LBP-85-19

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
Charles Bechhoefer, Chairman
Dr. James C. Lamb
Frederick J. Shon

In the Matter of	Docket Nos. STN 50-498 OL STN 50-499 OL
HOUSTON LIGHTING AND POWER COMPANY, ET AL.	ASLBP No. 79-421-07 OL
(South Texas Project Units 1 and 2)	June 18, 1985

MEMORANDUM AND ORDER
(Explanation of Ruling on CCANP
Motion to Reopen Phase I Record)

Hearings in this operating license proceeding have been subdivided into three phases. Phase I included, inter alia, issues related to the character and competence of the lead Applicant, Houston Lighting & Power Co. (HL&P). The Licensing Board's Partial Initial Decision (PID) of March 14, 1984, LBP-84-13, 19 NRC 659, resolved most of the Phase I issues (but left open a number of questions bearing on those issues for further consideration in Phase II or Phase III).

Citizens Concerned About Nuclear Power, Inc. (CCANP), an Intervenor, appealed many of the rulings in LBP-84-13. In ALAB-799, 21 NRC 360 (1985), the Appeal Board affirmed the legal standards which we adopted in LBP-84-13, together with a number of procedural rulings

which CCANP had appealed.[1] The Appeal Board declined, however, to rule on the factual questions raised by CCANP, citing the lack of finality of our rulings on many of those questions.

On April 17, 1985, CCANP filed with this Board a Motion To Reopen Phase I Record ("Motion").[2] The Applicants and NRC Staff each opposed the Motion.[3] In our Sixth Prehearing Conference Order, dated May 17, 1985 (unpublished), as well as in our earlier Memorandum of May 10, 1985 (unpublished), we announced our rulings on various aspects of the CCANP Motion. Specifically, we held that we were denying the Motion in its entirety insofar as it seeks to reopen the Phase I record but that certain matters raised by one exhibit to the Motion will be litigable under the aegis of CCANP Contention 10, which is to be litigated during Phase II. We also announced our rulings on three procedural questions to which the Motion gave rise.

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1 CCANP is seeking Commission review of ALAB-799. Petition for Review, dated April 30, 1985. As of the date of this Memorandum and Order, the Commission has not acted upon CCANP's request.

2 The Motion was dated April 15, 1985 but was not served until April 17, 1985.

3 Applicants' Response to CCANP Motion To Reopen Phase I Record ("Applicants' Response"), together with Applicants' Memorandum Concerning Counsel's Continued Representation of Applicants ("Applicants' Memorandum"), both dated April 25, 1985; NRC Staff Opposition to CCANP Motion To Reopen Phase I Record, dated May 9, 1985 ("Staff Response"). (During the recent prehearing conference, we had granted the Staff's request for an extension to May 10, 1985 of the time within which to file its response. Tr. 11012, 11071.)

The Sixth Prehearing Conference Order noted that the reasons for the foregoing determinations would be explained in a subsequent issuance. We here set forth our reasons for these rulings.

A. General Description of Motion

CCANP's Motion seeks to reopen the Phase I record concerning HL&P's character and competence, as to which we made extensive findings in our Phase I Partial Initial Decision. In short, CCANP seeks to establish that HL&P was experiencing difficulties with Brown & Root, Inc. (B&R), its former contractor, far earlier than is reflected in the Phase I record, that the termination of B&R accordingly was not timely, and that HL&P's asserted delay in replacing B&R represents a deficiency in HL&P's character (if not in its competence). Furthermore, CCANP also points to our positive Phase I findings concerning HL&P's candor (an element of character) and claims that the material supporting the Motion establishes that the Applicants provided misleading testimony to the Board in 1981-82, assertedly representing a lack of candor which reflects adversely on HL&P's character.

The Motion is supported by 42 exhibits (designated as "A" through "PP"). The first (Exhibit "A") represents portions of the transcript of hearings in October, 1984 (see Staff Response, at 5; Tr. 11053, 11054) before the Public Utilities Commission of Texas (PUCT). It is submitted in support of CCANP's claims of lack of candor. The other 41 exhibits represent documents variously dated from 1972 to February, 1980 and

introduced into evidence before the PUCT. (14 of these exhibits--"H" through "T" and "OO"--predate the award of construction permits to the Applicants.) They are submitted primarily to establish a lack of timeliness of the replacement of B&R and only incidentally as bearing upon HL&P's candor (i.e., less than full disclosure of HL&P's difficulties with B&R).

Prior to discussing our rulings on each aspect of the Motion, we turn to several related procedural questions.

B. Procedural Questions

Following our receipt of the CCANP Motion, we requested the parties to address at the recent prehearing conference three procedural questions which we believed to inhere in the Motion. Order dated April 18, 1985 (unpublished). The parties responded to our request.[4] We provide an explanation for our previously announced rulings on these questions seriatim.

1. Jurisdiction to Consider Motion. The first procedural question was whether this Board or the Appeal Board has jurisdiction to

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4 Tr. 10869-10914; 10950-11074. The Applicants' written response to the motion, as well as their Memorandum on the representation matter, treated these questions. The Staff's response did so to a limited extent. CCANP's motion raised and discussed certain aspects of these questions.

rule on the CCANP Motion. The question arises because of the somewhat unusual appellate posture which attended this proceeding as of the time the Motion was filed.

Under normal circumstances, jurisdiction to consider a motion to reopen a record on which an initial decision (or PID) has been issued lies with the Licensing Board prior to the filing of an appeal from (or exceptions to) that decision. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983). On the other hand, once an appeal from an initial decision (or PID) has been taken, jurisdiction passes to the Appeal Board. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324 (1982).[5]

Here we have a situation which, from a jurisdictional standpoint, does not fall precisely within the contours of either Limerick or TMI. An appeal from our Phase I PID has been filed by CCANP. The Appeal Board has ruled on certain legal and procedural questions raised by CCANP but has declined, for lack of finality, to rule on the factual findings and conclusions on which an appeal had also been taken. The Appeal Board reasoned that our rulings on various

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5 From the standpoint of when jurisdiction passes from the Licensing Board to the Appeal Board, it makes no difference whether the Licensing Board's decision is an Initial Decision or a PID. Limerick, ALAB-699, supra, 17 NRC at 757 n.4.

substantive issues--including the character and competence issues to which the Motion to Reopen is directed--are subject to supplementation or change as a result of further consideration in Phase II and/or III of the proceeding. ALAB-799, supra, 21 NRC at 368-70.

All parties assert that we have jurisdiction to consider the Motion, although for somewhat differing reasons. CCANP claims that the Appeal Board, in ALAB-799, "essentially remanded" the various factual questions back to us (Motion, at 7). The Applicants regard the jurisdiction question as a "close one" (Response, at 28), pointing to several decisions which depart from the strict dichotomy discussed above and noting (correctly) that the situation in this proceeding differs from those which have been the subject of the Limerick and TMI decisions cited above. The Applicants claim that, given the conflicting authority, a prudent approach would be for this Board to rule on the Motion, given our likely greater familiarity with the Phase I record than would have been attained thus far by the Appeal Board (a general approach endorsed by the Appeal Board in Limerick) (Response, at 30). The Staff finds jurisdiction to lie with this Board "in view of the conclusion of proceedings before the Appeal Board and the Appeal Board's recognition that further proceedings would be conducted before the Licensing Board before an initial decision on HL&P's character and competence would issue" (Staff Response at 2, n.1).

Although we express no opinion as to whether the Appeal Board also has jurisdiction to consider the Motion, we conclude that, in the circumstances of this proceeding, we do have such jurisdiction. The

question is indeed a close one. The Appeal Board has an appeal from our character and competence determinations pending before it; and, contrary to CCANP's position, it has not remanded those determinations for us to reconsider. In fact, the Appeal Board observed that its decision to defer appellate review of our substantive rulings on HL&P's character and competence "does not signal an opportunity for de novo relitigation of matters disposed of by the Licensing Board". ALAB-799, supra, 21 NRC at 385.

Nonetheless, the character and competence issues remain before us, and there is a "reasonable nexus" between those issues and the material upon which CCANP seeks to reopen the record. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 707 (1979); cf. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-782, 20 NRC 838, 841-42 (1984). Indeed, much of the information in Exhibit "A" to the Motion is directly material to Phase II issues. Moreover, although the Appeal Board in ALAB-799 did not sanction the relitigation of Phase I issues, neither did it preclude us from doing so in appropriate circumstances. Furthermore, we have sufficient familiarity with the Phase I record to be able to evaluate the import of the documents which the Motion seeks to add to the record.

In these circumstances, we agree with all parties that we have jurisdiction to entertain the Motion. We are thus proceeding to consider it.

2. Inclusion of certain aspects of Motion to Reopen within scope of CCANP Contention 10. The next procedural question was whether certain aspects of the Motion were comprehended by CCANP Contention 10, which is to be litigated in Phase II. If so, the standards for reopening a record would not be applicable to those aspects of the Motion.

Contention 10 questions whether, shortly after its release, the Quadrex Report should have been reported to the Licensing Board pursuant to the McGuire rule, and whether HL&P's failure to do so reflects adversely on its character and/or competence. LBP-85-6, 21 NRC 447, 463 (1985). The Applicants agree with CCANP that issues regarding the termination of B&R in 1981 (as related to the candor of HL&P's testimony in the spring and summer of 1981) can be considered under issues framed for Phase II. The Applicants would include portions of Exhibit "A" but would exclude the remainder of "A" and all of Exhibits "B" - "PP" of the Motion. Applicants' Response, at 31. The Staff would have us read Contention 10 strictly, limited to the reportability of the Quadrex Report itself (Tr. 10977-84). As set forth in our Prehearing Conference Order, however, we consider this contention as broad enough to include not only the reportability of the Quadrex Report but also of the replacement of B&R as an outgrowth of the Quadrex Report.

We noted that we consider as relevant only the portion of the PUCT transcript (Exhibit "A" to the Motion) which may bear on the accuracy of the information previously supplied to this Board, together with possible obligations to advise this Board under the McGuire rule of

the potential replacement of B&R. We here add that we see no necessary connection of Exhibits "B" - "PP" to this contention (as amended) (although we are not now so ruling as a matter of law). We also add that events which might constitute the basis for a claim that B&R was not replaced on a timely basis do not constitute in our view the type of information concerning the replacement or potential replacement of B&R which we view as potentially encompassed under McGuire rule obligations.

3. Representation of Applicants by their Present Counsel. In its Motion, CCANP asserts that several of the statements made and actions taken by Applicants' lead counsel, with respect to HL&P's eventual decision to replace B&R, were improper (Motion, at 4, 5, 6, 10, 43, 44, 46-47). The Motion alleges, inter alia, that "Applicants' counsel, involved directly in the replacement discussions, did not notify the Board of said discussions" (id. at 43); and that he "participated in manipulating" and "apparently tried to orchestrate the replacement to have the minimum impact on the case Applicants had already prepared for the Board" (id., at 4, 43; see also Tr. 11041, 11044-46). CCANP contends that in June, 1981, HL&P had arrived at the decision to replace B&R but did not notify the Board of the proposed change until late September of that year (Motion, at 4; Tr. 11051). The Intervenor claims that the lapse from June until September is evidence that Applicants' counsel purposefully withheld information from the Licensing Board and misled the Board in an effort to encourage a less careful investigation into the licensing ramifications of replacing B&R (Motion, at 4, 46-47).

The Board was concerned that these allegations potentially raise factual questions which, if resolved through adjudicatory hearings, might require the testimony of Applicants' lead counsel. CCANP's allegations portray the role of Applicants' lead counsel in the selection of the B&R replacement as involving other than legal advice. As a result of the allegations, therefore, the Board in its April 18, 1985 Order asked the parties to provide their opinions on the "propriety of continued representation of a party by an attorney who may have participated other than as counsel in factual matters potentially at issue before an adjudicatory tribunal" (emphasis supplied).[6]

The Applicants claim CCANP's assertions are meritless because (1) Applicants' counsel, Mr. Jack Newman, was acting in his legal capacity in advising HL&P of the likely ramifications which would ensue if B&R were replaced (Applicants' Memorandum, at 8-9) and (2) Mr. Newman did not suggest an untimely or tardy announcement of the replacement decision at all, much less for the reasons asserted by CCANP (id., at 6-7). The Applicants also claim that, even if Mr. Newman were to appear as a factual witness on the issues raised by CCANP, neither they nor CCANP would be prejudiced by such continued representation.

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6 The parties were notified that oral argument would be heard on three procedural questions, including this one, at the April 30, 1985 prehearing conference. The Board also provided the parties with an opportunity to submit written responses. The Applicants filed their April 25, 1985 Memorandum (see n.3, supra) to address the Board's representation question.

Finally, they assert substantial hardship if Mr. Newman (and his firm) were not permitted to continue to represent the Applicants in this proceeding.

Our April 18, 1985 Order referenced the standards for judging an attorney's conduct set out in the American Bar Association Model Rules of Professional Conduct, adopted by the ABA on August 2, 1983. Those rules represent the evolutionary development of standards by which the conduct of attorneys is evaluated. However, the District of Columbia, where Mr. Newman is a member of the Bar, continues to adhere to the earlier Code of Professional Responsibility, as the Model Rules have not yet been ratified for adoption in the District. Thus, Code provisions DR-102(A) & (B) are the standards which are to be applied to Mr. Newman. The ABA Code has been applied to attorneys appearing before administrative agencies generally, and the NRC specifically.[7] In evaluating the potential disqualification of Mr. Newman, we will consider the application of both the Code and the Model Rules.

DR 5-102(A) applies to the possibility of a client calling its attorney as a witness on its behalf. That disciplinary rule states:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he

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7 Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 916 (1982); id., at 916 n.26.

> or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B) (1) through (4).

The exception applicable to the circumstances of this case is DR 5-101(B)(4). It permits an attorney to continue representation even if he were to testify,

> * * * if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Thus, the prohibitive portion of DR 102(A) makes prerequisite that Mr. Newman learn, or it becomes obvious, that he or a lawyer in his firm will be called to testify as a witness for his client. Although at this point Mr. Newman clearly is aware of the possibility that he could be called as a witness to explain his participation in and knowledge of the process of replacing B&R, HL&P, Mr. Newman's client, in both its written Memorandum and at the prehearing conference, unequivocally stated that the company would not call Mr. Newman as its witness[8] (Memorandum, at 11 and Tr. 10963-64).

If CCANP were to call Mr. Newman or a member of his firm to testify, DR 5-102(B) would come into play. That rule would allow him to "continue the representation until it is apparent that his testimony is or may be prejudicial to his client." At this point we do not have

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8 Mr. Newman and his firm are represented on the continued representation question by Mr. William H. Allen, an attorney with the firm of Covington & Burling. It was Mr. Allen who signed the Memorandum submitted on this issue and appeared at the prehearing conference on behalf of Mr. Newman.

sufficient documentation to lead us to conclude that Mr. Newman's testimony would prejudice HL&P's case in any meaningful way.

The proposed ABA Model Rule relevant to the circumstances before us is 3.7(a)(3). That rule and its exception provide that

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: * * * (3) disqualification of the lawyer would work substantial hardship on the client.

We hold in abeyance the issue of whether Mr. Newman may be a witness "necessary" for a complete record. Mr. Newman could become a necessary witness to testify to factual matters if other evidence were to lead to a reasonable inference that Mr. Newman held some unique, factual and material information not known by others involved in the replacement discussions. The Applicants argue that this is not the case (Applicants' Memorandum, at 11). For now, we accept Applicants' representation of Mr. Newman's role during the replacement process as remaining within the boundaries of providing legal advice, although there must necessarily have been issues, factual in nature, to which he was privy. We will not immediately leap, as CCANP would have us do, from the premise that because Mr. Newman was actively involved in a selection process which may be categorized as a corporate management decision, he was not providing legal advice or services. The demands upon a licensee in a highly regulated field such as nuclear power generation could well mean that a company views it as only prudent to confer with its attorneys on many diverse aspects of the licensing

process. Some of these questions may be legal in nature, but not specifically related to pending litigation.

The exception to DR 5-102(A) of the Code, as well as to Model Rule 3.7(a), necessitates a discussion of whether a "substantial hardship" would be created for Applicants if Mr. Newman were precluded from continuing his role as lead counsel. While we do not imply that another attorney familiar with the case could not replace Mr. Newman under extraordinary circumstances, a showing of substantial hardship is the standard to be met under both the Code and the Model Rule. (Under the Code, such hardship must be premised upon the "distinctive value" of the lawyer in the particular case.) The Board reviewed several of the factors Applicants highlighted in their Memorandum. We agree that the ongoing nature of a nuclear licensing proceeding gives intrinsic value to an attorney (and his firm) consistently involved since the litigation began. Mr. Newman has maintained the position of lead counsel for HL&P's STP licensing activity for twelve years. We do not doubt that the knowledge accumulated by Mr. Newman, of both technical matters and administrative procedure in the unique administrative forum of the NRC, makes his counsel precious to Applicants. We were adequately convinced by the arguments propounded in their Memorandum and during the prehearing conference that Mr. Newman's services are of "distinctive value" to the Applicants and that the Applicants would endure substantial hardship if they were forced to seek new counsel at this point in the proceeding (Tr. 10971; Applicants' Memorandum, at 18-19).

Further, the Applicants argue that the disqualification rules for an attorney/witness are not meant to encroach upon a client's right to the legal representative of its choice (Memorandum, at 13, 15). We agree that once the possible prejudice which may accrue is highlighted to the client, the client is free to make the decision to continue with the same counsel in the face of such information. Particularly significant is the sophistication of the client where, as here, the client makes an informed decision with a complete understanding of the possible consequences and implications of retaining its counsel. The company has represented to the Board that it is completely at ease with the decision to waive counsel's possible disqualification (Memorandum, at 17-18).

Finally, the comment on Model Rule 3.7 indicates that combining the roles of advocate and witness "can prejudice the opposing party" and "[t]he opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation."[9] Upon specific inquiry from this Board, CCANP indicated that it would not be prejudiced by Mr. Newman's continued representation of the Applicants were Mr. Newman to appear as a witness (Tr. 11057-59, 11064-65).

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9 The ABA Code does not appear to take into account prejudice to the opposing party. But the rationale for considering such prejudice (as expressed in the comment on the Model Rule) would appear as applicable to the Code as to the Model Rule, in evaluating the substantiality of claimed hardship.

For these reasons, we conclude that, even if Mr. Newman were to appear as a witness, his disqualification (and, per force, the disqualification of other members of his firm) from continuing to represent the Applicants would amount to a substantial hardship to the Applicants. Absent any showing of prejudice to CCANP, we conclude that Mr. Newman (and members of his firm) should not be disqualified from continued representation of the Applicants, even if it were necessary or appropriate for Mr. Newman to appear as a witness in this proceeding.[10]

C. Ruling on Motion

1. Legal Standards. The standards for reopening a record are well established and not disputed by any party here. As we have previously observed, the proponent of a motion to reopen a record bears a heavy burden. LBP-84-13, supra, 19 NRC at 716; see also Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 NRC 619, 620 (1976). Three criteria must be satisfied:

1. The motion must be timely filed;

2. It must address a significant safety (or environmental) issue; and

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10 We previously announced this conclusion in our Memorandum of May 10, 1985. Given the conclusion we have reached, we need not treat Applicants' argument that the lawyer-witness disqualification rule need not be applied, or need not be vigorously applied, in administrative proceedings such as this.

3. Where, as here, a decision has already been reached on the question for which reopening the record is sought, the motion must demonstrate that the information sought to be added to the record might alter the result previously reached.

LBP-85-13, supra, 19 NRC at 716; Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1355 (1984); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1324 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980).[11]

The criteria for reopening a record must be applied separately to each issue for which reopening is sought. Thus, the circumstance that one or more issues or questions remain to be heard or decided does not alter the necessity for satisfying the reopening criteria for issues already decided. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 22 (1978).

Finally, the criterion of timeliness, while important, may be subsumed in circumstances where it is outweighed by the significance of the information in question. The Appeal Board has long recognized that "a matter may be of such gravity that the motion to reopen should be

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11 As the Staff points out, the Commission has proposed to codify these standards in its regulations. 49 Fed. Reg. 50189 (Dec. 27, 1984). The Commission stressed that it was proposing to codify "current reopening criteria" but that it was considering adding certain documentation requirements. Id. We are not basing any of our conclusions on a failure to abide by such proposed documentation requirements (e.g., affidavits).

granted notwithstanding that it might have been presented earlier." Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).[12]

2. Positions of Parties. The CCANP Motion is opposed by both the Applicants and Staff for failing to satisfy the criteria for reopening a record. No party disputes that the character and competence questions to which the Motion is addressed are significant safety issues, although the Applicants and Staff do challenge the relevance to those issues (and thus the significance) of much of the information proffered by the Motion. Nonetheless, there appears to be no dispute that the second reopening criterion has been satisfied.

The Applicants and Staff each claim that the Motion was not submitted in a timely fashion. Each also asserts that even if the Motion were considered timely, the documents and transcript of testimony sought to be included in the record would not have changed the result which we reached in our earlier Partial Initial Decision. They regard the documents as either cumulative or as not material.

CCANP asserts that its Motion was timely. It claims that it became aware of these documents and testimony excerpts through the participation of its primary representative in the PUCT proceeding, and

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12 The Commission's proposed regulations would qualify the timeliness criterion to the extent that "an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented". 49 Fed. Reg. at 50190.

that it did not have the documents in its possession prior to October or November, 1984, when they were admitted into evidence in that proceeding (Motion, at 40; Tr. 10997). CCANP also states that the PUCT Final Order was entered on January 11, 1985 and was subject to rehearing until late February, 1985.

On the merits, CCANP spells out the relevance of some (although not all) of the documents proffered. It also specifies certain of our findings and conclusions which, it claims, would be altered by the "new" evidence. Most particularly, CCANP focuses on our conclusion that, prior to the 1980 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" (LBP-84-13, supra, 19 NRC at 688). CCANP claims that the documents upon which the Motion is based demonstrate that "HL&P had extensive knowledge of B&R's failures" long before issuance of the Show-Cause Order--indeed, even prior to the award of construction permits to HL&P. It seeks to reopen the record "to determine whether the timing of HL&P's replacement of B&R was consistent with the character and competence necessary for operation of a nuclear power plant." Motion, at 3-4, 7-8, 25-39. CCANP also charges that counsel for the Applicants participated in "manipulating" the replacement decision (and its announcement to us) "with an eye toward minimizing its impact" on this proceeding, and this manipulation reflects upon HL&P's candor (one of the elements of character) (id. at 4-5). (See discussion, pp. 9-16, supra.) CCANP also seeks discovery on matters raised by its Motion.

3. Discussion. As described above, of the three criteria for reopening a record, no party appears to question the significance of the character and competence issues to which the Motion is directed. We agree and conclude that CCANP has satisfied the second criterion for reopening a record; hence we will limit our discussion to the other two criteria.

(a) As for the first of the criteria, timeliness, the latest time when CCANP became aware of all of the information comprehended by the Motion was October (or possibly November), 1984, when the documents and testimony covered by the Motion were entered into evidence in the PUCT proceeding.[13] The Motion was not filed until April 17, 1985, almost six months later. That period in itself is excessive. We note that CCANP advised the Appeal Board in December, 1984 that it planned to file a motion covering at least some of the material which was incorporated in the Motion before us (12/13/84 App. Bd. Tr. 10, 36). Not until four months later was the Motion in fact filed.

Moreover, most of the information underlying the Motion was available much earlier--some of it, in fact, predating the award of construction permits. To the extent relevant to Phase I issues, such information could have been obtained through discovery. (Neither CCANP

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13 CCANP has not explained, and we fail to perceive, the relevance from a timeliness standpoint of the January, 1985 date when the PUCT reached its decision or the February, 1985 date within which the PUCT decision was subject to reconsideration.

nor the Applicants could state whether or not any of the documents, or at least certain key documents, had been obtained or at least requested by CCANP (or CEU, the other Intervenor in Phase I) as a part of Phase I discovery. Tr. 11001-02 (CCANP); Tr. 10891 (Applicants).)

CCANP asserts that it was afforded inadequate discovery opportunities in Phase I (Tr. 11002) and that between October, 1984 and April, 1985, it was faced with numerous filing deadlines in this proceeding which made it impossible for CCANP to have filed its Motion earlier (Motion, at 41). We do not view these grounds as legally adequate to justify filing the motion as late as April 17, 1985 (for information which became known no later than October or November, 1984, and should have been available to CCANP earlier, either in this proceeding or the PUCT proceeding). For, as another Licensing Board has held, it is the opportunity to gain access to information which is significant in determining whether a motion based on such information is timely filed. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-52, 18 NRC 256, 258 (1983). See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1369 (1984).[14]

For the foregoing reasons, we find that CCANP's Motion was not timely filed. Nonetheless, because untimeliness is subsidiary

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[14] The numerous filing deadlines to which CCANP refers (Motion, at 41) might have been grounds for an extension of time within which to file the motion. CCANP did not seek such an extension.

to the significance to the proceeding of the information sought to be added to the record, we are relying on untimeliness only for the limited purpose of ruling on CCANP's discovery request (see p. 33, infra). We are not basing our decision not to reopen the Phase I record on the Motion's untimely filing. Rather, we are denying the Motion to reopen on the ground that the documents and information proffered (to the extent not material to issues already being litigated in Phase II) are not susceptible of changing the conclusions which we earlier reached on character or competence.

(b) The final--and in our view most important--criterion for reopening a record is whether the new information is significant enough that it might change the result which we previously reached. For this evaluation, the information in Exhibit "A" to the Motion (the PUCT transcript excerpts) must be differentiated from the remainder of the information supporting the Motion.

To the extent that the Exhibit "A" PUCT transcript is utilized to support a claim that the Licensing Board should have been informed earlier than September 24, 1981 of the change or proposed change in project contractors, we have concluded that the information is relevant to CCANP Contention 10, which is to be litigated in Phase II. See discussion supra, paragraph B.2, pp. 8-9. For that information, no motion to reopen a record is required, and the criteria for reopening do not apply. On the other hand, to the extent that the PUCT transcript relates to the selection of one contractor vis-a-vis another, it does

not appear relevant either to Contention 10 or to the Phase I issues sought to be reopened.

The remaining documents are claimed mainly to support the proposition that HL&P's asserted delay in replacing B&R reflected adversely on HL&P's character and/or competence. In support of its thesis that our PID would be changed by the newly proffered evidence, CCANP provides several examples of findings or conclusions which it believes would be modified. We discuss them seriatim.

Example "a" (Motion, at 26-27) questions our findings that the history of nonconforming or noncomplying conditions at STP (including incidents of harassment of QC inspectors) reflected inexperience rather than lack of corporate character. CCANP cites excerpts from 1977 and 1978 reports to HL&P by Management Analysis Corp. (MAC), a consultant, which state that HL&P management was inexperienced; it argues that since HL&P knew it had inexperienced management, the noncompliances and nonconformances at STP were attributable to lack of character rather than experience.

The MAC reports on which CCANP relies for this example (Exhibits "D," "F") were not themselves introduced into evidence in Phase I, but their general content was discussed (e.g., Tr. 1235-36, 5119-20 (Oprea)). We considered evidence as to HL&P's knowledge of, and attempts to correct, its lack of experience in our PID. 19 NRC at 687-88, 691-93; FOF 59-60, 19 NRC at 740-41; FOF 99-104, 19 NRC at 752-53. Having now examined the reports, we do not perceive that they might change any conclusions which we reached.

Example "b" (Motion, at 27-28) relies on a draft of a 1979 MAC report concerning HL&P personnel (Exhibit "HH") and in effect claims that, since HL&P knew of the deficiencies of its personnel, its continued reliance on them demonstrated poor character.

We have already looked at the competence of the employees named by CCANP. 19 NRC at 689, 692-93; FOF 101-103, 19 NRC at 752. The new evidence would not significantly affect our evaluation that at least certain of the employees (Messrs. Frazar and Turner) lacked nuclear experience. CCANP's claim that HL&P failed to implement the advice of its consultant is not supported by evidence. See, e.g., FOF 208-209, 211-213, 215-216, 19 NRC at 777-79. Perhaps HL&P did not act as quickly as CCANP (or we) might have preferred--i.e., prior to issuance of the Staff's Show-Cause Order. We specifically found that HL&P "tolerated deficiencies in personnel for too long a period of time." 19 NRC at 689-90. But changes eventually occurred. The lack of timeliness of particular changes--if proved--would not cause us to find a character deficiency sufficient to disqualify HL&P from receiving operating licenses. Indeed, we have already rejected this same claim of CCANP. Id.

Example "c" (Motion, at 28-29) asserts that several MAC reports or other documents (Exhibits "D", "E", "F", "G" and "Z") undermine the Board's earlier conclusion concerning HL&P's asserted abdication of responsibility for the STP to B&R. But as the Staff and Applicants each point out, the Phase I record is replete with testimony concerning HL&P's assumption or lack of assumption of responsibility for

the project (Staff Response, at 14-15; Applicants' Response, at Appendix A, pp. 4-5). We concluded then that HL&P did abdicate some responsibility for the STP to B&R at lower levels of responsibility but we attributed that failure to a lack of competence rather than character. The "new" documents proffered by CCANP are not identical to--but are largely cumulative of--evidence already in the record. They emphasize that HL&P management was advised by a consultant as early as 1977 to 1979 that too much responsibility had been turned over to B&R (or, alternatively, that HL&P was not exercising responsibility effectively). But these documents do not contradict any of the findings to which CCANP alludes.

Indeed, the "new" documents can as easily be read not as advocating replacement of B&R (as CCANP asserts) but rather as supporting a conclusion that HL&P should take steps to improve B&R's performance--exactly the course of action which HL&P initially followed. For example, Exhibit "F", a draft MAC report dated October 16, 1978, concludes (at 15) that

> There are many good people within the Brown & Root organization and the corporation has the capability of performing well on the South Texas Project from here on in. Changes in attitude and organization at all levels are called for. At this stage of the project, MAC feels the only alternative is to make B&R a success [emphasis in original].

Exhibit "G", a MAC report dated January, 1979, recognizes some of the management problems to which CCANP alludes but indicates MAC's then-current approbation of the corrective actions being undertaken by HL&P. The report states (at 1):

> Prior to October, 1978, serious deficiencies in Project Management and Project Controls had been evidenced and major changes in organization and operation of the STP were warranted. * * * Several specific action items were recommended by MAC and implementation of those recommendations deemed appropriate have been in process since mid-November, 1978.

In short, we do not perceive any of the documents relied on by CCANP in example "c" (individually or collectively) to be susceptible of significantly changing our findings or conclusions on HL&P's assumption of responsibility for the STP. See, e.g., 19 NRC at 688-90; FOF 115-116, 19 NRC at 756; FOF 151-152, 19 NRC at 764-765; FOF 185-187, 19 NRC at 771-72.

Example "d" (Motion, at 29-30) also challenges the responsibility of HL&P management for not dismissing B&R earlier. It questions our conclusion that HL&P upper-level management did not abdicate responsibility to B&R for the QA/QC program, and that the lack of effective control at lower levels was attributable to inexperience as well as excessively long lines of communication. For its basis, CCANP cites Exhibits "F", "P", "Q", "Z" and "CC" to the effect that HL&P knew during 1977-78 that it was having QA/QC problems with B&R.

This information is not "new" but rather is cumulative. We made specific findings on this very subject. The topics covered by the exhibits cited by CCANP were the subject of testimony or documents previously presented to the Board. See Staff Response at 15-16 and n.6. Moreover, as set forth under example "c", the documents relied on by CCANP do not necessarily advocate the replacement of B&R at an earlier date, the result for which CCANP advances them.

In example "e" (Motion, at 30-32), CCANP claims that our conclusion that "friction between QC personnel and construction personnel" was attributable to inexperience on the part of both HL&P and B&R rather than a character deficiency (19 NRC at 692, 712) would be modified by Exhibit "AA", as well as "B" and "P", which are said to demonstrate that HL&P knew of such friction as early as 1977 and continued to "tolerate" it for several years.

The documentation of HL&P's knowledge of incidents of harassment during 1976-78 is not new information. We made specific findings and conclusions concerning such incidents, together with HL&P's attempts to deal with them. 19 NRC at 687, 710-13; FOF 62, 64, 19 NRC at 741-42; FOF 75, 19 NRC at 744; FOF 376-78, 19 NRC at 820-21; FOF 381-399, 19 NRC at 821-26. No "new" evidence is provided which would significantly change the foregoing findings or conclusions. Moreover, the exhibits cited do not reflect that HL&P "tolerated" such incidents, as claimed by CCANP. Nor do they cast doubt on our earlier conclusions concerning corrective action taken by HL&P to prevent such incidents. 19 NRC at 686-87, 692, 711-713. We note that the affidavits submitted by the Staff and Applicants in conjunction with the Phase II examination of the competence of HL&P and its new contractors, as well as underlying Staff inspection reports, appear essentially to support our earlier expectations of improvement in this area.

Example "f" (Motion, at 32-36) concerns HL&P's knowledge of the need for corrective action prior to the issuance of the Staff's Show-Cause Order in 1980. CCANP cites Exhibits "D", "F", "G", "P", "V",

"Z", "AA", "CC" and "JJ" to the effect that HL&P had early warnings concerning B&R deficiencies and accordingly should have taken steps earlier to remove B&R. None of these documents is inconsistent with our previous conclusion that HL&P had early warning of B&R deficiencies but lacked the experience at that time to recognize the need for major corrective action. See 19 NRC at 687-88.

Moreover, the major thrust of most of those documents was not that B&R should be dismissed but rather that HL&P should take steps to improve both its own and B&R's performance--a course of action which HL&P attempted to follow. See, e.g., Exhibit "D" (at IV-2); "F" (at 15, quoted supra at p. 25); "G" (at 1 (quoted supra at pp. 25-26) and at 22-23); "P"; and "Z". CCANP concludes that "Quadrex should have been hired in 1978, not 1981" (Motion, at 33). We do not necessarily disagree. But HL&P's failure to act earlier than it did does not, in our view, constitute such a significant character (or competence) deficiency as to alter the general conclusions which we reached in our PID.

In example "g" (Motion, at 36), CCANP claims that Exhibits "D", "E", "F" and "G" (various MAC reports) would cause us to change FOF 93-112, 19 NRC at 750-55, concerning "Evaluation of Root Causes of Noncompliances". CCANP would have us conclude that HL&P was knowledgeable of the root causes earlier than we found and should have undertaken corrective action earlier. However, although the reports themselves were not in the record, testimony about them was earlier provided to us and we in fact made findings very comparable to that which CCANP now urges upon us--i.e., that HL&P should have taken earlier

action to correct problems at STP. 19 NRC at 687-90. We stress again that the documents cited by CCANP (particularly "F" and "G") did not conclude that B&R should have been replaced.

Example "h" (Motion, at 36-38) criticizes our FOF 125, 19 NRC at 758, for giving credit to HL&P (in terms of assumption of responsibility) for the dismissal of B&R. CCANP relies on Exhibits "B", Appendix 1 to "B", "C", "D", "H", "P", "Q", "U", "X", "BB" and "FF", to show that B&R was demonstrating engineering inadequacies at an early date. CCANP would have us rewrite FOF 125 to give credit only to Mr. Goldberg (who became an HL&P employee late in 1980) but to fault HL&P for not taking action earlier. However, FOF 125 was predicated on the discharge of B&R as being an assumption of responsibility by HL&P (for whom Mr. Goldberg was acting). The cited documents do not necessarily indicate that the discharge action should have been taken earlier. But to the extent they do, they would only derogate from--not eliminate--the responsibility we perceived HL&P to have undertaken. Lack of timeliness on the part of HL&P--to the extent not already proved--would not in our opinion be sufficient to cause us to modify our earlier conclusions and determine that HL&P was so lacking in character or competence that it should be denied operating licenses.

The final example, "i" (Motion, at 38-39) summarizes the various reasons why CCANP believes the record should be reopened but provides no additional example of "new evidence" or findings which should be changed. As the Staff points out, the subjects listed were extensively dealt with in our PID, on the basis of record evidence

(Staff Response, at 18-19). We agree with the Staff that "all matters which CCANP sets out in this example as a matter it wishes to add to the record are already in the record". Thus these matters could not be said to have even the potential for changing the results which we already reached.

We have reviewed the examples set forth by CCANP in its Motion in some detail and have concluded that none of them include new information which might change the result which we previously reached. We have reached the same conclusion with respect to all material supporting the motion (other than portions of Exhibit "A"). This is not to say that, if offered in Phase I, some of the documents ("B" - "PP") would not have been accepted into evidence or that some findings in our PID might not have been altered to some degree--if only to reflect the presence of additional information in the record. Except with respect to "A", however, the documents either individually or collectively would not have changed the result which we reached. Even if we were to determine that B&R should have been discharged two or three years earlier than 1981, we would not judge HL&P's failure to take that action more expeditiously, to the extent indicated by the documents provided us, as significant enough to deprive HL&P of the opportunity to be awarded operating licenses.

As for Exhibit "A", we view portions of that PUCT transcript as bearing importantly upon HL&P's obligations to keep the NRC (including this Board) informed of significant events and hence as potentially affecting our earlier conclusions on HL&P's candor--in our

view, one of the most significant aspects of character. In any event, the transcript, insofar as it bears on those obligations to inform NRC of significant events on a timely basis, is relevant to an already admitted contention and hence need not be evaluated against the strict criteria for reopening a record.[15]

D. Discovery

In its Motion (at 47-48), CCANP seeks additional discovery on "the precise role played by counsel for Applicants in the replacement process for B&R and in advising or otherwise influencing the decision of Applicants not to inform the Board of the replacement plans or to testify about such plans." CCANP also seeks broad discovery "on any matter where [Phase I] testimony is questionable" (citing as precedent the Memorandum and Order (Reopening Discovery; Misleading Statement), dated December 18, 1984, in Texas Utilities Electric Co. (Comanche Peak Steam Electric Generating Station, Units 1 and 2), LBP-84-56, 20 NRC 1696). For the latter request, CCANP asks that an "independent special master" be appointed to reduce the workload of CCANP or the Board "in order to identify the possible areas where credibility is questionable and discovery is necessary" (Motion, at 48). Both the Applicants and

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15 We do not presently believe that documents "B" - "PP" bear on HL&P's obligation to inform NRC of significant relevant information, but at this time we are not so ruling as a matter of law.

Staff oppose any further discovery by CCANP (Applicants' Response, at 26-27; Staff Response, at 19-21).

At the outset, we must point out that, in a proceeding such as this one, discovery may relate only to "matters in controversy"--i.e., accepted issues or contentions. 10 C.F.R. § 2.740(b)(1). We have declined to reopen the Phase I record on the character and competence issues. Moreover, there already has been extensive discovery on those issues. Thus, new discovery on the activities of B&R or HL&P covered by Exhibits "B"-"PP" would not be appropriate or warranted. Nor, as applied to matters raised by those exhibits, would the broad discovery requested by CCANP be cognizable. We see no basis in the materials presented to us for invoking the type of far-reaching discovery permitted by the Comanche Peak Board. For as we have set forth, we do not regard Exhibits "B"-"PP" as necessarily or even likely being inconsistent with testimony previously presented to us.[16]

With respect to Exhibit "A", however, we are permitting certain aspects of that exhibit relative to the status of B&R during the summer of 1981, and HL&P's advice to the NRC (including this Board) of that

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16 For that reason, we need not consider CCANP's request for us to appoint an "independent special master". We question, however, whether an "independent special master" could be appointed to perform many of the tasks outlined by CCANP, particularly conducting discovery on behalf of a party. See 10 C.F.R. § 2.722. As the Staff observes (Staff Response, at 20-21) the appointment of a "special master" for that purpose would constitute financial aid to an intervenor, which is prohibited.

status, to be litigated under CCANP Contention 10. When that contention was strictly limited to the reporting of the Quadrex Report, we ruled that CCANP had forfeited its right to further discovery on that question. LBP-85-6, supra, 21 NRC at 466. At the same time, however, we directed the Applicants to provide the Board and parties with copies of certain records relevant to that subject. Id., at 463-64. (The Applicants have complied with that direction.)

We earlier determined that CCANP was untimely in waiting until April 17, 1985 to advise us of PUCT testimony presented in October, 1984 (see supra, pp. 20-22). To the extent that CCANP seeks further discovery on matters derived from the PUCT testimony, its request is similarly untimely. Although we did not deny CCANP's request to litigate matters derived from the PUCT testimony on untimeliness grounds, it is clear to us that further discovery on those questions could operate to delay the hearing, as to which testimony is scheduled to be filed in the near future. CCANP's untimeliness in filing the Motion in effect makes meaningful discovery on the matters from Exhibit "A" to be litigated inconsistent with following the schedule which we generally adopted over three months ago, prior to the filing of the Motion (LBP-85-6, supra, 21 NRC at 463). Since we do not believe that CCANP's untimeliness should be permitted to disrupt the hearing schedule, we are denying further discovery to CCANP.

Further, the only specifically identified topic of CCANP's discovery (the activities of Applicants' counsel) is not the primary focus of the matters to be litigated in Phase II and is likely to

involve much privileged material. For reasons set forth earlier in this Memorandum and Order, we do not at this time perceive any "manipulation" efforts by Applicants' counsel sufficient to identify him as a "necessary" witness with respect to CCANP Contention 10. For this reason, that particular discovery requested by CCANP is not appropriate at this time.

Nonetheless, the development of an adequate record on CCANP Contention 10 (as modified) suggests that certain background information would be relevant. Thus, as in the case of LBP-85-6, we conclude that the Applicants should furnish the Board and parties (to the extent not already furnished) copies of internal documents or other records (in any form, including drafts), or correspondence or other communications with outside persons (including but not limited to consultants), concerning (1) the decisions to seek replacement of and, thereafter, to replace B&R, including the dates when those decisions were made; (2) the reportability of either of those decisions to NRC (including this Board); and (3) discussion (if any) of the discharge or potential discharge of B&R between Mr. George Oprea and other corporate officers or officials. These records should cover the time frame from April 1, 1981 through September 24, 1981; except that, for topic (3), the documents may be limited to the period April 1, 1981-June 29, 1981. If the Applicants claim attorney-client privilege or work-product protection (as defined by 10 C.F.R. § 2.740(b)(2)) for any record, they should so advise us, setting forth an identification of the particular record (sender, recipient, date, general subject matter).

The foregoing records or advice on privileged or protected documents should be in the hands of the Board and parties by Wednesday, July 3, 1985.[17]

For the reasons set forth above, and reaffirming conclusions set forth in our Sixth Prehearing Conference Order (Further Definition of Phase II Issues), dated May 17, 1985, it is, this 18th day of June, 1985

ORDERED

1. That CCANP's Motion to Reopen Phase I Record, dated April 15, 1985 (but filed April 17, 1985), is denied.

2. That material included in Exhibit "A" to CCANP's Motion is accepted for litigation under CCANP Contention 10, to the extent described in our Sixth Prehearing Conference Order (at 3-4) and in this Memorandum and Order (at 8-9).

3. Further discovery requested by CCANP in conjunction with its Motion is denied as untimely and, in certain respects, outside the scope of issues accepted for litigation in Phase II.

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17 Dr. Lamb's copies need not reach him until Monday, July 8.

Through a telephone conference call on June 10, 1985, the parties were notified of this ruling on document production. Later that day, the Applicants advised that they would produce the specified documents on the schedule set forth herein.

4. The Applicants are directed to provide the Board and parties with records as described in this Memorandum and Order (at 34). These records are to be provided by July 3, 1985 (except that Judge Lamb's copies need not reach him until July 8, 1985).

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE