

In this part of the hearing, members of the NRC Staff were on the stand. Among other things, they testified that HL&P had the character and the competence required to receive an operating license. In the PID, the ASLB relied heavily on this testimony. CCANP's objectives in cross examination were to determine the reliability and completeness of the information upon which the Staff based its testimony and to determine the NRC Staff's definitions of character and competence, as used in their testimony.

The ASLB thwarted CCANP's every attempt to accomplish these objectives. In addition to the examples of erroneous rulings cited, there are at least thirty five (35) erroneous rulings concerning CCANP's cross-examination while the NRC Staff witnesses were on the stand. The ASLB participated actively in the harassing and groundless objections and arguments made by the Applicants and NRC Staff attorneys. Given the space limitations imposed on this brief, it is impossible to fully explicate the improper behavior of the ASLB during this crucial part of the hearing. Instead, CCANP can only direct the attention of the ASLAB to the following sections of the transcript: 9403-9504, 9769-90, 9828-9919, 9974-81.

A reading of these pages compels the conclusion that the ASLB turned the hearing into a free-for-all, thereby depriving CCANP of its cross-examination rights during a critical phase of the testimony. Incidentally, it should be noted that this section of the transcript contains one of the instances where the ASLB decided to actually enforce its threat to arbitrarily cut off CCANP's cross examination after a certain period of time. See Tr. at 9482, 9917.

To account for the actions of the ASLB during this part of the hearing without ultimately finding substantial bias with the ASLB would be very difficult. The ASLB's failure to respect CCANP's cross-examination rights greatly prejudiced CCANP's ability to contribute to the record of this proceeding and amounted to a protection of the Applicants from the rigors of the adversary process.

d. The ASLB failed to take into account the convenience of CCANP in setting the time for the hearings to begin.

Section 554(b) of the APA requires the ASLB to consider the convenience of the parties in setting the time and place for the hearings. The ASLB set the hearings to begin on May 12, 1981, in spite of the fact that CCANP's pro se representative was to take final examinations in his first year of law school that same week. CCANP was forced to expend its limited resources to bring in outside counsel, limited in his prior knowledge of the case, in order for CCANP to participate. CCANP was unable to have the individual most familiar with the details of this case present during an important phase of the hearings.

In making its decision not to postpone the hearings for a

week, the ASLB cited the Commission's mandate that these hearings be expedited. The Commission's order encouraging an early hearing on issues raised by CCANP was made in 1980. Phase I of these hearings did not end until mid-1982. It is doubtful that postponing the start of the hearings by one week would have seriously altered the completion date of these proceedings.

The ASLB misconstrued the Commission's order for expedited hearings. That order was the result of CCANP's request for a hearing on the Order to Show Cause. The Commission, rather than granting CCANP a hearing on the Order to Show Cause, encouraged the ASLB to adopt the early hearings plan already proposed by the ASLB to the parties. 12 NRC 291. The purpose of expedition was to determine if there were grounds for an early denial of the operating license. Expedition was solely for CCANP's benefit and to protect the public from a possibly unworthy license applicant. To prejudice CCANP's ability to participate fully in the hearings on the grounds the Commission wanted the hearings expedited is a clear abuse of the ASLB's discretion.

e. The ASLB failed to make findings on all issues of fact and law as required by the APA.

Section 557(c) of the APA requires that all decisions in hearings conducted under Section 556 include findings of fact and conclusions of law on all material issues of fact and law presented on the record. Issue A, as set forth in the pre-trial order, required a yes or no answer to the following fact and law question: Apart from any remedial efforts, did the acts and omissions of HL&P demonstrate that there can be no reasonable assurance that HL&P has the requisite character and competence to

operate a nuclear power plant? The ASLB purported to answer this question in the negative, but only after considering HL&P's remedial efforts. In doing so, the ASLB failed to answer Issue A, answering Issue B twice instead.

The ASLB did not find that Issue A was not the correct statement of the law. If it had, perhaps it could have avoided a fact finding and legal conclusion. At no point did it make any statement to that effect, nor did it supply any rationale for such a conclusion as would have been required by Section 557(c). Instead, the Board purported to make a finding on the issue, but erroneously considered HL&P's remedial actions in making that finding.

Throughout the course of this proceeding, CCANP consistently argued that Issue A is the correct statement of the law and should be answered affirmatively. CCANP devoted the greatest part of its energies to this issue. By refusing to make a finding on the issue, the ASLB arbitrarily denied CCANP the most important of its litigation objectives and left CCANP in the position of never having really been on notice of what was being litigated in this proceeding.

f. The ASLB restricted the scope of cross examination to matters raised in direct testimony in violation of the APA.

Section 556(d) of the APA sets down principles for admission of evidence and cross-examination in administrative hearings, such as the one leading to this appeal. Unless specifically granted statutory authority to do so, agencies may not depart from these principles. See, *Cohen v. Perales*, 412 F.2d 44 (5th Cir 1969). Essentially, the APA seeks to ensure that a party's

efforts to bring probative evidence into the record are not hindered by technical rules of evidence. See, *Ogg Cotton Mills, Inc. v. Administrator, Dept. of Labor*, 312 U.S. 126, 155 (1941), *Samuel H. Moss, Inc. v. EIC*, 148 F.2d 378 (2d Cir. 1945) (per curiam decision by Clark, A. Hand, L. Hand).

The federal rule of evidence limiting cross-examination to matters raised by direct testimony is controversial in the federal courts. The rule has been criticized because it promotes too many technical arguments over the propriety of otherwise permissible cross-examination. In enacting the APA, Congress sought to eliminate this type of technical hair-splitting. By reintroducing it into this proceeding, the ASLB unnecessarily complicated this hearing and erroneously refused to permit otherwise proper cross examination by CCANP. See e.g., rulings at 2039-41, 2279-86, 3080, 5500, 5513, 5231, 5533, 7337, 8233, 8321-23, 8763, 10115, 10116.

2. The ASLB deprived CCANP of its procedural rights under the Due Process Clause of the Fifth Amendment.

a. CCANP's interest in this proceeding is protected by the Due Process Clause.

CCANP has two types of interests in this proceeding, both of which are protected by the Due Process Clause. First, CCANP seeks to preserve the lives and property of its members. CCANP was granted leave to intervene because the health and safety of its members are directly affected by this project. These interests are obviously protected by the Fifth Amendment.

Second, CCANP stands as the representative of all the persons whose health and safety is affected by this project. NRC rules of practice deny the right to intervene to a party whose

interests are identical to a party already admitted to the proceeding. 10 C.F.R. 2.714. Realistically then, all persons who are similarly situated to the members of CCANP must look to CCANP to protect their interests. This broader public interest, being simply a conglomeration of all interests identical to those of CCANP's members enjoys the same degree of protection as those private interests.

b. The ASLB erroneously permitted the introduction of written testimony.

The United States Supreme Court uses a balancing approach to determine whether the Due Process Clause requires a given procedure. In Mathews v. Eldridge, 424 U.S. 319 (1976) the Court balanced the interest affected, the risk of erroneous deprivation of that interest, and the value of additional safeguards against the fiscal and administrative burdens that additional procedures would entail. The Court refused to require procedures which might have increased the accuracy or fairness of the hearing before it unless the procedures' benefits outweighed the costs.

In an operating license hearing, the benefits of oral testimony clearly outweigh its costs. Compared to most types of hearings where the use of written testimony is proper, the value of the interests affected in a hearing to license a nuclear power plant is extremely high. Thousands of lives and billions of dollars worth of property are at risk if an erroneous result is reached in an operating license proceeding.

The use of written testimony, as it was used in this proceeding, has been criticized as an abomination leading to the withholding of the true facts from the hearing examiner and

assuring that the case will be decided on grounds other than the evidence in the record. Gardner, Shrinking the Big Case, 16 Ad.L.Rev. 5. The primary reason for the problems associated with written testimony are: lessened ability to determine the credibility of the witness; no opportunity to police the manner in which the testimony is prepared; and the natural tendency of people to pay more attention to the live aspects of cross-examination and unconsciously deemphasize the content of the written testimony. These problems would be eliminated by the use of oral testimony only. The risk of an erroneous result would be sharply reduced.

The cost of substituting oral testimony for written in operating license hearings would not be nearly as great as it would be in other types of hearings where the use of written testimony is constitutionally permissible. Compared to the number of hearings held by the ICC or FTC, there are relatively few operating license hearings held by the NRC. Although the cost of this change per hearing would be higher, the aggregate cost to the NRC would be smaller than it would likely be to either of these agencies.

The use of written testimony, though constitutionally permissible in many types of administrative hearings, is not permissible in operating license hearings such as this one because the protected interest here is many times more valuable. The risk of erroneous deprivation of that interest, therefore, is much greater. The cost of additional safeguards, in the form of oral testimony, is substantially less than it is in other types of hearings. In sum, the constitutional cost benefit analysis

requires the use of oral testimony in operating license hearings.

This conclusion is even more compelling, given the nature of the testimony in this hearing. Written testimony is only appropriate for technical testimony. Generally, the credibility of this testimony rests in the qualifications of the expert and the technical merits of the testimony itself. Demeanor evidence and the other indicia of credibility observable in live testimony are less useful in this type of testimony.

Testimony relevant to character, however, generally depends heavily on the credibility of the witness testifying. The use of written testimony makes it extremely difficult to judge a witness' credibility because demeanor evidence cannot be observed.

Although cross-examination can be used to test credibility to some degree, the use of written testimony substantially blunts the effectiveness of cross-examination. Prior to cross-examination, the cross examiner suffers the same disabilities as the trier of fact in judging a witness' credibility - not having seen the witness testify yet. As a result, the cross examiner cannot plan questions relating to credibility effectively.

Finally, prefiled written testimony is a constantly available anchor to the witness while testifying, i.e. the witness can always go back to check an answer already given to a particular line of questioning under way by the cross examiner and then conform live answers to the printed document.

c. The ASLB erroneously allowed the Applicants to present their testimony in panels.

The use of panel testimony, while perhaps not a harmful way

of introducing technical expert testimony, is perhaps the worst way possible to introduce evidence concerning the acts and omissions of a corporation and its employees relevant to character. The ASLB's decision to use panels during the testimony of HL&P management personnel and QC inspectors essentially precluded any meaningful inquiry into the matters with which those witnesses were concerned.

The cost of eliminating panel testimony would be slight. Rarely are questions addressed to the panel as a whole. Generally, each member of the panel is questioned individually. The main difference between panel testimony and individual testimony is the order of questioning. In panel testimony, questioning on each topic is done all together. When individuals testify separately, questioning on each subject is split among the witnesses. Since the real difference between panel testimony and individual testimony is the order of questions, not the number of questions, the additional cost of individual testimony would be slight. In the aggregate, the practice of using individual testimony in non-technical testimony would be very limited, since NRC proceedings are typically dominated by technical testimony.

The benefits from substituting individual testimony for panel testimony are great whenever non-technical issues are in question. Permitting panel testimony allows the witnesses to educate each other, facilitating their efforts to corroborate each other's testimony. A prime example of the potential for abuse was the panel of QC inspectors being questioned about the card game. Here was a group of witnesses, each being asked if he

had engaged in activities for which he could be discharged or held in violation of federal law, being allowed to listen to each other's testimony. It would be unrealistic to expect meaningful testimony in such a situation. Having each witness testify individually would have been a cost effective way to gather meaningful information about these events. Under the balancing test of Mathews v. Eldridge, *supra*, it is the only constitutionally permissible way.

3. The ASLB failed to provide CCANP ample opportunity for discovery in violation of NRC regulations.

NRC regulations require that all parties be given ample opportunity for discovery. CCANP was unable to exercise its discovery right due to the illness of outside counsel retained for that purpose. Even if CCANP's attorney had attempted discovery, the time allotted was insufficient given the range of issues covered in the hearing. The ASLB refused to permit additional discovery, forcing CCANP to begin the hearings without sufficient preparation.

When CCANP moved for discovery on matters which had come to light after the time for discovery was near, the ASLB denied the motion, even though it apparently felt the motion had some merit. Instead of granting additional discovery time, the ASLB said it would permit CCANP to expand the scope of its cross examination. As discussed earlier, the ASLB failed to permit CCANP to conduct the cross examination it was entitled to. The promised extra cross examination was never granted. This failure to grant CCANP adequate discovery and the subsequent failure to provide the alternate remedy the ASLB had promised substantially prejudiced

CCANP's ability to contribute to the record in this proceeding.

4. The ASLB's cumulative failures to respect CCANP's procedural rights under the Constitution, the Administrative Procedure Act, and NRC regulations denied CCANP the fair hearing to which it was entitled.

While each of the procedural errors discussed above is an independent ground for reversal, when the effects of each are examined cumulatively, reversal is the only possible result. For example, the failure of the ASLB to permit adequate discovery made it difficult for CCANP to conduct cross-examination. The combination of written testimony and the rule limiting the scope of cross-examination to matters raised in direct testimony effectively precluded CCANP from calling the credibility of the direct testimony into question. The combination of written testimony and panel testimony on non-technical issues permitted Applicants to completely mask any inconsistencies which might have arisen if live individual testimony were used instead. The ASLB's refusal to allow CCANP to exercise its cross-examination rights further exacerbated these problems.

Finally, it should be noted that because CCANP is constrained in the length of this brief, many errors have been omitted. For the most part, these errors involve factual disputes over whether a particular question was relevant, material, or repetitious. While many of the ASLB's rulings foreclosed inquiry into important areas, it would be impossible to argue all of these errors individually. The following citations are examples of these kind of errors: Tr. at 1726-27, 1716-17, 7572, 7168, 7335, 2330-31, 1089, 2341, 2381-83, 4889-90, 6485-95, 7173-74, 8531-32, 8479-81, 9936-38, 8207-09, 3751, 4433, 4116, 3331, 3315-

17, 2310-11, 3312-14, 9895-96, 9831-34, 3914, 1177-81, 6239-41, 9979, 9910, 9905, 9901, 9371, 7337, 8233, 8763, 10118, 10116, 8321-23, 5262, 5219-20, 9249, 9252, 9356, 9390, 9593, 9836, 9842, 9899, 9809, 9217.

VII. RESPONSE TO FINDINGS OF FACT

What follows are CCANP's direct responses to the findings of the ASLB. The numbering corresponds to the numbering of the Findings in the PID.

FOF 6: The ASLB refused to let CCANP adopt the contentions of CEU, other than Contention 4. CCANP contends this ruling was in error. The ASLB can dismiss issues on substantive grounds, but not on a procedural nicety that an issue is foreclosed simply by a change in the intervenor presenting the issue. It is more important that the issue be subject to adversarial proceedings than that the party-issue alignment be kept in tidy arrangement. Since CCANP had the right of cross-examination on the CEU contentions and trusted CEU to vigorously pursue them, CCANP saw no need to explicitly embrace those contentions when CEU brought them up. Had CCANP known that CEU was going to leave the proceeding prior to litigation of the contentions, CCANP might well have asked to be joined on the contentions. As it is, there would be no prejudice to the Applicants from continuing the inquiry into issues they already knew were to be explored. There was prejudice to CCANP in removing issues CCANP thought it was going to have the right to explore.

FOF 14 - 34: When the Order to Show Cause was issued, the Applicants had the option of admitting or denying each

allegation. 10 C.F.R. 2.202 (5)(b). The Applicants admitted the allegation of false statements in the FSAR. Once that admission was made by the Applicants, 10 C.F.R. 2.202 provided that such admission constituted a waiver of the Applicants rights to a hearing, findings of fact, conclusions of law, and of all right to seek Commission review or to contest the validity of the order in any forum. 10 C.F.R. 2.202. In clear contradiction to this provision and over CCANP's objections, Applicants were allowed to contest the validity of the false statement allegation in the licensing hearing. The ASLB then proceeded to enter findings of fact and legal conclusions on that subject contrary to the original position of the NRC investigators and the admission by the Applicants. CCANP contends that only the seriousness of the admitted act should have been considered, not whether the act constituted a false statement, i.e. the fact of a false statement should have been assumed and then evaluated on the basis of how serious a reflection on Applicants' character and/or competence that false statement was. The Applicant was able to avoid the public hearing on the Order to Show Cause which intervenors so vigorously sought and then avoid the consequences of not requesting that public hearing. CCANP contends that the findings made in PID FOF 14-34 are made in contradiction of NRC regulations and are therefore without legal significance and should therefore be struck from the opinion.

FOF 35: The ASLB says, starting on 118, that the evaluation of HL&P's compliance record "must include ... prior knowledge and involvement of management in them" In other words, if we find that management was aware of what was going on and involved

in what was going on there will be greater responsibility for what happened. But there is another arm of the same inquiry. If we find that the management was not aware of what was going on and not involved in what was going on, we then have a potential finding of lack of knowledge or abdication of responsibility. The problem appears as a Catch 22 for the Applicants created by the seriousness of their failures. Either the deficiencies were not serious - the position of the Applicants - so that it does not matter whether they knew about them or not nor whether they were involved in the activities producing the deficiency or not Or the deficiencies were serious and either their lack of knowledge and involvement constitute a serious failure or their knowledge and involvement constitute a serious failure. In an enforcement context, prior knowledge or involvement might show wilfulness and thereby increase the level of penalty and seriousness of the violation; in the licensing context, wilfulness appears to raise a more serious challenge to character than would lack of knowledge/involvement.

But there is still another way to look at the problem. If the failure to keep informed or to retain responsibility resulted from the deliberate decisions of HL&P, then there is a congruence in the inquiry, i.e. did the management decisions of HL&P produce a system wherein HL&P abdicated its responsibilities to B&R and/or failed to remain informed about B&R's activities? The possibilities then become:

1. HL&P management set up a system which should have produced direct management involvement by HL&P in the STNP and an

appropriate flow of information to appropriate decision makers. The system failed to perform.

2. HL&P management set up a system which minimized direct management involvement by HL&P in the STNP and which shielded top management from receiving information about the project. The system performed as designed.

Given the ASLB's central finding of long lines of communication and the extensive prior experience of HL&P in large construction projects, possibility 2 seems to fit the pattern of actual events. Furthermore, given the inadequacies in upper management found by the ASLB, the motivation to set up a system minimizing upper management involvement and knowledge were present.

FOF 36: As the ASLB notes, the record of this proceeding in Phase I covered the period from the beginning of the project through December 31, 1981, i.e. it did not stop with 79-19 as many of the ASLB's findings seem to indicate. Finding 42 reflects the post-79-19 testimony as well.

FOF 44: CCANP accepts the ASLB's description of the pyramidal structure of the Quality Assurance program. CCANP would only add to this finding the following observation: The proper functioning of this lowest level of the pyramid is the most critical part of the program; if the detailed inspection program is functioning effectively, any failures in the upper part of the pyramid are minimized in their impact; if the detailed inspection program is compromised, as by intimidation and harassment, the proper functioning of the upper levels will not necessarily rectify the problem of defects not reported in the first place.

For example, there is little credit for HL&P in having numerous QA personnel on the site, PID FOF 58, if at the same time B&R is understaffed with QC inspectors, PID FOF 59.

FOF 58: Apparently for their to be harassment and intimidation of the QA/QC personnel sufficient to consider denial, that harassment and intimidation must have been a coordinated plot on the part of management. See also CCANP's response to FOF 74, 170, and 177, *infra*.

FOF 74: The recurring theme of production pressures driving events at the project is a commentary on HL&P's values. The finding that there were no "irreparable construction deficiencies" is the ASLB's competence equivalent to its immutable character defects. There must be a breakdown so severe as to be uncorrectable before the application for the license will be in any jeopardy CCANP rejects these highly restrictive views of what constitutes a disqualifying deficiency.

FOF 79: There is hardly a need for more to conclude the license should be denied.

FOF 80: There are some generic concerns that arise in the findings, often with different conclusions from finding to finding. One of these concerns is the involvement of HL&P management in the project. In FOF 80, the NRC Staff testify about "lack of detailed involvement" as a cause of QA/QC organizational problems and Mr. Amaral testifies about "too little management involvement" as an underlying cause for all the major problems at the project.

FOF 83: CCANP contends that all of HL&P's responses to the

revelations of the NRC in January 1980, FOF 69, were no more than efforts to avoid or mitigate enforcement action known to be contemplated by the NRC.

FOF 84: The Brown and Root brochure is such a classic case of abdication of responsibility and failure to keep informed that this finding deserves more attention than the ASLB gives it. The lecture forming the basis of the brochure was supposed to be a remedial measure to show management support for QA/QC; HL&P left all the details of the lecture to B&R; the lecture in fact stressed cost and schedule over inspection; the NRC had to further discipline the project as a result of this "remedial measure."

FOF 85: The false sworn statement by Oprea alleged by CCANP was part of this response, a response which was supposed to restore NRC confidence in HL&P.

FOF 86: The ASLB finds it significant that there was no "total breakdown of QA/QC." The ASLB seems to use this standard as the QA/QC equivalent for immutable defects in character and irreparable errors in construction. Only at the very edges of poor performance will license denial be considered. See PID at 38. There is an ambiguity in how the word "breakdown" gets used. Mr. Oprea thought there was never a breakdown in the QA/QC program, even as documented in 79-19. FOF 140. The NRC Staff recognize the widespread violations but do not consider a total breakdown to have occurred. FOF 155. CCANP rejects the position that only an immutable character defect, an irreparable construction error, or a total QA/QC breakdown can lead to license denial. In fact, such a standard is no standard at all.

and therefore very dangerous. Standards for acceptable character and competence should set some boundaries within which licensees operate and are constrained. The immutable, irreparable, and total standard has no real limits. The Staff seems to make much of HL&P's record of reporting construction defects pursuant to 10 C.F.R. Section 50.55(e), but as the ASLB noted, the obligations under that regulation are very different from the obligation created by 10 C.F.R. Part 50, Appendix B. PID at 69. The major difference is that 50.55(e) creates an obligation to notify the NRC of a potentially safety related defect and report such defects if actually confirmed, while Appendix B requires an in depth inspection effort on a continuous basis whether any defects are found or not. HL&P failed in the latter and far more important task.

FDF 87: The Staff's "not so poor" standard is one of the worst failure in the entire proceeding, i.e. worse than the failures of HL&P. If the regulators are satisfied with poor performance, the public is in grave danger. CCANP rejects the concept that inexperience and irresponsibility are separate, alternative assessments; CCANP contends that use of inexperienced people in critical positions is irresponsible. HL&P's performance during construction is viewed by the Staff as "relevant to, and probative of, how HL&P would perform under an operating license," but this same behavior is "not considered by Staff reviewers to be determinative." If a licensing proceeding is to be predictive, there is no better evidence available than the performance of the applicant under the construction permit. CCANP has the sense that the NRC Staff would agree with this position were it not for the

fact that HL&P's performance was so substandard.

FOF 89: HL&P's performance from April 1980, when the Order to Show Cause came out, and December 1981 remained about the same in terms of the violations of NRC regulations. This evidence would seem to argue for the failure of remedial measures to do any real good.

FOF 94: Bechtel did not recommend either a third party QA/QC or the removal of B&R. The absence of any such recommendations reflects badly on Bechtel's qualifications. The ASLE took no notice of this possibility.

FOF 96: An experienced corporation, HL&P set up a management network that shielded the top officers from the nuclear project. CCANP contends that this was a deliberate abdication of responsibility by people who knew their knowledge and expertise in the nuclear field was too limited to handle much responsibility. Having Frazer be the key to resolving the communications problem is like trying to put out a fire with gasoline.

FOF 97: This set-up was guaranteed to keep information and hence responsibility for action away from Oprea. The organization is also a commentary on the low priority given to QA/QC by top HL&P management.

FOF 98: Again we have Amaral testifying to too little management involvement.

FOF 99: It took Don Jordan three years to figure out how difficult it was to design, engineer, and construct a nuclear power plant. Perhaps it took so long because he paid little attention to the project, not having the skills or background to

understand the project. For such a person to be the CEO of a nuclear utility is simply not acceptable.

FOF 99-102: Jordan, Oprea, Turner, and Frazer all lacked nuclear experience and HL&P failed to spend the resources to attract someone who had such experience.

FOF 103: When Warnick got overwhelmed at the site, there was no one in HL&P who could help him. Everywhere Amaral looked were people who could not perform the tasks given to them by HL&P and S&R.

FOF 107: This finding is an excellent finding for demonstrating the dangers involved in giving too much weight to willingness. Amaral is a quality assurance professional. He concludes that HL&P simply has not put quality as the first goal. Oprea disagrees. Perhaps Oprea honestly believed he put quality first and was willing to do whatever he could to encourage quality work, but his performance and that of his lower managers was so deficient that a professional like Amaral came to the conclusion quality must not be the highest value of the corporation. In the nuclear context, such a conclusion by someone with Amaral's credentials is devastating.

FOF 108: The ASLB should give no credibility to representations of quality concerns by Mr. Jordan. His "crafts build in quality" view is just another form of abdication; the construction crew is responsible for building it right the first time, so there is no real value in an inspection force. Since he personally would not know how to inspect anything at STNP, it is not surprising for him to take the attitude that quality is the responsibility of the crafts. Jordan says he did not get

information he needed. This contrasts with the HL&P position that Jordan did receive the information appropriate to his position. The ASLB found that the flow of information to Jordan and Oprea was not the problem; instead it was their inability to understand the information. If so neither Jordan nor Oprea ever admitted to that deficiency. Jordan consistently refused to admit HL&P had abdicated any responsibility to B&R or that HL&P failed to keep informed. There is not even any repentance from Mr. Jordan.

FOF 109: Oprea, too, says he lacked the information.

FOF 112: A different NRC panel concludes there was a lack of detailed involvement in the project by HL&P. But now the conclusion is that they were involved in details of the project but the wrong ones. Production pressures surface again. HL&P knew from the beginning that it either had to bring in top management familiar with the nuclear undertaking or rely on its contractor. HL&P chose reliance/abdication.

FOF 115: The NRC Staff offers the findings the Commission requested in 12 NRC 281. HL&P did abdicate to B&R in the QA/QC area. That should be enough for license denial right there.

FOF 116: Abdication proceeded up and down the pyramid. There was no protection, no management backup for the QC in the field. The middle level of the pyramid - auditing - did not function. And the top of the pyramid stayed so far away that the messages of trouble could not (or would not) be heard.

FOF 118: Jordan testified that an abdication conclusion would be unfair to HL&P. Here is truth and candor at HL&P's best. CCANP does not understand why the ASLB never pulled together findings like 115 and 116 with 118 to conclude that Jordan could

not be trusted to perceive HL&P's failings or, alternatively, to admit to them if he did. Such a conclusion weighs in heavily on the side of character defects which should disqualify an applicant for a nuclear license.

FOF 120: Oprea too denies continuously that there are any real problems. The excessively long lines of communication argue against the premise that "[o]ver the years, HL&P management had become more involved in the project." Placing decision making and monitoring far from top management argues precisely the reverse, i.e. that top management insulated itself from the project.

FOF 122: CCANP disagrees with the ASLB that it was an exercise of responsibility to send Frazer to tell B&R's management to shape up. Mr. Frazer did not have the stature or the confidence to pull B&R into line and keep them there. Sending Frazer is just another form of abdicating responsibility, not assuming it.

FOF 124: Similarly, sending a memorandum from a technical consultant, rather than a high officer in the corporation is not the way to get the attention of B&R.

FOF 131: It is hard to know what to do with a top manager who claims to have been well informed and then dumbfounded when he learned what was really going on. Mr. Oprea's competence and character are both called into question by his repeated representations that all was well between him and the project.

FOF 136: For Jordan, the whole problem was the competent people who had let the project down, not the incompetent people who were inexperienced and overwhelmed.

FOF 138: Mr. Oprea certainly considered himself experienced.

FOF 139: Mr. Oprea's considering the hiring of a consultant had gone on for months and could best be described as procrastination.

FOF 141: While throughout this opinion much is made of experience and how different everything would have been had there been experienced people in charge, it is worth noting that the only operating license denial in NRC history was directed at one of the most experienced nuclear utilities in the country. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ASLBP-79-411-04 PE, January 13, 1984.

FOF 146: While much is made of the communications problem in 1980, the evidence is that in 1978, HL&P was warned by the NRC that communication between the top management and the field personnel, particularly the inspection force, were so limited that the inspector felt there was a lack of management support.

FOF 159: CCANP takes exception to the ASLB attempting to portray HL&P's corrective actions in late 1979 and early 1980 as if they were initiated by the company with no knowledge of pending NRC enforcement action. NRC came on the site in early November and by the end of the year was making known its findings to HL&P. That HL&P took actions to mitigate the potential enforcement action is without weight as character evidence. Whether the violations had actually been written up or not, HL&P was aware of the areas and the types of violation being found.

FOF 161: There is simply nothing voluntary about moving to head off an enforcement action that is clearly coming.

FOF 162: In the face of his company's record, Mr. Oprea's "expressions of intent" are certainly not weighty evidence of his

character.

FOF 163: This is an important finding in its understated way. The ASLB finds it worth noting that HL&P did not fail in every area, again suggesting the total breakdown standard. But for a nuclear plant operator, a failure in only one area can destroy the entire project and threaten the lives of thousands of people. There is no balancing of success stories against failures. The technology is too unforgiving to allow any failures. Yet in this finding the NRC concludes there were areas where HL&P failed completely. All the willingness and supposed commitment to quality could not prevent a total failure. FOF 157. The weakness of the "willingness" argument could hardly be more clearly highlighted.

FOF 170: If no one has found an irreparable defect, CCANP's burden to achieve license denial then becomes to show the absence of such a defect is "a matter of luck." This proposition would be very difficult to prove directly. CCANP would contend that given the record of construction and inspection at STNP documented in this proceeding, the conclusion can be inferred, notwithstanding any testimony to the contrary.

FOF 172: Mr. Shewmaker of the NRC engages in another form of the balancing process where one element of a fundamental requirement can be missing, in this instance a major component of competence, and the analysis conducted then looks for positive elements to offset the missing one. This type of analysis is not acceptable. In CCANP's analysis, an applicant missing any one of the key ingredients of character or competence is missing something too important to be entrusted with a nuclear power

plant. Furthermore, the positive example Mr. Shewmaker turns to is the bringing in of competent outside consultants to solve a problem. The fact is that after using a consultant to write the QA program, HL&P waited six years before bringing in another QA consultant.

FOF 173: At least one NRC witness does not accept the inexperience explanation. He viewed HL&P management as professional people making occasional mistakes. The ASLB, at one point appears to agree. FOF 180. Inconsistencies of this sort are common in the opinion and the findings.

FOF 177: The evidence available just from 79-19 is sufficient for license denial. When combined with the pre-Order to Show Cause evidence and the April 1980 to December 1981 evidence, the case is open and shut.

FOF 179: For the ASLB to consider denial, a noncompliance must produce a construction defect which is "irreparable," cause the complete loss of the function or integrity of a safety system, result from deliberate acts of management, represent encouragement to evade regulation, or result from putting cost before safety. CCANP would argue that some of these are in fact proven in the record, but the point here is that the standard is simply too low. Rather than looking for extreme acts of wrongdoing, an applicant should be judged by an "excellence" standard (as opposed to a "not a complete failure" standard). See Appendix, Figure 2.

FOF 180: Total incompetence is another form of the same low standard.

VIII. MOTION TO REOPEN PHASE I RECORD

While denying CCANP motion to reopen the Phase I record, PID at 87 et seq., the Board states:

"Although the information might bolster our view of HL&P's former questionable managerial competence, it would not do so to a degree which would offset our view that HL&P has taken adequate steps to improve its competence."

CCANP reads this part of the Board's opinion to say that if the Board had in fact made a decision on Issue A as potentially determinative of the license, i.e. on the independent and sufficient grounds for denial question, the evidence offered in the DIA report might have influenced the Board's decision as to HL&P's competence. Since the Board has already indicated that the lack of competence found in HL&P might have been sufficient to warrant license denial, PID at 51, CCANP was entitled to have the additional evidence included in the record as possibly leading the Board to a denial decision under Issue A.

Furthermore, there is evidence on contention 1.7(e) regarding the card game that was not available to the Board and might well have changed the Board's opinion on that part of the contention subpart.

IX. PRAYER FOR RELIEF

As should be apparent by now, CCANP takes exception to the conduct of this proceeding and to the opinion therein almost in their entirety. Further, CCANP has no expectation that a remand to the same ASLB for additional consideration would be worthwhile.

CCANP, therefore, moves the ASLAB to correct the numerous

errors in the PID by rendering an opinion ab initio. Such an action is within the authority of an ASLAB when an ASLB has erred in defining its task and the record is sufficient for the ASLAB to reach a decision. Consumers Power Company (Midland Plant, Units 1 and 2), 6 AEC 162 (1973).

CCANP would urge that the new opinion and findings encompass:

- the issues as originally admitted into this proceeding,

- all character traits reasonably related to operating a nuclear power plant and reasonable inferred by the record,

- all the evidence relevant to each trait, and

- use of evidence to its fullest material extent.

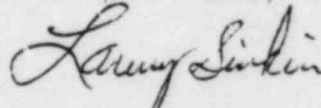
CCANP believes there is enough evidence in the record to support license denial despite the due process violations which limited CCANP's ability to make its case. Should the ASLAB find, however, that there is not sufficient evidence to warrant license denial, CCANP moves the ASLAB to remand the case to a new and different ASLB with instructions to cure the due process violations to the extent possible, that is, permit improperly denied discovery, cross examination questions, and admission of evidence, including the most recent evidence offered to reopen the record. See p. 116, supra.

The latter remedy is less than satisfactory in that most of the personnel at STNP during the initial discovery phase and the hearings are now gone. Should the ASLAB decide to remand to a new ASLB, CCANP may find it necessary to seek additional relief.

Furthermore, given the limitations on time and length of

this appeal, CCANP did not have the ability to call to the attention of the ASLAB every ruling by the ASLB which violated CCANP's rights. If the ASLAB decides to remand to a new ASLB, CCANP urges the ASLAB to review the decisions made throughout this proceeding in order to identify for the new ASLB where corrective relief is warranted.

Respectfully submitted,



Lanny Sinkin
Craig Jordan, Michael Hall,
and Margaret Burns

Representatives for
Citizens Concerned About
Nuclear Power, Inc.
114 W. 7th, Suite 220
Austin, Texas 78701
(512) 478-7197

Of Counsel: Robert Hager, Esquire
Christic Institute
1324 North Capitol Street
Washington, D.C. 20002
(202) 797-8106

Dated: June 23, 1984
Austin, Texas

APPENDIX

FIGURE 1

COMPLIANCE WITH NRC REQUIREMENTS

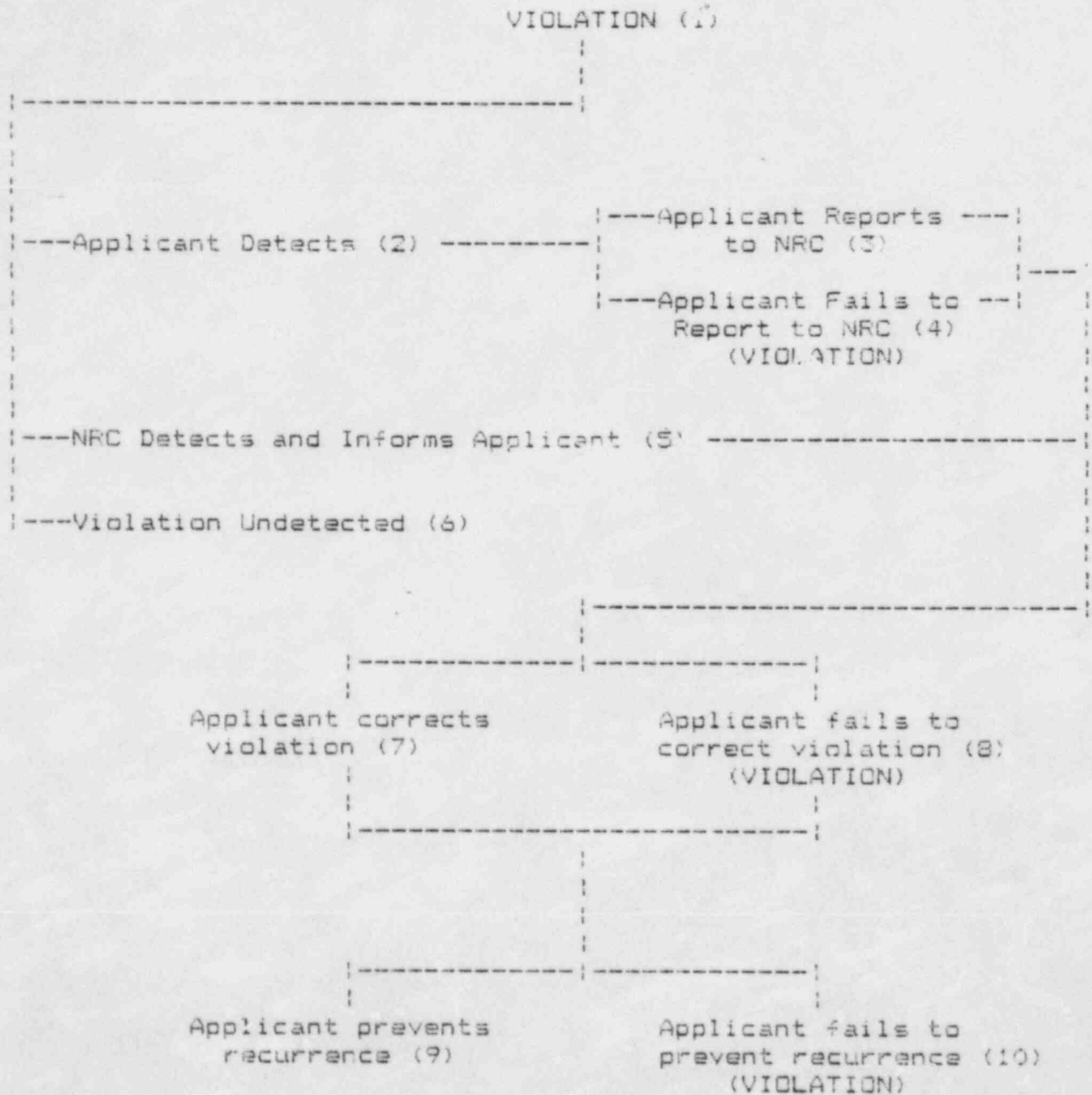
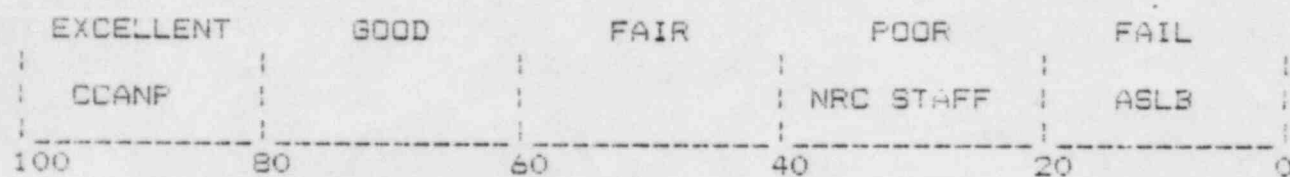


FIGURE 2

THE STANDARD FOR CHARACTER/COMPETENCE/PERFORMANCE:



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of CITIZENS CONCERNED ABOUT NUCLEAR POWER, INC. (CCANP) BRIEF ON APPEAL FROM PARTIAL INITIAL DECISION were served by deposit in the U.S. Mail, Express Mail (*) or first class postage paid to the following individuals and entities on the 25th day of June 1984.

*Alan S. Rosenthal, Esquire
Chairman
Atomic Safety and Lic. Appeal Bd.
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Christine N. Kohl
Administrative Judge
Atomic Saf. & Lic. App. Bd.
U. S. Nuclear Reg. Comm.
Washington, D.C. 20555

*Dr. W. Reed Johnson
Administrative Judge
Atomic Safety and Lic. Appeal Bd.
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Brian Berwick, Esquire
Asst. Atty. Gen.
State of Texas
Environmtl. Protection
P. O. Box 12548, Capitol Sta.
Austin, Texas 78711

*Robert G. Perlis, Esquire
Office of the Exec. Leg. Dir.
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

*Jack R. Newman, Esquire
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Melbert Schwarz, Esquire
Baker and Botts
300 One Shell Plaza
Houston, Texas 77002

Atomic Safety and Licensing Bd.
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Mrs. Peggy Buchorn
Executive Director, C.E.U.
Route 1, Box 1684
Brazoria, Texas 77422

Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

William S. Jordan, III, Esq.
Harmon, Weiss & Jordan
2001 S Street, N.W., Suite 430
Washington, D.C. 20009

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Pat Coy
5106 Casa Oro
San Antonio, Texas 78233

Lanny Sinkin
Lanny Sinkin