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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

SERVED MAY 23 1984

In the Matter of	ASLBP No. 79-421-07 OL
HOUSTON LIGHTING AND POWER COMPANY, ET AL.	Docket Nos. STN 50-498 OL STN 50-499 OL
(South Texas Project Units 1 and 2)	May 22, 1984

MEMORANDUM AND ORDER
(Ruling on CCANP Motions for Additional Discovery and Applicants' Motion for Sanctions)

Pending before us are three motions bearing on Phase II discovery: CCANP has filed two motions for additional discovery with respect to Phase II issues, and the Applicants seek sanctions against CCANP for deficient responses to Phase II discovery. For reasons set forth below, we grant in part and deny in part both of CCANP's motions; we deny Applicants' motion for sanctions, without prejudice to its later renewal (if appropriate).

A. CCANP's first motion for additional discovery was filed on October 28, 1983. CCANP seeks an additional 90 days' discovery on those Phase II issues which had been identified prior to our March 14, 1984 Partial Initial Decision (PID)--namely, the Quadrex Report (including reviews thereof) and Contention 4 (hurricanes). CCANP acknowledges that

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we had already provided a 90-day discovery period on those issues (ending April 25, 1983) and that it had not filed any discovery during that period nor sought any extension of time for discovery. It explains that it has been represented primarily by a law student who was faced with examinations in April, 1983, that the Quadrex Report issues involve highly technical and voluminous documentation, and that CCANP "saw no point in seeking additional discovery time [in April, 1983] which could not be used productively" (motion, p. 2). Further, it explains that it had intended to rely on the introduction of certain documents together with cross-examination but that, as a result of the filing on October 6, 1983 of the Applicants' Motion for Sanctions (seeking to limit CCANP's participation on Phase II issues), it needed additional discovery to pursue the Phase II issues adequately.[1] Further, CCANP points to suggestions by the Applicants and us that CCANP's previous cross-examination had been "extended" and "unfocused" (motion, p. 3), and it claims that this condition (to the extent it existed) could be alleviated by additional discovery.

In responses filed respectively on November 14 and 21, 1983, the Applicants and Staff oppose CCANP's first motion. They cite CCANP's failure to take advantage of the discovery it had been afforded (which they each regard as adequate) and assert that CCANP failed to demonstrate the requisite "good cause" for its requested relief (see 10

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1 We consider that motion in Part C of this Memorandum and Order.

CFR § 2.711). Both also refer to extensive discovery responses obtained by the State of Texas to which, they claim, CCANP will have access.

We recognize that CCANP has thus far been delinquent in seeking discovery on a timely basis. That delinquency alone might warrant the denial of further discovery on the Quadrex Report and hurricane issues. See Florida Power & Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), ALAB-660, 14 NRC 987, 1014-15 (1981). We also recognize that, if there were any doubt whether the review of the sought operating licenses could be completed in this case in a timely fashion (i.e., prior to projected fuel loading), the reasons advanced by CCANP for an extension of discovery time would not be sufficient. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981). In such circumstances, the potential gain to the hearing process through CCANP's better preparation would be outweighed by the necessity for completing the hearing process expeditiously.

That situation (which appears to be the one to which the Commission's Statement of Policy is directed) does not, however, pertain in this proceeding at this time. Fuel loading for Unit 1 is currently not scheduled until December, 1986 (see "Update to Construction Status Report," provided to NRC on February 29, 1984, document ST-HL-AE-1050). Since the briefs provided for in our Memorandum and Order dated June 22, 1983 (unpublished) have not yet been filed, we do not anticipate that a prehearing conference for Phase II can profitably be held any earlier

than the fall of 1984.[2] Furthermore, as we pointed out in our March 14, 1984 PID, CCANP's cross-examination was frequently poorly focused and unproductive (PID, at p. 100). If CCANP's explanations are accurate, these deficiencies were partly the result of the expedited discovery which we felt compelled to enforce in Phase I. Furthermore, as we also observed in our PID, we intend to consider steps to help assure that CCANP's cross-examination in Phase II will be more productive than much of its cross-examination in Phase I, with a view toward enhancement of the decisional record (id.).

We have earlier expressed the view that the Phase II issues--particularly the examination of the Quadrex Report and reviews of that Report--must be narrowed prior to the evidentiary hearing. Memorandum and Order dated June 22, 1983, supra, at 4. We hereby reiterate that view. In our opinion, the Quadrex Report is so broad, and covers topics with varying applicability to safety, that greater particularization is necessary to permit informed inquiry into potentially unresolved safety questions. The Commission itself envisions discovery as assisting in this regard. CLI-81-8, supra, 13 NRC at 455. Finally, we regard our PID as having had some effect on the scope of the issues properly open to litigation in Phase II. The conditions outlined below reflect that scope. Taking into account the

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2 We intend no criticism by this observation. We are, however, establishing a deadline for the submission of these briefs, as well as a target date for a prehearing conference.

foregoing considerations applicable to this proceeding, we believe that permitting CCANP some further opportunity to develop its case adequately outweighs any need at this time to penalize it for its previous delinquencies. For these reasons, we are affording CCANP a limited amount of additional discovery on the Quadrex Report and hurricane issues. The following limitations will apply:

1. Insofar as the Quadrex Report is concerned, we regard the issue of the adequacy of HL&P's character to have been resolved by our March 14, 1984 PID, except to the extent that HL&P's promptness (or lack thereof) in turning over the report to the Staff, other parties and the Board may be said to reflect on that character. See PID, pp. 37-38, 46. In other words, to the extent that deficiencies in Brown & Root engineering performance were uncovered by the Quadrex Report, we do not regard it as useful to litigate those deficiencies in the context of HL&P's (or B&R's) character. Discovery with respect to HL&P's character will be limited to an exploration of the circumstances surrounding HL&P's notification of NRC and the parties about this report.

2. With regard to HL&P's competence prior to the Show-Cause Order, we have already determined that there were certain deficiencies, particularly with respect to nuclear experience. See PID, pp. 47-51. We regard that, to the extent that the Quadrex Report reflects deficiencies in the early competence of HL&P, it is merely cumulative. No further discovery on that subject will be entertained. (We will consider discovery with respect to HL&P's current competence in conjunction with CCANP's second discovery motion, infra.)

3. What we regard as relevant to the Phase II Quadrex issue is whether the corrective actions being followed by the Applicants and their current contractors are adequate to resolve any safety-significant deficiencies revealed by the Quadrex Report. Discovery seeking to develop this point will be permitted, assuming other criteria spelled out below are also satisfied. In permitting this discovery, we are not contemplating any inquiry into whether or why the particular deficiency may have occurred but only as to the adequacy of corrective actions.

4. Any discovery by CCANP on either the Quadrex Report issue or the hurricane issue must not duplicate that obtained by the State of Texas. To the extent that it covers the subject areas of Texas' discovery, CCANP's further discovery is to be limited to follow-up questions or requests for documents (i.e., second-round discovery). In addition, CCANP may seek to develop information in areas not covered by Texas' discovery, so long as those areas have safety significance to plant construction or operation and also meet the criteria set forth above. (Monetary significance, standing alone, will not be considered as relevant to Phase II issues.)

5. We will permit further discovery for approximately the 90 days requested by CCANP. While an extended period of this sort may be generous for the discovery we are permitting, we are taking into account that CCANP is filing a brief in this proceeding before the Appeal Board no later than June 22, 1984 (see Appeal Board Order dated April 17, 1984). We are also assuming that all parties will be planning some vacation time during this period. We will here require that CCANP's

discovery be complete (i.e., answers received) by Friday, August 31, 1984. To meet this requirement, CCANP should take into account the response times included in NRC rules (14 days after service for interrogatories, 30 days after service for production of documents). If additional response times are needed and granted to the Applicants or Staff, CCANP's discovery deadlines will be correspondingly extended. (Upon request, we will permit the Applicants and Staff to have additional time for follow-up discovery against CCANP, to ascertain the particular information and witnesses (if any) upon which CCANP will rely at the Phase II evidentiary hearings. However, some part of that information may be forthcoming in the prehearing conference report which we are directing CCANP and (to the extent applicable) other parties to file. See Part E, infra.) No further requests for extensions of discovery time by CCANP on the Quadrex Report or hurricane issues will be entertained by us, absent the most extraordinary circumstances.[3]

B. CCANP's other motion for additional Phase II discovery was filed on March 29, 1984. It seeks 90 days' discovery with respect to the report on "safety-related construction activities (including implementation of the QA/QC program) following the assumption of duties by Bechtel and Ebasco" which we directed be made at the Phase II evidentiary hearings in our March 14, 1984 PID, at pp. 6, 56-57. In

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3 This schedule does not include additional time (if any) necessitated by discovery-related motions arising out of the discovery we are authorizing.

support of this request, CCANP describes the report as an extension into Phase II of Issue B, emanating in part from a position taken by CCANP in its proposed findings for Phase I. It seeks discovery to assist it in its preparation for this issue.

In their response dated April 13, 1984, the Applicants oppose the granting of any additional discovery on the Phase II report. They claim that CCANP has misinterpreted our PID, that we did not extend Issue B into Phase II, but that we only directed that the record be supplemented or enhanced in a limited respect. As precedent, the Applicants cite the denial of discovery with respect to a somewhat analogous reopened record by the Licensing Board in Florida Power & Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-81-14, 13 NRC 677, 705-06; id., LBP-81-16, 13 NRC 1115, 1119 (1981). The Applicants also assert that the discovery requested would be particularly open-ended and burdensome.

The NRC Staff's response dated April 19, 1984[4] suggests that we defer ruling on CCANP's request until the issues for Phase II are further specified. The Staff observes that it is not certain whether we intended to reopen Issue B broadly or whether we intended the Staff report to be the focus of Issue B during Phase II.

Our direction to the Staff to provide a Phase II report was not intended to be an open-ended extension of Issue B into Phase II. In

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4 On the basis of service of CCANP's motion on March 29, 1984, the Staff's response should have been filed by April 18, 1984. 10 CFR § 2.730(c).

the first place, Issue B was extensively litigated in Phase I. In considering it, we had not found that HL&P suffered from any significant character deficiencies. Remedial actions with respect to character were therefore not of critical importance and are thus not in issue in Phase II (save to the limited extent outlined earlier, at p. 5). However, we did find certain deficiencies in HL&P's competence; and, although we thought that the corrective actions taken would remedy those deficiencies, we pointed to the lack of evidence regarding construction activities under Bechtel and Ebasco as leaving a gap in the record on this issue. We therefore directed that the record be supplemented in Phase II to help ascertain whether our expectations as to improvement in competence were being fulfilled. We called on the Staff to provide the report in question because of the likelihood of greater objectivity, but we also invited other parties to provide comments or reports of their own. See PID, p. 57. The scope of the Phase II report is thus close to that described by the Applicants in their response to CCANP's motion.

Nonetheless we believe that some discovery by CCANP is warranted. Discovery may well be the key to meaningful participation by a party in a licensing proceeding. See, Cuomo v. NRC, ___ F.Supp. ___ (D.D.C., April 25, 1984) (slip op. at 7). Our requirement of a Phase II report anticipated that there would be meaningful participation by all parties. In our opinion, the Turkey Point ruling cited by the Applicants as precedent for denying discovery is inapposite. The discovery request there was denied because the party seeking discovery had already been afforded an opportunity for discovery on the issue in

question and had not "diligently pursued" that opportunity. Turkey Point, ALAB-660, supra, 14 NRC at 1014-15. Here CCANP has not had an opportunity for discovery on the matters to be covered by the Phase II report.

We agree with the Applicants, however, that CCANP's request is too open-ended. We perceive the center-piece of the Phase II issue to be the Staff's report, and the foundation of that report is likely to be various I&E reports, OI reports, SALP reports, or other material of that genre prepared by or for the Staff since the cut-off of evidence in the Phase I record. As a first step, CCANP (and other parties or participants, if they request) should be provided access to such reports and material, either directly or through their presence in one of the local public document rooms. (The parties and Board have not been on the distribution list for such reports.) For convenience, it would be desirable if such material were available in the Austin, Texas area, where it could be referenced by both CCANP and the State of Texas (assuming it wishes to do so). If such information has not already been made available, it should be provided as described above within 30 days of service of this Order.

Thereafter, CCANP (and other parties, including Texas) may have the opportunity for asking questions or seeking documents with respect to particular matters identified in such reports (or in 10 CFR § 50.55(e) reports filed by the Applicants, copies of which are being routinely furnished to the Board and parties). The matters in issue must have some bearing on HL&P's competence to finish construction of

the STP facility and they must be identified with specificity. In particular, examples of construction experience in areas where HL&P previously encountered difficulties would be relevant. Examples of harassment or intimidation of QC personnel, if any, would of course be included. See PID, pp. 56-57, 83.

The discovery period set forth in Part A of this Order will also govern the discovery on the Phase II report.

C. On October 6, 1983, the Applicants filed a motion for sanctions against CCANP. The motion was premised on CCANP's alleged failure to respond in good faith to discovery requests of the Applicants and prior discovery orders of this Board. The Applicants seek to bar CCANP from litigation of any aspects of the Quadrex Report as to which CCANP's responses to interrogatories were inadequate. (The Applicants identified most areas of the Quadrex Report as being subject to their requested sanctions.)

In its response dated October 28, 1983, CCANP states that it has had difficulties in responding to the Applicants' discovery requests, in part because of its inability to conduct discovery during the period which had been established for that purpose (to which all parties had agreed). CCANP cites the law-school obligations of its representative and the complexity of the documents involved. CCANP refers to its first motion for additional discovery (see Part A of this Memorandum and Order, supra) as a means of remedying any deficiencies in its earlier discovery responses. (That motion was filed simultaneously with CCANP's response to the Applicants' motion.) CCANP also points out

that the Applicants never filed any follow-up interrogatories. It also stresses that, "without such [requested additional] discovery, CCANP has done its best to respond to the Applicants' interrogatories" (response, p. 4).

If that be true, then CCANP has fulfilled its discovery obligations, although perhaps setting the stage for a limitation of issues it may raise on its own at the hearing. In addition, the Applicants' motion goes too far--it would bar CCANP not only from raising Quadrex Report issues on its own but also from participating through cross-examination in aspects of the Quadrex Report raised by other participants (i.e., the Staff or Texas) or by the Board. This result would be manifestly improper. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857 (1974), reconsideration denied, ALAB-252, 8 AEC 1175, affirmed, CLI-75-1, 1 NRC 1 (1975).

We do not find it useful at this point to evaluate the adequacy of CCANP's individual discovery responses. In Part A of this Memorandum and Order, we are granting in part CCANP's request for additional discovery. We anticipate that, following receipt of responses (and taking into account responses already received by the State of Texas, to which CCANP will have access), CCANP will be able to define more precisely the matters it wishes to litigate in Phase II. Indeed, in Part E of this Memorandum and Order, we are requiring it to do so.

For these reasons, we are denying the Applicants' motion for sanctions at this time, without prejudice to its resubmittal (in perhaps

a somewhat less encompassing form) if CCANP's responses to additional discovery (based on its own additional discovery) should prove inadequate.

D. The Staff brief we requested in our June 22, 1983 Memorandum and Order should be submitted no later than August 24, 1984 (earlier if possible). (The briefing schedule set forth in our June 22, 1983 Memorandum and Order will then govern.)

E. Following the completion of the discovery outlined in Parts A and B of this Memorandum and Order, and the receipt of briefs provided for in Part D, we expect to convene a prehearing conference in order to delineate more precisely the particular matters to be litigated in Phase II. A tentative target is the week of October 15, 1984. (The exact timing and location of the conference will be announced at a later date.) Ten days prior to such conference, we expect CCANP (and other parties, as applicable) to submit a list of particular matters which they believe should be encompassed in the Phase II hearings. We will hear responses to those submissions at the conference, as well as oral argument (as necessary) on the matters covered by the briefs provided for in Part D, supra. We may also permit further discovery (particularly by the Applicants and Staff) after we rule on various issues. The end result should be a Phase II hearing much more precisely defined than was the Phase I hearing. We call upon all parties, in their conduct of discovery and other pre-trial activities, to focus on this goal. We envision early December, 1984, as a target for the commencement of Phase II hearings.

For the reasons stated, it is, this 22nd day of May, 1984

ORDERED

1. That CCANP's motions for additional Phase II discovery dated October 28, 1983 and March 29, 1984, respectively, are each granted in part and denied in part. Discovery shall be afforded to CCANP on the terms and conditions outlined at pp. 5-7 and 10-11, supra.

2. That the Staff file the brief described in our Memorandum and Order of June 22, 1983 by no later than August 24, 1984, with responses to follow under the schedule established by us in the June 22, 1983 Memorandum and Order.

3. That the Applicants' Motion for Sanctions, dated October 6, 1983, is denied, without prejudice to its renewal (if appropriate) following the conclusion of Phase II discovery.

4. That a prehearing conference is tentatively scheduled for the week of October 15, 1984, with statements of issues proposed to be litigated filed no later than 10 days prior to such conference.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE