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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF'S RESPONSE TO CCANP
MOTION FOR RECONSIDERATION

Oreste Russ Pirfo
Counsel for NRC Staff

March 25, 1985

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NUCLEAR REGULATORY COMMISSION

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I. Introduction

On March 8, 1985, intervenor CCANP filed a motion (hereinafter "Motion") requesting that this Appeal Board reconsider its decision in ALAB-799, 21 NRC ___ (issued Feb. 6, 1985), (hereinafter "Decision"), in which it affirmed in part the Licensing Board's Partial Initial Decision, LBP-84-13, 19 NRC 659 (1984). Specifically, CCANP moved the Appeal Board to withdraw or reverse its holdings on the character standard and the due process questions presented by the CCANP appeal (CCANP Brief on Appeal from Partial Initial Decision, filed July 8, 1984 [hereinafter "CCANP Appeal"]). The NRC Staff opposes intervenor's motion for reconsideration.

II. Discussion

In its motion for reconsideration of ALAB-799, CCANP asks the Appeal Board to: (1) withdraw its rulings with regard to the approval of the character standard and methodology used by the Licensing Board; (2)

reverse itself on the finding of no bias or procedural error in the proceeding below; and (3) order a reconstitution of the Licensing Board for subsequent hearings.

This motion for reconsideration is without merit and should be denied for the reasons explained below.

A. Character Standard (Motion 2-5)

The intervenor first asks that the Appeal Board "withdraw" its Decision to the extent that it dealt with the "character standard" applied below by the Licensing Board. In so arguing, the intervenor construes the Appeal Board's Decision as "not in fact endors[ing] a particular standard for character developed by the ASLB." Motion at 2. However, contrary to intervenor's assertion, the Appeal Board did in fact address the standard of conduct set out by the Licensing Board and expressly stated that: "We affirm the Licensing Board's rulings with respect to the standard to be applied when measuring character and competence." ALAB-799, at 8. The Appeal Board then went on to review, "prior decisions [identifying] the factors that are pertinent to an inquiry into these matters." Id. at 9. See e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1206 (1984). In its decision, the Appeal Board ascertained that the Licensing Board had properly applied the standards set out by the Commission in this proceeding in CLI-80-32, 12 NRC 281 (1980), and concluded that:

> In the Board's judgment, "[w]hat is necessary is a nexus of a particular trait to particular performance standards contemplated by the Atomic Energy Act or NEPA and NRC's implementing regulations and guides." Specifically, the Board

> concluded that it was necessary to scrutinize HL&P's record of compliance with NRC regulations, its response to noncompliances, and its candor in dealing with the Commission, the Board, the staff and other parties. We find no fault with the Board's approach. [Footnotes omitted].

Id. at 10-11. In light of this thorough analysis and conclusion, it is plain that the Appeal Board correctly endorsed the standards of character applied in this proceeding by the Licensing Board.

Next, intervenor argues that "the ASLB never answered the question [of] whether, without regard to remedial measures, HL&P's record called for denial of the application at the threshold . . . [and thus] denied CCANP its right to a decision on [this] issue . . ." Motion at 4. We cannot agree. Contrary to Intervenor's claims, both the Licensing Board and the Appeal Board looked at the question (labeled "Issue A" below) of whether HL&P's character or competence was so poor in the past as to prevent it from receiving a license, without regard to the consideration of any subsequent remedial measures HL&P might have taken. The Licensing Board focused on this issue and answered it in the negative. See 19 NRC 676-78. The Appeal Board agreed with the Licensing Board's treatment of this issue in this proceeding, and held that the Licensing Board's "evaluation of remedial measures was a proper part of an overall appraisal of character and competence." ALAB-799 at 12; see also id. at 13-20. Plainly, the Licensing Board and the Appeal Board found that HL&P's conduct had not been such as to require the denial of a license without consideration of any remedial measures HL&P may have taken, and intervenors have set forth no compelling reason why this Board should now reconsider that determination.

Finally, CCANP argues that determinations on the standards for finding character are premature, and should not be made at this stage of the proceedings (Motion at 2, 4-5); however the Appeal Board expressly addressed this question, and ruled that:

> We. . . recognize that this is a unique proceeding in which the Commission has specifically directed the Licensing Board to issue an "early and separate" decision on the character and competence question. [See CLI-80-32, 12 NRC 281, 292-93]. Thus, the Commission intended a determination of whether the application should be denied at the threshold. In such circumstances, we do not believe it is appropriate to defer all appellate consideration.

ALAB-799, at 7.

It is thus clear that the Appeal Board's decision complies with the Commission's directive in CLI-80-32 and is in the best interest of judicial administrative economy, the public, and the parties to this proceeding. A failure to pass upon the appropriateness of the standard applied by the Licensing Board would serve to create uncertainty in the Phase II proceeding on how any evidence then adduced should be assessed by the Board. Intervenor would have character evidence taken with no standard against which it should be applied. Relevance and materiality of proffered evidence and testimony would become uncertain. Rather than creating "an unwieldy middle ground of decided but less than essential issues" as CCANP chooses to describe it [Motion at 2-3], the Decision sets clear guidelines for the Phase II decision-making process and resolves the question of how and what is to be considered when determining the issue of the requisite character for an NRC licensee.

Consequently, intervenor's request that the portions of the Appeal Board Decision addressing the character standard be reconsidered or "withdrawn" should be denied.

B. Due Process Questions

Intervenor moves the Appeal Board to reconsider its holding that the Licensing Board's conduct of Phase I of the proceeding did not deny intervenor its right to due process. It should be noted initially that intervenor has already been provided the opportunity to argue specific due process violations in its appellate brief. Intervenor maintains that it was unable to do so in that filing because of the page limitation. To obviate that limitation, intervenor now, in effect, has used the device of a motion for reconsideration to make arguments and provide some specific transcript citations that were missing from its brief. Such a filing is not actually a motion for reconsideration. It is merely a new section to be appended to that original brief. This "support," irrespective of its merit, should have been set out in CCANP's Appeal. CCANP cannot first set out these new arguments and citations in a motion for reconsideration. See Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619, 621 n. 1 (1976); Tennessee Valley Authority (Hartsville Nuclear Plant, Units, 1A, 1B, 2A & 2B), ALAB-467, 7 NRC 459 (1978). Moreover, Intervenor further ignores the Appeal Board's Decision on these alleged procedural errors and attempts to make its case on the basis of certain questions asked and remarks made by members of the Appeal Board during the course of oral argument. See e.g. Motion at 6, 20.

Examining the due process allegations in CCANP motion for reconsideration, it is clear that each is without merit. Moreover, the "cumulative" effect of these procedural rulings is not reversible error simply because CCANP counsel or representative decides "to give up" or has "reached his personal limit," (Motion, at 12, 19) in the words of intervenor, and fails to make an offer of proof or otherwise demonstrate prejudice. See Tr. 9919, 9827. These specific due process allegations are as follows:

(1) Scheduling of the Hearing (Motion 6-9)

CCANP first cites the Board's refusal to reschedule the start of the hearing for the convenience of CCANP representative as "abusive." Motion, at 7. Intervenor concedes that this was not reversible error in and of itself, but says it forms part of a pattern which does constitute error. Id. This argument is without merit. Since, the scheduling decision was in no way erroneous, it cannot be deemed part of a pattern of error merely because CCANP decides to label it as "abuse." The Appeal Board has expressly addressed this scheduling question in ALAB-799, and stated:

> To justify overturning a licensing board's scheduling decision, we must be satisfied that the board set a schedule that deprives a party of its right to procedural due process. (citing Public Service Co. of Indiana (Marble Hill Nuclear Generating Station), ALAB-459, 7 NRC 179, 188 (1978). See also, Wisconsin Electric Power Co. (Point Beach Nuclear Power Plant, Unit 1), ALAB-719, 17 NRC 387, 391 (1983)) We find no such prejudice or deprivation of due process resultant from the Board's schedule.

ALAB-799, at 27-28.

Intervenor has offered no new significant argument or evidence as to why this prior decision should be reconsidered or how any prejudice or deprivation of its right to procedural due process occurred.

The "illustration of prejudice" that intervenor proffers is that substitute counsel had to cross-examine Messrs. Jordan and Goldberg without consultation with Mr. Sinkin. This could have been remedied simply by better preparation of intervenor's counsel. Mr. Sinkin's failure to coordinate and prepare counsel for a hearing known about months in advance hardly shows that CCANP was denied due process in the scheduling of this matter for hearing. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

Similarly, the "further illustration" presented by CCANP does not show prejudice. CCANP argues that prejudice resulted from this scheduling decision because during oral argument CCANP's counsel misspoke concerning events which he now believes transpired during the period in which substitute counsel was handling the case. He claims that he failed to realize during oral arugment that motions had been filed objecting to prefiled testimony and the use of witness panels by substitute counsel, and this would not have happended but for the scheduling decisions

necessitating the use of substitute counsel. [1/] The failure of substitute counsel for a party to keep its primary representative apprised of the proceedings and of the actions taken on behalf of a party does not provide a bootstrap for that party to complain later that the hearing was unfair.

(2) Opportunity for Discovery (Motion at 9-10)

The next Due Process issue CCANP raises for reconsideration in its instant motion is an alleged inadequate opportunity for discovery. The Appeal Board's Decision carefully addressed this question and recognized that 18 months had been provided for discovery before hearing. ALAB-799, at 29-31. Although Intervenor now refers to a motion to extend discovery predicated on the illness of its counsel, it fails to detail why the 18 month discovery period was not sufficient. As the Staff has said previously: "In light of the Commission directive to hold an expedited hearing -- a directive which CCANP applauded -- the eighteen months of discovery afforded was ample time by any objective standard." NRC Staff's Brief in Response to Brief of Intervenor CCANP on Appeal from Partial Initial Decision, August 23, 1984, at 23. Further, CCANP makes no showing that it could not have obtained all information available in

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1/ It is noted that the APA expressly contemplates the use of written testimony in agency licensing proceedings (5 USC § 556(d)) and Commission policy expressly provides for witness panels in 10 CFR Part 2, Appendix A, V(d)(4). See ALAB-799, at 27.

Further, Staff counsel's search of his pleading file fails to turn up such a motion. A review of the transcript pages cited, moreover, indicate that the "motion" being discussed is one related to identification of intervenor witnesses not objections to witness panels or written testimony. See Tr. 983.

the time provided. The fact that "many exhibits [were] entered into evidence by CCANP" (Motion, at 10), is of no moment. The issue, as the Appeal Board recognized, is why the 18 months granted for discovery was inadequate. CCANP has not shown this. No basis for reconsideration on the issue is presented on the ground that the discovery period was too short.

(3) Cross-Examination by Intervenor CCANP (Motion at 10-19)

Intervenor then turns to its Due Process complaint that it was denied full rights of cross-examination. The particular instances referred to by intervenor are addressed seriatim:

(i) Cross-Examination of Mr. Goldberg (Motion at 10-11)

Intervenor first complains of the Licensing Board's requirement that the citizen intervenors (CEU and CCANP) submit cross-examination plans indicating what topics each intervenor would be covering in order to coordinate their respective examinations. Motion, at 10. The Licensing Board did this to avoid the repeated duplication of cross-examination in particular areas. Tr. 1190. CCANP states that in so doing "[t]he Board ignored the reality of the record" and the intervenors' claimed "demonstration" that the proposed cross-examination of Mr. Goldberg in issue was not duplicative. Motion, at 10. The authority of the Licensing Board to require cross-examination plans is encompassed by the power to control the conduct of hearings (10 CFR 2.718(e)) and is encouraged by the Commission (Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981)). Consequently, no error was committed in this regard. See ALAB-799, at 23.

In support of its argument that its examination of Mr. Goldberg was improperly curtailed and not duplicative of cross-examination of the other intervenor, CCANP particularly cites Tr. 930-931, 1175-1181, 1190-1214. An examination of these latter references reveals that the grounds for sustaining the objections to CCANP's follow-up questions was relevancy, not simply that such questions were duplicative or cumulative. Tr. 1175-77, 1180. Intervenor was going into excessive detail on the nature of the problems Mr. Goldberg had encountered and solved in other jobs. The Licensing Board correctly ruled that this was not relevant to this operating license proceeding. Id. Intervenor's "demonstration" that the sought testimony was not duplicative, even if accepted, does not answer the more important objection of relevancy.

(ii) Cross-Examination of NRC Staff Regarding Issue of Character (Motion, at 11-14)

Intervenor CCANP next turns to what it views as an improper limitation on its attempts to probe the NRC Staff on the issue of HL&P's character. Motion, at 11-14.

This specific part of the Phase I hearings, and intervenor's objections thereto, were expressly addressed by the Appeal Board. ALAB-799, at 24. As ALAB-799 correctly notes, CCANP's questions were objected to--and disallowed--as being unduly vague when seeking answers from the Staff on the relative "importance" of various deficiencies. Id. The intervenor failed to remedy this infirmity in its questioning (notwithstanding suitable suggestions by the Licensing Board), and ultimately dropped this line of exmination. Tr. 9827. The Licensing

Board had cogently spelled out the basis of its ruling just prior to the time intervenor's counsel ceased this line of questioning. Tr. 9826-27. Nevertheless, as the Appeal Board noted (ALAB-799, at 24), intervenor was content to take exception to the Licensing Board's ruling and to move on to a different line of questioning. As this Board said, in those circumstances, it cannot be concluded that intervenor was prejudiced. Id.

The motion for reconsideration does no more than CCANP's original Appeal to explain why CCANP did not seek to remedy the objectionable nature of the questions by rewording them. Nor does CCANP set out the manner in which it was prejudiced by the Licensing Board's action. The putative "repeated attempts to demonstrate that what he was doing was perfectly legitimate and legally permissible" by CCANP's counsel at hearing (Motion, at 14), did not transpire; rather, CCANP's counsel merely persisted in asking vague and ambiguous questions. See Tr. 9797-9804, 9869-9872. He finally ceased questioning of his own volition. Tr. 9827,9919.

From a reading of the Motion, intervenor would have the Appeal Board conclude that the cessation of cross-examination was a result of counsel reaching his "personal limit" with the "abuse" he faced. Motion, at 11-12, 14, 19. There was no abuse, however. The Board's response to the objection to the questions was correctly to sustain these objections on the grounds of vagueness. See ALAB-799, at 24-25. The fact that intervenor's counsel became frustrated and gave up does not make the Board's rulings erroneous. Intervenor has shown no error or grounds for reconsideration here.

(iii) Other Cross-Examination of NRC Staff (Motion at 14-15)

At pages 14-15 of its Motion, intervenor cites other instances of what it sees as "frustrated attempts to ask perfectly reasonable questions." Intervenor initially cites ninety transcript pages as an example containing this effort ("See e.g., Tr. 9829-9919"). The Staff herein only responds to the particular complaints made in the motion with specific transcript citations.

CCANP refers to "a blocked attempt to get a responsive answer to a critical question regarding whether proceeding to build a nuclear power plant with inexperienced personnel is irresponsible." Tr. 9828-9845. At Tr. 9829, Mr. Hager from CCANP questioned Mr. D. W. Hayes of the NRC as follows:

> Q. Is it possible for a licensee to be both inexperienced on a particular issue and to also fail to discharge its responsibility in such a way as to be termed irresponsible in the sense that you have used the word "irresponsible" in the sentence?
>
> A. I have difficulty picking, you know, little chunks of our testimony and trying to deal with them in little chunks.
>
> The purpose of -- one of the purposes of our investigation was to determine the effectiveness of the quality assurance program at the South Texas Project, and we did that and we found some weaknesses in that program. It needed some shoring up, and we determined that part of the reasons for some of those weaknesses was inexperience in the construction of a nuclear power plant.
>
> We did not find the licensee irresponsible. In fact, he was responsible.

After that exchange, the Staff objected to the next question on the ground that it mischaracterized the Staff's testimony. Tr. 9829. Although the objection was apparently sustained, Mr. Hager was not

prevented from following up on the previously answered question quoted above. In fact, the Board encouraged such follow up questions. See Tr. 9834. Any fair reading of the questioning in issue, does not illustrate any "blocked" attempt to get answers to intervenors' questions. It is the obligation of the party's representative or counsel to formulate proper questions.

Intervenor's Motion next alleges that "new and extensive direct testimony prepared with the assistance of counsel [was] delivered by the NRC Staff in the middle of CCANP's cross examination in an effort to blunt the effectiveness of the cross examination." Motion, at 14. 2/ The transcript citation provided by intervenor shows an NRC witness attempting to give the basis for an answer to a question upon cross-examination and his being cut off by intervenor's counsel before he could finish his answer. Staff counsel objected to CCANP's counsel's attempt not to allow the witness to finish his answer, and the Board correctly allowed the witness to finish his answer. Tr. 9849-9850. The fact that intervenor's counsel chose to characterize it at the hearing as "new direct testimony" does not make it such. See Tr. 9850. Even if it could be so labelled, the intervenor had the opportunity to follow up with further cross-examination immediately thereafter; thus, no prejudice could have resulted. To the extent the effectiveness of the prior

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2/ It should be noted that the Staff witness, Mr. Phillips, particularly testified that the subject testimony was prepared without the assistance of any others. Tr. 9872.

cross-examination was "blunted," that was a function of the matters being discussed not any procedural error by the Licensing Board.

In the same portion of the Motion, CCANP alleges that the Board attempted to terminate cross-examination on the "essence" of the Staff's position on character. CCANP cites Tr. 9869-9872. Those transcript pages only reflect a Board directive that intervenor was to avoid duplicating evidence already of record. Intervenor's counsel's cross-examination was not terminated. He was allowed to proceed. There is no showing of prejudice from either the motion to reconsider or from a reading of the transcript pages cited.

Intervenor next alleges that Staff witnesses changed testimony "as a result of coaching by the Board". Motion, at 14, citing Tr. 9885-9888. Contrary to what intervenor asserts, the Staff did not "change" its testimony nor did the Board coach the witnesses. The Board sought a clarification by the witness panel of how it was using the term "irreparable" in the context of plant construction. See Tr. 9887. There was no coaching by the Board as to direct a particular answer to the question. While the question may have been objectionable as to its form as leading if it were propounded on direct by a party sponsoring the witness, the Board did not commit error by using a leading question. More importantly, the intervenor neither claimed nor demonstrated prejudice at the time of the questioning in issue nor does it do so in the present motion for reconsideration.

Intervenor then goes on to cite Tr. 9891-9895 as representing "blocked attempts to determine the weight to be given to major elements in the Staff's ultimate character determination." The record at those

transcript pages, and continuing onto Tr. 9896, shows clearly that the same question was asked and answered twice. Intervenor asked whether the only deficiency for assessing character was the kind of deficiency that required "tearing down" the project. The witness answered in the negative. Intervenors counsel then attempted to follow up with a question as to the relative importance of deficiencies that were not irreparable deficiencies. Tr. 9895. The Board sustained Staff counsel's objection in light of the prior Staff witness' response (Tr. 9891-92) that these factors could not be categorized as to relative importance. The questions were vague, repetitive and irrelevant, and the Board correctly stopped the pursuit of this line of questioning. Similarly, at Tr. 9909-10, cited as support by intervenors on this point, the question clearly called for the witness to speculate. It was thus irrelevant and properly objectionable. No error resulted from the Board curtailing this type of questioning.

CCANP also asserts (Motion at 14-15) that the Board decided to terminate intervenor's cross-examination if it was not concluded within a certain time and that this caused counsel for the intervenor to cease cross-examination. Tr. 9917-9919. The transcript reveals that while the Licensing Board did expect that cross-examination could be reasonably concluded by a certain time, the decision to discontinue was made well before that time by intervenor's counsel. See id. The remarks of Mr. Hager upon ceasing his cross-examination were in immediate reaction to the Board's ruling on sustaining an "asked-and-answered" objection. See Tr. 9981-82. A reading of those transcript pages, and the earlier ones at Tr. 9891-9892, shows that the Board was correct in sustaining the

objection. The Board cannot be held in error for the unjustified reactions of counsel to its rulings. Moreover, neither at the hearing nor in the instant motion for reconsideration was a showing or proffer made of what intervenor hoped to elicit in testimony if allowed to continue or how the Board's contemplated termination prejudiced intervenor's case. 3/

In sum, intervenor has not demonstrated that the Licensing Board committed prejudicial error with regard to any limitations it placed on CCANP's cross-examination of NRC Staff witnesses and the motion for reconsideration in this regard should be denied.

(iv) Objections at Hearing by Applicants' Counsel (Motion at 15-16)

The intervenors' motion for reconsideration (at 15-16) asserts "multitudinous objections" and "similar unacceptable behavior on many occasions" by applicants' counsel at the hearings below. Even a cursory examination of the many transcript pages cited by CCANP in this regard show that the vast majority of the objections made were correctly sustained. How these instances together or individually rise to prejudicial error is not explained by the motion. In addition, this particular area of "due process" argument had not been raised in CCANP's

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3/ Intervenor states (Motion, at 15) that the Licensing Boards' statement at Tr. 9981-9983 was recognized by the Appeal Board as "mischaracterizing the record". The portion of the oral argument transcript cited by CCANP (App. Tr. 89-91) does not support the recitation of any such finding by the Appeal Board. At most, it merely shows one Member of the Board inquiring of counsel with respect to issues before it on appeal.

previous appeal and, consequently is not a proper basis for reconsideration of the Appeal Board's Decision.

In concluding this particular subject in its motion for reconsideration, CCANP baldly asserts that "[e]arly in the proceeding, the Chairman [of the Licensing Board] indicated he had no intention of considering denial of the license in this proceeding." Motion, at 16. This statement is false and misrepresents the record. What was stated at the cited transcript page concerned whether the Licensing Board's jurisdiction over discovery would be lost after its decision in Phase I:

> Judge Bechoeffer: Would we, by any chance, lose jurisdiction over those issues, or could we condition an order so that we wouldn't?
>
> Mr. Reis: Mr. Chairman, the ultimate issue of whether an operating license should issue is not going to be decided at this proceeding.
>
> Judge Bechoeffer: That's correct.
>
> Mr. Reis: So that I don't think the question of jurisdiction would necessarily be foreclosed.... (Tr. 1000).

Intervenor's attempt to use this as a supposed example of predisposition on the part of the Licensing Board Chairman is, at best, fanciful. No indication of an unwillingness to deny a license ever occurred below.

(4) CCANP'S Remaining Due Process Arguments (Motion at 17-20)

After the preceding topics, the balance of intervenor's motion for reconsideration turns to various Board rulings below that it argues were erroneous. Motion, at 17-20. These other rulings are now discussed.

CCANP states that repeated efforts to introduce evidence relevant to HL&P's character were blocked by the Board. According to intervenor, this "evidence" included: efforts by CCANP to secure a subpoena "in order

to explore a possible effort by HL&P to intimidate the Attorney General of Texas and prevent [his] effective participation" in this proceeding; efforts to secure a subpoena for a journalist "whose job HL&P threatened;" and questioning regarding "HL&P attempts to prevent funding of intervenors." Id. at 17.

These complaints are raised for the first time upon appeal in the instant motion for reconsideration; therefore, reconsideration may be denied solely on that basis. See Hartsville, supra; Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-477, NRC 766, 768 (1978). Additionally, these rulings were proper and were not erroneous or prejudicial.

With regard to the subpoena to the Attorney General and the journalist, CCANP offered no more to the Licensing Board than suppositions as to what testimony it expected to elicit. Tr. 2622-2631, 2650. Under 10 CFR 2.720(a), relevance of the testimony must be shown before a subpoena is issued. No relevance of the testimony was shown. See Tr. 2685. Moreover, CCANP's refusal to reveal what these witnesses would testify to would have resulted in surprise to the other parties. See Tr. 2624-25; 2651-52. The Licensing Board did not commit error in rejecting the request for these subpoenas.

As to questions regarding the purported prevention of funding of intervenor (See Motion, at 17; Tr. 5219-5220), the question was not relevant to the issues in this proceeding. The questions had no nexus to the character necessary for the safe operation of a nuclear plant. See e.g., Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1),

ALAB-772, 19 NRC 1193 (issued May 24, 1984). The Board's prohibition of the questioning was correct.

Intervenor then turns to what it maintains is an example of the Board's allegedly preventing the building of an evidentiary record on character when it prevented inquiry on "possible conflict of interest" by HL&P's Board of Directors in the hiring of Brown & Root. Tr. 3985. The Board sustained the objection to the question because it was outside the scope of direct testimony of the witnesses on the stand. Such an objection, if proper, is correctly sustained. See Decision, at 26 (citing Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076 (1983)). The Board did indicate that it would have some questions concerning the relationships between Brown & Root and HL&P relevant to this proceeding of proper witnesses, and that Mr. Oprea might be that witness. Tr. 3985-87.

When Mr. Oprea appeared on the stand, CCANP did not attempt to ask any questions of him concerning the alleged conflict of interest during its initial cross-examination. Tr. 5530-32. The Board subsequently questioned Mr. Oprea on the basis of HL&P's hiring of Brown & Root. Tr. 5406-5414. CCANP then attempted to raise the "conflict of interest question" with him upon recross-examination. Tr. 5530-32. However, this subject had not been asked about in redirect examination or in the Board's questions. Thus, objection to these questions as being beyond the scope of permissible recross-examination were sustained. Id.

The final areas regarding due process raised by intervenor's motion for reconsideration concern denial of a request that witnesses be sequestered and the Board's allegedly permitting "a surprise witness" to

be called. While neither matter had been raised previously by the CCANP Appeal and is inappropriate in a motion for reconsideration, each allegation is unfounded as well. See Hartsville, supra; Wolf Creek, supra. With regard to sequestration, intervenor's request came at the time a witness panel was already on the stand. (Tr. 1533-1542) Regardless of the merits of the device in some instances, or even in this instance, sequestration should have been proposed much earlier by intervenor. It was, of course, solely within the Board's discretion to control the conduct of the hearing at that time. See 10 CFR § 2.757. The denial of such an untimely request for sequestration of witnesses cannot be held to be an abuse of that discretion or reversible error. Cf. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-379, 5 NRC 565, 568-69 (1977).

As to the "surprise witness," Mr. Duke, the Licensing Board had previously expressed its intention to hear from a number of witnesses, including Mr. Duke. Tr. 340-41. Written testimony from this witness had been filed over two months before, and CCANP had ample time to prepare for any contemplated cross examination of this witness. Even now, in its instant motion, CCANP simply states that the witness was to testify "on a matter of great importance to the intervenors since the subject was part of the specific elements in an intervenor contention." Motion, at 19. There is no showing of prejudice in receiving the testimony of this "new witness."

In conclusion, in response to intervenor's due process arguments, these can all be shown to be unfounded. Intervenor was entitled to a fair hearing below, not a perfect one. See Lutwak v. United States, 344

U.S. 603, 619 (1953). Intervenor received a fair hearing and there was no deprivation of due process.

D. Reconstitution of the Licensing Board

In closing its motion for reconsideration, intervenor also asks for a reconstitution of the Licensing Board regardless of the resolution of its motion. Motion, at 20. CCANP has neither demonstrated bias nor what it charges is "a Board lacking in the judicial attributes." Thus, even assuming arguendo a remand were to occur, a reconstitution of the Licensing Board would be improper. See 10 CFR § 2.704(c).

III. Conclusion

For the foregoing reasons, the intervenor's motion for reconsideration should be denied in all respects.

Respectfully submitted,

Oreste Russ Pirfo
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 25th day of March, 1985

UNITED STATES OF AMERICA
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO CCANP MOTION FOR RECONSIDERATION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 25th day of March, 1985.

Gary J. Edles, Esq., Chairman*
Atomic Safety and Licensing
Appeal Board
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