UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Gary J. Edles, Chairman
Dr. W. Reed Johnson
Thomas S. Moore

February 6, 1985
(ALAB-799)

In the Matter of

HOUSTON LIGHTING & POWER COMPANY, ET AL.

(South Texas Project, Units 1 and 2)

Docket Nos. 50-498 OL
50-499 OL

Lanny Sinkin, Washington, D.C. (with whom Craig Jordan, Michael Hall, and Margaret Burns, Austin, Texas, and Robert Hager, Washington, D.C., were on the brief), for intervenor Citizens Concerned About Nuclear Power, Inc.

Maurice Axelrad, Washington, D.C. (with whom Jack R. Newman, Alvin H. Gutterman and Donald J. Silverman, Washington, D.C., and Finis E. Cowan, Houston, Texas, were on the brief), for applicants Houston Lighting & Power Company, et al.

Edwin J. Reis (with whom Oreste Russ Pirfo was on the brief) for the Nuclear Regulatory Commission staff.

DECISION

We have before us the appeal of the intervenor, Citizens Concerned About Nuclear Power, Inc. (CCANP), from a March 14, 1984 partial initial decision in this operating license proceeding involving the South Texas nuclear power project.[1] The facility consists of two pressurized water

[1] LBP-84-13, 19 NRC 659.

reactors, each with a rated electrical output of 1250 megawatts, located approximately fifteen miles southwest of Bay City, Texas.

The NRC issued construction permits for South Texas in 1975.[2] The operating license application was filed in 1978 by Houston Lighting and Power Company (HL&P), Central Power and Light Company, and the cities of Austin and San Antonio, Texas. HL&P, however, is the lead applicant with responsibility for construction and operation of the project. Brown and Root, Inc. (B&R) was chosen by HL&P as architect-engineer, constructor and project manager. Various problems attended the project from its inception. Over a period of about six years, beginning even before issuance of the construction permits, the NRC's Region IV staff performed more than seventy site and corporate inspections and investigations and issued more than forty notices of noncompliance or deviation.[3]

As a result of HL&P's seeming inability to correct previously identified problems, along with continuing allegations concerning intimidation and harassment of

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[2] LBP-75-71, 2 NRC 894 (1975), aff'd, ALAB-306, 3 NRC 14 (1976).

[3] LBP-84-13, supra, 19 NRC at 738. A noncompliance is a failure to comply with a NRC regulatory requirement. 10 CFR Part 2, Appendix C, §§ III and IV. A deviation is a failure to satisfy a voluntary commitment. Id. at § IV (E)(3).

quality control inspectors and lack of quality control, the staff undertook a special investigation between November, 1979 and February, 1980. That investigation culminated in the issuance of Report 79-19 by the Commission's Office of Inspection and Enforcement.[4] The report identified twenty-two noncompliances in construction activity, substantiated allegations of harassment and intimidation of quality assurance inspectors, noted substantial deficiencies in the construction of the project, and, in general, cast serious doubt on HL&P's ability to manage the construction of the project. The report was accompanied by a proposed civil penalty of $100,000 and an order to show cause requiring HL&P to demonstrate why safety-related construction activities at South Texas should not be halted.[5]

The applicant responded to the order by acknowledging most of the staff's findings, paying the civil penalty, and undertaking remedial measures.[6] In late 1981, HL&P replaced B&R as architect-engineer and project manager. Bechtel

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[4] Staff Exhibit (Exh.) 46, Appendix D.

[5] 45 Fed. Reg. 30,753 (1980).

[6] LBP-84-13, supra, 19 NRC at 667.

Power Corporation assumed those duties. Ebasco Services later replaced B&R as the constructor.[7]

Prior to issuance of the show cause order, the Licensing Board assigned to preside over the operating license proceeding had proposed to hear the intervenors' contentions relating to construction and quality assurance deficiencies before the other issues in the proceeding. It did this "so that, if corrective action is required, it may be undertaken as early as possible in the construction schedule."[8] Thereafter, the intervenors also asked the Commission to direct a hearing on the staff's order to show cause. They contended that the violations found by the NRC investigation were part of an ongoing pattern of problems that called into question whether the safety of the plant could be assured. The Commission denied the intervenors' request for a hearing but endorsed the Licensing Board's proposal to hold expedited hearings as part of the ongoing operating license proceeding. The Board was instructed to issue "an early and separate decision" on whether the matters brought to light by the order to show cause -- including, specifically, the broad issue of HL&P's character

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[7] Ibid.

[8] Licensing Board Memorandum (March 10, 1980) (unpublished) at 2.

and competence to operate the plant -- warranted denial of the operating license application.[9]

In response to the Commission's instructions, the Board proposed to divide the operating license proceeding into three phases. Phase I was designed to deal with the applicant's character and competence and various quality assurance/quality control (QA/QC) issues. These matters were derived primarily from the Commission's order. The Board's decision in Phase I is the subject of this appeal.

Based on its review of the evidence in Phase I, the Board found "no basis at this time for concluding (1) that the reasonable assurance findings contemplated by 10 C.F.R. § 50.57 cannot be made, or (2) that HL&P currently lacks managerial competence or character sufficient to preclude an eventual award of operating licenses for [the South Texas Project]."[10] Hearings on some aspects of the competence and character issue, however, are not complete. First, the Board has yet to hear testimony on the so-called Quadrex Report. That study, prepared at the behest of HL&P by Quadrex Corporation, an independent consultant, "analyzes the engineering practices and capabilities of Brown and

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[9] CLI-80-32, 12 NRC 281, 290-92 (1980).

[10] LBP-84-13, supra, 19 NRC at 668 (emphasis added).

Root, Inc. . . ."[11] Furthermore, the Board must hear the parties' evidence regarding the performance of HL&P and its new contractors since the close of the hearing.[12] These matters will be taken up in Phase II. As a consequence, the Board expressly left open the possibility of modifying its tentative findings and conclusions regarding character and competence.[13]

Before us CCANP challenges a number of the Board's substantive determinations and also argues that certain procedural errors occurred that deprived it of a fair hearing.[14] Because the record on the issues of character and competence remains open and the Board's findings

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[11] Licensing Board Memorandum and Order (March 25, 1982) (unpublished) at 1-2.

[12] See LBP-84-13, supra, 19 NRC at 697, 698, 832.

[13] Id. at 668, 691, 697-99. In Phase III, HL&P and the staff will update testimony regarding HL&P's planned organization for operation. Because operation of the plant is several years away, and HL&P has been concentrating on construction, its operational plans are incomplete. See id. at 782-87.

[14] On June 27, 1984 we rejected CCANP's 118-page, late-filed brief because it greatly exceeded the 90-page limit we established in response to the intervenor's motion for an enlargement of the page limit for briefs. Order of June 27, 1984 (unpublished). Again, CCANP has submitted a brief in excess of that limit. Although in this instance we accept the brief, it appears that CCANP easily could have presented its argument within the 90-page limit. (Indeed, it appears that the 70-page limitation contained in 10 CFR §2.762(e) should have been sufficient.) In the future, we expect strict adherence to the terms of our orders.

are expressly subject to change, we cannot reach any appellate determination on the merits of the ultimate issue of HL&P's fitness to operate the plant. Generally, we do not review licensing board determinations that do not constitute a final resolution on the merits.[15] Perforce, we do not examine the numerous factual findings or inferences that undergird a board's conditional conclusions.

We nonetheless 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. 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.

We also appreciate that much time and effort have already been expended in connection with the appeal and that some of the subsidiary questions, at least, are now amenable

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[15] In the Three Mile Island Restart proceeding, for example, the Licensing Board issued conditional findings on the issue of management integrity and competence in view of the pendency of ongoing investigations by the Department of Justice. We declined to make any final judgment on appeal as to the licensee's management competence and integrity in the face of what we there described as "[t]he absence of a materially complete record." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-738, 18 NRC 177, 190 (1983).

to resolution. Indeed, our early pronouncement on these questions -- such as whether the Licensing Board applied the correct standard when measuring character and competence, or whether prejudicial procedural error was committed -- may be helpful to the parties and the Licensing Board in litigating Phase II of the case. Accordingly, we take the somewhat unusual step of resolving certain issues at this time.[16]

We affirm the Licensing Board's ruling with respect to the standard to be applied when measuring character and competence. We find no bias or procedural error in the Board's conduct of the proceeding. As discussed in Part II(G), infra, however, we return one matter to the Board for its further consideration -- whether certain issues originally raised by former intervenor Citizens for Equitable Utilities, Inc. (CEU) present serious safety or environmental questions that warrant Board examination pursuant to its sua sponte authority. We decline to review the Board's determination that HL&P is likely to be able to

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[16] Although the Commission did not specifically instruct the Licensing Board on how to manage the case, it did call for an "early and separate" decision to resolve the character and competence questions -- presumably with appellate review to follow. See CLI-80-32, supra, 12 NRC at 292. Because the Licensing Board has yet to resolve these questions, no such decision has been issued. Nevertheless, in the circumstances it is consistent with the Commission's expectation of an "early and separate" decision for us to undertake a limited review of the Licensing Board's decision at this time.

demonstrate that it possesses the requisite fitness to operate the South Texas plant safely.

I.

The Character and Competence Issue

A central issue on appeal is what standard for character and competence should be used to measure HL&P's eligibility for an operating license. As a threshold matter, CCANP suggests that we have a "unique opportunity to address an issue that has never really been addressed by the . . . Commission . . . in the context of a nuclear licensing proceeding."[17] We believe our mission is far more limited.

As we recognized in our decision last year in the Three Mile Island (TMI) Restart proceeding, despite the lack of definitive standards for measuring an applicant's character and competence the adjudicatory boards do not operate entirely within a regulatory vacuum.[18] To be sure, neither the Atomic Energy Act nor the Commission's case law provide a complete definition of character or competence.[19] Nevertheless, prior decisions identify the factors that are pertinent to an inquiry into those matters. Consequently,

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[17] App. Tr. 4.

[18] Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1206 (1984).

[19] See id. at 1206-07.

neither we nor the Licensing Board is writing on a clean slate.

The Licensing Board used the Commission's decision denying the intervenors' request for a hearing on the staff's show cause order, CLI-80-32, as its starting point.[20] It concluded, first, that character and competence are separate elements of fitness to operate a nuclear plant.[21] Second, by reference to CLI-80-32 and other Commission precedent, it determined what factors are pertinent to a character and competence inquiry.[22] In particular, it pointed to the sufficiency of staffing and resources, the quality of management, and the adequacy of a utility's organization as bearing on the question of management competence. It recognized that an evaluation of character called for a "more subjective determination" but concluded that only those character traits relevant to the construction or operation of a nuclear power plant should be considered. 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

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[20] LBP-84-13, supra, 19 NRC at 670. The intervenor acknowledges that this approach is correct. See CCANP Brief at 1.

[21] LBP-84-13, supra, 19 NRC at 671.

[22] Id. at 672-76.

NRC's implementing regulations and guides."[23] 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.[24] We find no fault with the Board's approach.

The focus of the intervenor's appeal is its disagreement with the Board's view of reformation of character and improvement in competence as decisional factors. The Board concluded that the Commission's instituting order contemplated a determination of both (i) whether past acts, standing alone, warrant a denial of the license application, and (ii) whether the totality of HL&P's performance, including corrective action, is sufficient to justify a finding that there is reasonable assurance that HL&P can and will operate the plant safely.[25] The Board acknowledged that some character defects, such as an applicant's intentional lack of candor, might warrant denial of a license without any evaluation of an applicant's

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[23] Id. at 675-76.

[24] Id. at 676.

[25] Id. at 676-78.

efforts at reformation.[26] Nonetheless, it concluded that evaluation of remedial measures was a proper part of an overall appraisal of character and competence. We agree.

The Licensing Board's analysis is consistent with the language of CLI-80-32. The Commission said, in pertinent part:

> The history of the South Texas Project . . . is relevant to the issue of the basic competence and character of [HL&P]. Central to that issue are two questions: whether the facts demonstrate that the licensee has abdicated too much responsibility for construction to its contractor . . . and whether the facts demonstrate an unacceptable failure on the part of [HL&P] to keep itself knowledgeable about necessary construction activities. Either abdication of responsibility or abdication of knowledge . . . could form an independent and sufficient basis for revoking a license or denying a license application on grounds of lack of competence (i.e., technical) or character qualification on the part of the licensee or license applicant . . . . In large part, decisions about licenses are predictive in nature, and the Commission cannot ignore abdication of responsibility or abdication of knowledge by a license applicant when it is called upon to decide if a license for a nuclear facility should be granted.
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> We believe that the . . . issues relating to technical competence and to character permeate the pleadings filed by Citizens. They do deserve a full adjudicatory hearing, as they will no doubt get in the operating license proceeding, and they do deserve expeditious treatment because they could prove disqualifying. Accordingly, we agree that the Licensing Board in the operating license proceeding should proceed with its expedited hearing on the quality control-related issues

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[26] Id. at 677-78.

> (including the allegations of false statements in the FSAR). As the Board has already determined to proceed in this manner, no formal order is necessary. However, we expect the Board to look at the broader ramifications of these charges in order to determine whether, if proved, they should result in denial of the operating license application.[27]

CCANP argues that, by referring to an abdication of responsibility or an abdication of knowledge serving as "an independent and sufficient basis for . . . denying a license," the Commission intended to confine the Licensing Board's examination of HL&P's performance to the period preceding and covered by the order to show cause. CCANP asserts that, by looking at remedial measures, the Board essentially declined to follow the Commission's directions.[28] We perceive no such limitation in the Commission's order.

In the first place, the Commission stated only that abdication of responsibility or knowledge could prove disqualifying, not that such a result must or would follow. We believe that the Commission's language reflects an explicit judgment that the allegations, even if proven, need not automatically dictate denial of the license. Rather, the charges would bear on a predictive determination

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[27] CLI-80-32, supra, 12 NRC at 291-92 (footnotes omitted).

[28] CCANP Brief at 1-2.

regarding the likelihood that the applicant could operate the plant safely and in conformity with Commission regulations. Such a determination would necessarily embrace an examination of remedial measures.

The history of the introduction of character and competence questions into this operating license proceeding confirms the Licensing Board's reading of the Commission's order. When the staff issued its order to show cause, the Board had already proposed to hold early hearings in the operating license proceeding directed to similar issues in order to determine the need for, and efficacy of, corrective action. The Commission was well aware of this focus.[29] Indeed, it gave the Board the green light to "proceed with its expedited hearing on the quality control-related issues."[30]

The Commission also wanted a more far-reaching investigation and thus instructed the Board "to look at the broader ramifications of these charges."[31] It sought a thorough review of whether HL&P's conduct up to the time of the order to show cause was such that the Commission could ever be confident that the plant could be operated safely.

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[29] See CLI-80-32, supra, 12 NRC at 290.

[30] Id. at 291 (emphasis added).

[31] Ibid.

At the time the Commission issued its order, there were pending allegations that false statements had deliberately been included in HL&P's final safety analysis report (FSAR). In this connection, the Commission noted that operating license determinations were essentially predictive, and that material false statements, if made intentionally or with disregard for the truth, may so erode Commission confidence in an applicant that it could, without more, prevent grant of a license.[32] It was also aware of an admission by HL&P that quality assurance personnel had been harassed or intimidated.[33] Thus, there was a genuine question as to whether construction of the plant up to that time was adequate. In the circumstances, the Commission understandably expected the Board to review whether HL&P's application may already have been irremediably tainted. We see no intention on the Commission's part, however, to circumscribe the matters the Board proposed to examine to exclude the appraisal of the need for, and efficacy of, remedial measures.

Indeed, the very scheme of the Commission's regulations recognizes that an applicant is bound to make errors necessitating correction during the course of construction

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[32] Id. at 291 & nn.4 & 5.

[33] Id. at 283-84.

of a nuclear power plant. For example, 10 CFR § 50.55(e) requires that applicant notify the Commission of "each deficiency found in design and construction, which, were it to have remained uncorrected, could have affected adversely the safety of operations," including any "significant breakdown in any portion of the quality assurance program."[34] Such recognition that errors will be made and must be corrected buttresses the view that remedial measures are an essential component of any analysis of character and competence.[35]

The Board's construction of the Commission's order is also consistent with the case law touching upon an applicant's character and competence. Although no cases are precisely on point, the clear import of our decisions is that remedial efforts are relevant to determining whether applicants should be permitted to obtain or retain licenses.

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[34] See also 10 CFR Part 50, Appendix B, § XVI.

[35] CCANP argues that because the objective of the proceeding is to predict whether the plant can be operated safely and in conformity with Commission regulations, the Board improperly evaluated whether the plant had been built adequately. CCANP Brief at 4. We find no problem with the Board's inquiry in this regard. Plainly, whether the plant was properly built bears on whether it can be operated safely. Construction quality assurance issues are a frequent component of operating license proceedings. See, e.g., Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 345 (1983) ("A recurring issue in reactor operating license proceedings is whether the facility has been properly constructed.").

In the Byron case, for example, we concluded that denial of a license requires a finding that "it is not possible for the ascertained quality assurance failings either to be cured or to be overcome to the extent necessary to reach an informed judgment that the facility has been properly constructed."[36] Similarly, in the Midland proceeding, we endorsed the licensing board's exploration of both the quality assurance deficiencies that led to institution of the proceeding to suspend the licensee's construction permit and subsequent corrective measures.[37] And, quite recently, in the Three Mile Island Restart case, we observed that evaluation of the efficacy of remedial action was a necessary element in determining whether the licensee had demonstrated its ability to operate in a safe and responsible manner in the future.[38] In sum, we have required a review of the totality of circumstances in order to permit a reasonable prediction regarding whether an applicant can and will comply with the safety and

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[36] Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1169 (1984).

[37] Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-283, 2 NRC 11, 20 (1975).

[38] Three Mile Island Restart, ALAB-772, supra, 19 NRC at 1232.

environmental standards imposed by statute and the Commission's regulations and procedures.[39]

CCANP also claims that the Board used the term "competence" too expansively to include managerial characteristics that better belong under the heading of "character." In CCANP's view, the Commission limited the term "competence" to technical rather than managerial characteristics.[40] The precise import of CCANP's argument is unclear. Presumably, it believes that the various indicia of alleged incompetence would be considered less amenable to remedial action if defined as character flaws. We believe the Board's distinction between character and

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[39] CCANP relies on United Broadcasting Co. v. FCC, 565 F.2d 699 (D.C. Cir. 1977), cert. denied, 434 U.S. 1046 (1978), affirming Applications of United Television Co., 55 F.C.C.2d 416 (1975), to support its view that the Commission intended the violation of its rules to be disqualifying even if the violations could be remedied. CCANP Brief at 2, 7-8. That reliance is misplaced. First, the United Broadcasting case was cited only by Commissioners Gilinsky and Bradford in their concurring statement in CLI-80-32. Contrary to CCANP's assertion, it was not relied on by the majority of the Commission. More important, the case does not support CCANP's position. To be sure, the court approved the FCC's refusal to renew a radio license in view of the long history of persistent violations of the FCC's rules. Important to that agency's decision, however, was a finding that the applicant's remedial measures were mere "window dressing" and that no reliance could be placed on its promise of future compliance. Thus, the court's decision is fully consistent with an approach that includes examination of remedial measures.

[40] CCANP Brief at 12-13.

competence is in line with CLI-80-32 and governing precedent. In any event, the Board considered all important evidence pertaining to both character and competence[41] and we cannot conclude that the semantic distinctions CCANP asks us to make would alter the ultimate result.

CCANP further asserts that the Board should have assessed HL&P's character by reference to various general factors it considers pertinent: foresight, judgment, perception, resolve, integrity, and values.[42] The Board concluded that use of the factors cited by CCANP "would serve only to replace one label, 'character,' with many" and that such factors were also too abstract to be useful in responding to the Commission's concerns outlined in CLI-80-32.[43] Our review of the Board's decision, however, satisfies us that the Board did take these factors into account insofar as they have some relationship to the

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[41] See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1109-10 (1983).

[42] CCANP Brief at 37-40. See also id. at 23-26.

[43] LBP-84-13, supra, 19 NRC at 675.

Commission's health and safety standards.[44] CCANP's argument is therefore without merit.[45]

II.

Alleged Bias and Procedural Errors

CCANP cites bias by the Board and various procedural errors as evidence that it was deprived of a fair hearing in violation of its due process rights and the Administrative

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[44] For example, the Licensing Board expressly evaluated CCANP's evidence on the applicants' "integrity" when reviewing the applicant's candor. Id. at 684. CCANP acknowledges that honesty and candor are important character traits in the licensing context but defines this element of character as "integrity." CCANP Brief at 27-28.

[45] Finally, CCANP argues that the Board's decision has the effect of establishing an inappropriately low standard for an applicant's character. CCANP Brief at 40, 81-82. We disagree. The thrust of CCANP's argument is that HL&P's poor performance prior to issuance of the notice of violation and order to show cause in 1980 is the best measure of how it is likely to perform under its operating license. Based on HL&P's indisputably poor past performance through 1980, CCANP argues that the Board should have found HL&P unqualified but, instead, has countenanced an impermissibly low standard for character. Such argument is simply a variant of CCANP's general claim that remedial measures must be ignored. To be sure, HL&P's performance before issuance of the order to show cause may be an indication of likely future performance. But even an applicant's poor past conduct need not automatically foreclose a finding that it now possesses the requisite high degree of character or competence. Thus, we do not agree that the Board's approach has resulted in the establishment of an inappropriately low standard for character evaluation. We emphasize, however, that we are not now deciding what conclusions should be drawn from HL&P's past performance. See pp. 8-9, supra.

Procedure Act.[46] We do not find any evidence of bias or any deprivation of constitutional or statutory rights as claimed by the intervenor. In any event, CCANP has not demonstrated that it was prejudiced by any of the Board's actions about which it complains.

A. CCANP contends that the Licensing Board was biased.[47] Assertedly, this bias manifested itself in the determinations contained in the Board's partial initial decision -- for example, the Board's definition of character, which was not identical to the one suggested by CCANP, and its consideration, contrary to CCANP's desire, of HL&P's remedial actions.[48] CCANP also objects to the Board's characterization of some of its proposed findings as "'broad, ill-defined,' and of 'little assistance.'"[49] It believes that the Board "demonstrated repeated hostility toward CCANP's efforts" by these and other substantive determinations in favor of HL&P.[50]

CCANP's position is without foundation. That the Board reached conclusions and made findings contrary to those

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[46] See 5 U.S.C. §§ 554-558.

[47] CCANP Brief at 57.

[48] Ibid.

[49] Id. at 59.

[50] Ibid. See also id. at 59-61.

urged by a party does not establish bias.[51] Moreover, as discussed in Section I, the standards adopted by the Board are proper.[52]

B. CCANP claims that the Board arbitrarily interfered with its cross-examination by requiring it to submit cross-examination plans, threatening at several points to disallow further questions, and actually terminating its questioning of witnesses.[53] In reviewing these claims, we start from the proposition that a mere demonstration that the Board erred by curtailing cross-examination is not sufficient to warrant appellate relief. "'The complaining party must demonstrate actual prejudice -- i.e., that the ruling had a substantial effect on the outcome of the proceeding.'"[54]

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[51] Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 923 (1981).

[52] The presence on the Board below of Judge Hill, a Licensing Board member whom CCANP unsuccessfully sought to disqualify at an earlier stage, does not advance CCANP's cause. The Commission previously determined that Judge Hill was not disqualified from serving on this Licensing Board. See CLI-82-9, 15 NRC 1363, reversing ALAB-672, 15 NRC 677 (1982). We are bound by that decision. Further, CCANP has not directed us to any new evidence since the Commission's ruling (apart from the Board's rejection of its various arguments) that would demonstrate Judge Hill's alleged bias.

[53] CCANP Brief at 64-67.

[54] Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984), quoting Waterford, supra, 17 NRC at 1096.

Certainly, the authority of the Board to demand cross-examination plans is encompassed by the Board's power to control the conduct of hearings[55] and to take all "necessary and proper measures to prevent argumentative, repetitious, or cumulative cross-examination."[56] Indeed, such plans are encouraged by the Commission as a means of making a hearing more efficient and expeditious.[57] In any event, CCANP points to no harm, and we see none, that resulted from the Board's requirement in this case.

CCANP contends that the Board threatened to and did terminate its cross-examination for no reason other than the Board's belief that a "reasonable time" for such examination had passed.[58] It appears that, in at least one instance, the Licensing Board actually did refuse to allow CCANP to continue with cross-examination because the agreed upon "time period . . . ha[d] run out," even though counsel for intervenor had not finished his questioning.[59] CCANP,

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[55] 10 CFR § 2.718(e).

[56] 10 CFR § 2.757(c). See Waterford, supra, 17 NRC at 1096 (licensing board may insist on advance indication of what cross-examiner hopes to elicit).

[57] Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981).

[58] CCANP Brief at 64.

[59] See Tr. 6818.

however, failed to make the required showing below of what further information it sought to elicit.[60] On appeal, CCANP does not even attempt to show how it was prejudiced by the Board's ruling. Similarly, its general assertions that the Board's threats to terminate cross-examination created an "oppressive atmosphere" that made effective questioning impossible are not enough to warrant reversal. Again, CCANP's brief does not point to any questions that it would have pursued had it not felt oppressed. It has failed to demonstrate, therefore, that any harm befell it as a result of the Board's actions.[61]

On a related note, CCANP cites to a large number of transcript pages as containing "at least thirty-five

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[60] See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 697 & n.14, aff'd, CLI-82-11, 15 NRC 1383 (1982).

[61] At oral argument, counsel for CCANP offered only one example of asserted prejudice involving an evidentiary ruling against it. See App. Tr. 33-37. At Tr. 9794-9824, counsel for CCANP attempted to cross-examine staff witnesses with respect to the "importance" of certain failures of the applicant. The Board sustained staff and HL&P objections on the ground that the term "importance" as it had been discussed was too vague but suggested that CCANP should frame its questions in terms of "gross negligence." See Tr. 9814-15. CCANP refused to accept the Board's suggestion. Instead, it was apparently content to take exception to the Board's ruling and move on to a different line of questioning. See Tr. 9824-28. In these circumstances, where CCANP abandoned the attempt to pursue this area of inquiry in terms acceptable to the Licensing Board, we cannot conclude that it was prejudiced by the Board's ruling.

. . . erroneous rulings concerning [its] cross-examination [of] [s]taff witnesses."[62] CCANP does not discuss why any of these rulings is incorrect or what effect they may have had on the outcome of the proceeding. Rather, it merely characterizes the objections of the other parties that prompted the rulings as "groundless and harassing."[63]

The staff is correct that such bald allegations may be properly dismissed for inadequate briefing.[64] Nonetheless, we have carefully reviewed the pages cited by CCANP to determine in fact whether any "harassment" occurred. We agree with the intervenor that numerous objections were made by counsel for both HL&P and the staff during CCANP's cross-examination of staff witnesses. Such objections at a minimum can be described as persistent. It is also true that the Board sustained the vast majority of these objections. But because the questions posed by intervenor's counsel were often broad, repetitious, or unclear, and CCANP has not demonstrated that it was prejudiced by any of the rulings, we cannot say that the Board committed reversible error. We are nevertheless constrained to add that the frustratingly slow pace of the challenged portion of the

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[62] CCANP Brief at 66. See also App. Tr. 33.

[63] See CCANP Brief at 66.

[64] See 10 CFR § 2.762(d) and n.88, infra.

hearing was attributable, in part, not so much to the form of the questions asked but to the length of the objections[65] and the ensuing argument permitted by the Board.

Lastly, CCANP challenges the appropriateness of limiting the scope of cross-examination to matters raised in direct testimony. CCANP claims, without reference to any supporting citation, that such a restriction is "controversial [and] . . . criticized."[66] To the contrary, it is firmly established that the scope of cross-examination is ordinarily so limited.[67]

C. CCANP objects on appeal to the use of prefiled, written testimony and the presentation of evidence by, and cross-examination of, witnesses sitting in panels.[68] As CCANP conceded at oral argument, however, it did not object to these practices before the Licensing Board or ask the Board for any other arrangements.[69] Its objections thus

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[65] See 10 CFR § 2.743(d).

[66] CCANP Brief at 70.

[67] See Waterford, supra, 17 NRC at 1096 and cases cited.

[68] CCANP Brief at 71-74.

[69] App. Tr. 32. For example, in contrast to CCANP's failure to object, intervenor CEU requested that panel members be sequestered. The Board granted two such requests. Tr. 6458, 8038.

come too late. Moreover, the use of prefiled, written testimony generally is permitted by the Administrative Procedure Act in licensing cases[70] and authorized by the Commission's Rules of Practice.[71] The use of witness panels is likewise a long-standing practice in licensing hearings, consistent with Commission policy.[72] Further, CCANP has not demonstrated any prejudice to it from the use of these practices in this case.

D. CCANP argues that it was prejudiced by the Licensing Board's scheduling of hearings. CCANP asserts that it "was unable to have the individual most familiar with the details of this case" present during part of the hearing because he was busy taking law school examinations and the Licensing Board refused to delay the hearings for a week.[73] We considered a similar argument when it was earlier raised by CCANP in a request for directed certification.[74] 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

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[70] 5 U.S.C. § 556(d).

[71] 10 CFR § 2.743(b).

[72] See 10 CFR Part 2, Appendix A, § V(d)(4).

[73] CCANP Brief at 67.

[74] See ALAB-637, 13 NRC 367 (1981).

due process.[75] We find that no such prejudice or deprivation of due process resulted from the Board's schedule.

CCANP was represented by counsel at the hearing during the week in question and does not assert that this representation was less than adequate. The only harm claimed was that CCANP had to spend its limited resources to obtain outside counsel and that his knowledge of the case was not as great as it could have been.[76] CCANP obviously would have preferred that its pro se representative be present during that one week period. In denying directed certification under 10 CFR § 2.718(i), however, we observed that CCANP's scheduling request did not rise to the level of "a compelling demonstration of a denial of due process or the threat of immediate and serious irreparable harm" that would warrant our interlocutory intercession.[77] Against CCANP's need for a delay we balanced the following facts:

> (1) [CCANP knew] since November 19, 1980, that the hearing would commence in early May 1981 and alterations to the schedule would be disfavored . . . ; (2) [CCANP had] not provided

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[75] Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), 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).

[76] CCANP Brief at 67.

[77] ALAB-637, supra, 13 NRC at 371.

> any specific explanation as to why no other members of their organization [were] available or able to participate in the . . . hearing; (3) the parties. . . had almost two full months between the Board's oral ruling . . . denying the postponement and the first day of the hearing; and (4) . . . the Commission ordered this hearing to be expedited . . . . "[78]

These facts remain true. CCANP's preference for a delay is not grounds for reversal where it has not demonstrated substantial harm because of the Licensing Board's scheduling order.

E. The Licensing Board allowed over eighteen months for discovery before the beginning of the Phase I hearing.[79] Included in this period was a three-month extension requested by CCANP.[80] CCANP nonetheless complains that it was not given "ample opportunity for discovery."[81]

CCANP assigns two reasons why the discovery period was inadequate. First, it claims (albeit without details) that it was unable to conduct discovery because of "illness of

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[78] Ibid. (footnote omitted).

[79] Memorandum and Order (Aug. 3, 1979) (unpublished) at 10; Memorandum and Order (Aug. 1, 1980) (unpublished) at 2; Second Prehearing Conference Order (Dec. 2, 1980) (unpublished) at 5-7.

[80] Motion for Extension of Discovery Period (July 8, 1980); Memorandum and Order of Aug. 1, 1980 at 2.

[81] CCANP Brief at 74.

outside counsel retained for that purpose."[82] Next, it states that the Board denied its motion for additional discovery concerning certain matters that apparently came to light during the discovery period. In this connection, according to CCANP, the Board then left unfulfilled its promise to allow extra cross-examination by CCANP on these unspecified matters.[83]

CCANP's complaint must fail. Without knowing the length of CCANP's counsel's illness, or why CCANP was unable to obtain substitute counsel or conduct discovery itself, we are unable to conclude that the time allotted was inadequate. Further, CCANP does not cite to its request for extension that was denied by the Licensing Board. As mentioned, the Board granted CCANP's July 8, 1980 motion to extend discovery for the length of time requested. The only other similar motion that appears in the record was made by another intervenor, CEU, right before the beginning of the hearing.[84] Although that motion was denied,[85] CCANP was permitted sufficient cross-examination on the matters of

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[82] Ibid.

[83] Ibid.

[84] Citizens for Equitable Utilities Motions (May 11, 1981) at 9.

[85] Tr. 1009.

concern to CEU.[86] Further, as HL&P notes, CCANP "was provided [with] a large number of documents in response to its informal discovery request at the hearing."[87] In the circumstances, CCANP has not established that the Licensing Board abused its discretion in setting the time limits for discovery.[88]

F. The Licensing Board denied CCANP's motion to reopen the record to admit evidence relating to a report prepared by the Commission's Office of Inspector and

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[86] See Tr. 4589-4716.

[87] See Tr. 4876.

[88] CCANP's brief on this issue lacks any citation to the record as well as specific facts concerning the incidents about which it complains. Although we have searched the record in order to find support for CCANP's assertion, we remind CCANP that it carries the burden of presenting us with an adequate brief in the first instance and bears the risk of any oversight by us if it fails to do so. As we recently reiterated in Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC __ n.133 (Dec. 20, 1984), quoting Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-270, 1 NRC 473, 475 (1975), and United States v. White, 454 F.2d 435, 439 (7th Cir. 1979), "a failure to brief issues adequately 'deprives us precisely of that assistance which the Rules of Practice are designed to have an appellant provide, i.e., to flesh out the bare bones [of claims on appeal] . . . and to present us "with sufficient information or argument to allow an intelligent disposition of [the] issue[s]."'" See also Wisconsin Electric Power Co. (Point Beach Nuclear Power Plant, Unit 1), ALAB-696, 16 NRC 1245, 1255 (1982) (treating inadequately briefed exceptions as waived); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 786-87 (1979) (dismissing inadequately briefed exceptions).

Auditor.[89] CCANP challenges that denial.[90] Upon review of the pleadings and the relevant record, we find that virtually all of the factual information CCANP sought to introduce was already in the record. Thus, the Board did not err in denying the motion.

G. CEU was an active intervenor in Phase I and the sole sponsor of five contentions (numbers 4-8). CEU, however, withdrew from the case as part of a settlement agreement with HL&P. Under the agreement, a CEU representative was invited to participate in HL&P's annual independent audit of its construction quality assurance program.[91] Subsequent to CEU's withdrawal, CCANP requested that it be allowed to adopt the five contentions that no longer had a sponsor. The Licensing Board granted its request only with respect to contention 4 (concerning the ability of the plant to withstand hurricanes).[92] On appeal, CCANP asserts that it should have been able to take up contentions 5-8 as well.

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[89] LBP-84-13, supra, 19 NRC at 715-21.

[90] CCANP Brief at 89.

[91] See letter to Licensing Board from W. S. Jordan and J. R. Newman (June 14, 1982) and attachments.

[92] See LBP-82-91, 16 NRC 1364 (1982).

In determining whether to allow CCANP to stand in the shoes of CEU, the Licensing Board applied the five-factor test normally used to determine whether to grant a nontimely request for intervention,[93] or to permit the introduction of additional contentions by an existing intervenor after the filing date.[94] The test requires a board to balance the following considerations:

> (i) Good cause, if any, for failure to file on time.
>
> (ii) The availability of other means whereby the petitioner's interest will be protected.
>
> (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
>
> (iv) The extent to which the petitioner's interest will be represented by existing parties.
>
> (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

In reviewing the Licensing Board's determinations concerning contentions 5-8,[95] we must first consider the correctness of applying the five-factor test. CCANP, after all, is not a late intervenor to the proceeding. Nor are the contentions themselves newly advanced; they had already

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[93] 10 CFR § 2.714(a)(1).

[94] 10 CFR § 2.714(b).

[95] The admissibility of contention 4 is not before us on appeal.

been accepted by the Board for litigation by CEU. Thus, CCANP is not proffering "new contentions" in the usual sense of 10 CFR § 2.714 of the Commission's regulations. Nevertheless, as explained below, we believe that a balancing of the factors contained in 10 CFR § 2.714 was correct in the circumstances.

CCANP's principal argument on appeal is that it should be permitted to adopt CEU's contentions in order to ensure litigation of important safety or environmental questions. It claims, in addition, that no prejudice to HL&P results from continuing an inquiry into issues it knew would be explored. CCANP observes that it saw no need to embrace CEU's contentions earlier because it had the right to cross-examine on them and "trusted CEU to vigorously pursue them."[96] We reject CCANP's arguments.

To begin with, there is no automatic right to adjudicatory resolution of environmental or safety questions associated with an operating license application.[97] The Commission's regulations limit operating license proceedings to "matters in controversy among the parties" or matters

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[96] CCANP Brief at 76.

[97] See Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 9 (1976).

raised on a licensing board's own initiative sua sponte.[98] Where only a single intervenor is participating in an operating license proceeding, its withdrawal serves to bring the proceeding to an end. Where there is more than one intervenor in a case, the withdrawal of one does not terminate the proceeding. Under NRC procedure, however, it does serve to remove the withdrawing party's contentions from litigation.[99] The Commission has made it clear, in this regard, that the mere acceptance of contentions at the threshold stage does not turn them into cognizable issues for litigation independent of their sponsoring intervenor.[100]

This approach is neither unfair to remaining intervenors nor inconsistent with the public interest. Intervenors, after all, choose the issues they wish to advance. To be sure, under principles announced in our

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[98] 10 CFR §§ 2.104(c), 2.760a.

[99] Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 391-92 (1976).

[100] Texas Utilities Generating Co. (Comanche Peak Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1113-14 (1981). Safety or environmental matters not the subject of contentions or raised by a board sua sponte are left for nonadjudicatory resolution by the NRC staff. Consolidated Edison Co. (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 189-90 (1976).

Prairie Island opinion,[101] an intervenor may ordinarily conduct additional cross-examination and submit proposed factual and legal findings on contentions sponsored by others. But that does not elevate the intervenor's status to that of a co-sponsor of the contentions.[102] Because contentions can be withdrawn or (as in the instant case) settled through negotiation, a non-sponsoring party assumes at least some risk that the pursuit of its interests may not be wholly within its control.[103] Indeed, an approach that accorded a remaining intervenor more or less an equal right to pursue contentions earlier put forth by another party would frustrate the Commission's policy of encouraging legitimate efforts by applicants and intervenors to reach

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[101] Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 863, 867-68 (1974), aff'd in pertinent part, CLI-75-1, 1 NRC 1 (1975).

[102] The Commission's regulations require that, at the outset of a case, each intervenor submit "a list of the contentions which [it] seeks to have litigated." 10 CFR § 2.714(b). Moreover, one may not introduce affirmative evidence on issues raised by another intervenor's contentions. Prairie Island, supra, 8 AEC at 869 n.17.

[103] Clinch River, supra, 4 NRC at 392. See Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 645 (1977).

good faith, mutually satisfactory resolution of issues without the need for litigation.[104]

We find that the facts support the Board's decision to deny CCANP's request. The original request proceeded from the basic assumption -- now rejected -- that CCANP was entitled to stand in CEU's litigation shoes without an attempt to satisfy any criteria for adopting the contentions late.[105] The Licensing Board's decision thoroughly appraised each of the five factors. It noted, among other things, that CCANP had never exhibited any particular independent concern about any of the contentions in question.[106] It also observed that CCANP had not attempted to demonstrate how it would assist in developing the record on any of CEU's contentions. On appeal, CCANP does not seriously challenge either the Board's resort to a

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[104] See 10 CFR § 2.759. See also Statement of Policy on Conduct of Licensing Proceedings, supra, 13 NRC at 455 (parties should be encouraged to negotiate at all times prior to and during the hearing to resolve contentions).

[105] See Citizens Concerned About Nuclear Power, Inc. (CCANP) Motion to Adopt Contentions of Intervenor Citizens for Equitable Utilities (CEU) (July 29, 1982).

[106] As the Licensing Board pointed out, CEU and CCANP jointly sponsored Contentions 1 and 2, CCANP was the sole sponsor of Contention 3, and CEU was the sole sponsor of Contentions 4-8. LBP-84-13, supra, 19 NRC at 666. It thus appears that CCANP identified at the outset those particular issues about which it shared concern with CEU. The contentions now at issuue were not among them.

five-factor balancing approach or its observations regarding the individual factors. Rather, it merely reiterates its view that the contentions raise serious issues that it should be allowed to pursue.[107] In the context of this proceeding at least, this is not enough to warrant CEU's replacement by CCANP.[108]

In rejecting CCANP's argument, however, we do not endorse the Licensing Board's finding that, as a matter of law, the departure of one party from a proceeding may never be an element of good cause when deciding whether to permit a remaining intervenor to adopt contentions earlier submitted by another. An absolute rule that the withdrawal

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[107] CCANP asserts: "Had CCANP known that CEU was going to leave the proceeding prior to litigation of the contentions, CCANP might well have asked to be joined on the contentions." CCANP Brief at 76.

[108] In ruling on factor two in the five factor analysis (i.e., the availability of other means by which the petitioner's interest will be protected), the Board concluded that CCANP's interest in contentions 5-8 would be adequately protected by the NRC staff through its normal, nonadjudicatory review of the license application. See LBP-82-91, supra, 16 NRC at 1369-70. In Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167 (1983), decided after the Board's ruling here, we determined that the participation of the NRC staff in a licensing proceeding was not tantamount to participation by a private intervenor. By analogy, the availability of staff review outside the hearing process generally does not constitute adequate protection of a private party's rights when considering factor two. Nonetheless, on the facts of this case, even weighing factor two in CCANP's favor does not alter the ultimate balance of the factors.

of one intervenor could not be taken into account when considering good cause would do little more than encourage all intervenors to become nominal co-sponsors of all contentions at the outset -- and, thus, perhaps complicate litigation and settlement offers. As we said in River Bend, "[i]f, in the circumstances of a particular case, there is a sound foundation for allowing one entity to replace another, it can, of course, be taken into account in . . . making . . . the 'good cause' determination."[109]

There is an additional aspect of the Board's decision that gives us cause for concern, and requires us to return this matter to the Board for further consideration. When it originally admitted contentions 4-8 under the sponsorship of CEU, the Board did not simply find them acceptable for admission into the case. It affirmatively characterized all five contentions as raising "significant safety or environmental issues."[110] Indeed, the Board considered the issues sufficiently significant that it was willing to overlook whether there was good cause for CEU to file its contentions late. The Board did not address these concerns regarding contentions 5-8 when disposing of CCANP's motion.

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[109] Gulf States Utilities Co. (River Bend Station, Units 1 and 2, ALAB-444, 6 NRC 760, 796 (1977).

[110] Memorandum and Order (Aug. 3, 1979) (unpublished) at 2.

In our judgment, some further explanation is required. If the Board remains of the view that these contentions present serious safety or environmental issues it can invoke its sua sponte powers under 10 CFR § 2.760a to review them even in the absence of contentions.[111]

III.

Further Proceedings

Our decision to defer appellate review of the Licensing Board's findings regarding the applicant's character and competence does not signal an opportunity for de novo relitigation of matters disposed of by the Licensing Board. Our opinion today resolves several of the intervenor's most important arguments and that resolution becomes the law of the case for future litigation in the proceeding.

We affirm the Licensing Board's ruling with respect to the standard to be applied when measuring character and competence. We find no bias or prejudicial error manifested in the Board's conduct of the proceeding. We remand one

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[111] See Waterford, supra, 17 NRC at 1110-12. Such powers can be invoked only after advising the Commission and observing special procedures. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-685, 16 NRC 449, 452 n.5 (1982), citing Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), LBP-81-54, 14 NRC 918, 922-23 & n.4 (1981).

matter to the Board for its further consideration, i.e., whether the issues originally raised by CEU present serious safety or environmental questions that warrant Board examination pursuant to its sua sponte authority.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board