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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of

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

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Docket Nos. 50-498 DL
50-499 DL

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CITIZENS CONCERNED ABOUT NUCLEAR POWER (CCANP)
MOTION FOR RECONSIDERATION OF ASLB ORDER OF NOVEMBER 16, 1984

I. Introduction

On November 16, 1984, the ASLB in this proceeding issued its Fifth Prehearing Conference Order (Consideration of issues for Phase II) [Hereinafter "Order"]. This Order constitutes the Board's view of the issues to be litigated in Phase II of this proceeding.

CCANP moves the Board to reconsider this Order in so far as it dismisses "all Quadrex-related issues except those challenging the reporting to the NRC ..." and denies discovery on the Staff's most recent determination of whether designs reviewed by the Quadrex Corporation were or were not released for construction and regarding the new classification system used by the Staff in its brief on the reportability issue. Order at 9. See Citizens Concerned About Nuclear Power (CCANP) Brief In Response To Licensing Board Memorandum and Order Regarding the Requirements Applicable To The Applicants To Notify and Report To The Nuclear Regulatory Commission About the Quadrex Report and Its Findings dated October 1, 1984 at 13, 15, 29.

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II. Phase II Issues

Over the years, the Board has shifted its position as to

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what Phase II would encompass. In doing so, the Board has denied CCANP's due process rights; failed to consider HL&P's character and competence as required by the Commission, See Houston Lighting and Power Company (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281 (1980); and ignored Issue A as accepted for litigation by the Board.

When it first addressed the Quadrex-related issues to be heard in Phase II, the Board stated:

"[O]ur inquiry into all aspects of the Quadrex Report is deferred until Phase II. Any findings made at the conclusion of Phase I will be subject to change in Phase II to reflect the information in and reviews of the Quadrex Report. ... Phase II will include all aspects of the Quadrex Report, including its commissioning, its findings [sic] its submission to and handling by the Applicants, and Applicants' notification of the NRC (including this Board)." (emphasis added) Fourth Prehearing Conference Order dated December 16, 1981 at 5.

This 1981 order was in part a response to CCANP's attempt to specify Quadrex issues to be heard in this proceeding. See Citizens Concerned About Nuclear Power Motion to File Additional Contentions Based on New Information and to Establish a Discovery and Hearing Schedule With Respect to New Contentions" dated November 23, 1981 at 35 et seq. In this motion, CCANP proposed 20 contentions specifically dealing with the Quadrex Report and the broader ramifications of that report.

Based on the 1981 order, the NRC Staff objected to the admission of CCANP's contentions as unnecessary. The Staff argued that since the Board had admitted "all matters relating to the Quadrex Report," "looking at all aspects of the Quadrex Report" would be a "more efficacious way of developing a sound record than the adoption of twenty new contentions." NRC Response in

Opposition to Additional Contentions Filed by Citizens Concerned About Nuclear Power dated February 5, 1982 at 2-3. The NRC Staff stated:

"Given the broad scope of the anticipated Board inquiry into all aspects of the Quadrex Report, and the Board's acknowledgement that any finding made in Phase I will be subject to change as a result of subsequent information developed during Phase II, it is the Staff's position that adopting any of CCANP's remaining twenty new contentions at this time is unnecessary to protect CCANP's interest in having Quadrex related matters fully litigated and would not be the best means to create a comprehensive and sound record." (emphasis in the original) Id. at 6.

The NRC Staff further took the position that:

"In view of the broad scope of both the Quadrex Report and the Board's intended inquiry into that report, CCANP's alternative of litigating twenty specific allegations is surely focusing on the trees and failing to see the forest." Id. at 8.

After reviewing the NRC Staff position the Applicants wrote the Board saying:

"Upon reflection, the Applicants [found] the NRC Staff's position persuasive and agree that, given the broad scope of the anticipated Board inquiry, no new contentions or issues relating to Quadrex are necessary." Applicant letter from Jack R. Newman to the ASLB dated March 9, 1982.

CCANP eventually agreed to withdraw its contentions given that all the parties and the Board were in agreement that CCANP's rights would be fully protected in that all aspects of the Quadrex Report would be fully litigated in Phase II.

The Board then issued its Memorandum (Memorializing Certain Rulings Announced During Evidentiary Hearing Sessions of June 15-17, 1982) dated June 24, 1982. In its Memorandum, the Board simply recognized the agreement of all the parties not to consider specific contentions and declined to admit the

contentions proposed by CCANP. Id. at 2-3.

After the issuance of the Partial Initial Decision on March 14, 1984, however, Phase II went through a radical change as far as the Board's conception of what such hearings would include.

"[W]e regard our PID as having had some effect on the scope of the issues properly open to litigation to Phase II. ... Insofar as the Quadrex Report is concerned, we regard the issue of the adequacy of HL&P's character to have been resolved by our March 14, 1984 PID, except to the extent that HL&P's promptness (or lack thereof) in turning over the report to the Staff, other parties and the Board may be said to reflect on that character. ... In other words, to the extent that deficiencies in Brown & Root engineering performance were uncovered by the Quadrex Report, we do not regard it as useful to litigate those deficiencies in the context of HL&P's (or B&R's) character. Discovery with respect to HL&P's character will be limited to an exploration of the circumstances surrounding HL&P's notification of NRC and the parties about this report. ...

With regard to HL&P's competence prior to the Show-Cause Order, we have already determined that there were certain deficiencies, particularly with respect to nuclear experience. ... We regard that, to the extent that the Quadrex Report reflects deficiencies in the early competence of HL&P, it is merely cumulative. No further discovery on that subject will be entertained." Memorandum and Order dated May 22, 1984 at 4-5.

In the face of this dramatic reversal of the Board's earlier position on the scope of the Phase II inquiry, CCANP filed a motion to reconsider. Motion for Reconsideration dated June 6, 1984.

In response, the Board emphasized its new limits on Phase II.

"With respect to the specific limits we established with respect to the Quadrex-Report issue, we wish to note that we believe it to be permissible to exclude from further adjudication aspects of issues which we regard as no longer material. See PID at p. 91." Memorandum and Order (Denying Reconsideration but Clarifying Memorandum and Order of May 22, 1984), dated July 10, 1984 at 4.

The citation is to the Board's ruling on CCANP's motion to reopen in which the Board found that the specific issues on which CCANP sought to introduce additional evidence had already been adequately litigated, hardly the situation with the Quadrex Report which has never been litigated and where there is no record to even be reopened.

In the same Memorandum and Order, the Board states:

"Issue A inquired into HL&P's managerial character and competence in the context of the particular construction deficiencies encompassed within the Show-Cause Order and the accompanying Notice of Violation. Id. at 5.

The Board misconstrued Issue A as limited to the Show-Cause Order and the Notice of Violation. Issue A deals with HL&P's record of compliance with NRC regulations with the Order to Show Cause and Notice of Violation being only one of the matters illustrative of that record. Furthermore, the Commission ordered the Board to look into the broader ramifications of the entire history of HL&P's record at the South Texas Nuclear Project.

The Board further stated:

"The Quadrex Report is, of course, an evaluation of the engineering practices of Brown & Root, Inc. (B&R). B&R is no longer associated with the project. Although HL&P's activities in supervising B&R's design engineering efforts may theoretically have some bearing on an overall assessment of HL&P's character, we have already examined those activities to a considerable extent. See, e.g. PID, at pp. 40-41, 44. We do not believe that further inquiry into this subject through the findings of the Quadrex Report would be productive. Id.

The citation to the PID refers to one relatively minor inquiry in this proceeding where HL&P went into the field with engineering far less complete than it should have been. To characterize the brief inquiry into this episode as examining HL&P's supervision

of B&R's design engineering work "to a considerable extent" is simply a distortion of reality. The Board's position is particularly curious in light of Applicants' position that there was no need to bring up the Quadrex Report in Phase I since that phase did not deal with design and engineering. Tr. 10845. The Board apparently believes Phase I considered to "a considerable extent" issues that the Applicants did not believe were included at all.

To use this brief inquiry to close out all further inquiry into HL&P's supervision of B&R's design engineering work and into the Quadrex Report and its ramifications is symptomatic of the Board's strong desire to avoid confronting HL&P with the consequences of their actions.

In this attempt, the Board creates a whole new criteria for what is relevant to the character inquiry in this proceeding.

"We have been provided no factual basis from the Quadrex Report for concluding that HL&P character deficiencies may have contributed to the design engineering difficulties which developed. The Quadrex Report does not directly address this question." Id.

Issue A is the history of noncompliance and how that noncompliance reflects on HL&P's character. That issue did not contemplate that the only relevant evidence would be reports produced which were specifically addressed to the character of the Applicants; the Order to Show Cause did not address the character of the Applicants but was obviously relevant and even central to the inquiry into HL&P's character. Similarly the history of HL&P supervision of B&R design and engineering work, the history of the Quadrex Report, the Quadrex Report itself, and the response of HL&P to the Quadrex Report are all relevant

inquiries to determine whether the past acts of HL&P without regard to any remedial measures were so seriously deficient that they should be disqualified from receiving an operating license - the question posed by the Commission and Issue A.

The Board then tries to slam the door on Quadrex and Issue A altogether.

"When coupled with the eventual replacement of B&R itself, it would appear to be the equivalent of 'beating a dead horse' to engage in a lengthy, excursive examination of the possible implications regarding HL&P's character of the B&R design-engineering activities evaluated by the Quadrex Report or of HL&P's pre-1981 procedures for overseeing such B&R activities. . .

With respect to HL&P's competence, we have already evaluated the personnel who were overseeing B&R's construction functions during the period prior to the preparation of the Quadrex Report and have found them deficient in certain respects (PID at pp. 47-51). Because competence deficiencies are in any event remediable, further evidence on early deficiencies of HL&P would be at best cumulative." Id. at 6-7.

Again the Board uses the dismissal of Brown and Root as a remedial act that somehow provides HL&P a free pass for nine years of grossly deficient performance.

CCANP's position is that the Quadrex Report and a full exploration of HL&P's supervision of B&R's design and engineering process would show that a chaotic and life threatening design and engineering process went on for years at the South Texas Nuclear Project, that HL&P knew or should have known such a process was taking place, and that the long term existence of such a process

*. The Board might keep in mind that when Brown and Root witnesses were testifying they were still on the job at STNP. There was every reason for them to mute any criticisms they might have had of HL&P. Had they known that the Board was going to blame Brown and Root for everything, their testimony might well have been different, particularly regarding HL&P.

demonstrates a totally unacceptable character and competence on the part of any applicant for a license to operate a nuclear power plant. This is not cumulative evidence, but rather evidence which should cause the Board to reconsider its decision on Issue A. What the Quadrex Report reveals about the HL&P record at STNP is even worse than what the Order to Show Cause and Notice of Violation revealed. As the NRC Executive Director for Operations testified under oath before Congress:

"Though we were aware of Quality Assurance problems at South Texas and had cited the licensee for a breakdown in their quality assurance program in April 1980, the magnitude of potential problems was not fully appreciated until we first examined the [Quadrex] Report in August 1981." Testimony of William J. Dircks Before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs, United States House of Representatives, Washington, D.C., November 19, 1981.

But the "dead horse" Memorandum and Order made clear the Board's lack of interest in pursuing substantive issues raised by the Quadrex Report.

So, CCANP had tried to raise specific contentions on Quadrex in November of 1981 but was convinced by the NRC Staff, the Applicants, and the Board that CCANP's rights were fully protected without such contentions. Later CCANP was told that except for reportability, nothing about the Quadrex Report could affect the decision on Issue A, the issue CCANP was most concerned with litigating. The Board then asked CCANP to identify what issues CCANP wanted litigated in Phase II.

With nowhere else to turn, CCANP took the only course open to it. In its October 1, 1984 "Specification of Particular Matters for Consideration In Phase II Hearings," CCANP asked for

"further clarification from the ASLB on the ASLB's view of the issues which it will permit to be considered in Phase II hearings. Consequently, CCANP herein submits a comprehensive list of the issues it believes the Phase II hearings should encompass and awaits the ASLB's response to such a list."

In that pleading, CCANP provided an identification of all the areas of inquiry which CCANP believed would complete the record on HL&P's supervision of B&R's design and engineering, illustrate the issues raised by the Quadrex Report, and provide a basis for assessing how seriously this record reflected on HL&P's character and competence.

At the October prehearing conference, however, the Board did not respond to CCANP's earnest request. The Board lectured CCANP's representative, saying:

"Normally, you have a contention. You say that such-and-such is a specific finding, and such finding has not been adequately disposed of or taken care of.

In an Operating License type of proceeding like this is, we only litigate contentions or issues. If we don't know what the issue is or the contention is, we don't know why something may be wrong, we don't normally litigate that." Tr. 10757

Yet the Board already knew what issue CCANP wanted to litigate.

"CCANP (supported by Texas) apparently wishes to litigate the design engineering questions raised by the Quadrex Report under the umbrella of [Issue A]." Memorandum and Order (Denying Reconsideration but Clarifying Memorandum and Order of May 22, 1984 dated July 10, 1984 at 5.

The Board recognized weeks before the prehearing conference that both CCANP and the State of Texas believe the Quadrex Report and its ramifications fall within the scope of Issue A.

As noted earlier, CCANP had tried three years earlier to formulate specific contentions and been told they were

unnecessary.

In its Fifth Prehearing Conference Order, for which reconsideration is sought herein, the Board attempts to blame CCANP for not bringing to the Board issues and contentions for litigation. For CCANP, it is very much like being sent in a revolving door in 1981 and exiting in 1984 exactly where we started. The Board is using CCANP as a scapegoat in order to conceal the Board's interest in shutting down the inquiry into HL&P's character and competence.

CCANP finds it remarkable that this Board, when it finally saw the Quadrex Report, responded with an order scheduling a special hearing to consider suspending all safety-related work at the project, an order that all three members of the Board made it a point to sign. But now this same Board finds no character implications in the report and is willing to forego any inquiry into what happened. Clearly the initial reaction of the Board represents an appropriate regulatory response. What the Board is doing now represents an attempt to rebury this incredibly damaging report precisely because the implications for HL&P's character are so drastic.

CCANP moves the Board to reconsider its position on the Phase II issues and permit hearings on all the areas set forth in CCANP's specification of issues. After seeing all the evidence relevant to HL&P's supervision of B&R's design and engineering, all aspects of the Quadrex Report, and the parties' view of the broader ramifications of this evidence, CCANP believes the Board will be compelled to reassess its decision on Issue A and find that the past acts of HL&P without regard to remedial measures

disqualify HL&P from receiving an operating license for a nuclear power plant.

II. Discovery Issues

In its October 1, 1984 brief on the notification and reportability requirement for the Quadrex Report, CCANP sought discovery from the NRC staff. Brief at 13, 15, 29. Specifically, CCANP sought discovery of the basis for the Staff's categorizing into one of seven areas of reportability the individual items in the Quadrex Report. CCANP also sought discovery concerning the Staff's determinations whether the designs had been released for construction.

The Board has now denied these motions citing two reasons. The Board says that (1) the information has no bearing on HL&P's character and (2) the request comes too late.

The Board's position makes no sense to CCANP. The extent of HL&P's failure to notify and report is a clear reflection on its character. The discovery is directed toward resolving the issue of just what should have been subject to notification or reportability requirements.

The Staff opposed CCANP's motions because it had been caught in its own failure to satisfy the Board's June 22, 1983 Memorandum and Order. The Staff failure to both do the analysis requested by the Board and provide a brief on that analysis is amply discussed in CCANP's brief on the notification and reportability questions. Suffice it to say that the Staff fell far short of satisfying the Board's orders.

At the prehearing conference, even the Staff's own attorney recognized, however briefly, that the latest NRC effort was "not

as thorough" as the earlier effort.

CCANP sought discovery on the most fundamental matters upon which the Staff's conclusions were based. These were supposed to be conclusions based on new analysis. The Board, however, says that seeking such discovery is "too late."

Should CCANP have known that the Staff would not comply with the Board's order in writing their brief? Had CCANP sought discovery on these matters during the fourteen months between the ASLB order to the Staff to prepare the brief and the Staff issuing their brief, such discovery would have been objectionable on the grounds that the Staff was working on a brief on just those matters.

The Board is still considering how to address the notification and reportability issues. There is thus no prejudice to anyone in allowing CCANP to conduct discovery on the Staff's most recent determinations and classifications. CCANP, therefore, moves the Board to reconsider its denial of the discovery requested in CCANP's brief.

Respectfully submitted,

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Dated: December 4, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

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I hereby certify that copies of CITIZENS CONCERNED ABOUT NUCLEAR POWER, INC. (CCNP) MOTION FOR RECONSIDERATION OF ASLB ORDER OF NOVEMBER 16, 1984 were served by deposit in the U.S. Mail, first class postage paid to the following individuals and entities on the 4th day of December 1984.

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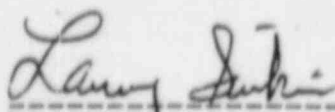
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