

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' RESPONSE TO CCANP
MOTION FOR RECONSIDERATION OF
ASLB ORDER OF NOVEMBER 16, 1984

I. Introduction

By motion dated December 4, 1984,^{*/} Citizens Concerned About Nuclear Power (CCANP) seeks reconsideration of the Atomic Safety and Licensing Board's (Board) Fifth Prehearing Conference Order.^{**/} CCANP argues that the Board's Order is in error insofar as it: (1) "dismisses 'all Quadrex-related issues'" (other than those addressing reportability ; and (2) denies CCANP's request for additional discovery on certain aspects of the NRC Staff's analysis of the reportability of the Quadrex Report. Motion at 1.

The Board did not err in either respect. Notwithstanding numerous opportunities, CCANP failed to identify a single litigable issue with respect to the Quadrex Report (other

^{*/} CCANP Motion for Reconsideration of ASLB Order of November 16, 1984 (December 4, 1984) (Motion).

^{**/} Fifth Prehearing Conference Order (November 16, 1984) (Fifth Prehearing Conference Order). Although objections to a prehearing conference order must be filed within five days after service of the order (10 C.F.R. § 2.752(c)), CCANP's Motion was not served until December 4, 1984 and is, therefore, untimely.

than its reportability). Similarly, CCANP failed to avail itself of extensive opportunities for discovery. Since it has provided no new information or argument warranting reconsideration,^{*/} CCANP's Motion should be denied.

II. Limitation of Issues to be Litigated in Phase II

CCANP argues that the Board erred in limiting the issues to be litigated in Phase II for two principal reasons. First, it alleges that "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 . . ." should be considered in Phase II (Motion at 6), and that by failing to admit such matters as litigable issues, the Board "failed to consider HL&P's character and competence as required by the Commission. . . ." Id. at 2.

Second, CCANP alleges that the limitations which were imposed on the scope of Phase II were not contemplated by the Board's Fourth Prehearing Conference Order,^{**/} that it agreed to withdraw its proposed Quadrex contentions based upon the anticipated scope of the Phase II proceeding as described in that Order, and that it was, therefore, deprived of its "due process rights." Id. at 5-6.

^{*/} Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5-6 (1980).

^{**/} Fourth Prehearing Conference Order (December 16, 1981) (Fourth Prehearing Conference Order).

An examination of the record demonstrates, however, that CCANP has mischaracterized the Board's efforts in the period between the Fourth and Fifth Prehearing Conference Orders to obtain a reasonable definition of the issues to be litigated in Phase II, as required by the Commission's regulations, and has failed to identify a single litigable issue.

In the Board's Fourth Prehearing Conference Order, it described the general scope of the issues to be addressed in the three phases of this proceeding. The Board indicated that "all aspects" of the Quadrex Report would be addressed in Phase II, but anticipated that the issues to be litigated would be influenced by the ongoing reviews of the Quadrex Report by Bechtel and the NRC Staff. Fourth Prehearing Conference Order at 5. The Board did not attempt to anticipate the potential relevance of the determinations that would be reached in its Partial Initial Decision (PID) on Phase I issues, although it did note that "[a]ny 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." Id. Clearly, the Fourth Prehearing Conference Order contemplated that before Phase II would begin, the scope of inquiry into the Quadrex Report would be defined more specifically based upon the significant amount of information expected to be available at a later date.

After the Bechtel and NRC Staff reviews of the Quadrex Report were completed, the Board proceeded, consistent with

its Fourth Prehearing Conference Order and its responsibilities under the Commission's regulations, to secure a specification of the issues to be litigated in Phase II:

Following the completion of discovery, we expect to have the parties delineate the particular Quadrex-related issues which they wish to litigate or believe should be litigated At a later date, we expect to set forth a schedule for . . . the filing of particular Quadrex-related issues which any party (including for this purpose the State of Texas) seeks to litigate.

Memorandum and Order (June 22, 1983) at 5. Thus, it was clear as early as June, 1983 that the Board would require the parties to define litigable issues arising out of the Quadrex Report with specificity.

Again, in May, 1984, in the course of ruling upon Applicants' motion for sanctions against CCANP and upon two CCANP motions for additional discovery, the Board expressed its expectation that, following discovery, CCANP would be able "to define more precisely the matters it wish[d] to litigate in Phase II." CCANP (as well as the other parties as appropriate) were instructed "to submit a list of particular matters which they believe should be encompassed in the Phase II hearings . . ." so that those hearings would be "much more precisely defined than was the Phase I hearing." Memorandum and Order (May 22, 1984) at 12-13.

In establishing the permissible scope of the additional discovery granted to CCANP, the Board noted that it regarded its PID as having "had some effect on the scope of the issues properly open to litigation in Phase II." Id. at 4. In

particular, it concluded that "the adequacy of HL&P's character" had been resolved by its PID except to the extent that Quadrex reportability considerations might affect that determination, and stated that it would not be "useful to litigate" alleged "deficiencies in Brown & Root engineering performance . . . uncovered by the Quadrex Report . . . in the context of HL&P's . . . character." Id. at 5.

The Board further noted that it had "already determined that there were certain deficiencies, particularly with respect to nuclear experience," and that "to the extent that the Quadrex Report reflects deficiencies in the early competence of HL&P, it is merely cumulative." Id. The Board did grant additional discovery with respect to HL&P's "current" competence. Id. at 5, 9-11.

Although CCANP moved for reconsideration of the Board's May 22 Memorandum and Order, it failed to identify any litigable issue regarding HL&P's character or competence arising out of the Quadrex Report, beyond the general assertion that the Board had foreclosed inquiry into the "essence" of the Report.^{*/} Instead, CCANP simply referred, without any underlying, articulated basis, to "[t]he possibility" that evidence could be developed to show that HL&P had misled the NRC regarding Brown & Root's engineering capabilities.

Motion for Reconsideration (June 5, 1984) at 2.

^{*/} CCANP Motion for Reconsideration of ASLB's Memorandum and Order (Ruling on CCANP Motions for Additional Discovery and Applicants' Motion for Sanctions) dated May 22, 1984 (June 5, 1984) (Motion for Reconsideration (June 5, 1984)) at 1.

The Board denied CCANP's Motion for Reconsideration and, in doing so, again reiterated the need for particularization of the issues to be litigated:

Nowhere have we held that the entire Quadrex Report would perforce be subject to examination in Phase II. Indeed, the Quadrex Report, taken as a whole, is too wide-ranging a document to be considered as a "matter in controversy"

Memorandum and Order (July 10, 1984) at 4. It also clarified its prior statements regarding the appropriate scope of the Phase II proceeding.

In particular, the Board stated that since the Quadrex Report is "an evaluation of [Brown & Root's] engineering practices . . . , " Brown & Root is "no longer associated with the project," and it had "already examined [HL&P's supervision of Brown & Root engineering activities] to a considerable extent . . . further inquiry into [HL&P's character] through the findings of the Quadrex Report would [not] be productive." Id. at 5. The Board concluded that CCANP's reliance on the "circumstantial conclusions of the Quadrex Report" and "conjecture" was insufficient to "provoke another full-blown inquiry into HL&P's character, given the substantial evidence of HL&P's positive character traits upon which [it] relied in [its] PID. . . ." Id. at 5-6.

With respect to HL&P's "early" competence, the Board reiterated its conclusion that certain deficiencies existed, but determined that "further evidence on early deficiencies

of HL&P would be at best cumulative." Id. at 6-7. The Board recognized that "the only competence question of continuing materiality is whether HL&P and its current contractors are competent to finish construction of and/or to operate the facility." Id. at 7.

Following the Board's July 10 Memorandum and Order, the parties were required to specify the particular issues they believed should be litigated in Phase II. Despite the fact that CCANP had this additional opportunity to demonstrate to the Board that there were litigable character and competence issues to be addressed, it provided no more than a "laundry list" of general topics concerning the Quadrex Report rather than a statement of issues sufficiently drawn to permit adjudication.*

The pattern is unchanged to this date. At the October 16, 1984 prehearing conference convened to identify the issues to be heard in Phase II, CCANP's counsel stated its desire to "go into the underlying factual issues on each of the specific findings," made a "global request . . . [to] go into each matter discussed in the Quadrex Report . . . " and

*/ CCANP Specification of Particular Matters for Consideration in Phase II Hearings (October 1, 1984) (CCANP Specification of Issues) at 1-4. Although it vaguely requested "further clarification" regarding the issues the Board deemed appropriate for litigation, CCANP included in its list topics it now claims have been improperly foreclosed from consideration. For example, CCANP listed among the "issues" it wished to litigate, the "[i]mplications for HL&P's [c]haracter and [c]ompetence" of the "[s]ubstance" of the Quadrex Report. Specification of Issues at 1, 3. Thus, it cannot argue that uncertainty regarding the scope of the issues deemed appropriate for litigation by the Board caused it to omit any particular matter. Instead, CCANP simply failed to identify the matters it wished to litigate with sufficient specificity to warrant adjudication.

concluded that he had nothing "to add beyond what [was] present . . ." in the CCANP Specification of Issues.*/

Even in its current Motion, CCANP continues to rely upon unspecified and unsupported allegations regarding the "chaotic and life threatening" design process at STP and fails to provide any factual basis for those allegations. Motion at 7. Although CCANP cites the Board's statement that HL&P's oversight of Brown & Root's engineering effort "may theoretically have some bearing on an overall assessment of HL&P's character . . .," it has not identified any aspect of HL&P's performance in that regard that reflects adversely on its character.**/ Id. at 5.

*/ Fifth Prehearing Conference Transcript (October 16, 1984) (Tr.) at 10756, 10758 and 10759.

**/ CCANP also takes issue with the Board's conclusion that it had "already examined those activities to a considerable extent, . . . [and that] further inquiry into [that] subject . . . would [not] be productive." Motion at 5. CCANP argues, in particular, that the Board overstated the extent to which the Phase I record addressed HL&P's oversight of Brown & Root engineering, and that the one "minor" inquiry into such activities cited by the Board could not justify its refusal to consider HL&P's record in that regard in Phase II. Id. at 5-6. CCANP is in error. The Board's one record reference, which was cited by way of example, is not the only evidence in the Phase I record regarding HL&P's oversight of Brown & Root engineering. Other testimony addressing those activities was presented in the context of descriptions of HL&P's overall Project management and QA organizations and activities. E.g., Goldberg and Frazar, ff. Tr. 906, at 1-2, 5-14, 16-21, 30-31; Tr. 1150-51, 2512 (Goldberg), 5119-20 (Oprea). Other witnesses testified about concrete placement (including Cadwelding and reinforcing bar installation) and described HL&P Engineering's activities related to such work. E.g., Murphy et al. (Contentions), ff. Tr. 6522, at 53-57, 61, 65; Saltarelli et al., ff. Tr. 7536, at 4-5; Tr. 6621, 6990-92, 7205-07 (Hernandez).

Pursuant to 10 C.F.R. § 2.752(a)(1), NRC licensing boards are required to convene a prehearing conference in order to consider, among other things, the "[s]implification, clarification, and specification of the issues . . ." to be litigated. Licensing boards are also required, after the prehearing conference, to "enter an order . . . which limits the issues or defines the matters in controversy to be determined in the proceeding."^{*/} 10 C.F.R. § 2.752(c). See also, 10 C.F.R. Part 2, Appendix A, II(b) and (c). Thus, the Board properly sought to define and narrow the issues to be litigated in Phase II, a process in which CCANP has been either unwilling or unable to cooperate.^{**/}

^{*/} Furthermore, in NRC proceedings, a party seeking to litigate a specific issue must set forth a contention and describe the bases for such a contention with "reasonable specificity." 10 C.F.R. § 2.714(b). Even where specific contentions are not required (as in the case of an interested state pursuant to 10 C.F.R. § 2.715(c)), a participant is still required to frame new issues to be litigated with "sufficient detail and preciseness" to warrant adjudication. Gulf State Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768 (1977). In River Bend, 6 NRC at 770, the Appeal Board cited favorably the requirement imposed by the Licensing Board that the State of Louisiana, participating as an interested state, identify issues which are "relevant, material and narrow enough to permit evidentiary determination in an adjudicatory setting."

^{**/} CCANP asserts that the Board "already knew what issue [it] wanted to litigate" since the Board had previously acknowledged that "CCANP . . . apparently wishes to litigate the design engineering questions raised by the Quadrex Report under the umbrella of [Issue A]." Motion at 9. CCANP has reiterated on numerous occasions its general position that the "questions" raised by the Quadrex Report are somehow relevant to HL&P's character and competence. It has failed, however, to specifically identify such "questions" or to describe how they affect the Board's determinations on HL&P's character and competence.

CCANP's second principal basis for challenging the Board's determination that no Quadrex-related matters (apart from reportability) warrant litigation in Phase II is that the imposition of such limitations deprived it of its due process rights. In particular, CCANP points to the fact that its proposed Quadrex contentions were withdrawn based upon the "broad" inquiry into the Report envisioned by the Board's Fourth Prehearing Conference Order, that the Board subsequently imposed limitations on litigation of the Quadrex Report not anticipated by the agreement among the parties which led to the withdrawal of CCANP's contentions and that, therefore, it was unfairly deprived of its right to litigate the Quadrex Report. Motion at 3, 8.

Even if CCANP believed that the Board's Fourth Prehearing Conference Order had authorized a broad inquiry into the Quadrex Report,^{*/} by the time that it was required to submit a list of issues to be litigated in Phase II, CCANP, as noted above, had been repeatedly informed that a reasonable degree of specificity would be required in defining Phase II issues and had been provided numerous opportunities to identify such issues. Given CCANP's failure to formulate any such issues,

^{*/} Although broad discovery pertaining to the Quadrex Report was, in fact, available, CCANP did not choose to exercise its discovery rights. The State of Texas, however, did exercise its discovery rights and obtained answers to numerous interrogatories from Applicants and the NRC Staff, and deposed HL&P's Vice President, Nuclear Engineering and Construction.

it cannot fairly argue that it has been denied due process on the basis of the withdrawal of its proposed contentions over two years ago. As a result, there is no basis for the Board to reconsider its decision to eliminate from the scope of Phase II all Quadrex-related matters other than reportability questions.

III. Board Denial of CCANP's Additional Discovery Requests

CCANP also requests that the Board reconsider its decision denying further discovery from the NRC Staff regarding the bases for the Staff's determinations on the reportability of the Quadrex Report pursuant to 10 C.F.R. § 50.55(e).^{*/} CCANP argues that "[t]he extent of HL&P's failure to notify and report is a clear reflection on its character," that the Staff "fell far short" of providing the information requested by the Board regarding the bases for its reportability determinations, that if CCANP would have sought discovery earlier "such discovery would have been objectionable," and that "no prejudice" will result from the additional discovery sought. Motion at 11-12.

Contrary to CCANP's allegation that HL&P's reporting of the Quadrex findings pursuant to section 50.55(e) reflects

^{*/} In particular, CCANP requests additional discovery regarding the Staff's "most recent determination of whether designs reviewed by . . . Quadrex . . . were or were not released for construction and . . . the new classification system used by the Staff in its brief on the reportability issue." Motion at 1.

adversely on its character, both the NRC Staff^{*/} and Applicants^{**/} determined that all matters identified in the Quadrex Report which were reportable pursuant to section 50.55(e) have, in fact, been reported. Though further inquiry might theoretically disclose some error in the Staff's analyses, the existence of such an error would not reflect adversely on HL&P's character (particularly in light of the subjective nature of those analyses).^{***/} Thus, the Board properly concluded that even if it were to disagree with the concurring opinions of the Staff and Applicants, "the failure to have reported would not reflect adversely on HL&P's character . . ." and that the additional information sought by CCANP has "no bearing on HL&P's character. . . ." Memorandum and Order (July 10, 1984) at 8; Fifth Prehearing Conference Order at 9.

CCANP also argues that the Staff's brief on reportability issues did not include the information requested by the Board in its June 22, 1983 Memorandum and Order, and that it could not anticipate that the Staff would fail to provide the requested information. Motion at 11. The Board had requested the Staff "to provide further analysis of its determination that most items under the Quadrex Report [were]

^{*/} NRC Staff Response to Licensing Board Memorandum and Order Regarding the Reportability of the Quadrex Report (August 24, 1984) (Staff Brief) at 10.

^{**/} Applicants' Response to NRC Staff Brief on the Reportability of the Quadrex Report (September 28, 1984) at 4.

^{***/} See Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), LBP-78-10, 7 NRC 295, 299 (1978).

not reportable, including the basis for its conclusion that various designs had not been 'released for construction' (within the meaning of 10 C.F.R. § 50.55(e)(1)(ii))."

Memorandum and Order (June 22, 1983) at 6. In responding to the Board's inquiries, the Staff identified specific rationales in support of its conclusion that "all reportable Quadrex-related items were in fact reported" pursuant to section 50.55(e). Staff Brief at 10. It did not, however, describe the bases for its previous conclusion that the various designs had not been released for construction, because it concluded that to revisit its original evaluation process would require an extremely time consuming "reexamination of not only the Quadrex work packages, but a winnowing out from all South Texas drawings of those relevant to each work package." Id. Rather than engage in that exercise, the Staff provided the Board with additional, specific bases supporting its reportability determinations. Id. at 8.

Thus, although it did not provide every aspect of the information requested, the Staff, nevertheless, supplied sufficient information to inform the Board and the parties regarding the bases for its reportability determinations and fairly responded to the Board's June 22, 1983 Memorandum and Order. As a result, CCANP's allegation that the Staff "fell far short" of complying with the Board's instructions is without merit.

CCANP also argues that had it sought discovery from the Staff, such discovery would have been objectionable "on the

grounds that the Staff was working on a brief on just those matters." Motion at 12. Apparently, CCANP's argument in this regard is based at least in part upon its belief that Applicants had raised a similar objection to an interrogatory propounded by the State of Texas. However, CCANP is mistaken.

Applicants objected to the specific interrogatory in question based, in part, upon the fact that to respond would have required them to provide their legal positions prematurely.^{*/} Unlike the discovery which CCANP now requests, the interrogatory in question called for legal conclusions rather than the factual bases for the Staff's reportability determinations.^{**/}

In any event, CCANP's argument that its discovery requests "would have been objectionable" is pure speculation and cannot excuse it from its failure to request discovery against the Staff in a timely fashion despite the extensive opportunity provided by the Board for it to do so.^{***/}

^{*/} Applicants' Answers and Objections to State of Texas' First Set of Interrogatories to Applicants on Quadrex (August 26, 1983) (Applicants' Answers) at 26.

^{**/} In response to another interrogatory, Applicants provided a factual discussion of the bases for their reportability determinations under section 50.55(e). Applicants' Answers at 21-25.

^{***/} In the Board's June 24, 1982 Memorandum it established a 90 day discovery period following receipt of Bechtel's and the Staff's evaluations of the Quadrex Report and imposed no limitations on the scope of discovery aside from those prescribed by the Commission's Rules of Practice. In its discretion, the Board subsequently granted CCANP an additional 90 days of discovery and stated that "[n]o further requests for extensions of discovery time by CCANP on the Quadrex Report . . . will be entertained by us, absent the most extraordinary circumstances." Memorandum and Order (May 22, 1984) at 6-7. CCANP, however, sought no discovery during either of the periods made available to it. Under the circumstances, the Board properly concluded that CCANP has "forfeited" its right to take additional discovery. Fifth Prehearing Conference Order at 10.

Finally, CCANP argues that no prejudice will result from granting it the additional discovery it requests. Motion at 12. On the contrary, further discovery could delay the Board's determination regarding what reportability matters, if any, should be addressed in Phase II, as well as the submission of testimony on any such issues admitted. Furthermore, such delay is unwarranted in light of the fact that even if the requested discovery revealed some theoretical error in the Staff's analysis, such an error would not reflect adversely on HL&P's character.

Thus, CCANP has failed to provide any basis for the Board to reconsider its decision denying additional discovery from the NRC Staff.

IV. Conclusion

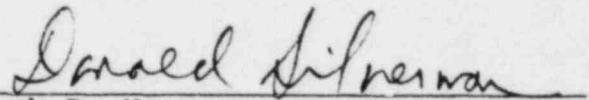
CCANP has requested that the Board reconsider its decision to eliminate from the Phase II proceeding all Quadrex-related matters (other than those addressing reportability, upon which it deferred ruling). CCANP has failed, however, to identify a single litigable issue arising out of the Quadrex Report, despite the fact that it has been informed by the Board on numerous occasions that particularization of the issues to be litigated would be required prior to initiating Phase I hearings.

Furthermore, CCANP has not provided any basis for the Board to reconsider its denial of additional discovery from the Staff. CCANP has failed to submit a single discovery

request or to adequately explain why it could not have obtained the desired information at an earlier date, despite extensive opportunities to do so. Moreover, requiring the Staff to respond to such discovery would delay initiation of Phase II hearings, if any are to be held, even though the requested information would have no bearing on HL&P's character.

Accordingly, CCANP's Motion should be denied in all respects.

Respectfully submitted,



Jack R. Newman
Maurice Axelrad
Alvin H. Gutterman
Donald J. Silverman
1615 L Street, N.W.
Washington, D.C. 20036

Finis E. Cowan
3000 One Shell Plaza
Houston, Texas 77002

Dated: December 31, 1984

NEWMAN & HOLTZINGER, P.C.
1615 L Street, N.W.
Washington, D.C. 20036

BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

ATTORNEYS FOR HOUSTON LIGHTING
& POWER COMPANY, Project Manager
of the South Texas Project acting
herein on behalf of itself and
the other Applicants, THE CITY
OF SAN ANTONIO, TEXAS, acting by
and through the City Public
Service Board of the City of
San Antonio, CENTRAL POWER AND
LIGHT COMPANY, and CITY OF
AUSTIN, TEXAS

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the "Applicants' Response To CCANP Motion For Reconsideration Of ASLB Order of November 16, 1984" dated December 31, 1984, has been served on the following individuals and entities by deposit in the United States mail, first class, postage prepaid, on this 31st day of December, 1984.

Charles Bechhoefer, Esq.
Chairman, Administrative Judge
Atomic Safety and Licensing
Board Panel
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. James C. Lamb, III
Administrative Judge
313 Woodhaven Road
Chapel Hill, NC 27514

Ernest E. Hill
Administrative Judge
Hill Associates
210 Montego Drive
Danville, California 94526

Mrs. Peggy Buchorn
Executive Director
Citizens for Equitable
Utilities, Inc.
Route 1, Box 1684
Brazoria, TX 77422

Robert G. Perlis, Esq.
Office of the Executive Legal
Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Brian Berwick, Esq.
Assistant Attorney General
for the State of Texas
Environmental Protection
Division
P. O. Box 12548, Capitol Station
Austin, TX 78711

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

Kim Eastman, Co-coordinator
Barbara A. Miller
Pat Coy
Citizens Concerned About
Nuclear Power
5106 Casa Oro
San Antonio, TX 78233

Lanny Sinkin
Nuclear Information and
Resource Service
Fourth Floor
1346 Connecticut Ave., N.W.
Washington, D.C. 20036

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

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

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

Edward Liberman