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.	(	Docket Nos. 50-498 OL 50-499 OL
	)	
(South Texas Project, Units 1 and 2)	(	

CITIZENS CONCERNED ABOUT NUCLEAR POWER, INC. (CCANP)
MOTION FOR RECONSIDERATION

On February 6, 1985, the Atomic Safety and Licensing Appeal Board (ASLAB) in this proceeding issued its Decision, ALAB-799, on CCANP's appeal from the Partial Initial Decision, LBP-84-13, 19 NRC 659 (1984), issued by the Atomic Safety and Licensing Board. Herein, CCANP moves the ASLAB to reconsider its rulings in said decision.

In its Decision, the ASLAB stated:

> Because the record on the issues of character and competence remains open and the Board's findings are expressly subject to change, we cannot reach any appellate determination on the merits of the ultimate issue of HL&P's fitness to operate the plant. Generally we do not review licensing baord determinations that do not constitute a final resolution on the merits. [footnote omitted] Perforce, we do not examine the numerous factual findings or inferences that undergird a board's conditional findings.
>
> We nonetheless recognize that this is a unique proceeding in which the Commission has specifically directed the Licensing Board to issue an 'early and separate' decision on the character and competence question. ... In such circumstances, we do not believe it is appropriate to defer all appellate consideration. Decision at 6-7.

CCANP urges the ASLAB to reconsider this initial determination. Specifically, CCANP respectfully suggests that the decisions reached by the ASLAB on the character standard and the due process question are in fact premature.

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Regarding the character standard, the ASLAB really did not address the question of a character "standard." Such a standard would set some measureable limits to the character an NRC licensee is expected to demonstrate. Such limits would appear in terms such as excellent, poor, etc. Instead, the ASLAB discusses the methodology used to determine whether HL&P meets such a standard or the "factors that are pertinent to an inquiry into [character and competence]." Decision at 9. The ASLAB explored such questions as whether remedial acts should be included or should the elements of character proposed by CCANP have been addressed by the Board. At one point, the ASLAB did verge on discussing a standard for character but did so in the context of the evidence specific to this case, evidence it did not intend to review at this time. Decision at 20, n. 45.

From an overall reading of the Decision, the ASLAB did not in fact endorse a particular standard for character developed by the ASLB.

There is furthermore no need for the ASLAB to have decided the matters it did decide. Instead, such a decision places CCANP in an awkward posture of appealing what appear to be interlocutory issues, or, as the ASLAB termed them, "subsidiary questions," Decision at 7, while the central issues of the case remain undecided.

While recognizing the ASLAB's desire to respond to the "time and effort ... already expended in connection with the appeal," Id., CCANP respectfully suggests that the response does not in fact greatly further the decision making process at this time, but rather creates an unwieldy middle ground of decided but less

than essential issues.

CCANP, therefore, moves the ASLAB to withdraw the portion of the Decision which deals with character.

Regarding the due process issue, CCANP also urges the ASLAB to withdraw its opinion. If the ASLAB is not going to evaluate the ASLB opinion on the substantive matters litigated in Phase I, then they cannot evaluate whether particular procedural or evidentiary rulings in fact prejudiced CCANP; the prejudice would only be fully illuminated if the Partial Initial Decision in its entirety is evaluated in the light of the due process objections.

In the alternative, CCANP urges the ASLAB to reconsider the decisions it did reach in both the character and due process areas.

In the character section of its opinion, the ASLAB states:

> In the first place, the Commission stated only that abdication of responsibility or knowledge could prove disqualifying, not that such a result must or would follow. We believe the Commission's language reflects an explicit judgment that the allegations, even if proven, need not automatically dictate denial of the license. Rather, the charges would bear on a predictive determination regarding the likelihood that the applicant could operate the plant safely and in conformity with Commission regulations. Such a determination would necessarily embrace an examination of remedial measures. Decision at 13-14.

The ASLAB further stated:

> In the circumstances, the Commission understandably expected the Board to review whether HL&P's application may already have been irremediably tainted. We see no intention on the Commission's part, however, to circumscribe the matters the Board proposed to examine to exclude the appraisal of the need for, and efficacy of, remedial measures. (emphasis in original) Decision at 15.

These two quotations from the Decision highlight an overall distinction between what CCANP was attempting to argue and what

the ASLAB apparently perceived CCANP as attempting to argue. While CCANP did initially take the position that Issue A alone should be the subject of the hearings, CCANP took the alternative position in its appeal that with Issue A and Issue B both being heard, CCANP was entitled to an opinion on Issue A, an opinion the ASLB simply did not render. In other words, the ASLB never answered the question whether, without regard to remedial measures, HL&P's record called for denial of the application at the threshold. It is this determination that CCANP argued was the meaning of "independent and sufficient" in the Commission's direction to the ASLB.

CCANP's argument on this point is partially a due process argument. Supposedly one possible outcome of the hearing was that the Board would find the record of HL&P's failures so bad that denial was required on the basis of an absence of character or competence (Issue A) regardless of any remedial measures taken. CCANP proceeded to devote its resources toward building a hearing record, including its Proposed Findings of Fact and Conclusions of Law, supporting that outcome. But the Partial Initial Decision does not address whether such an outcome is warranted. Instead, practically every finding on Issue A included some remedial measure. In refusing to render an opinion on Issue A as accepted for litigation, the ASLB has denied CCANP its right to a decision on the issue and failed to provide CCANP with adequate notice of what was being litigated if such a decision was not to be rendered.

Turning to the due process issue, CCANP similarly urges the ASLAB to reconsider its rulings in this area if those rulings are

not to be withdrawn as premature.

The concept of due process is not a mere legalism measured by observance of procedural niceties. The goal of due process is to ensure that all the parties to a proceeding are treated fairly and have an equal chance to prevail. The essence of due process is fairness. The inquiry regarding due process is very much an inquiry as to how the parties to a proceeding were treated. If the proceeding was abusive, then due process is absent. CCANP contends that there is no way to read the record of this proceeding as other than abusive of CCANP and its rights.

The inquiry should not be simply a narrow examination of each individual instance within the process to determine whether a specific ruling was correct, but should include an overall assessment of the proceeding to see if the cumulative effect of the treatment given a party is sufficient to conclude that for that party the hearing was not fair. CCANP contends that no impartial reading of the total record in this proceeding could lead to the conclusion that CCANP was treated fairly.

In its brief on appeal, CCANP provided extensive citations to the record to direct the ASLAB's attention to the due process violations. At the same time, CCANP found itself constricted in how much analysis it could include in this one area by the ASLAB's limitations on the length of the brief as a whole.

The ASLAB chastized CCANP for its failure to limit the length of the brief, Decision at 6, n. 14, but, at the same time, criticized CCANP for not providing adequate detail on 35 different rulings as to "why any of these rulings is incorrect or what effect they may have had on the outcome of the proceeding,"

Decision at 35.

Overall, the Decision indicated the ASLAB would have preferred CCANP to be more detailed in its due process analysis. CCANP is concerned that is not be foreclosed from adequately arguing the ASLAB decision before the Commission should the ASLAB not withdraw or modify its opinion on the due process issue. See 10 C.F.R. Section 2.786(b)(4)(iii). The due process question in this hearing is too important to be dismissed for such a reason. What follows is a detailed but concise discussion of the due process violations. At the same time, the details provided are by no means exhaustive of the support in the record for CCANP's position regarding violation of its rights. CCANP urges the ASLAB to consider these details in light of the serious consequences of approving a proceeding wherein a party's due process rights were simply not respected. At least one member of the ASLAB found that the record demonstrated "how a hearing should not be conducted... a monument to how a licensing proceeding should not be run...." Appeal Tr. 67-68. CCANP contends that this judgment can be applied to the record as a whole and that immense harm to CCANP resulted.

As the Board notes, CCANP objected to the ASLB's scheduling of hearings as prejudicial. Decision at 27. Review of that scheduling decision on an interlocutory basis was denied because the Appeal Board did not perceive "a compelling demonstration of a denial of due process or the threat of immediate and serious irreparable harm" calling for interlocutory intercession. Id. at 28. While that standard may have been appropriate for an interlocutory decision, we are no longer in the interlocutory

position, so the matter of scheduling can be considered prejudicial without finding immediate and serious irreparable harm.

CCANP contends that the scheduling decision contributes to an overall conclusion that the proceeding was flawed by unfair treatment of CCANP. In particular, CCANP simply asked for a thirty day delay in beginning the hearings citing the conflicting schedule of CCANP's representative. Tr. 370, 378-79, 382-83, 385, 390-91, 392-93. CCANP's central argument was that CCANP had made a major contribution to the entire proceeding over the previous three years, that the contentions had been submitted two and a half years prior to the prehearing conference where scheduling was being discussed, and that delaying the hearings for a few weeks was not an unreasonable request. Id. CCANP urges the Appeal Board to view this simple request in the light of the circumstances of the entire hearing and to conclude that forcing CCANP to accept the May hearing dates was abusive. While this one abuse may not rise to the level of reversible error, this ruling does form part of the overall pattern of abuses which do constitute reversible error.

An illustration of prejudice introduced by the failure to provide relief to CCANP's main representative was that substitute counsel cross-examined the Applicants' Chief Executive Officer, Mr. Jordan, and a key figure in the entire remedial issue, Mr. Goldberg, without benefit of consultation with CCANP's primary representative.

A further illustration of the prejudice resulting from this one scheduling decision is evident in the oral argument years

later before the Appeal Board. As the Appeal Board notes in its Decision, CCANP conceded at oral argument that it did not object to the use of prefiled written testimony and the presentation of evidence by, and cross-examination of, witnesses sitting in panels. Decision at 26.

In fact, that concession by CCAPP's representative was in error. After the oral argument, CCANP's representative conveyed this concession to Mr. Hagar, who represented CCANP in that opening hearing. He stated that in fact just such an objection had been filed by CCANP.

In reviewing the record, it is clear that a motion was filed, Tr. 983, but CCANP can find no further mention of the motion or any record of the ASLB ruling on the motion. Nor does CCANP's primary representative find said motion in the pleading file kept by CCANP. CCANP's assumption is that substitute counsel filed the motion, but CCANP's primary representative never received a copy. Had the hearings been scheduled so CCANP's primary representative could be present, such a mistake could not have occurred and CCANP would not have abandoned points on appeal which apparently were protected in the record of the proceeding.

CCANP contends that the Board refusal to grant any relief to CCANP was based on the fact that the Board had already reserved time for the hearings in May prior to holding the prehearing conference to discuss scheduling. Tr. 367, l.16-17. Perhaps also influential were the repeated threats of Applicants's counsel to seek reconstitution of the Board if the Board did not move the hearings fast enough to suit him. See e.g. Tr. 377, 398.

There would have been no prejudice to any party had the

initial hearings been delayed by a few weeks. Short of dropping out of law school, there was absolutely nothing CCANP's representative could do about the scheduling conflict he faced; he did not set the date for the finals and could not change the date for the finals. The circumstances were fairly unique and unusual with the potential for prejudice quite large. The Board's refusal to even entertain the possibility of a short delay is indicative of the lack of concern for the rights of CCANP demonstrated by the Board throughout the remainder of the proceeding.

As the Appeal Board correctly noted, another of CCANP's due process complaints was the failure to allow adequate discovery time. Decision at 29. The Appeal Board, however, finds inadequate support for CCANP's position. Decision at 29-30.

CCANP did in fact file a motion detailing the reasons for requesting additional discovery, including the illness of CCANP's attorney. CCANP Motion for Leave to File Motion Out of Time to Compel NRC Staff to Provide Information, dated March 16, 1981. In this motion and in oral argument before the ASLB, CCANP discussed the extraordinary circumstances producing a CCANP inability to conduct adequate discovery. See e.g. Tr. 369, 665, 672-76. In fact, the conditions cited by CCANP were recognized by the Board as extraordinary and sufficient to warrant the granting of a motion to file a motion to compel out of time. Tr. 685, 718. CCANP contends that the same extraordinary circumstances warranted additional discovery time.

To show specific prejudice from a failure to grant adequate discovery time is difficult in that the burden is to show what

would have been discovered that was not. Certainly the many exhibits entered into evidence by CCANP is an indication that such time would have been productively used. At the same time, discovery is so fundamental to the process that the refusal to grant adequate discovery is per se a violation of due process.

The problems between CCANP, on the one hand, and the Applicants and Board on the other regarding actual cross-examination began in the early stages of the Phase I hearings. When CCANP attempted to probe the accomplishments of Mr. Goldberg prior to being brought to the South Texas Nuclear Project, the Applicants objected to the line of questioning. The Board upheld the objection on grounds that the questioning duplicated earlier questioning by the other citizen intervenor, and, based on that objection, the Board moved to restrict the cross examination of the citizen intervenors by requiring them to submit cross examination plans indicating which topics each intervenor would be covering. See Tr. 910 - 1214, 1298.

This event early in the hearing set a tone of confrontational objections, adverse and unjustified Board rulings, and unfair criticism of CCANP by the Board. The Applicants' objection was in fact not supported by the record; CCANP accurately characterized the record and carefully explained to the Board why the cross examination was in no way duplicative. Tr. 930, l.7 - 931, 1175, l.16 - 1181; 1190-1214.

The Board ignored the reality of the record, sided with the Applicants, cut off CCANP's line of questioning, and moved to restrict the intervenors.

The cross examination not permitted was an effort to explore

the performance of Mr. Goldberg, a key figure in the entire response to the problems at the plant. The Board refused to permit CCANP to determine whether the confidence placed in Mr. Goldberg was warranted by his past performance. The Board later however, in their Partial Initial Decision, relied heavily on the hiring of Mr. Goldberg as a major remedial measure. Cutting off CCANP's questioning was both without legal justification and prejudicial to CCANP.

The closing stages of the hearing provided the most dramatic evidence that CCANP was involved in an abusive and prejudicial proceeding. While the ASLAB addressed a portion of this record, Decision at 24, n. 61, CCANP directs the Appeal Board's attention to the entire line of questioning beginning at Tr. 9713.

CCANP was attempting to probe the basis for an NRC Staff panel's opinion on the ultimate issue of character. Early in the questioning, CCANP's counsel brought out the HL&P failures noted by this panel as possible criteria for judging character. Tr. 9720, 120 et seq. This effort to determine the basis for the NRC Staff character judgment was interrupted with totally specious objections, repeatedly and repetitiously. Tr. 9734, l.15 - 9746; 9752, l.11 - 9761. When CCANP was finally allowed to ask the very questions it started to ask, the witnesses were responsive and the record as clear as it would have been without all the intervening objections. Tr. 9761-9764. While it might seem that the fact CCANP eventually was allowed to ask the questions means there was no prejudice, such an analysis would be too superficial. The need to proceed in the face of constant baseless objections and harrassment drains the energy of the advocate and

discourages full participation. Enough abuse of this sort, particularly when tolerated by the Board, can eventually lead the counsel to give up, as will be seen below.

In the early part of this record, the Board chairman introduced a distinction between trivial and non-trivial failures. Tr. 9746, l.2-7. The NRC Staff also began to make this distinction. Tr. 9767, l.3-9; Tr. 9779, l.19-24. Applicants' counsel joined in the distinction. Tr. 9772, l.18-22. See also Tr. 9782, l.14 - 9783, l.1.

In probing the NRC Staff determination that HL&P was not irresponsible (abdication of responsibility being an issue specifically identified by the Commission as a possible disqualifying finding), CCANP asked the NRC Staff to define "irresponsible." Tr. 9794, 119-24. The NRC witness defined the term as "[d]eliberateness or gross negligence." Tr. 9795, l.5-6. The NRC witness then stated that HL&P management was not grossly negligent. Tr. 9797, l.13-14. CCANP asked the witnesses to define how they used the term "gross negligence." Tr. 9798, l.15 - 9802, l.19.

The Chairman of the Board then posed some "clarifying questions," Tr. 9802, 121, specifically introducing the concepts of importance, seriousness, and significance, Tr. 9803, 14- 9804, 121, as a measure of the "degree of seriousness." Tr. 9802, 122-25.

CCANP immediately thereafter asked a question using the concept of importance as just used by the NRC witness in response to the questioning from the Board. Tr. 9804, l.23 - 9805, l.5. Applicants' counsel objected that the concept should be applied

by questions addressing each individual failure rather than the group of failures as a whole (these being the same failures with which CCANP opened its cross examination in this section of the record). Tr. 9805, l.6-12. When CCANP attempted to do so, the deluge of objections and Board rulings sustaining them cut off the questions.

While the ASLAB finds it significant that that Board suggested CCANP abandon its questioning and go back to the term "gross negligence," Decision at 24, n. 61, the NRC witnesses had already indicated they did not believe HL&P guilty of gross negligence. Tr. 9797, l.13-14. Furthermore, the questions sought to be asked were clearly appropriate and clearly defined by restricting the term "importance" to its meaning in the sense the witness discussed with the Board. Tr. 9804, l.23-25; 9808, l.5-9; 9810, l.4-6, l.25-17; 9813, l.21-23. Finally, and most importantly, CCANP was attempting to probe the basis for a conclusion expressed by witnesses supposedly testifying as experts - the conclusion that HL&P had not been grossly negligent. Counsel for CCANP had already spent a great deal of time establishing the line of questioning and was clearly about to reach a concluding series of questions that were going to elicit answers seriously undermining the NRC Staff position on abdication of responsibility and, therefore, on character. To simply return to asking if the witness had the same conclusion is meaningless, destroys any effective attempt to probe the basis for the already expressed conclusion, and essentially gives the expert a free pass to propound conclusions without challenge.

This entire period of cross examination is a good example of

what CCANP contends constituted abuse. There was no basis for the objections. There was no basis for sustaining the objections. Counsel for CCANP made repeated attempts to demonstrate that what he was doing was perfectly legitimate and legally permissible, but his explanations were to no avail. This abuse occurred in one of the most important areas of intervenor cross examination, a fact CCANP contends reinforces its argument that the abuse was clearly prejudicial.

The entire effort by CCANP to probe the NRC Staff's basis for its conclusions on character and competence is a series of frustrated attempts to ask perfectly reasonable questions. See e.g. Tr. 9829 -9919. This particular episode included: a blocked attempt to get a responsive answer to a critical question regarding whether proceeding to build a nuclear plant with inexperienced personnel is irresponsible, Tr. 9828, 1.15 - 9845, 1.18; new and extensive direct testimony prepared with the assistance of counsel delivered by the NRC Staff in the middle of CCANP's cross examination in an effort to blunt the effectiveness of the cross examination up to that point, Tr. 9848, 1.17- 9864, 1.18; 9872, 1.2-19; attempts by the Board to terminate CCANP cross examination on the essence of the NRC's Staff's position on character, Tr. 9869 - 9872, 1.1; NRC Staff witnesses changing their testimony as a result of coaching by the Board, Tr. 9885, 1.13 - 9886, 1.13, Tr. 9887, 1.7 - 9888, 1.7; blocked attempts to determine the weight to be given to major elements in the Staff's ultimate character determination, Tr. 9891 - 9895, 1.5; Tr. 9909, 1.4 - 9910, 1.8; a Board decision to terminate CCANP's cross examination if not concluded by a certain time, Tr. 9917,

1.1-6; and finally an abandonment by CCANP of any further efforts to determining the basis for the NRC Staff's position, Tr. 9919, 1.11-24.

The Board made a statement in response to CCANP's decision to cease cross examination, Tr. 9981 - 9983, 1.3, at least part of which the ASLAB recognized as mischaracterizing the record. App. Tr. 89, 1.11 - 91, 1.14.

There was an attempt by counsel for Applicants at oral argument before the ASLAB to portray the infamous three days of transcript as exceptional, App. Tr. 69, 1.20-23; to place the blame for the multitudinous objections on the particular counsel for CCANP, Tr. 69, 1.24 - 70, 1.1; Tr. 68, 1.9-16; and to mislead the Appeal Board as to how often that particular counsel for CCANP was present, Tr. 68, 1.7-8.

In fact, the three days were not exceptional. Applicants' counsel engaged in similar unacceptable behavior on many occasions during the proceeding. For example, when the issue was the ultimate rationale for how the QA/QC responsibilities should be organized, Applicants' counsel repeatedly testified and coached the witness. See e.g. Tr. 1641-42 (testifying, coaching), 1663-65 (testifying, coaching), 1666-67 (testifying, coaching), 1670-71 (testifying, coaching), 1672-73 (Board's attention directed to what is being done). See also Tr. 2014-2031 (change of testimony after extensive coaching disguised as objections to cross examination), especially Tr. 1549, 1.25 - 1550, 1.1; 2015, 1.12-19; 2016, 1.12-14; 2028, 1.22 - 2029, 1.9.

Even the NRC Staff found occasion to complain of Applicants' counsel testifying. Tr. 1742, 1.2-3.

Applicants' counsel persistently interposed objections during cross examination. See e.g. Tr. 1224, l.17 - 1227, l.20; Tr. 1229, l.18 1232, l.8; Tr. 1232, l.20 - 1234, l.21. Applicants' counsel also developed an early propensity for making objections when there was really no reason justifying an objection. Unfortunately, the Board supported such behavior. See e.g. Tr. 1326, l.17 - 1328, l.19. Applicants' counsel repeatedly interposed objections that mischaracterized the record or the facts. See e.g. Tr. 1341, l.4 - 1342, l.10 compare Tr. 1223 ff 7, l.29-31; Tr. 2131, l.14-21 compare Tr. 2133, l.19-20; Tr. 1637, l.19 - 1638, l.10 compare Tr. 1634, l.1-10.

Quite early in the hearings the pattern of Applicants' counsel using objections to interrupt CCANP's cross-examination led CCANP to protest and request an admonishment. Tr. 2015, l.24 - 2020, l.0. See also Tr. 1672, l.13-19. The Board did not prevent the repetition of such incidents and never admonished counsel for Applicants.

Nor was Mr. Hagar the only CCANP representative to have problems with multitudinous objections and other forms of interference with cross examination. See e.g. Tr. 2194, l.19-25; 2207, l.14 - 2203, l.13; 2273, l.5 - 2274, l.11; 2279, l.19d - 2280, l.9; 2282, l.10 - 2286, l.21.

Besides supporting and permitting the actions of Applicants' (and NRC Staff) counsel that CCANP find objectionable, the Board itself performed in a prejudicial manner. Early in the proceeding, the Chairman indicated he had no intention of considering denial of the license in this proceeding. Tr. 1000, l.12-15.

Repeated efforts by CCANP to introduce evidence relevant to HL&P's character were blocked by the Board. Tr. 2618 - 2642, 1.16 [Effort by CCANP to secure subpoena in order to explore a possible effort by HL&P to intimidate the Attorney General of Texas and prevent the effective participation of the Attorney General in this proceeding. (denied, Tr. 2685, 1.12)] Tr. 2648, 1.13 - 2655, 1.6 [Effort by CCANP to secure subpoena for journalist whose job HL&P threatened if he published an article exposing problems at STNP. See especially Tr. 2650, 1.8 - 2651, 1.15 (summary argument for why evidence should be heard) (denied, Tr. 2686, 1.15)] Tr. 5219, 1.20 - 5220, 1.19 [Refusal by Board to permit questioning regarding HL&P attempts to prevent funding of intervenors] These rulings took an unduly narrow view of the legislative requirement for character by limiting the permissible areas of inquiry to only matters directly related to the history of the plant in question. The character requirement is broader and requires a comprehensive look at the performance of any applicant whose character has been called into question.

An even more egregious example of the Board preventing the building of a record on an issue related to character is found in the efforts of CCANP to explore the possible conflict of interest involved in the hiring of Brown and Root. CCANP attempted to question a top executive of Brown and Root regarding the members of the Board of directors, but was prevented from doing so by the Board. Tr. 3983, 1.6 - 3988, 1.14. The Board, however, did accept the issue as relevant, Tr. 3985, 1.5-9, but sustained the objection to CCANP questioning on the basis CCANP was asking the wrong witness. Tr. 3985, 1.10-11. The Board announced its

intention to question a top executive of HL&P on this subject when he was called as a witness. Tr. 3987, 1.10-13, and Applicants agreed that such questioning would be appropriate. Tr. 3987, 1.15-19.

But when the HL&P witness appeared, the Board did not question him about the possible conflict of interest. When CCANP attempted to pursue the matter, the Applicants objected and the Board sustained the objection. Tr. 5530, 1.23 - 5532, 1.21. CCANP had assumed the Board would raise the specific issue based on the earlier representation of the Board. But even though the Board did not, the direct examination by the Board clearly opened the question of how and why Brown and Root was selected, Tr. 5406, 1.17 - 5414, 1.10.

The refusal to permit this line of questioning foreclosed the possibility CCANP could prove a conflict of interest as opposed to an ability to perform as the real basis for hiring Brown and Root. This refusal seriously prejudiced CCANP. First of all, the decision to hire Brown and Root is clearly within even the narrow Board allowed area of character matters directly related to the history of this plant. There is simply no reasonable basis for excluding an exploration of this issue.

Second, if such a conflict of interest had been proven, such proof would represent a serious challenge to HL&P's character. For the Applicants to chose their architect-engineer-construction manager-constructor-quality assurance contractor on the basis of interlocking directors or other personal aggrandizement would represent a serious character deficiency.

Third, CCANP's position in its Proposed Findings of Fact and

Conclusions of Law was that HL&P management took an extremely indulgent attitude toward Brown and Root failures. If proven, the conflict of interest would have explained the indulgent attitude, exposed the true root cause of the deficiencies at the project, and provided insight into the key issue of abdication of responsibility.

When CCANP requested that witnesses be sequestered, the request was denied on a split vote. Tr. 1533 - 1542. The reason for the request was to permit an exploration of the "process by which Houston obtained the services of Bechtel to prepare the particular report in question." Tr. 1542 (Bechhoefer 1.8-10) In fact, this subject eventually became the area of a CCANP challenge to the veracity of a key HL&P witness.

Finally, the Board permitted the calling of a surprise witness on a matter of great importance to the intervenors since the subject was part of the specific elements in an intervenor contention. Tr. 6311 - 6314, 1.6; 6315, 1.8 - 6321.

By this point in the proceeding, CCANP's primary representative had reached his personal limit. Tr. 6442, 1.9 - 6448; Tr. 6458, 1.17-20.

There are dozens of further examples that CCANP could call to the attention of the ASLAB. At this point, CCANP trusts that a number of matters are clear.

First, why it was so hard for CCANP to truly illuminate on appeal the entire record of due process violations while also calling attention to every point of disagreement with the substance of the ASLB's Partial Initial Decision given the page limitations imposed by the ASLAB.

Second, that there is a pattern of abuse that permeated this proceeding to the point that the cumulative effect is to deny CCANP a fair hearing.

Third, that the responsibility for this abuse rests primarily with the ASLB and secondarily with the willingness of the Applicants' counsel (and on many occasions the NRC Staff counsel) to exploit the permissiveness of the ASLB.

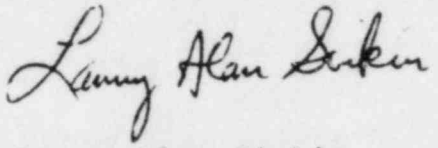
We are dealing in this proceeding with an administrative hearing before administrative law judges. There is no jury to prejudice. Such a hearing would normally be characterized by few objections, a broad latitude in cross examination, and a generally relaxed approach to developing a full record. There is no way the transcript just discussed can be perceived as even coming close to that norm. A party cannot be asked to continually run a gauntlet in order to make its case. Such a demand is itself reversible error and should be so recognized by the ASLAB.

Furthermore, permitting such a proceeding to occur indicates either bias on the part of the Board or a Board lacking in the judicial attributes necessary to conduct such a hearing. See e.g. App. Tr. 69, 1.3-4. Either explanation requires the ASLAB to remand the proceeding to a newly constituted Board with instructions to provide an adequate remedy for the due process violations committed in Phase I. In addition, CCANP is clearly entitled to a reconstituted Board for any Phase II hearings. The ASLAB concern in this regard, App. Tr. 67, 1.14-16; 69, 1.5-7; 90, 1.6-8, is well founded and should be addressed by the remedy of reconstitution sought by CCANP.

For the above and foregoing reasons, CCANP moves the Atomic

Safety and Licensing Appeal Board to reconsider its Decision and issue a decision in conformance with one of the alternatives suggested herein.

Respectfully submitted,



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Dated: March 8, 1985

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CERTIFICATE OF SERVICE

I hereby certify that copies of CITIZENS CONCERNED ABOUT NUCLEAR POWER (CCANP) MOTION FOR RECONSIDERATION were served by deposit in the U.S. Mail, first class postage paid to the following individuals or entities on the 8th day of March 1985.

Gary J. Edles
Chairman
Atomic Safety and Lic. Appeal Bd.
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