

204  
UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges  
Charles Bechhoefer, Chairman  
Dr. James C. Lamb  
Ernest E. Hill

DOCKETED  
USNRC

'84 JUL 11 AM 11:58

DEPT. OF ENERGY  
OFFICE OF THE SECRETARY  
SERVED JUL 11 1984

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

ASLBP No. 79-421-07 OL

Docket Nos. STN 50-498 OL  
STN 50-499 OL

July 10, 1984

MEMORANDUM AND ORDER  
(Denying Reconsideration but Clarifying  
Memorandum and Order of May 22, 1984)

In our Memorandum and Order (Ruling on CCANP Motions for Additional Discovery and Applicants' Motion for Sanctions), dated May 22, 1984, we granted in part and denied in part two motions for additional discovery which had been submitted by CCANP. The first, dated October 28, 1983, had sought additional discovery with respect to the Quadrex Report and the hurricane issues which are to be litigated in Phase II of this operating-license proceeding. CCANP's second motion, dated March 29, 1984, had sought discovery with respect to the managerial-competence questions which, in our Partial Initial Decision (PID) dated March 14, 1984 (LBP-84-13), we had directed the Staff (and permitted other parties) to address in Phase II. We permitted CCANP to have discovery

8407120134 840710  
PDR ADJCK 05000498  
G PDR

DS02

on all three issues, but subject to limitations as to timing and as to the scope of issues to which the discovery could be directed.

Through a motion filed on June 6, 1984, CCANP has asked us to reconsider our May 22, 1984 ruling in certain respects. By Memorandum dated June 11, 1984, we invited other parties or participants to respond. The State of Texas generally supports CCANP's motion; the Applicants and NRC Staff each oppose it. (The Applicants additionally, in a filing dated June 29, 1984, provided certain factual information bearing upon the response of the State of Texas.) For the reasons which follow, we are denying the motion but clarifying certain of the rulings to which CCANP takes exception.

1. In its reconsideration motion, CCANP seeks the following specific relief, directed solely at our rulings on the Quadrex-Report issue:

- (1) Discovery not limited as to any aspect of the Quadrex Report.
- (2) Such discovery to commence after the filing of the briefs on notification and reportability by all parties or alternatively an order to the Applicants that such questions are to be answered regardless of whether the briefs have been filed or not.
- (3) No defining of the issues to be litigated until after the discovery and the prehearing conference, i.e., rescission of the Board's limitations on the issues set forth in the [May 22] Memorandum and Order.

We do not read CCANP's motion as seeking any relief with respect to the discovery we permitted on the hurricane issue or on the Staff's report

on competence. In any event, CCANP has provided no basis for our modifying our previous ruling on those matters.

2. A fundamental tenet of NRC discovery in operating-license proceedings such as this one is that discovery may relate "only" to matters in controversy which have previously been identified. 10 CFR § 2.740(b)(1). Discovery prior to the formulation of contentions or issues is therefore not permissible. See also Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 929 (1974). Following discovery, and prior to hearings, issues or contentions may be further defined and, if appropriate, limited. 10 CFR § 2.752.

Our May 22, 1984, Memorandum and Order, in providing additional--and, as the Applicants point out, discretionary--discovery to CCANP, attempted to conform the discovery as closely as possible to usual NRC discovery practices. We established the general scope of issues to be litigated and provided for discovery within that general framework. We also provided for a prehearing conference following discovery in order to delineate more precisely the issues for hearing.

As both CCANP and the State of Texas observe, when we deferred litigation of the Quadrex Report to Phase II, we declined to accept Quadrex-Report contentions which had been submitted by CCANP. We reasoned that Quadrex-Report issues, to the extent pertinent to this proceeding, could be more productively explored in Phase II, following the review of those issues by Bechtel and the Staff, under the envelope

of the broader issues which we were then considering. See Fourth Prehearing Conference Order, dated December 16, 1981, at 7; Memorandum (Memorializing Certain Rulings Announced During Evidentiary Hearing Sessions of June 15-17, 1982), dated June 24, 1982, at 2-3. In that latter Memorandum, we made it clear that the issues which we were deferring to Phase II were those either "encompassed within existing issues" or within the scope of the issues described in our Fourth Prehearing Conference Order.

Nowhere have we ever 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". For example, substantial portions of it relate only to the economics of building or operating the South Texas Project (STP) and have no bearing on the safety questions before us. For these reasons, CCANP's requests that discovery not exclude any aspect of the Quadrex Report, and that no defining of issues take place until after discovery, must be rejected as contrary both to the discovery framework authorized by the NRC Rules of Practice and our earlier Quadrex-Report rulings.

3. 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. Since this proceeding is an operating-license proceeding, the bottom line of our inquiry into HL&P's character and competence must determine whether HL&P

has the necessary managerial character and competence to be granted operating licenses for the facility. In addition, as a result of the Show-Cause Order of April 30, 1980 and the Commission's opinion in CLI-80-32, we were also asked to examine whether HL&P has the necessary managerial character and competence to finish construction of the STP.

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. CCANP (supported by Texas) apparently wishes to litigate the design engineering questions raised by the Quadrex Report under the umbrella of that Issue. 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. 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. All that CCANP has proffered are the circumstantial conclusions of the Quadrex Report that certain difficulties in that area did develop, together with CCANP's conjecture that evidence revealed by the Quadrex Report might possibly show that HL&P attempted to "keep the Commission in the dark" about HL&P's and

B&R's asserted inability to design and engineer the project. That is not enough to provoke another full-blown inquiry into HL&P's character, given the substantial evidence of HL&P's positive character traits upon which we relied in our PID (including HL&P's replacement of B&R, particularly because of B&R's design-engineering performance--see PID, Finding 224).

Moreover, as our PID pointed out, many of the personnel who were involved in the oversight of B&R's design activities no longer serve in that capacity. In particular, HL&P hired Mr. Jerome Goldberg to oversee construction, and one of his first actions was to commission the Quadrex Report to ascertain the adequacy of B&R's design-engineering efforts (id). 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. In our view, those past activities and procedures can have little impact on the potential licenseability of the project, as long as any design errors which may have occurred are satisfactorily remedied (a subject open for exploration in Phase II).

4. 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. Whatever the reason for the deficiencies, 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. Our limitations on discovery with respect to competence were premised on that consideration. We have been provided no adequate reason for modifying those limitations.

5. Several points in our May 22, 1984 Memorandum and Order warrant some clarification. We have stated that HL&P's promptness (or lack thereof) in turning over the Quadrex Report to the Staff, other parties and the Board may reflect on HL&P's character, and we have permitted discovery concerning "the circumstances surrounding HL&P's notification of NRC and the parties about this report" (Memorandum and Order, at 5). Contrary to CCANP's apparent understanding, our reference to "report" is not necessarily limited to the final version of the report. We intend to permit an exploration of the timeliness of HL&P's reporting of either the final report or any drafts thereof. See Staff Inspection Report 82-02, provided to the Board and parties by the Staff on June 25, 1982. Furthermore, with respect to information either reported or considered by the Applicants or by the NRC Staff to be reportable under 10 CFR § 50.55(e) (as reflected in Inspection Reports 82-02 or 82-12 (NUREG-0948)), we will permit an inquiry into the circumstances of the reporting or non-reporting of that particular

information, including when HL&P first became aware of it. Such inquiry need not await the briefs on reportability which are to be filed.

In so ruling, we express no opinion on the reportability of that information or on whether additional information should have been reported to the Staff or to us. We will make our determination on that subject after we have examined the briefs which are to be filed. If we should determine that additional matters were reportable, and if an appropriate showing of relevance (i.e., open factual questions) were made, we would consider authorizing further discovery. It is our present opinion, however, that if neither the Applicants nor the Staff considered a matter to be reportable, and we were to disagree, the failure to have reported would not reflect adversely on HL&P's character (although HL&P might bear responsibility in other ways for the deficient reporting).

6. In our May 22, 1984 Memorandum and Order, we ruled that the adequacy of corrective actions was a subject that could be explored through discovery. In our June 11, 1984 Memorandum, we further indicated that, like the Staff, we would assume "that the various safety deficiencies alluded to in [the Quadrex] Report in fact occurred" and that, for that limited purpose, we would be prepared to admit the Report into evidence. In commenting on that statement, the Applicants correctly observe that "CCANP will be able to conduct discovery regarding not only the corrective actions being taken, but the bases for such actions (e.g., the interpretation of the Quadrex findings and any



related information used by HL&P and its contractors in determining the corrective actions)." We agree with the Applicants that, in following the Staff's practice of assuming that certain deficiencies occurred, we are not precluding the Applicants or Staff from demonstrating that such deficiencies did not in fact occur or were less significant than might be inferred from the Report. Where the Applicants or Staff take that position, however (through Bechtel or I&E reviews of the Quadrex Report), we regard that position as constituting the corrective action in question and hence as being open to discovery and potential adjudication.

7. CCANP seeks to postpone all discovery on the Quadrex Report until after the filing of the briefs on notification and reportability, on the ground that the Applicants have refused to answer Texas' interrogatories on that subject. We note that Texas never filed any motion to compel additional answers to its interrogatories. Furthermore, our examination of the interrogatory responses provided to us by the Applicants indicates that the Applicants have provided answers to certain factual questions on this subject. (We express no view as to the adequacy of those answers.) Moreover, as set forth in paragraph 5, supra, there is no warrant for postponing all discovery in this area. If CCANP is dissatisfied with answers it receives, it can file an appropriate motion. Finally, as we previously stated, it is possible that, following the submission of the briefs, we may determine that further discovery is warranted. In that connection, we regard the

target date for the prehearing conference as more definitive than that for a hearing. Indeed, to delineate further the date for the prehearing conference, we expect it to take place on one or two days during the period October 15-17, 1984. Parties should plan accordingly. (We will announce the exact time and location later.)

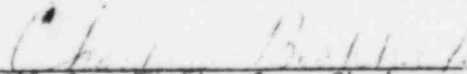
---

For the reasons stated, it is, this 10th day of July, 1984

ORDERED

1. That CCANP's Motion for Reconsideration of our Memorandum and Order of May 22, 1984 is denied.
2. That our Memorandum and Order of May 22, 1984, is clarified to the extent indicated.
3. That a prehearing conference is scheduled during the period October 15-17, 1984, at a time and place to be announced.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

  
Charles Bechhoefer, Chairman  
ADMINISTRATIVE JUDGE