

regard to the Quadrex-related issues this Board stated in the Fifth Prehearing Conference Order that (at 6):

We have previously expressed the view that Quadrex Report issues had to be narrowed prior to any evidentiary hearing thereon, and we directed parties to file statements as to particular matters derived from the Quadrex Report which they wished to litigate or believed should be litigated. Memorandum and Order dated June 22, 1983; Memorandum and Order dated May 22, 1984. In the latter Memorandum and Order, as well as in our Memorandum dated June 11, 1984 and our Memorandum and Order dated July 10, 1984, we also defined to some degree the scope of the Quadrex Report issues that we regarded as appropriate for Phase II consideration.

The Board then set out its conclusions that "CCANP has not set forth any issues suitable for adjudication" arising from the Quadrex Report, but had set forth only a generalized statement of topics. Fifth Prehearing Conference Order, at 7-8. On this basis it was concluded that CCANP had not properly defined matters for litigation or set out any nexus of those matters to safety. Id. Because of CCANP's failure to set forth issues for litigation, the Board dismissed all Quadrex-related issues except those raising issues concerning the Applicant's informing the Staff and the Board of the Quadrex Report. At 9.

The Fifth Prehearing Conference Order also reflects that the Board denied CCANP's request for further discovery of the staff on two grounds. First, the discovery sought had no bearing on the only remaining Quadrex-related issue, HL&P's character; and second, the request for further discovery came too late. The matters upon which CCANP again sought discovery (circumstances surrounding the Staff's categorization and analysis of the items in the Quadrex Report) had been within the scope of discovery permitted by the Board's orders of May 22, 1984 and July 10, 1984, but CCANP had not taken advantage of the discovery then permitted. At 9. It

therefore held CCANP had forfeited the opportunity for discovery on that subject.

The Fifth Prehearing Conference Order has behind it a substantial history of the Board attempting to have Quadrex-related issues formulated in this proceeding and providing for discovery on those matters. Shortly after the Quadrex Report came to light, this Board issued its Fourth Prehearing Order, November 16, 1981, indicating that any pertinent matters involving the Quadrex Report would be deferred to Phase II of the hearings. At 5. In a Memorandum (Memorializing Certain Rulings Announced During Evidentiary Hearing Sessions of June 15-17, 1982), June 24, 1982, the Board recorded its rejection of some twenty of CCANP proposed contentions on the Quadrex Report because those matters were apparently already encompassed in admitted contentions which might be heard in Phase II of the proceedings. At 2-3. It then set out a 90-day discovery schedule for Quadrex matters which was to commence upon the conclusion of the Staff's review of the Bechtel Corporation's evaluation of the Quadrex Report. At 3. That Staff review was served on the parties on January 17, 1983, and the discovery period expired on April 25, 1983. See Memorandum and Order (Granting Attorney General of Texas' Motion for Extension of Discovery Deadline), LBP-83-26, 17 NRC 945, 946 (1983).

On June 22, 1983, in a Memorandum and Order (Granting Applicants Motion to Compel Responses to Certain Discovery Requests, Delineating Procedural Format for Resolving Various Phase II Issues and Establishing Briefing Schedules for Certain Legal Questions), the Board stated (at 4):

[I]t is important that CCANP and other parties identify, prior to hearing, those portions of the Quadrex Report and the reviews thereof which impact the safety issues before us and which they seek to litigate. CCANP must take the lead in this respect and, as a predicate to litigation, must identify particular safety questions which it claims arise from the Quadrex Report and have not, in its opinion, been adequately resolved through the Bechtel or NRC Staff reviews. Id. at 4.

In the Partial Initial Decision on Phase I of these proceedings, 19 NRC 659, 686, 690-91 (March 14, 1984), the Board resolved all character issues regarding HL&P with the express exception of matters concerning the timely reporting of matters in the Quadrex Report.

Following the PID, in a May 22, 1984 Memorandum and Order (Ruling on CCANP Motions for Additional Discovery and Applicants' Motion for Sanctions), the Board again reiterated its view that Phase II issues in regard to the Quadrex Report had to be narrowed before litigation. At 4. Further, the Board pointed out that the Partial Initial Decision and the replacement of Brown & Root on the project had narrowed issues open for litigation in Phase II. At 4-6. It stated that except for the way in which the timely reporting of the Quadrex items might relate to character, issues relating to HL&P's character had been resolved in the PID; and that, since Brown & Root had been replaced, no useful purpose would be served by looking at Brown & Root's performance. Id. at 5 and 9. It also stated that it had already determined that HL&P lacked competence early in the project, and any further evidence on this subject would be cumulative. Id. The Board did, however, allow CCANP 90 days for additional discovery, but it emphasized that no further discovery on that matter would be allowed CCANP "absent the most extraordinary circumstances." Id. at 7. This opportunity for discovery included

inquiry into safety-related construction activities by Bechtel and Ebasco following Brown & Root's removal from the project and the basis of the Staff's review and conclusions on Quadrex Report items. Id. at 7-11.

On June 5, 1984, CCANP filed a Motion for Reconsideration of the aforementioned May 22, 1984 Memorandum and Order of the Licensing Board. It objected to any limitation of Quadrex-related issues in Phase II of this proceeding and particularly asked for reconsideration of the Board's ruling that the "Partial Initial Decision in Phase I of this proceeding had foreclosed any further inquiry into either the past lack of character or lack of competence on the part of HL&P as basis for license denial, except insofar as the failure of HL&P to provide the Quadrex Report to the Board and Commission might be probative of lack of character." At 1. CCANP also asked that the 90 additional days granted for discovery against Applicants and the Staff be extended. At 4.

In its Memorandum and Order (Denying Reconsideration but Clarifying Memorandum and Order of May 22, 1984), July 10, 1984, the Board emphasized that discovery may only be had on existing issues. At 4. It then stated (at 4):

Nowhere have we ever held that the entire Quadrex Report would perforce be subject to examination in Phase II. Indeed, the Quadrex Report, taken as a whole, is too wide-ranging a document to be considered as a "matter in controversy." For example, substantial portions of it relate only to the economics of building or operating the South Texas Project (STP) and have no bearing on the safety questions before us. For these reasons, CCANP's requests that discovery not exclude any aspect of the Quadrex Report, and that no defining of issues take place until after discovery, must be rejected as contrary both to the discovery framework authorized by the NRC Rules of Practice and our earlier Quadrex-Report rulings.

The Board reiterated that it did not believe that HL&P's activities in supervising Brown & Roots' design efforts could bear materially on HL&P's character, that further examination into that subject would not be productive, and that evidence of HL&P's early competence could only be cumulative to matters already in the record. Id. at 5-7.

In that July 10, 1984, Memorandum and Order the Board again reiterated that the timeliness of HL&P's reporting of matters in the Quadrex Report would be in issue, and that the adequacy of corrective actions in regard to matters set out in Quadrex Report could be explored in discovery. Id. at 7-9. The Board also denied any further postponement of discovery on the Quadrex Report or the Staff's review of that report. Id.

Thereafter, CCANP filed its generalized "index-type" statement of topics it wished to have litigated in Phase II of the proceeding, and asked for further discovery. (Specifications of Particular Matters for Consideration in Phase II Hearings, filed October 1, 1984) A Prehearing Conference was held on October 16, 1984. As a result, the Board then issued the subject Fifth Prehearing Conference Order, ruling that CCANP had not properly raised any contentions suitable for litigation concerning Quadrex Report matters (except as to its timely reporting), reiterated its former rulings on the scope of the Phase II hearing and denied CCANP further discovery. CCANP in the instant motion seeks reconsideration of these rulings.

III. Discussion

A. Quadrex-Related Issues to be Litigated in Phase II

CCANP notes that the Licensing Board stated in its Fourth Prehearing Conference Order, December 16, 1981, that all aspects of the Quadrex Report were left open for litigation in Phase II of these proceedings. On this basis CCANP claims that the Fifth Prehearing Conference Order newly limited the scope of Quadrex-related matters to be litigated in Phase II of these proceedings denying CCANP of "due process rights" and would lead to a failure by the Board to consider HL&P's character and competence as required by the Commission. Thus, CCANP maintains the Order should be reconsidered. (See Motion at 2)

While the words of the Fourth Prehearing Conference Order, "all aspects of the Quadrex Report," could be read to be without limitation, CCANP's arguments ignore what has happened since the Fourth Prehearing Conference Order was issued. After the Fourth Prehearing Conference Order, the Board issued its "Memorandum and Order (Granting Applicant's Motion to Compel Responses to Certain Discovery Requests, Delineating Procedural Format for Resolving Various Phase II Issues and Establishing Briefing Schedules for Certain Legal Questions)," dated June 22, 1983. There the Board made it clear that CCANP must take the lead in identifying particular safety questions for litigation which it claims arise from the Quadrex Report. See p. 4 herein, supra.

In the March 14, 1984 PID on Phase I of this proceeding, the Board found (subject to questions concerning the timely notification of the NPC of the Quadrex Report and corrective actions taken as a result of that report) that HL&P had a sufficiently high level of managerial competence and character to be granted licenses to operate STP. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-84-13, 19 NRC 659,

679-94 (1984). It further found that HL&P's current construction and design programs and its review of its contractors meet the requirements of the Commission's regulations, and that STP can be completed in accordance with Commission requirements. Id. at 699-701.

On March 29, 1984, CCANP filed a motion requesting ninety days additional discovery for the Phase II issues in this proceeding pertaining to the findings of the Quadrex Report. In its May 22, 1984 Memorandum and Order (Ruling on CCANP Motions for Additional Discovery and Applicants' Motion for Sanctions), the Licensing Board granted this additional time. The Board in granting this extension of time limited discovery on the Quadrex Report to those matters concerning HL&P's past character or competence which it believed to be relevant to Phase II. The Board reiterated that, except for questions concerning notification of the NRC of the Quadrex Report, it had resolved the character issue in Phase I of the hearings, and that deficiencies in Brown & Root's (B&R's) engineering performance examined in the Quadrex Report would not be helpful in assessing HL&P's character. (Order, May 22, 1984 at 5; See PID, 19 NRC 682-91) The May 22, 1984 Order also again directed CCANP (and all parties) to define precisely the matters to be litigated in Phase II by the submission of particular safety questions arising from the Quadrex Report which had not been properly resolved. May 22, 1984, Order, at 4. (See also Order of September 7, 1984).

On June 5, 1985, CCANP filed a "Motion for Reconsideration of ASLB's Memorandum and Order, dated May 22, 1984". CCANP stated that it "believes that this Memorandum and Order is entirely too sweeping in its exclusion of discovery, evidence, cross-examination, and findings on the essence of the Quadrex Report." (Id. at 1) In ruling on that motion for

reconsideration the Board issued its Memorandum and Order, dated July 10, 1984, denying reconsideration but clarifying its May 22, 1984 Order. The Board stated therein that its earlier Order attempted to conform the discovery as closely as possible to the usual NRC practice (Order at 3; see 10 CFR §2.740(b)(1); see also Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928 (1974)) and, to that end, it had established the general scope of issues to be litigated and provided for discovery within that framework. As the Board said, "Nowhere have we ever held that the entire Quadrex Report would perforce be subject to examination in Phase II." (July 10, 1984 Order, at 4; see p. 5 herein, supra.)

While intervenor attempts to bootstrap its way out of this situation by asserting that "the Board has shifted its position as to what Phase II would encompass," CCANP ignores its own failure to define with particularity any material issues raised by the Quadrex Report. CCANP is not entitled to a hearing on any and all matters brought up by the Quadrex Report. The Board succinctly pointed out:

Although HL&P's activities in supervising B&R's design engineering efforts may theoretically have some bearing on an overall assessment of HL&P's character, we have already examined those activities to a considerable extent. See, e.g., PID, at pp. 40-41, 44. We do not believe that further inquiry into this subject through the findings of the Quadrex Report would be productive. We have been provided no factual basis from the Quadrex Report for concluding that HL&P character deficiencies may have contributed to the design engineering difficulties which developed. The Quadrex Report does not directly address this question. Order of July 10, 1984, supra.

Notwithstanding the May 22, 1984, and July 10, 1984, Orders, CCANP's instant motion again asks the Board not to limit character evidence in Phase II to the question of the timely notification of the NRC of the Quadrex Report by hypothesizing that it is possible that evidence revealed by the Quadrex Report might show that HL&P attempted to "keep the Commission in the dark" about HL&P's and B&R's inability to design and engineer the project. The Fourth Prehearing Conference Order, at 4, provided that Phase I of this proceeding was to deal with "all events which transpired before September 24, 1981." Questions of whether HL&P might have hid B&R's design or engineering deficiencies from the Commission were relevant to B&R's performance before September 24, 1981, and HL&P's involvement therein, and were litigated in Phase I. As the Board later said, given the substantial evidence of HL&P's positive character traits, CCANP's mere conjecture should not provoke another full-blown inquiry into character. Order of July 10, 1984, at 5-6. The Board's responsibility to resolve Issue A does not entail a never-ending inquiry into any matter that CCANP allows itself to speculate might be construed as evidence of character. Similarly, with respect to competence, the Licensing Board found in the Phase I PID that HL&P had earlier lacked competence. See 19 NRC 726-735. CCANP gives no indication why these matters should again be litigated, or how evidence on the causes of the matters reported in the Quadrex Report could be other than cumulative to evidence dealing with HL&P's earlier lack of competence.

As this Board has recognized, CCANP's "index-type statement" of issues CCANP wished to litigate in Phase II (filed October 1, 1984,

pursuant to the Board's Orders of May 22, 1984, July 10, 1984, and September 7, 1984) did not identify a single safety-related finding for which HL&P's corrective actions are allegedly inadequate. It just outlined areas CCANP wished to explore without any basis and without any specificity. See 10 CFR 2.714 (b). CCANP would have the Board and the parties continue inquiry on these matters in the off-chance that it may uncover some evidence relevant to HL&P's character and competence. This issue of HL&P's character and competence has been fully examined in Phase I (with the exception of timely revealing the Quadrex Report). As the Board has recognized, aspects of issues which are no longer material are properly excluded from further adjudication. See July 10, 1984 Order, supra, at 4. Indeed, even in its instant motion the intervenor has not drawn a nexus or delineated aspects of the Quadrex Report with regard to any design errors that have any "impact on the potential licenseability of the project." In intervenor's own words, "CCANP wants to make a global request that it go into each matter discussed in the Quadrex Report . . ." PHC Tr. 10758. Such a request must be denied, has been so denied repeatedly for over two years, and is not meet for reconsideration.

Intervenor takes the same position and advances the same arguments in the instant motion for reconsideration as it did in the June 5, 1984 motion for reconsideration. That position and those arguments have been rejected by the Board and should again be so rejected. On several occasions now, CCANP has been afforded the opportunity to specify relevant material issues contained in the Quadrex Report, and has not done so. It failed to do so at any time after the May 22, 1984 Order, it

failed to do so in its October 1, 1984 filing, it failed to do so at the Prehearing Conference (October 16, 1984, Tr. 10755-10760), and it has again failed to do so in the instant pleading. Intervenor's motion does not provide any basis for modifying the limitations on the use of the Quadrex Report on Phase II of the hearing, and the motion for reconsideration on that point should be denied.

B. Additional Discovery with Regard to the Staff's Bases for Determination on Reportability

CCANP's request for further discovery should also be denied. CCANP has been allowed ample opportunity to take this discovery and has not done so.

CCANP maintains that if it had sought discovery on the reportability of Quadrex-related items during the period between the Board's order to prepare the brief on reportability and the Staff's preparations of that brief, such discovery would have "been objectionable on the grounds that the Staff was working on a brief on just those matters." This argument ignores the Board's Order of July 10, 1984, which expressly stated that an inquiry need not await the briefs on reportability which were to be filed. July 10, 1984 Order, at 8. The Board's ruling that CCANP's subsequent request was untimely was correct and should not now be modified.

Moreover, as the Staff has pointed out previously (Tr. 10825-26), the intervenor is asking for discovery of the Staff's procedures and standards for determining whether individual items in the Quadrex Report should have been reported and whether they were released for construction. Even if the Board were to determine that the Staff erred in its review of

the Quadrex Report, such a determination would not show flaws in HL&P's character. (Order of July 10, 1984, at 8) Consequently, CCANP's attempt to gain an additional opportunity for discovery on the Staff's standards and procedures should be rejected. The proper focus is whether the failure of HL&P to earlier reveal the existence of the Quadrex Report by HL&P adversely reflects on HL&P's character. As the Board has stated, even if these discovery requests going to the Staff's standards for reportability of individual matters in the Quadrex Report had been timely, they would have been beyond the scope of permissible discovery since it would not be probative of HL&P's character.

The Staff's brief on reportability ("NRC Staff Response to Licensing Board Memorandum and Order Regarding the Reportability of the Quadrex Report," filed August 24, 1984) ^{1/} described the applicability of the requirements of 10 CFR § 50.55(e), 10 CFR Part 21, and the requirements established for notification of adjudicatory bounds of new and important information. In response to the Board's request (Memorandum and Order, June 22, 1983, at 7) that the Staff "define the construction status of

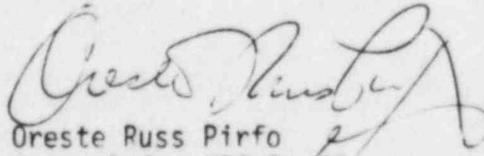
^{1/} It should be noted that the Staff strongly objects to intervenor's gross mischaracterization of what the Staff attorney stated at the Prehearing Conference when CCANP states flatly that the Staff attorney recognized that "the latest NRC effort was 'not as thorough' as the earlier effort." Motion, at 11-12. What Staff counsel said was, in fact, "We did a second report, which was not as thorough -- I shouldn't say 'as thorough.' It was not as time consuming and it did not involve the number of people that the original report used . . ." Tr. 10827.

each safety-related item dealt with by the Quadrex Report and explain the basis upon which it was determined that various items had or had not been released for construction," the Staff provided additional information concerning the "released for construction" finding and provided further information on the reportability of the various Quadrex findings. This does not "fall far short" of satisfying the Board's order as CCANP asserts. Even assuming, arguendo, that the Staff brief was in some way deficient, that fact would in no way operate to have prevented CCANP from seeking factual discovery during the ample additional time afforded to it by the May 1984 Order.

IV. Conclusion

Intervenor's Motion for Reconsideration of the Board's Order should be denied in all respects.

Respectfully submitted,


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Dated at Bethesda, Maryland
this 14th day of January, 1985

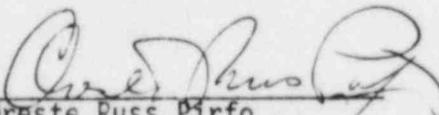
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