

ORIGINAL

UNITED STATES
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

DOCKET NO: STN 50-498-OL
STN 50-499-OL

EVIDENTIARY HEARING
HOUSTON LIGHTING AND POWER COMPANY,
et al.
(South Texas Project Units 1 and 2)

LOCATION: BAY CITY, TEXAS

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2 UNITED STATES OF AMERICA
3 NUCLEAR REGULATORY COMMISSION
4 BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

5 -----X

6 In the Matter of: : DOCKET NO.
7 HOUSTON LIGHTING AND POWER : STN-50-498-OL
8 COMPANY, ET AL., : STN-50-499-OL
9 (South Texas Project Units 1 & 2 :
10 -----X

11 Matagorda County Courthouse
12 Courtroom No. 2
13 Bay City, Texas

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15
16 Thursday, 11 July 1985

17
18 The hearing in the above-entitled matter was
19 convened, pursuant to adjournment, at 9:30 a.m.,

20 BEFORE:

21 JUDGE CHARLES BECHHOEFER, Chairman,
22 Atomic Safety and Licensing Board.
23 JUDGE JAMES C. LAMB, Member,
24 Atomic Safety and Licensing Board.
25

1 JUDGE FREDERICK J. SHON, Member,
2 Atomic Safety and Licensing Board.

3
4 APPEARANCES:

5 On behalf of the Applicants:

6 MAURICE AXELRAD, Esq.,

7 JACK R. NEWMAN, Esq.,

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11 Washington, D.C.

12
13
14 On behalf of the Nuclear Regulatory Commission Staff:

15 EDWIN J. REIS, Esq.,

16 ORESTE RUSS PIRFO, Esq.,

17 Office of the Executive Legal Director

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19
20 On behalf of the Intervenor:

21 LANNY ALAN SINKIN,

22 3022 Porter St. N.W., #304

23 Washington, D.C. 20008

24 Representative for Citizens Concerned About

25 Nuclear Power.

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P R O C E E D I N G S

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3 JUDGE BECHHOEFER: Good morning, ladies and
4 gentlemen. This is the beginning of Phase II of the
5 operating license proceeding dealing with the application
6 for operating licenses of Houston Lighting and Power and
7 others.

8 The Board here today is, to my left is Mr. Fred
9 Shon, to my right is Dr. James Lamb. And my name is
10 Charles Bechhoefer Mr. Shon is a new member of the Board
11 since the last phase of the proceeding. He's an engineer
12 with the Washington office of the licensing board panel.

13 Before we start today, are there any
14 preliminary matters? And I don't count the oral
15 arguments we've scheduled as preliminary matters. Are
16 there anything other than that that anyone wishes to
17 raise first?

18 Mr. Axelrad?

19 MR. AXELRAD: Perhaps --

20 JUDGE BECHHOEFER: Oh, yes, I think counsel
21 ought to identify themselves for the record. I guess
22 I'll go from my left to my right. Mr. Sinkin?

23 MR. SINKIN: I'm Lanny Sinkin, representing
24 Citizens Concerned About Nuclear Power.

25 MR. PIRFO: I'm Oreste Russ Pirfo, with the NRC

1 staff.

2 MR. REIS: I'm Edwin J. Reis, with the NRC
3 staff.

4 MR. AXELRAD: Representing the Applicants today
5 are myself, Maurice Axelrad with the firm of Newman &
6 Holtzinger, P.C., Mr. Jack R. Newman, same firm. And on
7 my left is Alvin Gutterman, from the same firm.

8 JUDGE BECHHOEFER: I might add for members of
9 the public, we are going to hold limited appearance
10 statements here in Bay City but not until next Saturday
11 afternoon at 2:00 o'clock. Nonetheless, members of the
12 public are welcome to attend any of the hearings.

13 Now, is there any preliminary matters? Mr.
14 Axelrad.

15 MR. AXELRAD: We do have an opening statement
16 we would like to make, if you consider that a preliminary
17 matter.

18 JUDGE BECHHOEFER: No, I was going to follow
19 with open statements.

20 MR. REIS: The staff also have a opening
21 statement.

22 MR. SINKIN: I have a preliminary matter, I
23 think the Applicant sent a letter to the Board sometime
24 ago saying that an engineering and design study of Brown
25 & Root had been prepared for Houston Lighting & Power but

1 that it was under a gag order and could not be produced
2 without special permission of the court.

3 The gag order has now been lifted and we think
4 that that report may well be material to the issues to be
5 decided by the Board. And we would urge that that report
6 now be produced to the parties and the Board.

7 JUDGE BECHHOEFER: Mr. Axelrad, Do you have any
8 knowledge of the particular report in question?

9 MR. AXELRAD: I believe so. But at the time
10 that that particular document was discussed, the -- my
11 recollection is that the gag order was not the sole basis
12 for not providing it. We indicated it was under a gag
13 order but if the Board wanted a copy or if there were
14 reason to produce it, we would try to get the gag order
15 lifted.

16 There was a discussion of the document and
17 there was a decision that it was not necessary to do so.
18 So we did not in fact get the gag order lifted. We don't
19 see the fact that the gag order has disappeared as being
20 any reason to change the status of that document.
21 Presumably Mr. Sinkin, if he wishes to see that document,
22 can go to the places where that document is available.

23 Mr. chairman if I may just add. It seems to me
24 inappropriate to deal with that subject on this kind of --
25 as a preliminary matter. If Mr. Sinkin wishes to go back

1 and look at the transcript of where that particular
2 matter was discussed, file a motion with the Board,
3 whatever relief he believes it is now entitled to, we
4 will responnd to that in the appropriate manner. I don't
5 think it's appropriate to attempt to have either the
6 parties or the Board rule on any matter which happened
7 many months ago.

8 JUDGE BECHHOEFER: The Board thinks that if
9 Mr. Sinkin, -- if there's anything specifically in the
10 document that we should be considering, Mr. Sinkin should
11 bring it to our attention. My recollection is that we
12 had some general idea of the contents earlier but no --
13 we did not feel that it was sufficient to have the gag
14 order lifted. But my recollection is also that if
15 anything specific would be in there, that could be
16 brought to our attention, specifically relevant to some
17 of the things we're considering in this phase of the
18 proceeding, and anything else would have to be the
19 subject of a motion for a new contention.

20 But if it's specifically related to what we're
21 considering in Phase II, perhaps that could be brought to
22 our attention. Anything further?

23 Parties, Mr. Axelrad, make your -- start with
24 your opening statement.

25 MR. AXELRAD: Thank you, Mr. Chairman.

1 Mr. Newman will present the opening statement on behalf
2 of the Applicant.

3 JUDGE BECHHOEFER: Fine.

4 MR. NEWMAN: Mr. Chairman, I have a fairly
5 brief opening statement. As HL&P advised the members of
6 the Bicensing Board earlier this year, in affidavits that
7 were filed with the Board, a substantial progress has
8 been made on the South Texas Project since the record
9 closed on Phase I of this proceeding.

10 The Board's observation in that partial initial
11 decision that the South Texas Project had turned the
12 corner proved correct. It's proven by the events of the
13 past three years and the testimony that has been filed
14 for these Phase II hearings by the NRC staff. Our
15 testimony, in this proceeding, will provide further
16 affirmation of the positive findings which the Board
17 reached in its partial initial decision regarding the
18 character of the Applicant.

19 For this proceeding, the Board has requested
20 that several of our witnesses in the Phase I proceeding,
21 specifically Mr. Jordan and Oprea, Mr. Goldberg, Mr. Frazar,
22 relate their testimony at that time to the events which
23 were occurring contemporaneously namely the Quadrex
24 report and the consideration then being given to the
25 adequacy of Brown & Root's performance in its engineering

1 functions.

2 The testimony of the witnesses whom you have
3 requested to appear at the hearing in this phase will
4 address those matters directly. But I would like to
5 share with Your Honors a basic perspective that we have
6 as a backdrop for considering their testimony.

7 First, I'd like to focus on the Quadrex report
8 for a moment. I think it's important to understand that
9 it was the perception of The Light Company's personnel,
10 their officers, their staff, that were aware of the
11 report, that the thrust of the Quadrex report was to
12 underscore a growing concern regarding the ability of
13 Brown & Root's engineering to support the construction
14 schedule for the South Texas Project. The report, and I
15 urge you to focus on this, did not purport to be an
16 analysis of the adequacy of the quality assurance program
17 for design, and only a few of Quadrex's findings
18 identified matters which turned out to be reportable
19 quality concerns and these in fact were reported to the
20 NRC and, by copy, to this board.

21 Another perception that's important is the
22 manner in which HL&P's witnesses viewed the issues that
23 were before the Board during Phase I of the proceeding.
24 Phase I dealt with construction and construction related
25 QA matters. It was not our perception that that phase of

1 the proceedings dealt with design QA, and certainly not
2 with the adequacy of Brown & Root's engineering program
3 to support a construction schedule. If, as the Board has
4 found under the McGuire rule, that the report should
5 have been furnished to the Licensing Board, I think the
6 facts that you will hear in this phase of the proceeding
7 will show you that that error, if error it was, was
8 committed in good faith, and based on our perception, the
9 company's perception, of the main thrust of the report
10 and the scope of the issues that were before the Board in
11 those Phase I hearings in 1981.

12 Finally, a word about the candor of the company
13 in dealing with the Quadrex report and some of the really
14 historical charges that have been made with respect to
15 it. The Quadrex report was treated by the company like
16 any other consultant's report.

17 It was not generally disseminated to the
18 public, but neither was it hidden from the NRC. And I
19 think so that's very important. In fact, the company
20 told the NRC's principal interface with the project that
21 the report would be undertaken and that was back in
22 January other February of 1981, subsequently, and I
23 believe it was in April, that the report would be
24 available shortly and would be discussed with the NRC;
25 and finally, that the report had been completed and that

1 report was accompanied by an offer to brief the NRC
2 staff.

3 The report was in fact discussed with the NRC's
4 licensing project manager just a few days after its
5 receipt by The Light Company and it was made clear that
6 the report would be available for inspection and review
7 by the NRC.

8 At the same time, Your Honors, Region IV was
9 informed of three potentially reportable deficiencies,
10 one of which turned out to be non-reportable. HL&P's
11 candor with the NRC's staff in light of these
12 circumstances is so clear that there is absolutely no
13 basis for any surmise about any attempt to hide this
14 report from the NRC, nor the more bizzare suggestion that
15 a conspiracy occurred. An exhaustive NRC investigation
16 on that very subject supports that conclusion, that's
17 inspection report 820, which I believe the Board has.

18 Turning from the Quadrex report to the
19 replacement of Brown & Root for a moment, on the matter
20 of the consideration which the company was being -- was
21 being applied to the adequacy of Brown & Root's
22 performance in that period, 1981, let me make three
23 points which I think will come out during the course of
24 this testimony. They are at one point or other reflected
25 in prior testimony in this proceeding, but it would be

1 well, I think, to summarize them.

2 At the time of the company's testimony before
3 this licensing board in 1981, Brown & Root's performance
4 regarding construction and construction related quality
5 assurance was satisfactory. Indeed the company never
6 entertained the notion of firing Brown & Root or
7 discharging them with respect to their construction
8 activities.

9 Second, Your Honors, the company's concern
10 regarding the effectiveness and the productivity of Brown
11 & Root's engineering activities was in fact a matter of
12 increasing concern during the spring and summer of 1981
13 and you'll hear Mr. Goldberg and Mr. Oprea, Mr. Jordan,
14 testify to that.

15 Efforts at the same time, at the very time we
16 were testifying before you during that spring and summer
17 of 1981, extraordinary efforts were being made to beef up
18 Brown & Root's engineering performance because that was
19 in fact the companies No. 1 priority in the spring of
20 1981.

21 And in that connection, and a third point, the
22 replacement of Brown & Root was regarded by the company
23 as the alternative of last resort. I'm sure that you are
24 all aware that an undertaking of this type had never
25 occurred before in NRC history. There had never been an

1 architect engineer replaced on a project after the
2 issuance of construction permanent. As I say, that was a
3 matter of last resort for the company. And serious
4 discussions regarding the removal of Brown & Root did not
5 occur until it became apparent that every effort that was
6 being made to beef up Brown & Root's engineering
7 organization was not likely to succeed, and that some
8 attempt was necessary to determine, and I wish to
9 underscore this, whether it was feasible to replace Brown
10 & Root in regard to its engineering functions.

11 Now, given those facts, Your Honors, we have
12 gone back and reviewed the record of Phase I of this
13 proceeding, indeed we've done more than review it, we've
14 combed that record, to determine whether during the time
15 of that testimony in 1981 by the company's officers,
16 those matters should have been disclosed to the Licensing
17 Board or otherwise brought to your attention, and we
18 think not.

19 And I'd like to share with you the reasons for
20 that determination. The Light Company did not establish
21 that a change of engineers could even be accomplished
22 until contacts were made within the industry, until
23 proposals were received, and that was not until late July
24 or August of 1981, and that a change was feasible from
25 both a commercial and a technical standpoint and very

1 importantly on a basis consistent with the continued
2 viability of the project. The Board was advised that
3 that that determination had been reached even before a
4 letter of intent was signed with Bechtel. The only
5 reason, Your Honors, that this Board was not informed any
6 earlier was that there was nothing which we could I am
7 part to you with reasonable certainty. And premature or
8 sketchy public disclosure would have severely disrupted
9 the project, the activities of the project, and as
10 importantly and in particular to the people of this
11 community, we would have disrupted the lives of thousands
12 of people who might have acted in anticipation of a
13 development that might never occur.

14 Finally I'd like to underscore for you, and
15 I've gone back to see what we discovered during the
16 spring and summer of 1981, we dealt with issues that were
17 germane to Phase I of the licensing proceeding, and I
18 submit to you that every single issue which was heard
19 during the summer of 1981 would have had had to be heard
20 by this Licensing Board even if Brown & Root had been
21 replaced before the hearings began.

22 Moreover, and I think in light of the sparks
23 that we've had about this issue, it's important to
24 mention one other thing. I want to assure Your Honors
25 that we had every incentive to inform you of the decision

1 to replace Brown & Root as soon as that decision was
2 reached. To the extent the regulatory proceedings before
3 this board, hearings, or other regulatory action might
4 have be necessary before Bechtel or whomever it turned
5 out to be the replacement engineer could take over the
6 job, we felt that some form of regulatory review might be
7 necessary and as a result, we wanted to get that action
8 started as soon as possible; in short, we had every
9 incentive to information this Licensing Board that that
10 decision had been reached as quickly as possible after
11 the decision had been made.

12 Your Honors, I believe it stands the world on
13 its ear to suggest that we would have manipulated these
14 hearings to any other purpose. That's the perspective
15 that we'd like to share with you before you hear our
16 testimony.

17 As to the reportability of the Quadrex
18 findings, themselves, the record, I think, is going to
19 speak for itself. Under a very complex regulation, 50.55
20 (e), which I know all of you have probably spent many
21 hours parsing, that regulation requires sophisticated
22 technical and regulatory judgments. And in that context,
23 Your Honors, we have a situation in which Houston
24 Lighting & Power, Brown & Root, Bechtel, and the NRC, on
25 several occasions, including the staffs prepared

1 testimony for this proceeding, I might add, have reached
2 essentially identical conclusions on the reportability
3 question.

4 In these circumstances, it has to be absolutely
5 clear that whether right or wrong on particular findings,
6 the review by HL&P for reportability was made in good
7 faith. And that, Your Honors, is the bottom line. And I
8 believe you'll find that it is the bottom line on every
9 issue to be dealt within this phase of the hearings.

10 Thank you.

11 (No Hiatus)

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1 JUDGE BECHHOEFER: Mr. Sinkin?

2 MR. SINKIN: We'll reserve our opening
3 statement until after the argument on calling of
4 attorneys in sequestration.

5 MR. REIS: Your Honor, the Staff would object
6 to that. If there is an opening statement, we want to
7 hear it now.

8 MR. SINKIN: It was made quite clear in the
9 conference call we had the other day that we had the
10 option of doing it at the opening or after we had
11 argument and we decided to do it after argument.

12 MR. PIRFO: It wasn't clear to this member of
13 the Staff.

14 MR. SINKIN: There were three options
15 presented in the conference call. Option one was to
16 begin with opening statements. Option two was to go
17 forward with the argument on calling of attorneys in
18 sequestration and then have opening statements. And
19 option three was to waive opening statements.

20 MR. AXELRAD: Mr. Chairman, I do not recall
21 those particular options being discussed.

22 MR. PIRFO: I do not --

23 MR. AXELRAD: If Mr. Sinkin had believed that
24 opening statements were going to follow the arguments,
25 he should have said so before I made my opening

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1 statement and then we could have discussed what opening
2 statements were going to be performed. But now that we
3 have begun the process of making opening statements, I
4 believe that should continue to its conclusion.

5 MR. PIRFO: If I may be heard, if I may remind
6 the Board, the only thing I recall in that conference
7 about opening statements was Judge Bechhoefer's
8 statement that we will have opening statements if you
9 want them or it could be waived, and that was the sum
10 total of any discussion on opening statements. And I
11 would agree with the Applicant that once the Applicants
12 have made their opening statements, that Mr. Sinkin
13 should follow.

14 MR. SINKIN: It was precisely in that part of
15 the conference call that Judge Bechhoefer laid out how
16 we might do opening statements. And if the Applicant
17 chose to go forward with theirs now, that's fine.

18 JUDGE BECHHOEFER: The Board thinks they ought
19 to be all together so that you ought to do yours now.

20 MR. SINKIN: All right.

21 Mr. Chairman and members of the Board, what
22 Citizens Concerned About Nuclear Power believes that it
23 will demonstrate quite clearly to this Board is that the
24 Quadrex report was a very significant report in the
25 history of this project, that it revealed fundamental

1 deficiencies in the manner and method which Brown & Root
2 was using to design and engineer the South Texas Nuclear
3 Project, and that it was a report that clearly should
4 have been turned over to both the NRC staff and to this
5 licensing board.

6 We think what you will find after you hear the
7 evidence is that Mr. Jerome Goldberg was placed in a
8 very difficult position by his own competence. When Mr.
9 Goldberg was hired in October of 1980 to be the
10 vice-president for nuclear engineering and construction
11 at Houston Lighting & Power, he brought to that company
12 an expertise they had never had in the history of this
13 project, except for certain limited instances such as
14 when Mr. Ferguson was there who recommended the possible
15 removal of Brown & Root and a few other very limited
16 instances where at the management level they had people
17 competent to understand the task involved in designing
18 and engineering a nuclear power plant. With Mr.
19 Goldberg they finally had someone in place who got a
20 good look at what was going on and who would have to
21 stay there because the NRC was aware that he had been
22 brought in and was depending on his qualifications to be
23 a remedy for the history of this project. In fact, your
24 partial initial decision relied very heavily on the fact
25 that Mr. Goldberg had been hired and that he was a key

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1 figure in the project and that he brought to the project
2 experience and expertise that had not been there
3 before.

4 What Mr. Goldberg did when he arrived we
5 commend him for. He took a look at Brown & Root's
6 design and engineering program and in a word he perhaps
7 would not use, he was aghast. He could see what was
8 happening. He could see they were not producing. He
9 could see that they were incapable of producing in some
10 areas. And he approached management about the hiring of
11 a third-party independent consultant to come in and
12 evaluate Brown & Root's design and engineering program
13 as to its technical adequacy. That technical adequacy
14 appears in two ways. One, their ability to efficiently
15 design and engineer a nuclear power plant in the sense
16 of not having extraneous engineering requirements that
17 made it difficult to actually perform the construction;
18 and a safety component to that technical adequacy, that
19 the design could indeed perform the task it was required
20 to perform.

21 So, a technical adequacy review was done
22 by the Quadrex Corporation at Mr. Goldberg's instigation
23 on questions that Mr. Goldberg himself identified as
24 important in areas where Mr. Goldberg believed that
25 Brown & Root was probably weak. It was put under the

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1 charge of Mr. Sumpter, an HL&P study with Quadrex to act
2 as technical assistant to Houston Lighting & Power
3 Corporation. The study was conducted and over a period
4 of time there were various interchanges between HL&P
5 management, Mr. Sumpter, Mr. Goldberg, others with
6 Quadrex, assisting them in the process of evaluating
7 Brown & Root.

8 We come now to that week of May the 7th.
9 We are five days before the licensing hearings in this
10 proceeding in Phase I are to begin. The prefile
11 testimony of Houston Lighting & Power has already been
12 submitted to the parties, the witnesses are already
13 prepared to give their testimony and Quadrex walks in to
14 Houston Lighting & Power and drops a bomb in the middle
15 of their proceedings, a five-hundred page report, 288
16 deficiencies in the Brown & Root design and engineering
17 program and a special volume created by Quadrex to bring
18 to the attention of Houston Lighting & Power systematic
19 defects that they believe might exist in the design and
20 engineering process at Brown & Root, what they call
21 generic findings where there were indications for more
22 than one discipline of the same problem. They had all
23 of their top officers in the corporation review that
24 volume to be sure that what they were saying to HL&P was
25 both warranted and necessary.

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1 So, there was Mr. Goldberg May the 7th, 1981,
2 with the Quadrex report sitting in front of him and I
3 suspect his reaction was what have I done? Here I was
4 brought in to save this project. I did what I thought
5 was right in hiring this company and they have come in
6 and torpedoed us by presenting us with a report that if
7 the NRC saw and read and understood would probably
8 result in an order to show cause, shutting down the
9 project, special hearings and a raft of additional
10 problems for a company already in deep water with the
11 NRC. At this same time they were still trying to
12 recover from the order to show cause. They were under
13 very strict scrutiny by the NRC. Every construction
14 program they intended to perform they had to have NRC
15 approval on. Now, even non-safety they were submitting
16 to the NRC to get their approval on.

17 So, you have a company in trouble under
18 strict scrutiny by the NRC with the NRC having serious
19 questions about their ability to perform and here comes
20 Quadrex saying the design and engineering program is
21 chaotic, inefficient, inoperable, poorly coordinated and
22 citing in their own words almost the terms of 50.55(e).
23 You find a failure to differentiate between
24 safety-related and non-safety-related items. You find a
25 lack of interdisciplinary coordinated interface which is

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1 essentially what Criterion 3 of the Appendix B says you
2 must have.

3 Now Mr. Goldberg faced the problem of what
4 could do I do with this report? If I turn it over today
5 to the NRC, if I turn it over today to the licensing
6 Board, what's going to happen? Probably the hearings
7 will be cancelled, the project shut down, my career
8 might be in serious trouble, at least here at HL&P. So,
9 we think he made the decision that this report should
10 not be released, it should not be released to the NRC
11 staff, it should not be released to this Board. Part of
12 his concern I think was us. If he made a 50.55(e)
13 report of the Quadrex report, if he turned it over to
14 the NRC pursuant to 50.55(e), he would have had to send
15 us a copy of it because we were on the service list for
16 all 50.55(e) reports and he knew that if we got this
17 report, all hell would break loose. We'd be all over
18 the newspapers. We'd be in here talking to you. We'd
19 be pointing to this report as proof of everything we had
20 been saying about the inadequacies in the operation of
21 this project.

22 So, he didn't want us to have it and that
23 meant he couldn't let the NRC have it. So, he did what
24 he felt might help cover him later which was to report
25 some of the findings, the barest minimum number of

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1 findings from this report. He picked the ones that
2 would be obviously a serious problem in the view of
3 anybody. All engineers would agree that the HVAC
4 defects, that's HVAC defects, had to be corrected; that
5 absence of computer code verification in a nuclear
6 project was a serious problem and could not be allowed.
7 Those things had to be reported. He also knew -- he was
8 familiar with 50.55(e). He knew that the thrust of
9 50.55(e) was to err on the side of notifying the NRC
10 that the purpose of 50.55(e) was to put the NRC on
11 notice of possible problems in the project so that they
12 could monitor the activities of the project and be sure
13 that that possible problem was either not a real problem
14 or if it was a real problem, was adequately resolved.

15 So, the whole thrust of 50.55(e) was to err on
16 the side of sending more notifications than not
17 notifications, or rather deciding on a given finding.
18 If there was a 50 percent question as to whether it
19 should be notified or not, or even a 60/40, you err on
20 the side of telling the NRC about it because they
21 provided you with the opportunity to write them in
22 thirty days and say, guess what, it wasn't a problem,
23 you don't have to worry about it, and the NRC is
24 satisfied. But rather than do that, he went over to
25 those three findings which were clearly notifiable to

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1 the NRC and sent them the barest minimum. Not only
2 that, they were sent without any identification that
3 these three findings came from the Quadrex report.

4 He then briefed, and I use that word very much
5 in quotes, Mr. Sells. There's conflicting testimony
6 between Mr. Goldberg and Mr. Sells, or at least you will
7 see it in the evidence, as to whether Mr. Goldberg
8 brought one volume or three volumes of the Quadrex
9 report with him and whether Mr. Sells, in fact, looked
10 at those volumes. Now, Mr. Sells will testify that he
11 did not look at any volumes and that Mr. Goldberg did
12 not have any volumes with him. I think it's
13 understandable that Mr. Goldberg would want to believe
14 that he had taken those volumes with him, would want to
15 believe that he had shown them to Mr. Sells and that Mr.
16 Sells had made some determination that no further review
17 was necessary. But that that's a delusion that makes
18 Mr. Goldberg comfortable with what he did; that, in
19 fact, Mr. Sells did not see these volumes and was given
20 a very brief summary description of what was in these
21 volumes; was told that the three potentially reportable
22 findings had been sent to the NRC; was told that they
23 were going to address the rest of the findings and
24 resolve any problems that existed, but was in no way
25 given the full import of what was in these documents.

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1 And, in our view, the efforts to inform Mr. Sells to a
2 limited extent about Quadrex are nothing more than the
3 actions of hiding the real substance of Quadrex, by
4 putting Mr. Sells at his ease that he had seen what he
5 needed to see.

6 That is the case that the Applicants are
7 going to bring to you, that Mr. Goldberg in good faith
8 made these determinations that what he told Mr. Sells,
9 the three 50.55(e) reports, that that was an adequate
10 response under NRC regulations to the Quadrex report.
11 There's also the question of turning that report over to
12 the Board.

13 The Applicant's position is that the Board
14 wasn't concerned with design and engineering and
15 therefore the report did not have to be turned over.
16 Well, I think it's clear that this is a report that is
17 certainly related to quality assurance; that this is a
18 report that demonstrates a major breakdown in the
19 quality assurance program at Houston Lighting & Power.
20 And here I would say we are going to differentiate
21 during this hearing between quality assurance with a
22 capital Q and a capital A and quality assurance with a
23 little Q and a little A and that that differentiation is
24 that QA, capital letters, is a formal structure within
25 Houston Lighting & Power, a formal structure within

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1 Brown & Root of people who audit the ongoing activities
2 to be sure they're being done right, but that quality
3 assurance, small QA, is the requirement imposed by
4 Appendix B on a nuclear power project that things be
5 done right whether quality assurance, capital QA, looks
6 at them or not, and that the Quadrex report clearly
7 demonstrates a major breakdown in the quality of the
8 design and engineering process being conducted by Brown
9 & Root. That would be reason enough for this Board to
10 have seen the report in Phase I. Obviously, the quality
11 assurance program of Brown & Root and the quality
12 assurance program of HL&P that was responsible for
13 seeing that Brown & Root did things right were matters
14 of interest to this Board. And the McGuire Rule has a
15 very low threshold. It basically talks about new
16 information that could affect the decision the Board was
17 going to make, not that it had to be directly material,
18 relevant and admissible on particular subjects
19 identified in specific contentions.

20 In fact, in this proceeding we had some very
21 general subjects, character and competence. And if ever
22 there was a report that dealt with Brown & Root's
23 competence to design and engineer a nuclear power plant,
24 it's the Quadrex report. So that on the ground that
25 it's a clear measure of Brown & Root's competence, this

1 report should have been given to the Board.

2 Mr. Goldberg is a very experienced person in
3 the nuclear industry. He has participated in more than
4 a dozen licensing hearings where he has prepared
5 evidence. He was fully aware of his responsibility to
6 inform the Board under the McGuire Rule. Oh, he says in
7 his testimony he doesn't know if it was called the
8 McGuire Rule, he was aware of the substance of the rule
9 which was to inform Nuclear Regulatory Commission boards
10 about major developments on the project that could
11 influence the decision they face. But he chose not to
12 do so.

13 Now, we know that Mr. Goldberg discussed the
14 Quadrex report with Mr. Oprea, that he discussed the
15 Quadrex report with Mr. Jordan, that he discussed it
16 with his staff. We're fairly certain that in those
17 discussions these problems came up. They may not have
18 come up in the direct sense of do I send this report to
19 the NRC, although they probably did, but they certainly
20 came up in the sense of what is the impact of this
21 report if it gets out, what happens to us if Lanny
22 Sinkin sees the Quadrex report? We're in big trouble.
23 So, how do we keep him from seeing it? Well, we can't
24 give it to the NRC. Well, you do what you have to do,
25 Mr. Goldberg, is what we suspect the instructions are

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1 from Mr. Oprea, Mr. Jordan. And Mr. Goldberg is made
2 the center point of this entire thing, the
3 responsibility is pushed onto him for what's done. And,
4 in a sense, this will not be the first time that there
5 isn't a complete harmony in the top management of HL&P
6 about what needs to be done on this project. The
7 decision on whether Brown & Root should be removed,
8 obviously Mr. Goldberg had very strong feelings about
9 that that were not totally shared by management.

10 But anyway, Mr. Goldberg makes his
11 decision. The report's not going to go to the NRC, the
12 report's not going to go to me, the report's not going
13 to go to you, it's going to stay within HL&P and within
14 Brown & Root. And we have evidence that it was treated
15 as a confidential document and that evidence will be
16 introduced to you. They deny in their testimony that it
17 was treated as a confidential document. The NRC
18 testifies that when they were given -- the NRC inspector
19 who went down in August of 1981 who looked at this
20 report testifies that when Mr. Frazar brought it in, Mr.
21 Frazar said this is a confidential report and you can't
22 take it out of the project. Mr. Frazar says in his
23 testimony I never knew it to be a confidential report.
24 Well, who has the motive to lie? Why does Mr. Phillips
25 have any reason to lie about whether this report was

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1 considered confidential by HL&P or not? He got to read
2 it. Once he saw it he took the appropriate actions.
3 But Mr. Frazar has something at risk. If it's treated
4 as a confidential report, that tends to reinforce this
5 concept except that they were keeping it inside the
6 company and hiding it from everybody else and he doesn't
7 want to do that, so he tells you, no, it wasn't a
8 confidential report. And it will be up to you to judge
9 the credibility of the witnesses as to what's the true
10 story.

11 That's the behavior of the Applicants.
12 They don't turn it over. They keep it within their
13 company. They don't make it part of their testimony in
14 the licensing hearings. The Applicants were offered, in
15 a sense, many different opportunities in Phase I to
16 mention the Quadrex report. In the Board's order for
17 these hearings they mentioned certain parts of the
18 testimony as places where it would have been appropriate
19 or even mandatory for Houston Lighting & Power witnesses
20 to mention the Quadrex report and they didn't. We
21 consider that testimony to be part of the continuing
22 conspiracy, that they are indeed, even when directly
23 confronted with questioning about it, reluctant to
24 reveal it.

25 The first situation we're in is we know about

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1 it and they really don't or they know a little about it,
2 they know we're conducting it, so let's tell them a
3 little about it to put them at ease about it. But you
4 don't have NRC coming to them and saying let me see it
5 and them having to fight over that. When NRC does come
6 to them and they have to produce it in the inspector's
7 investigation in August of '81, they produce it
8 reluctantly but say it has to stay here on the project.
9 When they get into a hearing, an adversarial process,
10 where I'm asking and Mr. Reis is asking what's going on
11 in design and engineering, then they have to overtly
12 refuse to mention it, not bring it up, minimize the
13 number of problems in design and engineering. There's
14 that remarkable question to Mr. Goldberg from Mr. Reis,
15 where did you find Brown & Root lacking in design and
16 engineering and Mr. Goldberg's answer that runs to all
17 of maybe four pages in a 10,000-page transcript where he
18 highlights three or four major problems and that's all
19 when he had this report sitting on his desk, when there
20 was a huge program underway at Brown & Root to try and
21 respond to this report, when it confirmed his concerns
22 on a wide range of issues about Brown & Root's
23 performance, he gives an answer like that to Mr. Reis.

24 Well, those are all decisions of the
25 Applicants. And we have talked about calling the

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1 attorneys to testify as to what they did too because
2 there's an independent obligation on the part of the
3 attorneys to have informed this Board about the Quadrex
4 report under the McGuire Rule and the reason we have
5 called the attorneys is to see what their specific role
6 was in what we are calling a conspiracy.

7 I would point out in December of 1981, perhaps
8 even a little earlier, maybe November, we filed with the
9 NRC a document that was titled Alleged Quadrex
10 Conspiracy. The minute we found out about Quadrex, we
11 conducted our own independent investigation of how
12 Quadrex came to the attention of the NRC. And after we
13 saw the facts and saw the report, we were convinced
14 there was a conspiracy and we said so from the very
15 earliest stages of the discovery of the Quadrex report
16 and we are maintaining that position today, and that the
17 conspiracy is not a single conspiracy, that there's one
18 conspiracy that starts with actually hiding the
19 substance of the Quadrex report and misleading the NRC
20 as to the seriousness of the report.

21 The second part is when Mr. Goldberg is sort
22 of set up to be the fall guy for all this. Nobody else
23 had anything to do with it, it was really Mr. Goldberg's
24 decision. And we presume that the purpose of that is to
25 move towards a limited damage scenario that if this

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1 Board finds, yes, Mr. Goldberg lacks character or, yes,
2 Mr. Goldberg lacks competence because of the Quadrex
3 report, then they can do what we call the Three Mile
4 Island shuffle. You take the people responsible for the
5 problem and you put them in another part of the company
6 or in another company, bring in new people and say now
7 everything's all right. And we fully expect that if Mr.
8 Goldberg is found to lack character and competence, that
9 is what Houston Lighting & Power will do. However, this
10 time it's not the same as Three Mile Island because this
11 is the second time. Mr. Goldberg was brought in to cure
12 the problem. Mr. Goldberg was the white knight. He was
13 going to save this project from its own failures. Then
14 he's brought in and he falls into the same pattern of
15 behavior that the management of this company has
16 demonstrated since the beginning of this project.
17 That's what we think the term corporate character means
18 to some extent. It means does someone come in with a
19 sense of values that's better than the existing values,
20 but because of the conditions of the company they then
21 start to perform like everybody else who's always be
22 there. It's like a corporate culture that draws that
23 person in and they start putting their own values
24 aside.

25 Mr. Goldberg was disturbed all the way through

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1 July of 1981 as to whether this entire report should be
2 a 50.55(e) report. He kept going back to it, kept
3 thinking about it, should I turn this over to them,
4 because he knew his instincts were right that it should
5 have been turned over, but he just couldn't handle it,
6 he couldn't do it.

7 Then there's continuation of the conspiracy in
8 the consultant list that was prepared for the Phase I
9 hearings where consultants are requested, a list of
10 consultants that are requested that have been paid more
11 than ten thousand dollars and Quadrex isn't on this
12 list. The Applicants say it's because of the title of
13 the list and the kinds of reports, that this wasn't that
14 kind of report and therefore they weren't listed. Well,
15 you can decide after looking at the Quadrex report
16 whether it should have been on that list. And that's a
17 problem that wasn't created by Mr. Goldberg, that's a
18 problem that was created by the attorneys' position on
19 what should be put on that list.

20 And then you come to the McGuire violation as
21 another part of the ongoing conspiracy. As long as that
22 report -- do you want to deal with this, Mr. Chairman?
23 Is that all right?

24 JUDGE BECHHOEFER: It's okay as long as they
25 don't move around.

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1 VOICE: Right. I'm just going to sit right
2 here.

3 MR. SINKIN: As long as the Quadrex report was
4 not turned over to the NRC, that is how long this
5 conspiracy went on. It's not a matter of just the
6 decisions that were made in May of 1981. It was not
7 turned over in June. It was not turned over in July.
8 It was not turned over in August. In September it was
9 turned over to this Board. Throughout that period this
10 is an ongoing conspiracy. Part of the reason we're
11 asking for the calling of attorneys and sequestration of
12 attorneys is it is our position that in their pretrial
13 testimony and in their positions taken before this
14 Board, the conspiracy is still going on. We would like
15 nothing better than for Mr. Goldberg to come in this
16 first day to testify and say I have a statement for the
17 record. I want to recant my previous positions. I want
18 to say that I was absolutely wrong from the beginning in
19 not turning this over, but I was under terrible
20 pressures. It was an awful mistake. I hope you'll
21 forgive me. And maybe if that's the approach he took,
22 we would have a different view of this.

23 JUDGE BECHHOEFER: You might move for summary
24 disposition.

25 MR. SINKIN: We might move for summary

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1 disposition, obviously. We would also have taken the
2 view it was a more serious violation.

3 If there had been any effort to say I was
4 wrong, if there had been any effort by this company to
5 come forward and say that in light of the whole facts,
6 that we see we really made a mistake. But they're
7 continuing to deny that they did anything wrong.
8 Everything they did was perfectly justifiable in their
9 view.

10 Well, that's enough on the Applicants. We
11 want to deal for a moment with the NRC staff. We think
12 this is a very sad day for the Nuclear Regulatory
13 Commission's staff because they have come forward in
14 this case and repudiated their own administrators and
15 staff and the reaction those folks had in 1981 to the
16 Quadrex report. They're now going to put on a case that
17 says there was no need for the Nuclear Regulatory
18 Commission to see the Quadrex report. We think that
19 lies in the face of everything that happened in 1981
20 when this report surfaced.

21 What you will see is that when Mr. Herr and
22 Mr. Phillips, Mr. Herr being the lead investigator, Mr.
23 Phillips being the lead inspector, saw the Quadrex
24 report, they were disturbed by it. They went to Mr.
25 Sells, the director of licensing, and said you should

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1 read this report. And Mr. Sells, who had been, quote
2 unquote, briefed by Mr. Goldberg earlier but had not
3 read the report, requested the report to read and did
4 so. Mr. Sells read the report. He was disturbed. He
5 went to Mr. Reis and Mr. Axelrad -- I'm sorry, not Mr.
6 Axelrad, Mr. Reis and Mr. Gutierrez and said this report
7 should go to the Board, it's a McGuire kind of report.
8 Mr. Reis or Mr. Gutierrez, it's not quite clear to us
9 who talked to Mr. Sells, but one or the other agreed
10 with Mr. Sells based on that discussion that this report
11 should go to the Board.

12 So, the licensing attorneys called Houston
13 Lighting & Power, Mr. Reis calls Mr. Newman, if we have
14 the facts correctly, and says either you turn the
15 Quadrex report over to the licensing Board or we will.
16 And Mr. Newman says we'll do it, give us a few days.
17 HL&P immediately fires Brown & Root as architect
18 engineer and turns the report over to the licensing
19 Board.

20 Examine, if you will, the reaction of the
21 licensing Board. You, Mr. Chairman, call in the
22 licensing judge, Judge Hill, who is no longer with us,
23 from California and Judge Lamb from North Carolina. You
24 convene a special meeting in Washington to look at the
25 Quadrex report, among other things. Despite the

11300

1 objections of Houston Lighting & Power, you schedule a
2 special evidentiary hearing to consider suspending all
3 safety-related construction, in part to be assured that
4 the findings of Quadrex are not working their way into
5 the design -- final construction, I should say, of this
6 project. Then this goes on to the upper management of
7 the NRC. An investigation is conducted.

8 There were two, really three Quadrex
9 investigations by the NRC and we shouldn't lose sight of
10 that. The first one responded to the chronology of
11 events we had submitted as an alleged conspiracy, a
12 chronology that went to a congressional committee, came
13 back through the Commission and down to the Staff and
14 the Staff was asked what about this chronology and the
15 Staff conducted an investigation and said the chronology
16 that we had prepared was essentially the same as the
17 chronology they had prepared with a few minor
18 differences. That was investigation number one. Then
19 there was a second investigation, a formal investigation
20 documented as 82-02.

21 But sticking for a moment with what happens
22 when that chronology is prepared and they look at the
23 events and they look at Quadrex, you have the behavior
24 of director of operations for the Nuclear Regulatory
25 Commission Mr. Dircks. Mr. Dircks writes a memorandum

11301

1 to Commissioner Bradford that's served on all the
2 commissioners saying that while the Applicants told us
3 they were doing the Quadrex report, the findings were
4 not communicated to us in a timely fashion. And in the
5 chronology attached to that letter there's obvious
6 references to the 50.55(e). He's obviously addressing
7 the fact that 50.55(e) was violated by not providing
8 that report to the NRC. In a second letter to the
9 Commission he says we've compared the chronologies of
10 the two and we see no significant difference. And my
11 chronology was entitled Alleged Quadrex Conspiracy, as
12 you may remember.

13 The third document from Mr. Dircks is his
14 testimony to the Congress of the United States under
15 oath when he and the chairman of the NRC have been
16 called in to be questioned about quality assurance.
17 That is the topic of their testimony, quality
18 assurance. And Mr. Dircks in his testimony cites the
19 Quadrex report and basically says while we found a lot
20 of problems at South Texas that led to the order to show
21 cause in April 1980, we had no idea of the potentially
22 serious breakdown in quality assurance at this project
23 until we saw the Quadrex report.

24 There you have from the inspector in the field
25 to the director of operations and off sideways to this

11002

1 licensing Board as a separate operation everybody in the
2 NRC that sees the Quadrex report responds with shock,
3 outrage, indignation. Yet, now the NRC staff would have
4 us believe that there is no need for the Applicants to
5 have turned this report over to the NRC. We think
6 that's a terrible, terrible repudiation of their own
7 regulations; that they're trying to rewrite their
8 regulations to save this company.

9 In fact, if you review the briefs that were
10 written on Quadrex reportability, or rather I like the
11 term notifiability, to keep us tracked on that
12 twenty-four hour period in 50.55(e) which is the essence
13 of this question, when you read their brief they looked
14 only at whether the design was released for
15 construction. If you look at NUREG 0948, the third
16 major Quadrex investigation, that's the essence of why
17 they said there didn't need to be notification. They
18 were not designs released for construction.

19 Well, there's two problems with that. One is
20 it's a red herring. Quadrex wasn't looking at designs,
21 they were looking at the fundamental documents from
22 which designs are generated. Ninety percent of what
23 Quadrex looked at would be inappropriate for field
24 construction. They were looking at the underlying basis
25 for what Brown & Root's doing, that's where they're

11303

1 finding the flaws. So, the NRC staff was then taking
2 the position that because it wasn't ultimately released
3 for construction, it was only in the fundamental
4 documents being used to design, it didn't have to be
5 notified. Well, that turns the world on its ear, to use
6 Mr. Newman's phrase. If what you start with to do a
7 design is flawed, that's more serious than if an
8 individual design that results from inadequate
9 foundation is flawed because those flaws in the basic
10 documents can work their way into every design in the
11 project. But the NRC staff wants to say -- wanted to
12 say that because they were not designs released for
13 construction, this report didn't have to be turned
14 over.

15 Well, as we pointed out in our brief, there's
16 another section of 50.55(e) that says if a given event
17 represents a significant breakdown in quality assurance,
18 you report that event, you notify the NRC of that
19 event. The NRC brief attempted to wash out that whole
20 requirement, attempted to say it didn't exist, it was
21 subsumed by a release for construction. But the Board
22 accepted our argument, that because that regulation is
23 written with an "or" between each of those, if any one
24 of those criteria is violated, you get a notification.
25 There is no "and." It's not a design released for

11304

1 construction and a significant breakdown in quality
2 assurance, it's a design released for construction or a
3 significant breakdown in quality assurance.

4 So, now we're really getting away from the red
5 herrings and away from the false trails and to the real
6 question and that is a significant breakdown in quality
7 assurance. And that's where we say if you look at the
8 reaction of NRC personnel charged with quality assurance
9 responsibilities in 1981 and how they reacted when they
10 saw this report, there's no question it should have been
11 turned over. Ultimately, what the Board has to decide
12 is whether an Applicant who receives a report like the
13 Quadrex report is under no obligation to turn it over to
14 the NRC staff. We urge you to keep in mind that while
15 McGuire was in place and does require notifications to a
16 licensing Board, and you have already ruled that McGuire
17 was violated, there will be many instances where there
18 won't be a sitting licensing Board, where McGuire
19 wouldn't be triggered. And if you say that the
20 Applicants didn't have to turn this report over to the
21 NRC staff as a general rule, you are setting a terrible
22 precedent for other license holders that they too can
23 get a report like this and if there doesn't happen to be
24 a licensing Board convened, then they can keep it
25 hidden, they don't have to turn it over to the NRC

11305

1 staff. So, we urge you to keep those two requirements
2 very separate because they don't cancel each other out
3 in any way.

4 We also feel that the public had a right
5 to see this thing. The people of Bay City had a right
6 to see the Quadrex report. They're the ones that have
7 to live with this plant. They're the ones that should
8 know whether things are going right or going wrong at
9 that project. And the general public, all of South
10 Texas that is at risk if this plant malfunctions, they
11 had a right to know. So that there was that compelling
12 public interest in knowing whether the report should
13 have been turned over and that only heightens the sense
14 that what they did was wrong and that the report should
15 have been given to the NRC staff, should have been made
16 public.

17 Turning for a moment to the Brown & Root
18 removal, the decision to remove Brown & Root. We
19 initiate that discussion by calling your attention to
20 testimony by Mr. George Oprea who was then the group
21 vice-president of HL&P. When asked a direct question
22 have you had any discussions with your staff about the
23 removal of Brown & Root from this project since the
24 order to show cause, asked that question in June of
25 1981, he said no. And because he said no, no further

11306

1 questions were asked. But, in fact, we know now that
2 Mr. Goldberg had become convinced by the end of April or
3 the first week in May at the latest that Brown & Root
4 had to go in, at least design and engineering that they
5 were refusing to do what they needed to do to make
6 themselves capable of adequately designing and
7 engineering this project. And he went to Mr. Oprea and
8 he went to Mr. Jordan and he said Brown & Root has to
9 go. And their response was, well, let us try again to
10 work out with Brown & Root some way of getting them up
11 to par before we make a decision that they have to go.
12 But by June 29th, only three weeks after Mr. Oprea
13 testified, they had made that decision.

14 So, there were ongoing discussions about
15 whether Brown & Root should continue as architect
16 engineer and Mr. Oprea's answer to that question is
17 simply false. And I'm sure he gave that answer because
18 he didn't want to reveal the fact that they were
19 discussing the removal of Brown & Root, the very reasons
20 offered to you by Mr. Newman about why you were not told
21 about the decision made within HL&P to remove Brown &
22 Root, and the ongoing discussions that were going on at
23 Brown & Root, the very reason you weren't told about
24 that we turned the other direction. That's why they
25 were worried. They didn't want it to become public

11307

1 knowledge that they were seriously considering removing
2 Brown & Root; that they had, in fact, decided to remove
3 Brown & Root in June.

4 That's not a reason to testify falsely before
5 the NRC. It's simply not a reason for saying no in
6 answer to the question he was asked so that those
7 discussions wouldn't suddenly be open and on the table.
8 We now know because the gag order was lifted and some
9 depositions have been read that in July of 1981, Brown &
10 Root came to HL&P and offered to relinquish their design
11 and engineering responsibilities to Gibbs & Hill, said
12 we'll give up, we'll leave. The Board wasn't told that
13 either. But Brown & Root had reached a point where they
14 themselves were judging that either they were incapable
15 of finishing or that HL&P was so unhappy with them that
16 there was no point in staying and they were offering --
17 they had already negotiated with Gibbs & Hill a contract
18 for Gibbs & Hill to take over from Brown & Root as
19 design engineer. That's what's going on. It may not
20 have been a contract actually. It may have been they
21 had a preliminary outline of the agreement and they
22 wanted HL&P's approval of it before they did it.

23 That's what was going on during that period.
24 Repeated signals within HL&P that Brown & Root couldn't
25 perform. Repeated discussions within HL&P about

11308

1 changing architect engineers. And a decision in June
2 during the middle of these hearings to remove Brown &
3 Root that was not communicated to the Board or the
4 parties. An approach by Brown & Root to be removed in
5 July that was not communicated to these parties, to the
6 Board or the parties. That we perceive and we will
7 argue is another indication of how the Applicants view
8 their responsibilities in informing this Board about
9 their activities. And there again we have right in the
10 middle of that the licensing attorneys for Houston
11 Lighting & Power. They are involved in reviewing the
12 proposals submitted by people who were going to replace
13 Brown & Root. They're involved in selecting the
14 replacement for Brown & Root. They're acting as if they
15 were management officials. They aren't just giving
16 advice about the licensing impacts, they're actually
17 rating the companies who are applying and giving their
18 opinions as to which one should be selected, with
19 differing opinions among the licensing attorneys and
20 management as to which one is the best candidate.

21 All of that this Board should have known
22 about. Not only because it would have obviously
23 affected the scope and the direction of the ongoing
24 hearings, but also because it was an indicator of how
25 HL&P felt about Brown & Root's competence, which was one

11309

1 of the central issues in the proceeding. If this Board
2 knew that HL&P was trying to find someone to replace
3 Brown & Root as architect engineer, they might have had
4 a very different view of both HL&P's competence in
5 allowing things to deteriorate so far and Brown & Root's
6 competence in having performed so poorly. But they were
7 not told about what was going on and they were left to
8 believe what's represented in the Phase I testimony of
9 the Applicants that while there were some problems with
10 Brown & Root, Brown & Root was improving, Brown & Root
11 was making the necessary changes to successfully go
12 forward and be the design architect engineer on this
13 project. They're telling the Board that, they're
14 telling the parties that when, in fact, Mr. Goldberg has
15 already made up his mind that they're not going to make
16 the changes that he wants done, and, in fact, that they
17 should be removed from the project.

18 We see all of these inconsistencies between
19 what they're telling the Board and the parties and
20 what's actually going on at the project as part of a
21 broader conspiracy, if you will. And the broad
22 conspiracy is to not let you know what's going on, to
23 keep you from finding out how bad things are at this
24 project because if you know, there won't be a license.
25 So, they have to minimize the amount of information you

11310

1 get. They have to only bring it to you after they've
2 sanitized it, they have everything ready, they can come
3 to you and say Brown & Root's being removed as architect
4 engineer and Bechtel's replacing them. Immediately get
5 your attention focused on the transition period rather
6 than on why is Brown & Root being removed as architect
7 engineer. And that's indeed what happened if you look
8 at the record of the hearings. Most of the concern of
9 the Board was over the transition. Is it going to be
10 done in a quality-related way? Are you sure that things
11 are done right? They got your attention over to the
12 transition phase rather than to the removal decision.

13 Overall, Mr. Chairman, we think that when
14 you put side by side the reactions of NRC personnel -- I
15 would include, by the way, you look at Citizens for
16 Equitable Utilities, Mr. Jordan representing them from
17 Washington, a very competent attorney in NRC
18 proceedings, Mrs. Buckhorn representing them in
19 Brazoria, a very knowledgeable person about the
20 project. When they saw the Quadrex report, their
21 reaction was to file a motion to suspend the
22 construction permit. They felt it clearly revealed a
23 chaotic design and engineering process that was a direct
24 threat to the quality of this plant. That was their
25 perception and it agreed with that of the NRC personnel,

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1 with that of this licensing Board and with that of the
2 top management of the Nuclear Regulatory Commission.
3 Take all of those reactions and put them side by side
4 with the position of HL&P and the position in 1985 of
5 the NRC staff and decide which is the correct reaction
6 to Quadrex. Who made the right decision in 1981, the
7 NRC staff, this Board, Mr. Dircks or are the years later
8 evolving positions that repudiate the earlier reactions
9 the honest, correct comprehensive kind of reaction that
10 you should have to a report like this?

11 And that concludes our opening statement.

12 MR. REIS: Mr. Chairman --

13 JUDGE BECHHOEFER: Mr. Reis.

14 MR. REIS: -- the Staff will be quite brief.

15 First of all, as the Board knows, and I want to -- as
16 the Board knows, we felt that the Quadrex report should
17 have been turned over on the McGuire Rule. We continue
18 to hold that position. However, it was never the
19 Staff's position here that the Quadrex report, looking
20 at its technical conclusions either as to generic
21 matters, as to the most serious matters or as a total
22 document which the Board has set for hearing in this
23 proceeding, should have been turned over.

24 I have listened with great attention to Mr.
25 Sinkin and I didn't hear one particular mention of

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1 something in the Quadrex report from a technical matter
2 that had to be brought before this Board, whether it is
3 finding 4.1.2.1 F or finding 3.6.7 D. The Quadrex
4 report was a careful technical document. It dealt with
5 very detailed technical matters, yet we hear here and we
6 don't have any showing of any technical evidence that
7 there were matters there that had to be informed except
8 the matters set out by HL&P which were informed to us,
9 the three matters involving the most serious ones, the
10 air conditioning matter, the computer verification
11 matter, the radiological matter which was later
12 withdrawn and then we found two others in our own
13 inspection later. But we don't hear from Mr. Sinkin,
14 although he talks about Quadrex and waves it around, we
15 don't hear what the technical matters are here. And I
16 want to get the Board back to the technical matters
17 because this is a technical agency. The boards are set
18 up to consider technical matters.

19 What are the technical matters here that were
20 involved? I think as we go through the Quadrex report
21 and look at 50.55(e), we will see that when we look at
22 it we see whether there was a significant breakdown in
23 quality assurance. That depends to a very large extent
24 of how far along the project -- and we can consider
25 whether it was in design and engineering, but we have to

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1 see how far along in design and engineering the project
2 was. If they were substantially behind in design and
3 engineering, we wouldn't expect them to have to report
4 things that maybe they would have had to report later if
5 they had accomplished a great deal or some more design
6 engineering.

7 Secondly, as long as I'm on 50.55(e), I
8 want to talk about the twenty-four-hour notification and
9 the position of the Staff. Yes, there is a duty to
10 report within twenty-four hours, but that is within
11 twenty-four hours after you know something, not when you
12 get some vague allegation otherwise or vague report.
13 The utility, the Applicant, the way the system works is
14 charged with looking at this material and finding out
15 what is there. It doesn't just hear a rumor or get a
16 report and turn it over immediately, it has to know
17 something about what is there. That was our position
18 before in looking at the Quadrex report and that is our
19 position now. We read the report, we read it with care,
20 we read it again for this hearing. Our testimony for
21 this hearing essentially is a fresh look at that report,
22 looking at what's in the report, referring to the
23 examples given in the report and seeing whether there
24 were 50.55(e) matters reportable.

25 Next, I want to change the subject a bit

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1 and deal with the need to look at the issues and not
2 focus, I hope this hearing doesn't focus, I want to
3 express my desire that it doesn't focus and have
4 extensive cross-examination on matters that are
5 established. There is no need to establish and rehash
6 facts that are already in the record or already
7 revealed.

8 Next, I would like to say that throwing
9 out buzz words and repeating the buzz words don't make
10 them true. And I hope the Board as the trier of fact
11 here does not get caught up, and I don't think they
12 will, in hearing words thrown out and therefore think
13 that there may be some semblance or iota of sense in
14 them. Repeating words again and again, repeating words
15 doesn't make them true. Suppositions and conjectures
16 thrown out as fact doesn't make those suppositions and
17 conjectures true.

18 Next, I would like to go to the fact that
19 we have before us in the past. As I said, let's not
20 rehash and go back. We have behind us a long history of
21 this proceeding. It went on from May of '81 until June
22 of '82. There are and there continue to be, and I don't
23 know whether they went out yesterday, we mailed out to
24 the Board and the parties some more allegations we
25 received. They came to the attention of the Staff

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1 attorney. I'm trying to think of the day of the week or
2 last week -- if you haven't received them yet, I will
3 supply you with them. Again there are allegations. But
4 let me say that there are proceedings within the NRC to
5 handle the allegations. These allegations are
6 constantly had in every proceeding up until the time the
7 Commission considers it. And as the Board is aware, up
8 to the eve of licensing there are always new allegations
9 coming in. It doesn't mean the hearing should be
10 adjourned. It doesn't mean the hearing should be
11 delayed. There are proceedings under 2.202 if
12 intervenors want to raise something under 2.206 for the
13 Staff to look at these matters and fully look at them,
14 whether they be matters of competence, whether they be
15 matters of character, no matter what they be. And
16 within that context, I want to inform the Board and
17 ensure the Board that on the conclusion of the suit
18 between HL&P and Brown & Root, the Staff is very
19 carefully going through what is revealed from that
20 transcript and seeing whether there is any indication
21 that in any way the safety of the plant could be
22 affected by what is being revealed as a result of that
23 transcript, either as to the character, as to the
24 competence or any other matter that comes forward from
25 the revelations coming out of the release documents in

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1 that proceeding.

2 Lastly, I just want to say and emphasize
3 that the issues here before the Board still are
4 basically the ones we had in the first hearing, the ones
5 of character and competence. Not how the NRC acted or
6 why it acted, we are not here -- there are many agencies
7 including Congress that look at the NRC, our own office
8 of investigations and audits and inspections that look
9 at the NRC's performance. We are here concerned with
10 whether HL&P is entitled to a license for the South
11 Texas Nuclear Plant and really that's what we should
12 keep our eye on and not get involved in ancillary and
13 side issues.

14 Again, I want to urge that we look now at
15 what the matters are in the prefile testimony and in
16 this proceeding so far and emphasize again the evidence
17 comes forward particularly when you're licensing
18 something and you're looking to the future and you have
19 an ongoing process like the building and construction of
20 a nuclear plant, new material constantly comes up. But
21 as the Board, the review Board said in the Katorba case,
22 ALAB, that's capitalized, 359, 454, NRC 6619, there has
23 to be an end to proceedings. And in that case I think
24 it involved particularly it was a question of need for
25 power. But in any of these things there has to be an

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1 end to proceedings. Proceedings have to end at some
2 point. We have to make a determination. If other
3 things come up after that, there are other ways the NRC
4 looks at them. There are other methods of petition to
5 the NRC. The NRC staff is charged with doing many
6 things. But I think we can finish up these proceedings
7 and conclude this OL hearing.

8 That concludes the Staff's statement.

9 (No hiatus)

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1 JUDGE BECHHOEFER: Mr. Reis, I didn't want to
2 interrupt your opening statement. But on the
3 allegations, we understand there's a new procedure that
4 the Commission is following for evaluating allegations.
5 I guess there's a preliminary view reached by, I believe,
6 the Office of Investigations, and then they're forwarded
7 to the Licensing board. Is that procedure being followed
8 for these particular allegations?

9 MR. REIS: Yes, indeed. We received this
10 material from O&I. This material was received from O&I
11 and they forwarded it to the staff for investigation.
12 And the complete package, which I'll distribute here,
13 indicates that, in that it has the cover -- I believe it
14 has the cover memo, so I'll have to look at it again. It
15 has the cover memos forward go to OI. They essentially
16 believed that it was not of sufficient gravity for them
17 to look at it, and sent it to I&E to investigate.

18 JUDGE BECHHOEFER: I was going to say before we
19 get into this argument on things like sequestration,
20 we'll take a short break. In fact, why don't we do that
21 now, Mr. Ries.

22 MR. REIS: This letter isn't dated because I'm
23 sure it went out but I don't know which just which date.

24 MR. AXELRAD: Before we take a break, can we
25 just establish what we will do when we return from a

1 break? I would like to repeat, before we take a break,
2 perhaps we can identify exactly when we will do when we
3 return from the break. It appears to me.

4 JUDGE BECHHOEFER: just one minute.

5 MR. AXELRAD: It appears to me, and my
6 recollection of the conference call that we had just the
7 other day, that we'd be arguing two things, one is the
8 subpoenaing of attorney witnesses; the second thing is
9 the sequestration of witnesses, whether attorneys or
10 layman.

11 I would suggest that when we return, we first
12 argue the question of subpoenaing of attorney witnesses
13 and we then after that argument is complete, have an
14 argument with respect to sequestration of witnesses.

15 Obviously the Board will reach any decisions
16 that it wishes to reach on either of those subjects at
17 any time it so desires. But it would seem to me the
18 lengthy -- it would lead to an orderly sequence of
19 argument to first complete one argument and then go on to
20 the next.

21 JUDGE BECHHOEFER: When I said we'd return for
22 sequestration, I did not necessarily mean to exclude the
23 other.

24 MR. REIS: The other thing the staff would ask
25 that in this proceeding now, is that the Board ahead of

1 time set a time, a limit on oral argument for each party,
2 so that we -- in other words, some reasonable time, ten,
3 fifteen minutes a party, or less, if the motion is of
4 less dramatic thing, but we think it would help in moving
5 along the proceeding if the Board ahead of time announced
6 just how long people are going to have to argue about it
7 so that we can move the proceeding along. I think that
8 would be fair for the Board to set what the time is. Sin

9 MR. SINKIN: I have a couple of things that I'd
10 like to respond to, Your Honor. First of all, the more
11 we've thought about it, the more we think that we should
12 discuss Mr. Powell, Mr. Poston and Mr. Robertson very
13 early in this proceeding.

14 I don't want to create difficulties by saying
15 this morning, because we hadn't agreed to that. But
16 perhaps tomorrow morning discuss that, because whether
17 they are to be called to some extent influences the
18 questions we will be asking of the witnesses to be
19 presented by the Applicant. We may have to go into far
20 more detail on a particular topic with a given witness
21 that's coming here when we would much prefer to examine a
22 witness we have called on that topic. So that's point
23 one.

24 Point two, as far as the limitation on oral
25 argument, I'm not opposed to setting some kind of time

1 limits. But I would point out that given the constraints
2 we were operating under, we have not filed a written
3 response on the calling of attorneys to what's been filed
4 by the NRC staff and the Applicant and we have only today
5 received a written sequestration argument by the
6 Applicant, and that if our oral argument is very limited
7 in time, then the major presentations we will have before
8 you in making your decision are those written
9 representations.

10 We're not intending extensive argument. I
11 don't have a good feel -- perhaps when we come back from
12 the break, I can give you a good feel for perhaps how
13 much time we'd have to see. And we don't object to
14 setting a time limit. I just wanted to point out our
15 whole argument would be a oral argument.

16 JUDGE BECCHOEFFER: I tak it you would not be
17 objecting to setting time limits on those who have
18 written --

19 MR. SINKIN: I wouldn't set any time limit on
20 them that was different from mine.

21 MR. AXELRAD: Mr. Chairman, if I may respond
22 just briefly to items that Mr. Sinkin mentioned, the
23 first with respect to whether the discussion of the
24 subpoenaing of Mr. Robertson, Powell and Poston, should
25 be taken up early, as we have previously explained to the

1 Board, it is the very fact that Mr. Sinkin is seeking to
2 obtain testimony from those witnesses which would be
3 largely cumulative and duplicative of testimony other
4 witnesses can give, which is the reason why we explained
5 to the Board what we think the Board agreed, that it
6 would be more useful to decide whether or not those
7 witnesses should be subpoenaed after it has heard some of
8 the testimony that's proceeding, and we'll be able to
9 determine whether in fact it's desirable and necessary to
10 have have those witnesses testify.

11 Mr. Sinkin has the obvious opportunity himself,
12 as he himself has explained, to ask the questions of the
13 witnesses he wants of the witnesses that are being
14 presented before this Board. It is only after that
15 testimony has been exhausted that he can show that
16 there's some additional reason why the record should be
17 burdened by calling additional witnesses, that the Board
18 would have to make that decision.

19 So we would strongly urge that Mr. Sinkin's
20 advice to the Board be ignored. We have agreed to argue
21 the sequestration and subpoenaing of lawyers today only
22 because we realize that Mr. Sinkin's sequestration motion
23 has placed the board board in a very difficult position.
24 But that similar kind of difficulty does not obtain to
25 the testimony or subpoenaing of those three witnesses.

1 Secondly, if Mr. Sinkin only received our
2 response to his motion to sequester today, it is only
3 because he has known full well what the testimony of all
4 the witnesses was going to be back in John 26 that he
5 chose not to file his sequestration motion until just
6 this past Monday. And if he hasn't had enough time to
7 read it or whatever complaint he has to make, he has no
8 one to blame but himself.

9 MR. SINKIN: If I could respond to that, Mr.
10 Chairman. We were looking -- we were given the prefiled
11 testimony on June the 26th in the late afternoon and
12 asked, instructed by the Board after we had read the
13 prefiled testimony to file a motion to sequester on the
14 third working day after receiving that testimony -- no,
15 take that back. Three days to travel, Washington to
16 Texas, got to Texas right away and then arrival in Texas --
17 got that motion in the mail, did the best we could.
18 Anyway --

19 I don't want to spend a lot of time on the
20 circumstances of the filing.

21 Just to complete the record complete. I also --
22 back to Mr. Poston, Powell and Robertson, what the
23 Applicants are saying is that if I have questions about
24 certain events that went on, that I should ask them of
25 the witnesses they want me to ask them of rather than the

1 witnesses I want to ask them of. And I don't think that
2 that's appropriate. If I think the witnesses I'm calling
3 are going to say something that I want to hear, then I
4 think I have the right to call them. We've already shown
5 the relevance of their testimony; we can argue
6 specifically why they should be called.

7 I think we will clearly demonstrate that each
8 of them has a unique perspective, a unique position from
9 which to testify. And even if they were -- even if I
10 asked all the questions that I have of those witness, of
11 the HL&P witnesses, we can demonstrate that they are
12 other reasons to call them, to answer even the same
13 questions.

14 So we do think in terms of knowing whether
15 we're going to be allowed to call those witnesses, that
16 we should be allowed to know that now, rather than have
17 to decide on our cross-examination plan for each of the
18 Applicant witnesses without knowing who it is we're going
19 to get to call as witnesses.

20 JUDGE BECHHOEFFER: Well, why don't we consider
21 this more when we get into the later oral arguments. Why
22 don't we take a fifteen minute break.

23 (Recess.)

24 JUDGE BECHHOEFFER: Okay, back on the record.

25 In getting into the discussion of whether the

1 attorneys should be witnesses, I wanted to start off the
2 discussion first by asking Mr. Sinkin and Mr. Reis or
3 Pirfo as the case may be, whether, with respect to the
4 sought testimony of the staff attorneys, at least, there
5 has been any attempt or whether the parties could agree
6 as to what testimony the attorneys would give.

7 I'm using as a basis for this a case which the
8 staff cited, United States v Tumora, where the court said
9 there had to be compelling need, and in view of the fact
10 there was a stipulation between the parties as to what
11 the attorney -- or the prosecuting attorney there would
12 have said, the court found no compelling need. And at
13 least with respect to some of the details of what we
14 understand the staff attorneys would be called for, I was
15 just wondering whether any attempt like that or any
16 solution of that sort could be worked out. Mr. Sinkin?
17 I'll ask you

18 MR. SINKIN: Mr. Chairman, I've made approaches
19 on more than one occasion on the NRC staff about whether
20 we could negotiate a resolution of this question.
21 Whether there was some method short of actually calling
22 people as witnesses which we could use to get the
23 testimony in the record that we want.

24 The basic position of the NRC staff to me has
25 been, "We will argue first about whether they are to be

1 called." And if they are to be called, then we'll
2 negotiate about whether to do something other than have
3 them actually appear as witnesses."

4 I said, "Fine, if that's what they want to do.

5 MR. REIS: Mr. Chairman, that isn't completely
6 correct. We still don't have a statement of exactly why
7 Mr. Sinkin feels the attorneys for the staff, I'm talking
8 about the staff attorneys, are necessary, what facts he
9 wants to establish that are material and necessary for
10 this proceeding.

11 For instance, as I point out in one of the
12 papers, the date the Board was informed of the Quadrex
13 report is known. When --

14 JUDGE BECHHOEFER: One of the things that the
15 Board had in mind is the procere where apparently Mr.
16 Sells advised or suggested to one of the staff attorneys
17 that the report be turned over, and that one of the --
18 you, I guess, contacted one of the Applicant attorneys
19 and suggested that it be turned over. That physical, the
20 physical acts -- I'm not sure whether that would be
21 established in the record as such. And that's the kind
22 of thing that the Board, at least, thought that a
23 stipulation might be useful.

24 MR. REIS: That would be very fine if I saw
25 anything relevant to this proceeding as to other than the

1 date I told them that. The date I told them that or that
2 I told them that when I found out about it, sur; sure,
3 when Mr. Sells came to me -- let me say this: I'm not
4 hiding it. I could very well tell it. But I don't see --
5 I think we're going to get into all kind of red herrings.

6 JUDGE BECHHOEFER: I was I referring to the
7 fact --

8 MR. REIS: I want to keep a from extraneous
9 matters we're not trying the staff. Whether the staff's
10 action is right or wrong is something else. But I think
11 the only possible material date is when I talked to the
12 HL&P attorneys on this matter.

13 JUDGE BECHHOEFER: Why mention dates, by the
14 way. I just mentioned the basic fact that Mr. Sells
15 suggested --

16 MR. REIS: When I learned about it, how I
17 learned about it, whether I learned about it from Mr.
18 Sells or something else has no materiality, that can have
19 no materiality to this thing. The question is HL&P's
20 conduct. So the question is when I talked to HL&P and
21 what they did after that time. There are other ways to
22 establish that.

23 MR. REIS:

24 MR. SINKIN: May I respond.

25 JUDGE BECHHOEFER: I'm not sure there is, but --

1 MR. SINKIN: May I respond?

2 MR. REIS: One second. I looked to what Mr.
3 Sinkin has in his thing, if he wants me to stipulate that
4 I spoke to Sells about the Quadrex report, I certainly
5 did and I spoke to Janet Philips, and I'll stipulate to
6 that on the record as a stipulation. That I then spoke
7 to counsel for HL&P about it. Mr. -- I will stipulate to
8 that. I won't stipulate to the exact words that Mr.
9 Sinkin has because I didn't call him, I spoke to him.

10 The reactions, provide the details of his
11 reaction to the conversation with Mr. Sells, I don't see
12 where that is in any way material and that's what he has
13 here and that's what we are talking about.

14 The details of my conversation with Mr. Newman,
15 I don't see where that's particularly material. How can
16 that be material to this proceeding?

17 MR. BECHHOEFER: Only if Mr. Newman strongly
18 objected to your suggestion, could it be material.

19 MR. REIS: We know that he called the Board and
20 told the Board about it, very shortly thereafter. And we
21 know those dates.

22 MR. SINKIN: This is a very strange way to take
23 testimony.

24 MR. REIS: He's asked me as to what I will
25 stipulate to and I've told you.

1 JUDGE BECHHOEFER: We asked because this was
2 one of the criteria used by the particular court -- the
3 case that was cited.

4 MR. REIS: Also, you know, the cases we cite
5 particularly state there has to be an utmost necessity of
6 it. As to the staff attorneys, he can't show that utmost
7 necessity.

8 JUDGE BECHHOEFER: Well, Mr. Sinkin.

9 MR. SINKIN: Yeah. First of all, I think we
10 have an event that transpires, Mr. Sells gets the Quadrex
11 report; he calls either Mr. Guttierrez or Mr. Reis or
12 both; suggests to them that this report is very serious
13 and that the Board should see it essentially invoking the
14 McGuire rule and Mr. Reis and Mr. Guttierrez based on
15 those representations by Mr. Sells agree with him and
16 call Mr. Newman. As we stated on our opening statement
17 and as we have stated on prior occasions, part of our
18 case is looking at 50.55 (e) and the 24 hour notification
19 requirement, as a case of first impression, how do people
20 respond when they see the Quadrex report.

21 Now, Mr. Sells responds by calling Mr.
22 Gutierrez and Mr. Reis. Mr. Gutierrez and Mr. Reis
23 respond by calling Mr. Newman. We think that the record
24 should be completed on that aspect.

25 Now, Mr. Reis has repeatedly argued that the

1 staff action whether right or wrong is extraneous to this
2 proceeding. Well, obviously that's just not the case,
3 from our point of view. We think that the staff
4 reactions in 1981 are one measure of what HL&P should
5 have done in 1981. And we would like to have the staff
6 come forward and testify about their reactions, what they
7 did, what the response was from HL&P, when they did it.

8 But we're arguing now over -- Well, I guess
9 this is all right.

10 JUDGE BECHHOEFER: Why don't you then go into
11 your entire argument on attorneys; why you want them --
12 why you want the attorneys as witnesses, I should say.

13 MR. SINKIN: Well, I will start with the NRC,
14 since we have begun with the NRC already, as to whether
15 the attorneys for the NRC should be called. And
16 essentially what I want to do is respond to the statement
17 regarding the permissibility of calling attorneys as
18 witnesses filed by the NRC.

19 In looking for example at the interaction
20 between Mr. Sells and Mr. Reis, or Mr. Reis and Mr.
21 Gutierrez, the NRC attempts to characterize that as a
22 client seeking advice, or communication for the purpose
23 of securing advice from the attorney.

24 We view that as very different. What Mr. Sells
25 is doing is calling Mr. Reis and Mr. Gutierrez because in

1 his own mind, he feels the licensing board should see the
2 Quadrex report. And it is a responsibility of the
3 licensing attorneys to see that the McGuire rule is
4 enforced. So he goes to the appropriate enforcement
5 mechanism within the NRC. That essentially the actions
6 of Mr. Sells and the actions of Mr. Reis are enforcement
7 actions; Mr. Sells is not calling to request Mr. Reis'
8 legal advice on whether Quadrex should be turned over;
9 he's calling to say to Mr. Reis he thinks the Quadrex
10 report should be turned over and based on what he tells
11 Mr. Reis about that report, Mr. Reis degrees with him,
12 essentially you have two officers of the Nuclear
13 Regulatory Commission enforcing the rules, enforcing the
14 McGuire rule.

15 JUDGE BECHHOEFER: Could you not ask Mr. Sells
16 to testify to that particular series of events? Mr.
17 Sells will be here.

18 MR. SINKIN: I understand he will be. Our case
19 is in part, as I said, the reactions of all the NRC
20 personnel to information received about the Quadrex
21 report that the reaction of Mr. Reis is part of that
22 reaction to the Quadrex record and that we would like to
23 have a complete record from Mr. Phillips and Mr. Herr in
24 the field when they first see it, all the way up to Mr.
25 Dircks, before Congress after he's seen it, and that that

1 record to be complete needs the testimony of Mr. Reis
2 and/or Mr. Gutierrez. We don't have a clear enough fix
3 on exactly who Mr. Sells talked to to know which one is
4 the more appropriate witness.

5 JUDGE BECHHOEFER: Is that consistent with
6 regard now only to the staff; is that consistent with the
7 exceptional circumstances requirement which the rule, I
8 believe, imposes on all staff witnesses?

9 MR. SINKIN: That's very much one of our
10 arguments for the other staff witnesses as well. In
11 order to have a complete record of how the NRC personnel
12 responded when they saw Quadrex, we would want all those
13 witnesses that we named.

14 JUDGE BECHHOEFER: Doesn't the rule anticipate
15 that there might be a number of people in the staff who
16 could address a question and that the executive director
17 or at least the staff may designate whoever it chooses to
18 address that, the information has to be unique?

19 MR. SINKIN: I guess what I'm saying, is the
20 unique part of the information is how each individual
21 responded, that Mr. Sells cannot testify how Mr. Herr
22 responded when he saw the Quadrex report; that each of
23 them provides a unique piece of testimony as to how their
24 individual -- how they individually reacted when they saw
25 the Quadrex report.

1 I think the purpose of the rule is more aimed
2 at technical kind of questions than it is at questions of
3 whether there was a conspiracy or what were impressions
4 of people in a 24 hour period. I don't think the rule
5 was intended for those kind of things.

6 I think it was intended to say that if the
7 staff wants to present witness X on whether this plant
8 can withstand a hurricane then I am not allow to call
9 witness Y within the NRC on whether this plant is
10 designed to withstand a hurricane. But that's the
11 purpose of the rule.

12 So we can't go marching through calling the
13 witnesses from the NRC on a technical issue. This is
14 very much not that kind of hearing. While Mr. Reis would
15 like to characterize this as a technical issues hearing,
16 it is by no means a technical issues hearing.

17 We're not here to discuss the substance of each
18 technical finding in the Quadrex report and whether it's
19 accurate, inaccurate and that sort of thing. We're here
20 to discuss whether HL&P should have turned the Quadrex
21 report over to the NRC.

22 Our case, in part, is that if you look at the
23 reaction of NRC people who saw it, then you know they
24 should have turned it over and that we're entitled to
25 have the evidence from those people of how they reacted.

1 The NRC has not made quite clear on one of their
2 arguments, whether they refer to themselves.

3 But they state in a footnote on Page 3 of their
4 filing, that cases involving the calling as a witness of
5 a parties attorney by an adverse party have mainly
6 involved criminal matters, where defendants subpoenaed
7 the prosecuting attorney.

8 However, as a practical matter, much of the
9 rationale for not calling prosecuting attorney in
10 criminal cases would also apply to adverse attorneys in
11 civil cases. Now, I don't know if Mr. Reis is
12 characterizing himself and Mr. Gutierrez as adverse
13 parties, attorneys for adverse parties in this
14 proceeding. And that might make some difference as to
15 whether we felt that particular argument even applied.
16 But I don't think in an administrative hearing setting,
17 before the Nuclear Regulatory Commission, that you'd have
18 the same kind of argument applying, because the staff is
19 here to provide this board with a complete record.
20 That's why they're hear.

21 And if they have information about what went on
22 in the NRC response to the Quadrex report, they have an
23 obligation to provide it to the Board, whether they are
24 adverse to us or not. As with the Applicant, many of the
25 cases cited by the NRC staff -- strike that.

1 JUDGE BECHHOEFER: Mr. Sinkin?

2 MR. SINKIN: Yes..

3 JUDGE BECHHOEVER: Taken together collectively,
4 the cases cited both by the staff and the Applicant, do
5 you not read those cases as saying that there has to be
6 something more than mere relevance to a party's case,
7 that there should be the compelling need or absolute
8 necessity as the standard that should be applied, perhaps
9 to find out first what the other witnesses, other than
10 attorney witnesses, would say, and then thereafter, if
11 there appears to be a gap, perhaps the attorneys would be --
12 should be called.

13 MR. SINKIN: We obviously have the gap already.
14 There's no one besides Mr. Reis or Mr. Gutierrez, and Mr.
15 Newman to some extent, but let's focus on Mr. Reis and
16 Mr. Gutierrez, look can testify as to why they made the
17 decision to call Houston Lighting & Power and tell them,
18 "Either you turn the Quadrex report over to the licensing
19 board or we will," and what the reaction of Houston
20 Lighting & Power was when they called. There are simply
21 no other witnesses who can testify to that. So the gap
22 is already there. I'm just trying to fill it.

23 JUDGE BECHHOEFER: Well, of course the staff,
24 you know, has provided its views in McGuire, and they
25 took the view that it should have been turned over. Now,

1 if you couple that with perhaps a stipulation or perhaps
2 there will be other witnesses who testify to the fact of
3 who turned it over, and who recommended it, would not
4 that be an adequate record on that particular point?

5 MR. SINKIN: That still doesn't provide us with
6 the reaction of Houston Lighting & Power, the actual
7 interaction between Mr. Sells and Mr. Newman, which is a
8 measure of the character and competence of Houston
9 Lighting & Power.

10 JUDGE BECHHOEFFER: I don't think you meant
11 Sells.

12 MR. SINKIN: Did I say Sells? Excuse me, Mr.
13 Reis and Mr. Newman.

14 I should also cover, by the way, Mr. Chairman,
15 Mr. Lieberman, since part of the argument is about
16 calling Mr. Lieberman who's also an attorney at the
17 Nuclear Regulatory Commission.

18 The position of the NRC is that his testimony
19 is not necessary, and that the designated NRC witnesses,
20 I have failed to show that the designated NRC witnesses
21 cannot testify to the matters specified from Mr.
22 Lieberman. Well, the fact is the matters I wish to
23 question Mr. Lieberman about are not in the NRC's
24 testimony. We want to question Mr. Lieberman about if
25 there was a finding that the Quadrex report should have

1 een turned over pursuant to 50.55 (e), what does that
2 trigger as an enforcement action by the NRC, because that
3 is the measure of character and competence. And we
4 wanted Mr. Lieberman to come to testify to that and the
5 NRC has not offered anybody else who has offered any
6 testimony on that point.

7 JUDGE BECHHOEFER: Why could not one of the
8 staff witnesses who are involved with various categories
9 of violations be able to testify as to what their view of
10 that -- that hypothetical, certainly, but what their view
11 of that would be?

12 MR. SINKIN: Well, all of the witnesses
13 provided by the Nuclear Regulatory Commission are taking
14 the position that there was no violation. To ask them to
15 then imagine that there was and tell us what the
16 enforcement action would be, I think is a very
17 unsatisfactory way.

18 So we were calling a more objective witness
19 whose job is to write -- receive comments upon, do a
20 final revision of and publish in the Federal Register the
21 enforcement policies of the Nuclear Regulatory Commission
22 and get an objective view from him as opposed to the
23 already tainted view in a sense of the NRC witnesses who
24 don't believe it should have been reported.

25 MR. REIS: Mr. Chairman, I didn't have an

1 opportunity to speak to Mr. Lieberman at all.

2 JUDGE BECHHOEFER: You haven't had an
3 opportunity to speak to anything, yet, except for my
4 limited question at the start.

5 MR. REIS: I just didn't want you to get ahead
6 of me.

7 JUDGE BECHHOEFER: No, no, no. Mr. Sinkin, you
8 want do proceed or is this your --

9 MR. SINKIN: My thought was that since the
10 arguments are rather different, that we had would the NRC
11 attorneys first and complete argument by all parties on
12 that and then do Houston Lighting & Power attorneys.

13 JUDGE BECHHOEFER: I think that's a good idea.
14 Have you finished with the NRC people now?

15 MR. SINKIN: I have.

16 JUDGE BECHHOEFER: Okay, Mr. Reis.

17 MR. REIS: Mr. Chairman, taking myself first,
18 certainly there's no showing of exceptional circumstances
19 which is doubly required here, because I am an attorney
20 and was a counsel in this proceeding.

21 JUDGE BECHHOEFER: You might be one of the best
22 witnesses we could ever get.

23 MR. REIS: And there's also 2.720H.

24 Certainly, from what we hear from Mr. Sinkin,
25 anything I have can be gotten from Mr. Sells who will be

1 testifying here as to this. The other thing is the
2 reactions of NRC people certainly my reaction was not at
3 that time to 50.55(e), it was to McGuire, and I don't see
4 where they're material. I still don't understand the
5 materiality, whether you picked in 25 people off the
6 street or who you went to, on this, we have technical
7 issues involved.

8 So we're looking at the Quadrex report, whether
9 it writes as a technical matter as to whether heating and
10 air conditioning or whether welding or whether pipe
11 joints or whether pipe restraints or whether the programs
12 or whether the proper consideration, whether they were
13 doing it right were technical questions and those even
14 within 24 hours can be looked at from a technical point
15 of view.

16 We have questions of fact about whether those
17 should have been reported. Certainly the reaction of
18 various people at various times, we'd have to go into how
19 much information they had, and how deep they went into
20 it, and whether -- what was their engineering degree, and
21 what they knew.

22 Those things get us off into areas far removed
23 and irrelevant to this proceeding. And certainly not
24 material and not material fact not known to other people
25 in the sense of which the regulation is written, and the

1 regulation by the way is binding in this situation as in
2 all other situations.

3 JUDGE BECHHOEFER: Mr. Reis, do we have on the
4 record, or what's proposed to be put in the record, any
5 sort of link in the chain which says that the report was
6 only turned over to the Board after you talked to Mr.
7 Newman. Well, Mr. Sells talked to you, he'll say that.
8 And is there anything in the record that says that you or
9 Mr. Gutierrez, whatever, talked to Mr. Newman, that that
10 fact -- because that's what I was working at when --
11 trying to inquire whether that would be a stipulation.

12 MR. REIS: I am willing to stipulate here in
13 the record and I'm not sure it is material, but I'm
14 willing to stipulate to shorten the proceeding, that I
15 talked to Mr. Newman and Mr. Alexrad and I don't know --
16 I'm sure I talked to to Mr. Axerad. I think Mr. Newman
17 was there -- and said, "This has come to my attention. I
18 think this should to go the Board under the McGuire
19 rule."

20 They at that point said, "Let me take a little
21 time to look at this and check into this."

22 And then shortly thereafter, they turned it
23 over to the Board. Now, I think that's all that's
24 necessary for the record. And I will stipulate to it,
25 and as far as I know, I think Mr. -- Now, whether that

1 was the motivating force for turning it over, of course I
2 can't say.

3 JUDGE BECHHOEFER: We wouldn't ask you to.

4 MR. REIS: I'm telling you are the facts, those
5 are the facts and I think other people will stipulate to.

6 Mr. Chairman, that subject was mentioned in the
7 representations that we made to the Board at the time I
8 believe the October prehearing conference. And the
9 testimony of Mr. Goldberg and Mr. Oprea, I believe, will
10 refer to the fact that the report was turned over to the
11 Board after that suggestion had been made by counsel from
12 the staff to counsel for Applicants.

13 So not only is it contained in what we said
14 previous prehearing conference but it's also contained in
15 the testimony of the Applicants; therefore, we have no
16 compelling necessity, the words "exceptional,
17 circumstances, absolutely necessary, unavailable from
18 other sources," none of this is present here, as to what
19 he want the testimony from me. As far as Mr. Gutierrez,
20 the same goes there. And we don't have anything.

21 As to Mr. Lieberman, it's much like calling the
22 district attorney to ask him what the law is and whether
23 he would have done it or what his enforcement policies
24 are. Usually, that isn't done and it's very improper.
25 And that's what I hear Mr. Sinkin saying he wants Mr.

1 Lieberman there for. Mr. Lieberman was, I believe at
2 that time, in the material time we're talking about here,
3 deputy director of of the NEOID, assistant chief counsel
4 of enforcement OEID, and that's what he wants to talk
5 about, is enforcement policy. It isn't proper in any
6 proceeding to call the attorney or the district attorney
7 to talk about what your enforcement policy is. It isn't
8 an exceptional circumstance, it isn't absolutely
9 necessary, it just isn't relevant to the proceeding.

10 Is it likely that the staff witnesses who are
11 testifying on 50.55(e) reportability would be able to
12 assign on a hypothetical basis what category of violation
13 failure to make an adequate 50.55(e) report would fall
14 into in. I am sure our witnesses could do that. They're
15 the once who enforce it and do it every day in the field.
16 And further, we have, of course, IE 82-02, which deals
17 with two failures to make 50.55(e) reports to the
18 commission on particular matters in the Quadrex report.
19 And in the sense of our talking about that, that could be
20 addressed.

21 MR. SINKIN: Mr. Chairman, I'd like to respond
22 to some of what Mr. Reis said.

23 JUDGE BECHHOEFERA: All right.

24 MR. SINKIN: First of all, as to what the facts
25 that he just laid out as to his interactions with now it

1 seems Mr. Axelrad primarily rather than Mr. Newman, it
2 was characterized by both Mr. Reis and Mr. Axelrad as a
3 suggestion that the report be turned over to the Board.
4 And we're not prepared to let the record stand that way.

5 We think that at that time, Mr. Reis made it
6 clear that if the Applicant did not give Quadrex to the
7 Board that the NRC staff would give Quadrex to the Board
8 and that there was no option given to HL&P to consider it
9 as a suggest and do it or not. But that's the way it's
10 now be characterized in the record and I think that
11 points out why cross examination brings out what really
12 went on as opposed to what the parties feel like saying
13 today.

14 As far as doing -- as far as doing hypothetical
15 examples with the staff being called as to what the
16 enforcement policy would be, I don't think you can remove
17 them from the fact that they are a part of a case in
18 which they have taken the position that this report did
19 not have to be turned over and that therefore anything
20 they say about enforcement, if they had found it should
21 have been turned over, they will have to minimize in
22 order not to contradict the essence of their testimony.

23 MR. REIS: Mr. Chairman, I also want to call
24 the Board's in connection that the staff protections that
25 are really in the Freedom of Information Cct, but which

1 applies to this testimony as well as to documents, as to
2 matters with Mr. Lieberman and also interagency memoranda
3 and advice to superiors. And if that's going to try to
4 be probed, that is also privileged.

5 JUDGE BECHHOEFER: Mr. Sinkin.

6 MR. SINKIN: There's no requests for any of
7 that.

8 JUDGE BECHHOEFER: With respect to staff
9 attorneys, we've made a decision anyway. We are going to
10 withhold any judgment with respect to Mr. Reis only until
11 after all the testimony of all the parties on this
12 particular subject is in. And then we will see whether
13 we think there's any urgent necessity or any necessity
14 for Mr. Reis to testify. We are going to deny the
15 requests for Mr. Gutierrez and Mr. Lieberman. We think
16 that -- first we think that if we need any attorney at
17 all, Mr. Reis would be able to testify to what --
18 anything Mr. Gutierrez could testify to.

19 But with Mr. Lieberman, we think the other
20 staff witnesses who are called on 50.55(e) matters will
21 be -- can be questioned certainly as to the severity of
22 violation, if we should -- if it should be found that
23 50.55(e) did call upon the Applicant to submit either the
24 Quadrex report in its entirety, or other significant
25 findings prior to the time it actually did.

1 I think other staff witnesses can address the
2 potential severity or what types of action the staff
3 would take. These are persons who are charged in their
4 day-to-day activities with I want to say enforcing
5 50.55(e), but making sure that the provisions of that
6 section are complied with; the various -- I'm going to
7 use the word audits, I'm not sure is correct, but they --
8 the audits that the staff performs partially take that
9 into account, at least. We think the other witnesses
10 will be able to address that subject.

11 MR. REIS: Mr. Chairman, in that connection,
12 the staff will reserve its objections until those
13 questions are propounded. As to the relevance of those
14 matters, either as to the nature of the severity, as to
15 what staff practice is, as to other licensees, as to
16 questions whether we're asking witnesses to testify as to
17 questions of law, because Appendix B B sets out the
18 severity levels and what authorities are and those might
19 be well questions of law that witnesses are not required
20 to testify as to or it's not proper to have witnesses
21 testify to, and we'll reserve all those objections when
22 these questions are propounded.

23 JUDGE BECHHOEFER: We were just noting that one
24 of Mr. Sinkin's statements had described a failure to
25 report as a, I think a, a Category I violation, failure

1 to report the Quadrex report, and we would think that
2 perhaps some of the staff witnesses could answer
3 questions concerning whether that degree of severity or
4 some lesser degree would be applied, assuming there were
5 to be a violation.

6 MR. REIS: Assuming it to be relevant, also.
7 We certainly don't feel -- we feel that this is going off
8 on a tangent, not directly looking at the issues. And we
9 would have great -- we will argue at that time, if those
10 questions are propounded, as to relevance. We don't
11 think they have to be made now and I don't intend to go
12 into the argument now.

13 JUDGE BECHHOEFER: What we were dealing with
14 was the expertise of the particular persons to answer the
15 questions.

16 MR. REIS: Right.

17 JUDGE BECHHOEFER: And we do anticipate that if --
18 assuming the questions were relevant and material, they
19 could be answered by persons already designated by the
20 staff.

21 MR. REIS: Thank you, Your Honor.

22 JUDGE BECHHOEFER: That is what our ruling
23 amounts to. Let's get into the Applicant attorneys.

24 MR. SINKIN: Mr. Chairman, responding to the
25 Applicant memorandum concerning the permissibility of and

1 need for calling certain attorneys, first of all, we did
2 address this whole problem of attorneys being called
3 earlier when we were suggesting that the attorneys for
4 HL&P actually were disqualified. HL&P made a decision
5 that the attorneys would not be removed, would be be
6 retained as their attorneys at that time.

7 Now we're discussing on whether in fact they
8 will be called as witnesses. As a preliminary matter, we
9 think that the very memorandum filed by the Applicant
10 reinforces some of the concerns we expressed earlier.
11 For example, although the Applicant doesn't appear to
12 perceive it, the testimony of their attorneys could well
13 be prejudicial to their client. At page 13 of their
14 pleading, they're not sure why it would be material that
15 the client never approached the Applicant -- they were
16 never approached by HL&P personnel, to give an opinion on
17 whether 50.55 (e) or the McGuire rule required turning
18 the Quadrex report over to the NRC staff or the ASLB.

19 And they state that they don't -- it's far from
20 apparent whether these facts are material. Well, in
21 fact, if their testimony were going to be that no one in
22 HL&P ever asked them for an opinion about 50.55 (e) or
23 the McGuire rule in relation to the Quadrex report, that
24 could well reflect on the competence of the people at
25 HL&P in not having asked for some advice when they had a

1 very controversial report in front of them, so that their
2 testimony could well be prejudicial to their client.

3 In addition, in the pleading, we have it signed
4 by Mr. Newman. And this puts it right into the very
5 problem raised by the Ethyl considerations where one of
6 the problems is arguing your own credibility, that Mr.
7 Newman is here having to write a pleading which says that
8 "My previous representations to the Board are true and
9 accurate and correct, and there's no further need to
10 delve into them."

11 He has been put in the position of having to
12 argue his own credibility which we just note is exactly
13 the kind of problem that was raised in the Ethyl
14 considerations.

15 There are potentially undesirable consequences
16 of calling an attorney as a witness, and we recognize
17 that this is a very unusual request, and not often done.
18 Some of the consequences cited by the Applicant, however,
19 stem from the fact that they have chosen to retain as
20 their attorneys in this licensing hearing lawyers who may
21 be called as witnesses.

22 In their brief on the question of the propriety
23 of continued representation that was filed for the
24 prehearing conference back in April 30, the Applicant
25 specifically indicated they were willing to have the

1 licensing attorneys remain on the case even under these
2 circumstances. Any adverse consequences flowing from the
3 decision to keep an attorney as your counsel who also
4 becomes a witness trace back to that decision by the
5 Applicant.

6 One area that permeates the response of the
7 Applicant to this question of whether they should be
8 called, is advice given by counsel. Obviously that's the
9 most protected area of the whole attorney-client
10 privilege, that someone should be free to go an
11 attorney to seek advice, receive that advice and know
12 that that advice is kept confidential and that all the
13 communications are kept confidential.

14 And they claim complete privilege in this area.
15 We have two responses to that. First, if the advice of
16 counsel is that the client should deliberately withhold
17 information that the Applicant and the attorney are
18 obligated to provide, then counsel is acting as a
19 co-conspirator rather than providing legal advice.

20 And I realize Mr. Reis is addressing, I'm sure,
21 my use of the word conspiracy when he talks about buzz
22 words and repeating the word "conspiracy" doesn't make it
23 true, I realize that.

24 But the essence of our allegation is that there
25 was a conspiracy, a continuing conspiracy; so I will

1 continue to use the use the term knowing that you will
2 full well be able to evaluate whether it has any meaning
3 or not.

4 There are two points we focus on, regarding
5 this possibility of a deliberate withholding of
6 information being the basis of the discussion. The first
7 point is that there's a separate obligation clearly under
8 the McGuire rule for an attorney to reveal information to
9 this board which could possibly influence its decision.
10 This creates a different situation than the normal
11 attorney-client relationship. If the attorney is
12 advising the client not to produce a report or testify
13 during a hearing regarding a report, in order to conceal
14 an impropriety by the attorney, a failure to turn over
15 the report to the Board, then the normal attorney
16 advisory role is tainted by the attorneys self interests,
17 rather than being covered by the interest of the client.

18 Second, if the attorney is indeed acting as a
19 co-conspirator with the client, then the attorney is is
20 subject to discipline by this Board. There is no
21 privilege to hide behind a claim of privilege in the
22 giving of legal advice if the purpose of that advice to
23 is to committ an act which places both the client and the
24 attorney in a position of violating the law. We consider
25 a conspiracy to withhold very significant information

1 from the NRC as a potentially indictable offense for
2 obstructing the NRC from conducting its Congressional
3 mandated duties of no claim of confidentiality should bar
4 this board from inquiring whether such a conspiracy
5 indeed took place.

6 These two points highlight why the normal
7 reluctance to attorneys being called as witnesses must be
8 set aside here. This is not a question of legal
9 theories, advice or litigation strategy; the question is
10 was there a conspiracy, and the attorney is a material
11 and necessary witness on that point. Our second major
12 response to the argument of privilege for attorneys
13 advice, is that if we are to believe the representations
14 of the attorneys and their clients, there was no advice
15 given.

16 Almost all of the citations provided by
17 Applicant address cases where a meeting was held or a
18 client attorney relationship was sought or advice was
19 given. According to Applicant witnesses and their
20 attorneys, that is not the case here. Their claim is
21 that no communication took place which constituted
22 seeking of advice or the giving of advice on the
23 requirements of 50.55 (e), or the McGuire rule as those
24 requirements applied to the Quadrex report.

25 There is thus on the face of it, no question of

1 legal advice or attorney-client privilege, or attorney
2 work product, and all the arguments by Applicant to these
3 points are irrelevant given their representations.

4 At the same time, we cannot know to whom, other
5 than the witnesses produced by Applicant, these attorneys
6 may have given advice regarding Quadrex or 50.55 (e) or
7 the McGuire rule. Only the attorneys know whether they
8 spoke about the Quadrex report with other company
9 officials other than those produced. And the witnesses
10 produced by the Applicant are not competent to testify
11 that Mr. Newman did not talk to someone other than
12 themselves about this problem or that Mr. Gutterman or
13 Mr. Axelrad did not. So that just calling the HL&P
14 witnesses that are being called on this point does not
15 exhaust the possibilities that is there was
16 communication.

17 The only way that a privilege could now be
18 asserted is if the Applicant and the attorneys now wish
19 to change their representations and say advice was
20 sought. Such a change at this point would contradict
21 their prior representations and be further evidence of a
22 conspiracy that's been going on for some time.

23 There would also be a paradox created here.
24 The applicants would be arguing first that if they gave
25 no advice then their testimony is cumulative of the

1 Applicant witnesses" testimony to this effect and
2 therefore they should not be called. But if they did
3 give advice, then this advice is privileged then they
4 should not be called.

5 Their argument then is that attorneys should
6 never be called. Turning to the cumulative argument and
7 I think this is to a great extent the heart of what their
8 saying, besides the attorney-client privilege, the
9 allegation is conspiracy. That some of the
10 co-conspirators should present testimony that another
11 co-conspirator did not conspire with them does not make
12 the testimony of that second group cumulative, the second
13 group being those that have not testified.

14 Co-conspirators cannot rely on the fact that
15 their pretrial positions agree that their was know
16 conspiracy, in order to argue some of them should not be
17 called to testify. CCANP has specifically sought to call
18 the attorneys and have them sequestered because only
19 under such circumstances can all the alleged
20 co-conspirators be cross-examined in an effort to
21 demonstrate inconsistencies without providing any of them
22 the opportunity to harmonize their testimony with what
23 has already be said.

24 As to whether CCANP has evidence that there was
25 a conspiracy, we contend that the nature of the Quadrex

1 report and the failure to report more than three of the
2 findings or the entire report to the NRC staff pursuant
3 to 50.55 (e) or to turn the report over to the Board
4 constitute prima facie evidence, we know that Mr.
5 Gutterman did talk to Mr. Goldberg about the Quadrex
6 report and 50.55 (e), and that that there was some
7 contact, at least, by the -- we know that on May 7, 1981,
8 Applicants attorneys were in Houston, preparing for the
9 licensing hearings.

10 Their Star witness was Mr. Goldberg. Mr.
11 Goldberg is going through an agonizing day and night
12 process of evaluating the Quadrex report for whether it
13 should be turned over, the 50.55 (e) reports made or
14 whatever; yet they would have us believe that at no time
15 during that period did any of them talk about that.

16 We don't find that credible.

17 (No hiatus)
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1 MR. SINKIN (Cont'd): There's also the failure
2 to testify that took place in Phase I --

3 JUDGE BECHHOEFER: Mr. Sinkin, though --

4 MR. SINKIN: Yes.

5 JUDGE BECHHOEFER: Can't you explore that to
6 some degree on cross-examination of Mr. Goldberg?

7 MR. SINKIN: The only problem we have, Mr.
8 Chairman, is if the allegation is conspiracy, we think
9 we're entitled to test that conspiracy allegation
10 through all of the co-conspirators. Not just take one
11 of them who could be real good at stonewalling, but have
12 access to all of them so that there would be the
13 opportunity for them to contradict each another or let
14 something slip or whatever. That's the whole purpose of
15 cross-examination in the adversarial process is to give
16 an opportunity for each side to elicit from the
17 witnesses of the other side information that might be
18 contrary to their position. And if Mr. Goldberg is the
19 only one to be provided, then all they have to do is be
20 sure that what he says is what he says and there's no
21 opportunity through a sequestered witness who hasn't
22 heard what he says to test whether what he said was
23 really accurate.

24 I was going to touch for a moment on the
25 question of failure to testify on the Baker & Botts

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1 attorneys being called. It was somehow cited, the
2 failure to testify on page seventeen of the testimony,
3 as an argument for not calling the attorneys. We are
4 arguing that the failure to testify about the project is
5 precisely the argument to call for attorneys and it fits
6 back into our earlier argument about the McGuire Rule,
7 the obligation of the attorneys to keep the licensing
8 Board informed, and brings us even closer to home
9 because here are the attorneys who prepared the prefile
10 testimony that was put before the Board, there was no
11 mention of Quadrex in it, the fact that it had been
12 commissioned, it was underway or anything of the sort,
13 who listened to the testimony of Mr. Goldberg or
14 reviewed it later in Phase I and all the other
15 witnesses, Mr. Jordan, Mr. Oprea, Mr. Frazar, and knew
16 that there had been no mention of Quadrex, and yet took
17 no steps to inform this Board or the parties. They did
18 not attempt to amend the prefile testimony when Quadrex
19 came in a week before the hearings began. They did not
20 attempt to amend the prefile testimony at any time
21 during the hearings, nor after the hearings closed they
22 did not file to reopen the record and present the
23 Quadrex report as evidence. They are in a similar
24 situation of potential co-conspirators who, while
25 advising the witnesses on what to testify about, may

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1 have slipped over into participating in a decision that
2 would be a violation of NRC regulations and not a matter
3 that is covered by confidentiality because they have
4 become co-conspirators.

5 Furthermore, in the face of the prima
6 facie evidence, the fact that there was no discovery
7 given on the issue of the independent duty of the
8 attorneys under the McGuire Rule has hampered us to some
9 extent in developing the evidence to date. The Board
10 discovery order covered only documents and on this
11 question there wasn't a single document produced from
12 the 1981 period. There were no opportunities for
13 depositions. So, cross-examination is the only
14 available technique for CCANP to explore.

15 JUDGE BECHHOEFER: Right. I might say there
16 were opportunities for depositions sometime ago and they
17 weren't taken.

18 MR. SINKIN: We were -- an issue was not the
19 independent duty of attorneys to report to the Nuclear
20 Regulatory Commission on the McGuire Rule.

21 JUDGE BECHHOEFER: I thought the reportability
22 of the Quadrex report had been an issue for sometime.

23 MR. SINKIN: Well, obviously it had, but it
24 had been a question of should HL&P have turned the
25 McGuire -- should HL&P have turned the Quadrex report

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1 over to the NRC under the McGuire Rule and you have
2 ruled on that as a matter of law, yes, they should
3 have. There was not a question at that time as to
4 whether the attorneys had, in fact -- what, in fact,
5 they had done.

6 Part of what you have to do, I think, in this
7 proceeding is decide whether your enforcement powers
8 over attorneys are activated by the actions of the
9 attorneys regarding the Quadrex report. And you can't
10 really know what they did if all you rely upon are their
11 representations made here without cross-examination. I
12 think it's a perfect example when Mr. Reis and Mr.
13 Newman are perfectly willing to say that Mr. Reis
14 suggested to Mr. Newman that the Quadrex report be
15 turned over to the Board and Mr. Newman agreed to the
16 suggestion. That's the kind of thing you've got. It
17 minimizes the fact of Mr. Reis' reaction, Mr. Newman's
18 reaction, what the real situation was and on real
19 cross-examination that would be brought out. And we
20 feel that cross-examination in this proceeding is the
21 appropriate way of exploring what really happened.

22 Now, if there was a conspiracy and the
23 Applicants and their attorneys have hidden it well to
24 date, then in a full hearing under the conditions set
25 forth by CCANP in its motion to call the attorneys and

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1 its motion to sequester them, the truth may emerge.

2 This is a far better test --

3 JUDGE BECHHOEFER: Can we take into account,
4 though this is more in line with sequestration so
5 perhaps I should hold it, but should we take into
6 account that the attorneys are officers of the court or
7 Board and are expected and presumed to tell the truth
8 and are also expected or presumed to reveal to the Board
9 any matters that are relevant, material to what's going
10 on --

11 MR. SINKIN: Well, then --

12 JUDGE BECHHOEFER: -- with the issues in
13 question?

14 MR. SINKIN: Well, then in a sense a complaint
15 could never be brought because the complainant would
16 come before the Board and say attorney X is guilty of Y,
17 attorney X would say no, I'm not and the Board would
18 have to say, fine, we have to believe attorney X and
19 therefore there's nothing to be heard. That's the
20 problem.

21 JUDGE BECHHOEFER: Would there be a difference
22 if there was some convincing showing that there might be
23 a problem in what the attorney advised a client?

24 MR. SINKIN: Well, we think there is a
25 convincing showing by the very fact that you have ruled

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1 that as a matter of law the McGuire Rule was violated.
2 The attorneys have already been found to have violated a
3 requirement of the NRC. That already --

4 JUDGE BECHHOEFER: Well, is that misconduct or
5 is that a mistake of judgment which --

6 MR. SINKIN: How do we know until we ask them?
7 How do we know until we go through some rigorous
8 cross-examination and we see what kind of answers they
9 give as to the decision making process that went on?

10 JUDGE BECHHOEFER: Well, to pass just the fact
11 of the attorney over to the Board may or may not be a
12 question of legal advice to the conspiracy, don't we
13 need something more to show that there was a conspiracy
14 before we act on the assumption that there was?

15 MR. SINKIN: When you have a violation of law
16 where one party, one individual had a responsibility to
17 observe the law and you know that there were other
18 individuals involved in that same violation, we think
19 you have a prima facie case of conspiracy that on its
20 face there is an inference of conspiracy that then you
21 can test in an administrative hearing through
22 cross-examination of such witnesses.

23 JUDGE BECHHOEFER: Are you familiar with the
24 Midland case where the question of some of Dow Chemical
25 Company's intentions was raised and there was

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1 allegations and actually a rather extensive hearing on
2 whether the attorneys participated in that, I don't know
3 if that was called a conspiracy, but something akin to a
4 conspiracy? Are you familiar with that proceeding at
5 all?

6 MR. SINKIN: I'm not familiar with that
7 altogether, but if I remember what I --

8 JUDGE BECHHOEFER: To the extent that you
9 might know what evidence in question really caused there
10 it was the Commission to demand that the attorneys be I
11 won't say investigated, but that a hearing be held?

12 MR. SINKIN: No, I don't know what evidence
13 triggered that decision by the Commission.

14 If I could just conclude my argument and then
15 I suspect there will be some responses.

16 JUDGE BECHHOEFER: Right. I'm going to ask
17 the other parties that same question.

18 MR. SINKIN: The Board has an obligation to
19 enforce certain standards of performance on attorneys.
20 To fulfill that duty, the Board should permit full
21 inquiry in an adversarial process to test the to date
22 untested representations of evidence.

23 We are not in a criminal or a civil trial
24 setting, this is an administrative hearing. As an NRC
25 proceeding, there is a special and unusual obligation on

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1 Applicants to produce information even if adverse to
2 their case. In fact, the NRC relies to a great extent
3 on the Applicants producing what is clearly adverse
4 information. That's in part what McGuire is all about.
5 Even if it's bad for you, give it to us, let us decide
6 what it means. With that special obligation comes a
7 heightened responsibility and when that responsibility
8 has been found as a matter of law by this Board to have
9 been violated, the Board has an obligation to inquire
10 thoroughly into how this violation happened.

11 The Board is also especially charged in this
12 proceeding with the issue of character and competence.
13 And if the evidence emerges that the attorneys were
14 conspiring with management, that has a great deal to do
15 with the character of Houston Lighting & Power and it is
16 obviously relevant to a central issue of this
17 proceeding. So, our basis is that you don't have
18 sufficient information at this time to know and that the
19 way to get that information is to call the attorneys,
20 sequester them and have them be subject to rigorous
21 cross-examination.

22 That concludes my argument.

23 JUDGE BECHHOEFER: Mr. Axelrad, I guess.

24 MR. AXELRAD: Yes. Mr. Chairman, I would like
25 to perhaps summarize the arguments that we have made

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1 before in our briefs just to make sure that the Board
2 has it all in mind.

3 If I may respond first just to what has been
4 the thrust of Mr. Sinkin's arguments, and we firmly
5 believe that his arguments are a sham. He continually
6 refers to a conspiracy and has produced not the simplest
7 element of evidence that any conspiracy took place. He
8 relies solely upon, I guess, the nature of the document
9 itself is what he referred to in the early part of his
10 discussion, and then to the Board's determination that
11 the McGuire Rule was violated as evidence of a
12 conspiracy. There is obviously no logic to that
13 argument at all.

14 If Mr. Sinkin had thought that there was some
15 kind of conspiracy afloat, he had ample opportunity to
16 examine that in the course of discovery which he had
17 ample opportunity to do since the Phase II proceeding
18 was begun. And he has undertaken discovery but produced
19 no information whatsoever in support of any conspiracy
20 by any officials of HL&P, let alone any conspiracy
21 involved in its lawyers. He has concocted this argument
22 to evade what is a clear issue both before this agency
23 and before the court.

24 The calling of attorneys as witnesses is
25 something which is done only if there is a compelling

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1 need to do so. There is ample reason why the legal
2 system frowns upon the calling of lawyers. The calling
3 of lawyers would very likely produce undesirable
4 consequences, such as divulgence of client confidences
5 or exposure of legal tactics or strategy or, as the case
6 in these particular circumstances, the harassment of a
7 client by his attorney by attempts to disqualify him or
8 to impair his ability to represent his clients. That is
9 illustrated by the sequestration motion which we will
10 next discuss.

11 JUDGE BECHHOEFER: All right. Mr. Axelrad, do
12 you have any comments on the Midland case that I
13 mentioned in a question to Mr. Sinkin? I might say --

14 MR. AXELRAD: Could you give us a citation to
15 that? I believe we have it.

16 JUDGE BECHHOEFER: Well, I'll give you two or
17 three. The one that I've got before me is LBP 8163, 14
18 NRC 1768. That's the licensing Board decision. The
19 Board was reversed on some of its rulings by the Appeal
20 Board in ALAB 691, ALAB being A L A B all caps, 691, 16
21 NRC 897.

22 MR. AXELRAD: Well, we have the --

23 JUDGE BECHHOEFER: And then the Commission
24 issued a very short statement on that case, CLI 8382, 17
25 NRC 69. For what it's worth, I have Xerox copies of the

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1 relevant portions of all these decisions with me, but
2 only one.

3 MR. AXELRAD: Well, we have a copy of those
4 materials also, but I must admit I have not looked at
5 that case recently. If there's a specific page that the
6 Chairman might refer me to?

7 JUDGE BECHHOEFER: Well, page 1774 of the LBP
8 8163.

9 MR. AXELRAD: No, I'm sorry, Mr. Chairman, all
10 I have is ALAB 691. I do not have the other decisions.

11 JUDGE BECHHOEFER: Hold on. Off the record
12 for a second.

13 (Discussion off the record.)

14 JUDGE BECHHOEFER: On page 903 of ALAB 691, it
15 indicates what I was really referring to was notes taken
16 by a Dow attorney of meetings with Consumers' attorneys
17 indicate a desire of the latter to finesse the dispute
18 with Dow if no intervenors appeared. Do you know how
19 those notes -- what those notes said and how they got --
20 how they were revealed? Because I have no idea myself.
21 And when we get to the Staff, I'll ask the Staff, too.
22 I'm not sure.

23 MR. AXELRAD: Mr. Chairman, I really do not
24 have the firsthand information of that subject. I do
25 note that these were notes taken by a Dow attorney of

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1 meetings with Consumers' attorneys. Dow was a separate
2 intervenor in the proceeding. I would believe that
3 notes taken of meetings between two parties might not
4 have been privileged.

5 I have a vague recollection that to the extent
6 that the lawyer's own materials pertaining to dealings
7 with his own client, that the privilege for that was
8 upheld. As a matter of fact, I think this is the very
9 case where the licensing Board had determined that a
10 lawyer's attempt to protect its privilege, the early
11 drafts of testimony was not, in fact, privileged. And
12 the Appeal Board, I think, in reversing the licensing
13 board made it very clear that materials of that type
14 were privileged under the attorney work product. So, I
15 think that the Appeal Board decision, as I recall it,
16 affirmed the views that I would have with respect to the
17 propriety of asserting a privilege with respect to
18 either communications under attorney/client privilege or
19 with respect to work product under work product
20 privilege.

21 JUDGE BECHHOEFER: And my next question to you
22 is do you know, you may not either and I wasn't able to
23 find out by doing a lot of research, whether any -- my
24 calculation shows that of fourteen witnesses in that
25 case, eight of them were attorneys, one of whom was an

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1 attorney -- one of those eight was not an attorney at
2 the time of the hearing but had been an attorney at the
3 time of the events occurred. But there were eight of
4 the fourteen witnesses were attorneys and what I
5 wondered was what facts, if any, distinguish that from
6 this proceeding. Those attorneys included such as Mr.
7 Weisel who was Dow's lead counsel, several other names I
8 can read, but Judge Bagin, who was at the time one of
9 Consumers' house counsel, Mr. Renfro who -- he was the
10 one who was not an attorney at the time but was at the
11 time of the events in question.

12 My question is how does this case differ? How
13 do we have all the -- and I don't even know. I couldn't
14 find whether there were any objections to calling those
15 particular attorneys as witnesses or not. So, our
16 records -- at least I couldn't find it.

17 MR. AXELRAD: Mr. Chairman, I obviously cannot
18 comment on the different factual circumstances that
19 might have been in existence in another proceeding.
20 That particular decision has not been cited in any of
21 the materials that were filed by parties for this
22 particular proceeding.

23 JUDGE BECHHOEFER: Right. I happen to think
24 it's one of the more relevant cases, notwithstanding the
25 fact that it was not discussed in the materials filed, 11368

1 but --

2 MR. AXELRAD: But there were not to my
3 knowledge any holdings in a case which are relevant. As
4 you yourself pointed out, we do not know the
5 circumstances under which those particular lawyers may
6 or may not have testified, whether there was a dispute
7 as to whether they should have testified or whether
8 because of those particular circumstances it was even
9 the party whose lawyers were involved who brought those
10 lawyers forward because it was an important part of the
11 presentation he was trying to make. They would have
12 no --

13 JUDGE BECHHOEFER: I'd say all of the lawyers
14 were brought forth as Board witnesses. In that
15 particular case, the intervenors had dropped out and the
16 commission -- the Commissioners had directed that the --
17 as far as I'm aware, had directed that either the -- at
18 least the Appeal Board and maybe the Commissioners had
19 directed that that particular issue be resolved through
20 a hearing, the Dow issue, the so-called -- the issue of
21 whether Dow's plants were fully revealed to the
22 licensing Board.

23 MR. AXELRAD: But my recollection of the case
24 is that there was something that was perhaps thought to
25 be tantamount to a material false statement before the 11369

1 agency in that --

2 JUDGE BECHHOEFER: Is not that being
3 essentially alleged here?

4 MR. AXELRAD: I certainly do not believe so,
5 Mr. Chairman. I think that the type of information that
6 we are talking about here is obviously completely
7 different from a material false statement.

8 JUDGE BECHHOEFER: Well, of course, a lack of
9 a statement can be a material false statement, can it
10 not?

11 MR. AXELRAD: Well, yes, I'm not denying
12 that. But the failure to reveal the Quadrex report as a
13 finding by the licensing Board in this particular case
14 with respect to the McGuire Rule certainly does not
15 strike us as being the equivalent of a material false
16 statement. And we certainly saw nothing in this Board's
17 decision with respect to the McGuire Rule that would
18 have indicated that to us.

19 And even the NRC staff in its argument at the
20 prehearing conference when it noted that, it continued
21 its view that the information should have been provided
22 under the McGuire Rule, indicated that it did not see
23 how the Quadrex report related to any particular issue
24 that was before this Board; but on the totality of the
25 circumstances thought that even though it was a close

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1 question, the Quadrex report should have been provided
2 to this Board.

3 Nothing in either the Staff position or the
4 Board's decision indicated to us that there was any
5 question that something, that a material false statement
6 was involved. That is a very grave matter and nothing
7 that we thought was involved in this proceeding.

8 JUDGE BECHHOEFER: Well, would it have to be
9 as serious as a material false statement to warrant
10 calling attorneys to testify?

11 MR. AXELRAD: Well, I think we're talking
12 about two different things.

13 JUDGE BECHHOEFER: We're not talking about
14 sequestration.

15 MR. AXELRAD: I understand. We are not
16 talking about what the standards are that would call for
17 the lawyer witnesses to testify. And because of the way
18 our legal system is established and because of the need
19 to avoid chilling affects upon client/attorney
20 communications, there is obviously a whole body of law
21 that establishes a high standard for calling of lawyers
22 as witnesses.

23 There has to be something more than a mere
24 allegation of conspiracy or something of that kind in
25 order to have an attorney called. What we have here

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1 is -- I'm sorry, in this particular situation Mr. Sinkin
2 has alleged a number of discreet matters that he wishes
3 to have the lawyers testify to and we have gone
4 painstakingly through each of those allegations. We
5 have explained how each of them would either be
6 privileged or a fact which is already established or it
7 would be cumulative and duplicative, all of the
8 requirements which, of course, have been held in a
9 number of instances to warrant a decision not to call
10 lawyers. And we have cited cases in the court where
11 attorneys have -- where the courts have explicitly
12 refused to call an attorney because of those very
13 considerations.

14 The gravity of the situation, even if the
15 situation were grave, might in some circumstances be a
16 factor. But still the fact that witnesses are being
17 called and will be testifying who can address the
18 factual circumstances involved and whose testimony would
19 make the testimony of lawyers duplicative and cumulative
20 and unnecessary, those are the very reasons that we
21 argued in our brief why the lawyers should not be
22 called.

23 And this Board itself has found in its
24 memorandum and order of June 18, 1985, at page thirteen,
25 the Board properly stated, and I'll quote, "Mr. Newman 11372

1 could become a necessary witness to testify to factual
2 matters if other evidence were to lead to a reasonable
3 inference that Mr. Newman held some unique, factual and
4 material information not known by others involved in the
5 replacement discussions." That is an explicit
6 recognition by this Board of the high standards which
7 have to be imposed before a lawyer is called as a
8 witness. Mr. --

9 JUDGE BECHHOEFER: Under that standard, would
10 you say that we should wait until we've heard the other
11 witnesses and then in the case of some fact which is a
12 unique fact as you described, that we should then
13 perhaps call an attorney if he were necessary to resolve
14 that question?

15 (No hiatus)

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1 MR. AXELRAD: Well, my feeling is that the
2 Board can make a decision right now that the attorneys
3 should not be called as witnesses. But obviously, the
4 Board could wait until after all that other evidence is
5 in and that is one of the -- that's in fact a suggestion
6 that we had made previously, that with respect to all the
7 witnesses to be subpoenaed, that the Board should wait.

8 And we agreed to argue these questions today,
9 because of its potential relevance to the sequestration
10 motion. Obviously if the Board were prepared today to
11 reach the decision that counsel should not be called as
12 witnesses, then there would be no need to decide whether
13 or not they should be sequestered. On the other hand, I
14 think it's perfectly plausible to defer that decision and
15 to at the same time decide the sequestration is not
16 appropriate under any circumstances for attorneys in this
17 case.

18 I do believe that in view of the information
19 which has previously been provided, including the
20 testimony of the witnesses that we have prefiled, that
21 the Board could be prepared right now to make the
22 decision that we urge, namely that witnesses, that the
23 lawyers should not be called as witnesses in this
24 proceeding and that Mr. Sinkin has not only failed to
25 show the need for lawyer's testimony, but he has not even

1 shown the possibility of likelihood of any such evidence,
2 even though he's had ample opportunity to look for such
3 evidence in the past.

4 I would like to emphasize that in NRC
5 proceedings, the inappropriateness of calling counsel as
6 a witness has clearly been recognized by the NRC
7 licensing board, including in particular the Midland case
8 in 18 NRC 282, where subpoenas for production of
9 documents of personal testimony were quashed and they
10 were quashed on the basis of counsel's representations
11 that all such communications were for the purpose of
12 obtaining legal advice.

13 The Board accepted counsel's representations,
14 emphasizing that quote, "They are admitted to the bar and
15 they have an obligation to tell the truth and we're going
16 to assume that they're telling the truth unless we are
17 told differently, unless there is significant proof."

18 And that's from transcript page 18,615.

19 Mr. Sinkin has far from any convincing proof
20 that any conspiracy involving the attorneys for
21 Applicants have taken place in this case. And as I
22 pointed out before, judicial cases have always expressed
23 a concern that calling lawyers would impede the ability
24 of counsel to prepare and present the clients' case. And
25 there are a number of cases that we cite in these

1 proceedings -- in our memoranda.

2 And as I mentioned before, they've already been
3 applied by this Board in quotation which I read from to
4 you previously.

5 We particularly note that an independent basis
6 for quashing these subpoenas is at CCANP has wholly
7 failed to satisfy the Board's directive that it provide
8 some identification of why it expects each witness called
9 to testify in accordance with CCANP's specification of
10 testimony; the Board specifically asked for that as a
11 result of the conference call in order to make sure that
12 it knew before you ruled on subpoenas whether there was
13 some actual basis for Mr. Sinkin's belief that the
14 witnesses could testify or would testify as he suggests.

15 And he has mentioned nothing of that kind at
16 all in his documents that he filed, and has resorted only
17 to completely unsupported speculation in his argument
18 today.

19 Since he has not addressed each of his specific --
20 the specific reasons why he wanted the individual
21 witnesses, lawyers witnesses to testify, I will not
22 reiterate everything that is contained in our memorandum
23 with respect to each of the items that he has specified
24 before.

25 So in essence, Mr. Chairman, I think that

1 Mr. Sinkin has wholly failed to show any justification
2 for subpoenaing lawyers; he has wholly failed to meet the
3 high standards that applies to subpoenaing counsel for a
4 party in this proceeding. And we believe that the Board
5 will receive all the information that is relevant to
6 these matters through the testimony of the witnesses that
7 we are providing.

8 We are providing, among others, Mr. Goldberg
9 and Mr. Oprea. Mr. Sinkin has absolutely no basis
10 whatsoever for thinking that discussions were held with
11 respect to the Quadrex report reportability, notifying
12 the Board or anyone else; I think the Board will be able
13 to obtain from the witnesses that were principal officers
14 of HL&P, all that the Board requires and all that is
15 relevant in this proceeding with respect to how the
16 differences in the views of HL&P and others as to the
17 reportability of these matters arose and why, as Mr.
18 Newman stated in his opening statement, any error on the
19 part of the Applicants were committed wholly good faith.

20 JUDGE BECHHOEFER: Mr. Axelrad, with respect to
21 your position with respect to Mr. Gutterman, which is
22 expressed on page 16, I think, of your brief, Mr. Sinkin,
23 in one of his filings stated that when Mr. Goldger's
24 deposition was taken, and I assume that's the deposition
25 that was taken by the state of Texas, but he stated that

1 he did not remember the substance of his conversation
2 with Mr. Gutterman concerning the Quadrex report.
3 Assuming that to be accurate, would that be a reason for
4 calling Mr. Gutterman as a witness?

5 MR. AXELRAD: I don't believe so, Mr. Chairman.
6 The company acted through its officials on the basis of
7 the views and information that it had at the time. If
8 Mr. Goldberg does not recall those particular
9 conversations, they obviously were not as relevant or
10 material as Mr. Sinkin purports them to be.

11 In any event, if there were, as Mr. Gutterman
12 indicated there were some such discussions, they would
13 obviously be a classic situation for applying the
14 attorney-client work product privileges.

15 MR. SHON: Mr. Axelrad, I'd like to have you
16 respond to perhaps a rather complex question that
17 Mr. Sinkin really proposed, I think, and that you have
18 not, in my mind, completely addressed.

19 Now, you, that is HL&P and its attorneys,
20 didn't turn over the Quadrex report at a time when we
21 have already decided it was really required by the
22 McGuire ruling; I mean, that's the thing that he says is
23 established. So there exists some question as to whether
24 this error was simply an honest one or whether it was
25 motivated by some attempt to deceive.

1 Now, how can we explore that question
2 completely without applying the full panoply of
3 adversarial examination to all of the people who had any
4 part in that decision; how can we know whether this was
5 an honest error or not, without examining everyone
6 involved in making that decision? I think that's
7 fundamental to what Mr. Sinkin has been arguing here and
8 really hasn't been addressed.

9 MR. AXELRAD: Let me attempt to answer that
10 this way: You will be able to fully explore
11 with the leading officials of the company, Mr. Goldberg
12 and Mr. Oprea, why they reached that decision at that
13 time. They will tell you to what extent, if any, they
14 consulted their lawyers in that regard. And they will be
15 able to satisfy you as to what they did or did not do.

16 If as a result of that, you feel there is then
17 a need to obtain the testimony of lawyers, then you
18 obviously will have the opportunity to do so at that
19 time. The way the record now stands, is that there has
20 been a representation made by counsel, it was myself back
21 at the October 1984 prehearing conference, where, the
22 best I recall that particular representation, I said we
23 were aware of the Quadrex report, we were aware that
24 there was some 50.55 (e) reportability -- reports filed;
25 we did not ask to see the report; we had not seen -- did

1 not see the reported until September 1981.

2 And while I was saying at that time in the
3 context of the Board's question of assuming there's a
4 McGuire violation, what should be the penalty; well, what
5 I was saying in essence is that yes, the lawyers were
6 aware that such a report existed, had not asked to see;
7 obviously had not advised the company to provide or not
8 to provide it.

9 Now, if you then feel that that somehow, that
10 reflects adversely on the character and competence of the
11 company, the fact that its lawyers did not do something
12 that perhaps you think they should have done, that may be
13 just one factor among many. But that hardly rises to the
14 consequence of a significant implication upon the
15 character and competence of HL&P to operate the plant.

16 That's the context within which those remarks
17 were made and it seems to me the Board is fully capable
18 of judging in light of that whether it really wants to
19 pursue with the counsel for the Applicants, ask why they
20 didn't ask to see the report or what they in fact did or
21 how they did it.

22 It doesn't appear to us that that kind of
23 riggery at this particular point meets the high level,
24 high threshold for calling counsel for an applicant as a
25 witness. And it seems to us they would have a very

1 damaging impact upon the conduct of the proceeding. But
2 that is obviously something that the Board has to weigh
3 for itself.

4 But we don't really see any shall we say
5 contested facts before the Board in this situation; we
6 don't see any additional facts that you need that will
7 help you reach your decision. And I sincerely believe
8 that you'll be in a better position perhaps to make that
9 decision after you hear from the officials. But I think
10 do you have enough on the basis of everything we've
11 described to reach a decision right now.

12 MR. SHON: Thank you.

13 JUDGE BECHHOEFER: One further question. What
14 about the discrete factual inquire about whether any or
15 all of the named attorneys discussed both the
16 reportability of the Quadrex report with other than the
17 assigned witnesses for the Applicants. I mean, other
18 than with Mr. Goldberg or Mr. Oprea, et al.

19 MR. AXELRAD: Mr. Chairman, I can only respond
20 that that has to be the biggest red herring that I've
21 seen in this proceeding so far.

22 JUDGE BECHHOEFER: Mr. Sinkin did mention it.

23 MR. AXELRAD: I understand that. I'm not
24 suggesting that it's the Board's red herring; it's
25 Mr. Sinkin's red herring. The officials of the company

1 who have that kind of responsibility are obviously Mr.
2 Goldberg and Mr. Oprea. It strains credibility to think
3 that other lower level staff members of HL&P separately
4 had discussions with the lawyers and somehow either made
5 the decision on their own of some kind or never discussed
6 with the Goldberg or Oprea, the result of any discussions
7 that is they'd had with the others on the subject.

8 If the Board would feel more at ease if we gave
9 our representation to the Board with respect to that
10 subject, we'd be perfectly willing to do so. I would
11 hate to --

12 JUDGE BECHHOEFER: That may be the kind of
13 stipulation that I referred to from the Tumara case that
14 is the staff cited in the brief.

15 MR. AXELRAD: My own feeling, Mr. Chairman, is
16 that the Board is perhaps giving too much credence to
17 unsupported allegations in requiring stipulations just
18 because Mr. Sinkin chooses to raise a question. I would
19 hate to think that every time Mr. Sinkin's fertile
20 imagination results in another speculation or
21 possibility, that the only way we'll be able to dispose
22 of that is by another stipulation. It seems to me that a
23 stipulation is necessary only in instances where there
24 are issues of fact which need to be resolved.

25 He doesn't have the faintest support for a

1 speculation that somehow, somebody talked to the lawyers
2 on this subject. The next thing he might do is to
3 speculate that somebody from from HL&P spoke to the NRS
4 staff about whether or not it should be submitted under
5 the McGuire rule and the staff told them not to do so and
6 now we'll need a stipulation that no such thing happened
7 between HL&P and the NRC or that somehow -- Well, I'm not
8 sure where imagination -- how far imagination can go.

9 But I do not believe that ever wild suggestion
10 is deserving of a stipulation.

11 JUDGE BECHHOEFER: Mr. Reis, what I was going
12 to ask you is whether your statement on the attorneys was
13 going to be long because if it is.

14 MR. REIS: No, it's about five minutes.

15 JUDGE BECHHOEFER: Because we were wondering
16 before we break for lunch --

17 MR. REIS: The first thing --

18 JUDGE BECHHOEFER: Were you finished with your
19 statement, Mr. Axelrad?

20 MR. REIS: In connection with that, the first
21 thing I wanted to say is we constantly hear the word
22 "conspiracy" and I go back to the contentions that were
23 set out in the prehearing order of February 26, 1985, the
24 matters for hearing, nine and ten, and really it's far
25 removed to get from that.

1 We're getting off on tangents; we're not
2 dealing with the issues that were set out here. We're
3 moving away. We're saying that there was a -- the great
4 paranoid theory of justice or something here, that deals
5 with a conspiracy see and looking under beds for
6 conspiracy.

7 And there's nothing here that says we are to
8 look at that or to think about that in these contentions
9 that were set forth by the Board here. And what we're
10 doing, we're spending a lot of time talking about
11 stipulating about facts that there's no support for,
12 about talking about conspiracies that there's no support
13 for, when we should be dealing with the basis of whether
14 there was anything in the Quadrex report that was
15 reportable and whether they erred in not reporting it.
16 And I think that's what we have.

17 In the -- and I want to make very strong. And
18 we can go back and keep talking about conspiracy and the
19 very thing I talked about in my opening statement, about
20 the more we repeat the word, the more true it becomes,
21 the more we're having rulings and arguments focusing
22 around it. Why? Because it's taking on a life of its
23 own; it's becoming real. It's not real.

24 Let me say here, on the subpoenaing of the
25 witnesses, again, the threshold is very high, we set it

1 forth in our brief, and that's absolute necessity and
2 unavailable from other sources. We think it fails on
3 both counts. We don't feel it's necessary to meet the
4 very matters nine and ten on page 24 set out on page 24
5 of the prehearing order of February 26th 1984. We need
6 more than conjecture.

7 Let me to go Midland.

8 JUDGE BECHHOEFER: That's what I was just about
9 to ask.

10 MR. REIS: On Midland. Let me read from what
11 the appeal board said below, and I think what the appeal
12 board said was that the licensing board was absolutely
13 wrong in going into these attorney-client matters, is
14 what they said and I think the licensing board recognized
15 that, or at least applied the correct rule in 18 NRC in
16 the Midland case. They said our comments in the previous
17 section dealt with primarily with the lawyers and/or an
18 Applicant's responsibility for full and accurate
19 disclosure of all --

20 JUDGE BECHHOEFER: What page is that from.

21 MR. REIS: Page 915, right under the B. And
22 this is from 16 NRC, nine -- Page 915 and it's from ALAB
23 691, and the paragraph reads, "Our comments in the
24 previous section dealt primarily with the licensee's
25 and/or an Applicant's responsibility of full and accurate

1 disclosure of all material information, the Board below
2 however also addressed to a lesser degree the obligations
3 of counsel. In this area as well, we believe the Board
4 has -- in this area as well, we believe the Board has
5 formulated some new standards that are neither necessary
6 nor desirable."

7 And they went on and they said essentially that
8 the attorneys definitely counsel and helped prepare
9 testimony and that is subject do the attorney-client
10 privilege, or the work privilege, actually, the attorney
11 work privilege, and then they said we similarly disagree
12 with licensing boards narrow view of the role of the
13 lawyer in attorney preparation. And they went on and
14 said lawyers have a big role in attorney preparation and
15 that it shouldn't be inquired into.

16 And I think again, this case, particularly the
17 appeal board;s case, in contrast with the licensing
18 board's case of Judge Miller, strongly indicates that the
19 attorneys should not been called upon to testify to what
20 is sought in this proceeding; in that all these matters
21 were in the context of testimony and were in the context
22 of what was -- how the testimony was the testimony was to
23 be prepared.

24 JUDGE BECHHOEFER: Well, do you have any
25 disagreement with the use in that Midland proceeding of

1 attorneys as witnesses per se, or just to the rulings
2 concerning matters in which those attorneys participated
3 that were subject -- let me express this differently.
4 The ruling that certain matters about which those
5 attorneys were questioned were or were not subject to the
6 work product protection.

7 MR. REIS: Well, obviously an attorney can be
8 called to testify into a proceeding -- in a proceeding to
9 matters which are not privileged and should answer them.
10 The problem is hear we get the matters to get to matters
11 that seem to fall with in the privilege.

12 Now to speak about the in the Midland case,
13 although I made inquiries about the Midland case, I
14 couldn't find out completely about the background of it
15 and how it came up.

16 MR. AXELRAD: Mr. Chairman, one thing with
17 respect to the Midland case.

18 JUDGE BECHHOEFER: I had the same result. I
19 had trouble. I didn't read the whole transcript, so I
20 perhaps --

21 MR. AXELRAD: But I'm just looking at the
22 syllabus on Page 897 in the Midland case and it starts
23 off, "The appeal board dismisses the intervenor's appeal
24 of the Licensing Board's decision in LBP-81-63, 14 NRC
25 1768 (1981) not to impose sanctions against the licensee

1 for failure to disclose assertedly significant
2 information in an earlier phase of this construction
3 permit proceeding."

4 JUDGE BECHHOEFER: That was for lack of
5 participation below.

6 MR. AXELRAD: No, no, the point I was going to
7 make, Mr. Chairman, is that the appeal board had reached --
8 I mean, the licensing board had reached a decision that
9 the employees below except for this intervenor were
10 apparently satisfied with this. So I therefore don't
11 believe that there was ever an appellate decision on the
12 propriety of attorneys as witnesses or as witnesses or
13 whatever it is, the Board is inquiring into here.

14 This was just an appeal on the results that the
15 intervenors had brought.

16 JUDGE BECHHOEFER: It was actually a sua sponte
17 take review. The appeal was untimely or was
18 inappropriate because the parties had participated in,
19 filed proposed findings so that -- the appeal was thrown
20 out on procedural grounds.

21 MR. AXELRAD: All I was trying to get at, I'm
22 not aware of the particular factual circumstances that
23 the Board is inquiring about that happened to have
24 occurred below, nor am I aware that there were any
25 appellate decisions as to the propriety of those

1 particular circumstances. That's all I was trying to --

2 JUDGE BECHHOEFER: I'm aware of that, too. I
3 was only inquiring to see whether there were any
4 differences which caused large number of attorneys to be
5 used as witnesses or called as witnesses. There were
6 also some non-attorneys, officials of the companies
7 involved.

8 MR. REIS: I think, Mr. Chairman, I think it's
9 clear from the opinion above, in a appeal board opinion,
10 that the Board's inquiry below was too broad. And that
11 the -- what was done in the Midland case in 18 NRC was
12 more appropriate.

13 JUDGE BECHHOEFER: Right. Well, it should be
14 was -- but you don't know, I'm assuming you're not saying
15 that it was inappropriate to call the attorneys there for
16 any of the things they testified to.

17 MR. REIS: No, I don't know. I did not go back
18 and read the transcript. I tried to find out.

19 JUDGE BECHHOEFER: I didn't either.

20 MR. REIS: In the time I had available, I
21 couldn't -- I could not find out.

22 JUDGE BECHHOEFER: Mr. Sinkin, you may have
23 sort of a brief response --

24 MR. SINKIN: First of all, at one point, rather
25 quietly and not with any stress, Mr. Axelrad seemed to

1 say that the purpose of requesting sequestration of
2 attorneys was harassment and I just wanted the record to
3 be clear that the reason for sequestering attorneys is
4 the reason we're giving for sequestering all the other
5 witnesses, it's the same basic reason and was not aimed
6 at the attorneys as harassment.

7 As far as the material false statement and
8 whether or not one is alleged here, I want to make it
9 quite clear that we are alleging a material false
10 statement in this proceeding.

11 Now, McGuire, violation of the McGuire rule,
12 may not be per se a material false statement under NRC
13 regulations, we will do a little more research on that,
14 but certainly if Quadrex should have been turned over
15 under 50.55(e) and was not, that omission is a material
16 false statement, and the participation by the attorneys
17 in that omission would be participation in a material
18 false statements.

19 JUDGE BECHHOEFER: Mr. Sinkin, as a matter of
20 law, I'm not sure that's correct.

21 MR. SINKIN: We will argue that as a matter of
22 law.

23 JUDGE BECHHOEFER: Because there have been a
24 number of allegations in the past that certain things
25 should have been reported under 50.55(e), where the staff

1 at least did not allege a failure to report there was a
2 material false statement. So I think there could be a
3 lot of --

4 MR. SINKIN: Take Quadrex as to whether is a
5 material false statement or not. I just want to be quite
6 clear that we are alleging the failure to turn Quadrex
7 over to the NRC is a material false statement.

8 As far as taking the approach of waiting,
9 letting witnesses testify, seeing what they testify and
10 then deciding whether to call attorneys, we have a number
11 of problems with that. First of all, if indeed there has
12 been some collusion in what has gone on, then you have
13 the attorneys sitting here while the witnesses are
14 testifying and they will know everything that the
15 witnesses have said and they will know whether they have
16 any problems that they have to cover when they are
17 called, and they will know whether anything has been
18 revealed that they might have to answer for, which
19 forecloses the opportunity of really using cross
20 examination to any great extent. Because they will know
21 exactly what they need to say having heard their own
22 witnesses.

23 Furthermore, you have those -- the very three
24 attorneys we seek to call in sequestered are the ones
25 handling the case today's, they will be calling

1 witnesses, they will be making the objections to
2 questions; they will be regulating the testimony of their
3 witnesses, and it would than very much in their interest,
4 if our allegation is true, to regulate that testimony in
5 a way to avoid if at all possible any slip up that might
6 indicate that the scenario that's been presented as to
7 what went on, is true, that if anything does slip up, and
8 come -- if such a thing were to have happened came out,
9 they would immediately move in to try to minimize it,
10 alter it, cue the witness whatever, so that that doesn't
11 look to bad i, the record and they'll also know when
12 their called to testify how to handle that particular
13 testimony.

14 As far as impede their ability to prepare the
15 case, I think their case is prepared, the way they
16 presented in it their prefiled testimony. But as well,
17 they were on notice that we intended to do this. I think
18 the record should be quite clear that it was June 25th
19 that we served the Applicants with a letter notifying
20 them of our intent to sequester them if they were called.

21 And we can get into that in the sequestration
22 argument. As far as what we expect them to testify to
23 and why, we do expect them to testify what they have
24 represented to the Board; we don't expect them to come in
25 and testify "No, what we said to the Board isn't true, we

1 sat down, we talked about Quadrex with these people and
2 said don't report it." We don't expect that, that's what
3 we were asked to do. Why did we expect to them to
4 testify the same way? Because it will be the same way.
5 They won't be creating contradictions. The point is, the
6 cross-examination of those witnesses may well elicit
7 something different than the position they presented and
8 that they're certainly going to testify to if called. So
9 that's --

10 JUDGE BECHHOEFER: You have reasons to support
11 that, at least to support a likelihood of that?

12 MR. SINKIN: What we have presented to you the
13 reasons we have. I mean, both the prima facie case of
14 the McGuire rule being violated, the report not being
15 turned over to the NRC, some indication that at least Mr.
16 Gutterman talked to Mr. Goldberg about 50.55 (e) and
17 Quadrex; the fact that they were there in Houston while
18 Mr. Goldberg was going through all of this, and preparing
19 for the hearings, all of those add up to us to indicate
20 that a strong enough that the question should be inquired
21 into and should not be simply dismissed on the
22 representations here before you.

23 JUDGE BECHHOEFER: You don't have any notes
24 that say something like, "Don't tell licensing board
25 that" or --

1 MR. SINKIN: I have a set of Jack Newman's
2 notes here -- no, I don't.

3 MR. NEWMAN: I think I'm going ask to speak
4 upon a point of personal -- I Idon't enjoy having remarks
5 made about whether I said something and a remark of mine
6 may have been recorded in minutes at some point, joked
7 about or laughed about particularly when it suggests that
8 I might not have been acting as I have been actingo for
9 26 years before this agency, as an officer of this Court.
10 You made the point that attorneys are officers of this
11 court; I am aware of I am an officer of this Court and so
12 is every attorney in my firm. Moreover, I'm an officer
13 of this agency' s judicial process and have been so for
14 more than a quarter of a century. And I could not be
15 more keenly aware of my need to be candid and honest with
16 this board under all circumstances and in respect to any
17 matter before this licensing board.

18 MR. SINKIN: If any offense was taken, and
19 apparently it was, at my silly little joke, I profoundly
20 apologize to Mr. Mewman. I thought by the tone of my
21 voice and what I said, that it was obvious I don't have
22 any of his notes and that I wasn't even beginning to
23 imply that I had any of his notes that contain such
24 information.

25 As far as Mr. Gutterman man, and the arguments

1 presented by Mr. Axelrad, on the calling of Mr.
2 Gutterman, man, they have returned -- they call it
3 classic attorney-client work product. They have returned
4 to the very Catch 22 I pointed out in our opening
5 argument, that is if no discussions went on about whether
6 to report Quadrex to the NRC or particular findings or to
7 this board, then they don't need to be called because
8 that would be cumulative of anything that the Mr.
9 Goldberg, Mr. Oprea, the others, would say.

10 But if they did have discussions about it with
11 those people then they can't go called because it's
12 attorney clients privilege. So they have effectively
13 said, "We can't be called period to testify about this
14 question." That's why we have taken it up to a level of
15 what is the real question. We think the real question is
16 what really went on here. And that where there is so
17 much smoke, perhaps there's fire and that that needs to
18 be tested by rigorous cross-examination.

19 And finally as far as Mr. Reis' statement that
20 the conspiracy is not in the contentions, the contentions
21 say if they did not report more than three findings of
22 Quadrex pursuant to 50.55 (e) and they should have, what
23 does that mean about their character and competence.

24 The other contention says given that they
25 violated the McGuire rule, what does that say about their

1 character and competence.

2 Well, obviously it's very relevant to their
3 character and competence whether it was purely a good
4 faith error as they have represented it was, or whether
5 at the other end, it was a conspiracy as I have
6 represented it was. And depending on what the evidence
7 shows on that spectrum, you will then decide how
8 seriously it reflects on their character and competence.

9 I should have the opportunity to prove my end
10 of the spectrum just as they will have the opportunity to
11 prove their end of the spectrum. And that's all I have
12 to say.

13 MR. AXELRAD: Mr. Chairman, may I have just two
14 minutes to respond?

15 JUDGE BECHHOEFER: Okay.

16 MR. AXELRAD: What Mr. Sinkin has said it's now
17 becoming clearer and clearer. He talks about where
18 there's so much smoke there must be a fire; he hasn't
19 shown anything at all. What he has said very clearly is
20 that he is hoping that somehow in cross examination, he
21 will elicit something contrary to what the facts
22 presently are. He has shown no evidence that there would
23 be anything to be obtained through that course. He
24 refers to a Catch 22 situation, and what he's referring
25 to instead is the traditional fact that lawyers are not

1 to be called as witnesses unless there is strong
2 evidence, there is some strong indication that they have
3 to be called. And there is no such evidence that he has
4 even alluded to; he is purporting to engage in a typical
5 fishing expedition in the course of testimony as opposed
6 to having discovered whatever evidence he thought he
7 would have during discovery.

8 And I would just add, he may now be alleging
9 that there is a material false statement. I do not
10 recall that allegation having ever be made by him; I
11 could be wrong.

12 But that is obviously something that he may
13 have a chance to develop in his proposed findings and
14 conclusions when the record is complete. But that has
15 nothing to do with the scope of the issues as written and
16 committed this board and certainly has nothing to do with
17 whether or not the high standard for calling attorneys
18 has been satisfied in this case.

19 MR. REIS: Mr. Chairman, the only thing I would
20 like to do is call your attention to the cases we
21 particularly state that if others can testify, you don't
22 call the attorney. And also, to the case on page 12 of
23 Applicants brief on their opposition to the motion to
24 sequester witnesses of Getters versus the United States
25 which we think is particularly important to the question

1 of both whether you call attorneys and how you look at
2 attorneys in these proceedings and whether, A, whether
3 you can call them as well as can sequester them or
4 prevent them from communicating with their clients. We
5 think the words and the quote particularly from that case
6 are extremely important to be considered here and I
7 particularly call your attention that.

8 MR. SINKIN: Mr. Chairman, I guess I would add
9 would add one final remark, I don't think we're preparing
10 to argue sequestration now before lunch.

11 JUDGE BECHHOEFER: No, we're not.

12 MR. SINKIN: So I'm not going to get into that.
13 But I think that to some extent, not to permit us to call
14 the attorneys and to have them sequestered is a ruling on
15 the merits, the way to protect the status quo as to
16 whether our allegation is true or not is to create a
17 situation in which the allegation can be tested. By
18 allowing the attorneys to remain in the room, conduct the
19 regulation of their witnesses, hear all that their
20 witnesses have to say, creates a situation in which
21 there's in essence a finding by the Board that there was
22 no conspiracy. That's all I have to say.

23 JUDGE BECHHOEFFER: Why don't we adjourn for
24 lunch.

25

1 (Hearing reconvened at 2:30 p.m.)

2 JUDGE BECHHOEFER: Okay. Back on the record.

3 The Board made a preliminary decision that if
4 we were to sequester the Board from the parties, we
5 could all play tennis this afternoon. Having rejected
6 that, we should perhaps get on to the sequestration
7 arguments.

8 Mr. Axelrad?

9 MR. AXELRAD: Mr. Chairman, I have one
10 additional comment with respect to a matter raised by
11 the Board. During the lunch break we called the
12 attorney that was involved in the proceeding, Mr.
13 Charnoff of Shaw, Pittman, who had represented Consumers
14 in this proceeding, and he confirmed what we thought was
15 the situation.

16 If the Board notes in ALAB 691, 16 NRC, at
17 903, the licensing board had made the following point of
18 observation. The licensing board in its decision said
19 that, and I'll quote, "Notes taken by a Dow attorney of
20 meetings with Consumers' attorneys indicate the desire
21 of the latter to 'finesse' the dispute with Dow if no
22 intervenors appear (Intervenors Exhibit 25, page 2,
23 paragraph B). The same notes reflect the exploration by
24 a Consumers' attorney of the possibility of using Dow
25 witnesses unfamiliar with the facts relating to the

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1 Dow-Consumers dispute to testify at the hearing; they
2 further disclose a proposed strategy by Consumers to
3 'drag feet' in the hearing process because as long as
4 construction continues, Consumers 'has a lever' (page 3,
5 paragraph 4)."

6 Even though the licensing board made these
7 observations, it had done nothing about it. When the
8 matter came up before the Appeal Board, the Appeal Board
9 specifically remanded the licensing board to explore
10 this possibility of misconduct. There were specific
11 notes that had been taken and had been part of the
12 record showing that perhaps some improper conduct had
13 taken place. And when the case was remanded to a
14 licensing board, Mr. Charnoff's firm became involved.
15 They represented the company for the first time. They
16 were the attorneys for the attorneys who had allegedly
17 been involved in this misconduct. And under those
18 conditions there was no question that the lawyers whose
19 alleged misconduct was involved were going to testify.
20 There was no argument about it.

21 There were specific notes, an intervenors
22 exhibit, showing or alleging there was some
23 impropriety. Now, as it later turned out, that was
24 found not to be improper. But that's exactly the kind
25 of distinction we're trying to make here. If there is

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1 some specific evidence, some concrete evidence that
2 there is some kind of a misconduct that attorneys have
3 been engaged in, that's one thing. But to claim and to
4 attempt to elicit testimony from attorneys simply on the
5 basis that there may be a conspiracy, they may have done
6 something, without the simplest piece of evidence is
7 completely improper.

8 JUDGE BECHHOEFER: Did you happen to find out
9 how those notes ever got revealed?

10 MR. AXELRAD: Well, they were an intervenors
11 exhibit.

12 JUDGE BECHHOEFER: I know. Did you ever find
13 out how the intervenors got that or was that attorney
14 work product?

15 MR. AXELRAD: I have been told they were
16 produced in discovery.

17 JUDGE BECHHOEFER: I see. So, notwithstanding
18 they may have been work product, they were still
19 produced?

20 MR. AXELRAD: Well, again, as you mentioned
21 before, notes of meetings between two parties may not be
22 subject to the work product doctrine.

23 JUDGE BECHHOEFER: Well, I thought if they
24 were in preparation for testimony, they would be work
25 product. But be that as it may --

1 MR. AXELRAD: Notes taken by one Dow attorney
2 of meetings with Consumers attorneys, that would not
3 necessarily be work product. That's different than
4 notes taken in preparation of your own client's
5 testimony or something of that kind. I'm not prepared
6 to --

7 JUDGE BECHHOEFER: Well, I'm not asking you
8 to, in any event.

9 MR. AXELRAD: I thought I'd draw the Board's
10 interest as a distinguishing feature that that might be
11 helpful to you.

12 JUDGE BECHHOEFER: Going to sequestration, Mr.
13 Sinkin, do you have further statements other than in
14 your motion?

15 MR. SINKIN: Well, I received --

16 JUDGE BECHHOEFER: Well, additional to
17 anything we talked about this morning?

18 MR. SINKIN: I received this morning the
19 Applicant's opposition to CCANP's motion to sequester
20 witnesses and have had some time to look at it. I want
21 to reply to a few of the things that were said.

22 First of all, the Applicants do state that
23 such motions may be granted in the discretion of the
24 Board if the party seeking sequestration can demonstrate
25 that the witness' credibility is in issue and

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1 sequestration is necessary to enhance full disclosure of
2 all relevant evidence. Well, I don't think there's any
3 question that in terms of Mr. Oprea, Mr. Goldberg, Mr.
4 Jordan, Mr. Frazar, the credibility of their testimony
5 is in issue. It was specifically put in issue by the
6 February 26th order of this Board that called upon them
7 to explain why they never mentioned Quadrex when they
8 were testifying in Phase I and the relationship of their
9 testimony to the fact of the existence of the Quadrex
10 report. In particular, their view of Brown & Root's
11 performance as reflected in their testimony as might be
12 contrasted with the view of Brown & Root's performance
13 provided by Quadrex given that they were aware of
14 Quadrex at the time they testified. So, I think the
15 credibility of those four witnesses is certainly at
16 issue here.

17 Then also the more general concern as to how
18 it came about that the Quadrex report was not delivered
19 to the Board. And among the witnesses that we've asked
20 to be sequestered are people who dealt with that
21 question of reporting of the Quadrex report to the
22 Board, in particular Mr. Robertson and Mr. Powell, and
23 there are people who observed the decision making
24 process as an external party who questioned that
25 decision making process to some extent, that's Mr.

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1 Poston. And there are representations in the
2 Applicant's testimony regarding the position of Quadrex
3 on notification and reportability. Mr. Stanley, his
4 testimony on how he viewed the Quadrex report and
5 notifications and those kind of things brings in Mr.
6 Stanley.

7 I won't -- I've made the argument, I think, on
8 the attorneys when we talked about attorneys. I think
9 all those arguments I was making go to why they should
10 be sequestered as much as why they should be called. If
11 we're going to have them called on the issue of whether
12 or not it was a conspiracy and have them testify to that
13 fact, then the argument is made in my motion to
14 sequester as well that the attorneys should not be
15 permitted to hear the testimony of the other witnesses
16 or to consult with each other on their testimony, on
17 what's going on in the hearing, and that sequestration
18 of the attorneys is therefore equally called for in the
19 situation.

20 Overall, as we've said in the argument on
21 attorneys, we are attempting to get a truth as to
22 whether there was involvement by a group of people in
23 one corporation in hiding from the NRC a significant
24 safety-related report. The best way to test that as to
25 whether there was indeed such collusion is to separate

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1 the witnesses, not allow them to hear each other's
2 testimony, not allow them to be exposed to the reports
3 of what other people testify to and ask them
4 specifically what their testimony, what their view is of
5 those events.

6 The Applicants have said that in our motion to
7 sequester that we have failed to identify the witnesses
8 involved in decision making or even the decision it has
9 in mind. I think it's obvious that what we are talking
10 about is the decision to turn Quadrex over to the
11 licensing board, the decision on whether to report more
12 than three 50.55(e) reports, the decision on whether to
13 turn the Quadrex report over to the NRC. All of those
14 are common decisions that were made in concert by a
15 group of people and that's the common decision making
16 process that we want to examine. And the best way to
17 examine whether the representations about that process
18 are indeed true is to sequester the witnesses so they
19 can be questioned independently without hearing what the
20 others have to say.

21 And while the Board may not be inclined
22 generally to sequester witnesses, this Board has done it
23 on prior occasions. We did have one also split vote, I
24 think the Chairman will recall, on that about doing it
25 on a second occasion in a Phase I hearing. So, it's not

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1 unprecedented in this proceeding to certainly consider
2 sequestering and even to grant it.

3 JUDGE BECHHOEFER: Mr. Sinkin?

4 MR. SINKIN: Yes.

5 JUDGE BECHHOEFER: Are you aware of whether or
6 not, whether Mr. Poston who is employed by a different
7 Applicant than the other people involved, has in the
8 past expressed any views different from those of HL&P
9 employees or representatives?

10 MR. SINKIN: Well, the minutes, such as they
11 were, produced at discovery by the Applicants of the
12 management committee meetings reflect that Mr. Poston on
13 one occasion questioned the Applicants directly as to
14 whether they were going to turn the report over to the
15 intervenors and were told no. There's another event in
16 those minutes where Mr. Goldberg is recorded as still
17 refusing to turn the report over to the NRC.

18 Those kind of discussions went on in the
19 management committee and Mr. Poston provides a view of
20 those discussions from outside the context of Houston
21 Lighting & Power that we think have a valuable view.
22 The inclination of Mr. Poston, as we said in our motion
23 to sequester, the obvious inclination of Mr. Poston will
24 not be to say something harmful to HL&P. And if he is
25 allowed to become aware of what everybody has testified

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1 before he arrives, his natural inclination would be to
2 harmonize his testimony with theirs. We think that by
3 sequestering him and not allowing him to know what
4 everybody else has testified to, we may well elicit from
5 him comments about those discussions that would be
6 valuable to the record.

7 Again, the Applicants are arguing that the
8 motion to sequester counsel is nothing more than a
9 veiled effort to disqualify counsel. The question of
10 disqualifying counsel is decided for the moment.
11 Counsel has chosen not to disqualify themselves, the
12 Board is not going to require that. What we're talking
13 about is how you go about evaluating whether or not
14 there has been a conspiracy, and, if so, who were the
15 participants. And it's that question on which we're
16 seeking sequestration and it goes to the failure to
17 inform the Board about Quadrex as well as the failure to
18 inform the Board about the activities related to the
19 removal of Brown & Root from the project.

20 We do consider that any of the Applicants'
21 arguments that under the Administrative Procedures Act
22 they have the right to counsel that they select and that
23 they have selected these particular members of the legal
24 profession, they are entitled to have them present, that
25 all of that merely goes to say that Houston Lighting &

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1 Power made a decision. They decided that they were
2 going to keep these attorneys, even though there was a
3 cloud of potentially being called as a witness.

4 There was no decision in the sixth prehearing
5 conference order as to whether they would be called as a
6 witness, that's part of what we're arguing today. The
7 potential was there. They could have chosen to relieve
8 these attorneys of their duties, bring in new attorneys
9 and proceed with the case so that if we got to this
10 point and the Board decided they were to be called as
11 witnesses and decided they were to be sequestered just
12 like any other witness, that they would not have to
13 suffer for that, they would be ready to go forward with
14 other attorneys. I have no knowledge, but I wouldn't be
15 surprised if Applicants have indeed protected themselves
16 against that possibility by having other attorneys
17 familiarize themselves with the case. I'd be surprised if
18 they hadn't.

19 In responding to the debtors opinion and
20 the quote from it, we have made two distinctions. First
21 of all, we are talking about prior conduct that may have
22 been unethical, the conspiracy allegation that we make,
23 and that in order to explore that we are asking for
24 sequestration.

25 In terms of future conduct and the idea that

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1 we're saying that they will violate ethical standards
2 tonight, tomorrow and thereafter, we're not necessarily
3 saying that at all, to some extent. What we are saying
4 is that if they sit here and listen to the testimony of
5 the other witnesses, there will be a natural
6 inclination, first of all, if they are called as
7 witnesses they will say the same thing. But more
8 importantly, they will know everything that those
9 witnesses have said and that will foreclose a standard
10 cross-examination technique of leading questions of
11 suggesting to them that something was said that may or
12 may not have been said and see what they say about
13 that. It is foreclosed if they know everything that's
14 already been said. And we think that that's a
15 significant part of the necessary kind of
16 cross-examination that would take place in these
17 circumstances. You have a group of people who are
18 telling the same story, trying to keep all the details
19 the same and any detail that we can bring up that might
20 not be the same, they would know whether someone had
21 testified on that or not and it would make it very
22 difficult, if not impossible, to cross-examine in an
23 effort to break down the story.

24 As far as the NRC being bound by its
25 regulations and may not exclude Applicants' counsel from

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1 these proceedings, I think that the Applicants retaining
2 as counsel attorneys who were potentially to be called
3 as witnesses waives their ability to argue that they
4 therefore cannot be sequestered as witnesses. What
5 they're saying is that any time a client wanted to
6 prevent his attorney from being sequestered, all he
7 would have to do is keep him on as attorney because the
8 Board would be bound to allow him to remain in the
9 room. I think once they entertained the possibility
10 that their lawyers would be called as witnesses and did
11 not ask for alternate lawyers, that they included in
12 that the possibility that the Board would find that
13 those witnesses as witnesses should be sequestered, even
14 though they were attorneys; that they would find that
15 the reason for sequestration that applies to all the
16 witnesses applies to them equally.

17 JUDGE BECHHOEFER: Do you think in ruling on
18 whether we should sequester any witnesses we should take
19 into account a balancing of interests between the
20 showing of a need for a sequestration against the
21 likelihood that such an order would hinder the ability
22 of the party whose witnesses are sought to be
23 sequestered? And if you think we should make such a
24 balance, should not the balance for attorneys require
25 even a greater showing of reasons for sequestering them?

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1 MR. SINKIN: Our response, Mr. Chairman, would
2 be that hindering them in putting on their case is
3 exactly what they risked when they left these attorneys
4 in place at a time when it was clear we intended to call
5 them as witnesses. And in the sixth prehearing
6 conference we made clear we were going to ask for
7 sequestration of witnesses. We put them on notice we
8 were going to do that so that there was always from that
9 day forward the possibility that their attorneys would
10 be called as witnesses and that we would ask for
11 sequestration. And if they chose not to do anything
12 about that and now want to claim that they're hindered
13 in presenting their case, it's because they didn't
14 change attorneys on May 1st, 1985.

15 JUDGE BECHHOEFER: So, you're in essence
16 saying that we should apply the same standards -- well,
17 first you agree that those standards, that there should
18 be a balancing of interests or do you think that
19 sequestration should be almost a matter of right
20 wherever credibility is involved?

21 MR. SINKIN: We do view sequestration as
22 almost a matter of right where credibility is involved
23 because the whole point of testing credibility is to be
24 able to question a witness without that witness knowing
25 what another witness has said on the same point. You

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1 just can't test credibility if they have managed to sit
2 there and listened to all the other witnesses. So, we
3 think that to start with we have a right to
4 sequestration if there's even a question of
5 credibility.

6 And then you say -- I agree that we need to
7 ask the question should attorneys be treated any
8 differently.

9 JUDGE BECHHOEFER: That's what I asked.

10 MR. SINKIN: That's what you asked. I guess
11 if the sequestration were being sought for a matter
12 where the attorneys were not claimed to be an integral
13 part of the decision making, you might have a different
14 situation than you have here. What we are alleging here
15 is that the attorneys were an integral part of the
16 decision making process that went on in this corporation
17 over what was to be done with the Quadrex report. I
18 think in those circumstances the attorneys are alleged
19 co-conspirators. And when it reaches that level, then
20 the fact that they're attorneys is not a bar to having
21 them sequestered.

22 As far as a balancing, I think the best answer
23 that I have to the balancing question is if it were
24 called for in the normal circumstances, they lose the
25 balancing test because they made the decision to keep

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1 these attorneys. They cannot now claim a hardship
2 because of the decision they made.

3 I do want to make one other point, Mr.
4 Chairman. I'm sorry to be so slow on this particular
5 part, but we did just receive this this morning and I
6 have not had as much time as I might have wished to
7 review it.

8 While the argument over disqualification was
9 already made and dealt with in the prehearing
10 conference, the Applicants have essentially raised it
11 again as an item of substantial hardship that would be
12 caused to the Applicants if they were called as
13 witnesses.

14 JUDGE BECHHOEFER: The attorneys you're
15 talking about?

16 MR. SINKIN: If the attorneys were called as
17 witnesses, there would be a substantial hardship to the
18 Applicants, and this is a reference to the disciplinary
19 rules. In Texas the reference would be disciplinary
20 rule 5-101, subsection B-4, and the burden is on the
21 firm seeking to remain in the case to demonstrate
22 substantial hardship and distinctiveness.

23 On the showing of substantial hardship, we
24 have checked some cases about what constitutes
25 substantial hardship and found that indeed while it is

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1 routinely raised as an exception, the argument has been
2 unsuccessful in virtually every case. I can give you
3 some citations. There's one called Draganescu, D R A G-
4 A N E S C U, versus First National Bank, 502 F. 2d 550.
5 It's a Fifth Circuit 1974 decision. Cert. was denied,
6 421 U. S. 929 in 1975. And it dealt with long-term
7 familiarity with the clients and a special ability to
8 speak the Rumanian language was not an acceptable
9 exception.

10 Perhaps more to the point is U. S. ex
11 rel., that's E X R E L period, Sheldon Electric Company
12 versus Blackhawk Heating & Plumbing, Inc., 432 F. Supp.
13 486, S. D. New York in 1976. A ten-year history of the
14 firms representation of a client and spending of
15 approximately 450 hours of time in connection with case
16 insufficient to show distinctive value of a lawyer or a
17 firm.

18 Normal Norell, N O R E L L, Inc. versus
19 Fedrated Department Stores, 450 F. Supp. 127, Southern
20 District New York, 1978, assertion that it would
21 probably be impossible to find other counsel experienced
22 in dress business who could be retained on a contingency
23 fee basis insufficient to show distinctive value of
24 firm.

25 (No hiatus)

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1 MR. SINKIN (Cont'd): May's Family Center Inc.,
2 versus Goodman, Inc. I'll have to give you the cite on
3 that in a moment. A long standing relationship with the
4 client involvement with the litigation from its beginning
5 and financial hardship to client do not meet hardship or
6 distinctive value tests.

7 And particularly the applicable I think to the
8 6th prehearing, is North Shore Neurosurgical Group versus
9 Leivy, 72 A.D. 2d 598 New York Appeals Court, 1979,
10 conclusory allegations of the cost and time in retaining
11 and familiarizing new counsel totally insufficient to
12 avoid disqualification. And --

13 JUDGE BECHHOEFER: In case we should decide not
14 to change our earlier ruling, is there any difference we
15 should apply to sequestration, any different standards
16 that we should apply to sequestration, than to
17 disqualification?

18 MR. SINKIN: Obviously sequestration is in a
19 fixed time. The attorneys are absent during part of the
20 testimony; after that testimony is completed and they
21 have testified, they come back, they're then free to do
22 findings of fact, write appeals, argue on appeal, all of
23 that.

24 It's a fixed period of time during the course
25 of the hearing when they are sequestered. So that's a

1 very real difference between sequestration and
2 disqualification. They can go on and do the case.

3 And in a sense, it is the minimum amount of
4 damage in one sense. I know the attorneys for HL&P don't
5 consider it minimal at all. But they have had -- they
6 have been been available to the company all the way up to
7 the date of hearing, to prepare the case, prepare the
8 prefiled testimony, know what all the exhibits are and
9 all that. Then they would be sequestered for a period of
10 time during the hearing. And after the end of that
11 period of time, they would be right back on the case,
12 they could go back and read the transcript, look at the
13 documents introduced with a complete familiarity with
14 what was done and proceed on to the findings of facts and
15 the further legal processes involved in the hearing.

16 JUDGE BECHHOEFER: Going back to a couple of
17 the other non-attorneys, do you know -- do you have
18 anything to suggest that Mr. Powell or Mr. Robertson
19 would provide different testimony from -- of the other
20 witnesses, Goldberg et al?

21 MR. SINKIN: Well, first of all, Mr. Chairman,
22 it is our position that with our contention being that
23 there was a conspiracy, we can go in and question those
24 witnesses about what other witnesses said and it will
25 emerge from the cross-examination as to whether or not

1 they differ from the other witnesses. Secondly, on Mr. --

2 JUDGE BECHHOEFER: What I was referring to,
3 however, was do you know whether those two at least, have
4 made statements which would cause us, perhaps, to believe
5 that differing testimony might be forthcoming, if we were
6 to order them to be sequestered.

7 MR. SINKIN: If you will give me just a moment.

8 Unfortunately, I don't have with me, Mr.
9 Robertson's testimony, actually his sworn statement to
10 the Nuclear Regulatory Commission. And I don't want to
11 misrepresent what he said, so I'm not going to argue it.
12 Just one moment.

13 Well, Mr. Robertson, of course, Mr. Robertson
14 is the third-party sitting in the room while the
15 decisions are being made on what the NRC is going to be
16 told about Quadrex. If Mr. Goldberg, Dr. Sumpter and Mr.
17 Robertson sitting in that room. If the board were to
18 find that Mr. Goldberg and Mr. Sumpter should be
19 sequestered so that they can be tested as to their
20 recollections of how that decision was made and what was
21 said and all of that, the same rationale would apply to
22 Mr. Robertson as the third party in the room.

23 I don't think we have to have any different
24 kind of argument for him than we had for Mr. Goldberg or
25 Mr. Sumpter, Dr. Sumpter.

1 JUDGE BECHHOEFER: What if we should decide
2 that the witnesses who have already been named need not
3 be sequestered since they may have conferred already in
4 preparing their testimony, but that certain outsiders who
5 were not designated perhaps should. Do we have any
6 reason to believe that those persons would provide
7 different testimony from the others?

8 MR. SINKIN: Well, at least we'd have a minimum
9 chance of questioning some who had not been totally
10 briefed on what had been testified to. I don't know; Mr.
11 Chairman, the essential issue is the credibility of the
12 witnesses. The essential issue is what really went on in
13 these days. And we think that issue has been clearly
14 raised by the nature of the Quadrex report and by the
15 treatment and the handling of the Quadrex report.

16 The issue is what did they do and who did it
17 and who knew what when, and you can't measure their
18 character and their competence without that kind of
19 evidence as to what really went on.

20 And that therefore, the people like Mr.
21 Robertson who while not called by the witnesses, are
22 direct participants in the event, at least would give us
23 an opportunity to ask some of them who were there
24 questions that had not necessarily been harmonized with
25 testimony they had heard by the fact that they had heard

1 it.

2 JUDGE BECHHOEFER: Well, are there any
3 circumstances which you might be aware of where Mr.
4 Powell or Robertson and I guess I asked you earlier about
5 Poston, had expressed views in any of these meetings that
6 appeared to differ from views expressed by Mr. Goldberg
7 or Oprea or the other witnesses.

8 MR. SINKIN: I guess with Mr. Poston, we would
9 be relying on those management committee minutes. If Mr.
10 Poston is raising the question repeatedly, "Why haven't
11 you turned over this report to other people," then he
12 apparently has a view different from the Applicant as to
13 what that decision should have been and how it was made.
14 And we can test that with Mr. Poston when he comes.

15 As far as Mr. Powell, the more I think about
16 what we really want to talk to Mr. Powell about, his
17 sequestration may not be as important. Now, he comes
18 into the meeting of the three at the very end. He's
19 there for an hour or so at the very end of the meeting
20 between Mr. Goldberg, Mr. Robertson, and Dr. Sumpter.
21 They call Mr. Powell in. So he does participate; he's
22 called in specifically because they're going to be making
23 50.55 (e) reports and he's the person that does that.

24 So he's called in to participate in the
25 discussion or at least for at least a short period of

1 time, about the reporting of Quadrex. So again, it's a
2 matter of a party involved in the decision. That's --
3 when we argued about about a common decision making and
4 wanting to test their recollections separate from each
5 other, that's exactly what we're talking about here.

6 I cannot say that we have a specific statement
7 by Mr. Powell that stands in contradiction to the
8 statements by Mr. Goldberg or Dr. Sumpter.

9 JUDGE BECHHOEFER: How about Mr. Robertson?

10 MR. SINKIN: I'm really sorry, I don't have his
11 statement to the NRC. Let me just see if I can remember.
12 Mr. Robertson recalls that there was a particular
13 discussion he had with Mr. Goldberg about whether to
14 report further findings to the NRC.

15 By the way, Mr. Robertson and Dr. Sumpter had a
16 meeting after the three of them had met, to discuss
17 notification. They had another meeting between the two
18 of them to discuss notification. Again, though, I cannot
19 provide the Board with a statement of Mr. Robertson that
20 directly contradicts what we have from Mr. Goldberg.

21 MR. SINKIN: I think in essence, Mr. Chairman,
22 what we're seeking in sequestration is an opportunity to
23 put on our case, to make our case for conspiracy, that if
24 all of the witnesses are allowed to hear each other, that
25 opportunity could well be lost; that the decision making

1 that went on here was involved and complex; and that
2 there were differing views; I'm almost certain, there
3 were differing views of what should have been done with
4 this report. And that those views were will not come out
5 unless we achieve sequestration.

6 JUDGE BECHHOEFER: Do you have any reaction to
7 the position taken by the Applicant that two part
8 position, one that there should be some representative of
9 the Applicant who is free of any sequestration order, and
10 that that person ought to be Mr. Goldberg.

11 MR. SINKIN: Handling two, first, I mean
12 obviously while there were other people involved in the
13 decision, Mr. Goldberg through his own testimony and his
14 own representations has taken upon himself the primary
15 responsibility for the decisions that were made about
16 what should be done with the Quadrex report. So if there
17 is a center person that we are interested in, it's Mr.
18 Goldberg. STOP

19 Now, if Mr. Goldberg is free after giving his
20 testimony to talk to all the other witnesses, again,
21 assuming that we are -- I think -- see, part of the
22 problem is you have to assume to some extent that we are
23 right, or you can't have a real argument. If there is --
24 Jack doesn't want to agree with that, okay. What I'm
25 saying is if -- if I say Mr. Goldberg is an alleged

1 conspirator and that the conspiracy has continued on to
2 this hearing, in their testimony and everything else, it
3 is still continuing, and that he is the center piece of
4 the conspiracy and then the Applicants say, "Well, we
5 wanted him to be the person free of sequestration, free
6 to talk to every other witness about what's going on,"
7 then you're saying the ringleader of the conspiracy is
8 free to go and continue it right through the hearing.

9 So obviously we would object to Mr. Goldberg
10 being in that position. Even if you don't want to think
11 of it in terms of conspiracy, if you want to think of it
12 in terms of a serious error in judgment by Mr. Goldberg
13 and what he did, still he's the center piece; it is his
14 primary judgment; he is the decision maker.

15 So if he is free to make his testimony and then
16 go talk to the other witnesses about how he testified and
17 what he said and what they might say and all of that,
18 he's able to again work on not letting discrepancies or
19 disagreements surface about his personal judgment which
20 is the center point of the hearing.

21 So on that grounds, even if you don't want to
22 talk about conspiracy, talk about a serious error in
23 judgment, Mr. Goldberg should not be that person. If you
24 would just give me just a second.

25 JUDGE BECHHOEFER: While the Applicants are

1 quoted on page six of the fotenotes which really carries
2 over to from page five, one of the federal rules of
3 evidence which appears to say that the representative can
4 be designated by the attorney for the particular party.
5 Would that not allow the Applicant to designate Mr.
6 Goldberg as the so-called representative?

7 MR. SINKIN: Well, again, Mr. Chairman, having
8 received this this morning, I haven't had time to
9 evaluate that exception provided for in the federal
10 rules. There is always the possibility that a decision
11 could be made about sequestration that Mr. Goldberg could
12 be allowed to begin his testimony today, is obviously
13 going to go on tomorrow, and there isn't a need for him
14 to be designated as of today. If we can have overnight
15 to check on this federal rule of evidence and see what we
16 think about it, I'd be happy to respond more in depth
17 tomorrow morning.

18 In summary, our position is that the same
19 reasons that generally call for sequestration and that
20 called for it in San Antonio at the hearings, where the
21 question was what is the truth, truth of an event, that
22 those reasons appear here.

23 And we're entitled to sequestration in order to
24 test what is the truth of what went on here, that when
25 you have a licensing board that concludes that a major

1 regulation of the Nuclear Regulatory Commission or major
2 at least case law rule, the McGuire rule, has been
3 violated because of a significant new information has not
4 been provided to the licensing board, and that the
5 credibility of the witnesses testimony in Phase I has
6 been called into question at least by the circumstances
7 of the Quadrex report, that that is a normal customary
8 circumstance under which sequestration is sought and
9 granted.

10 JUDGE BECHHOEFER: Mr. Sinkin, may I ask I ask,
11 what did the reference to San Antonio mean?

12 MR. SINKIN: We had, if I remember correctly,
13 we had a motion to sequester at the hearing in San
14 Antonio, that was granted.

15 JUDGE BECHHOEFER: I see, our hearing. I see.

16 MR. SINKIN: Our hearing, excuse me. Yes, the
17 ASLB hearing.

18 JUDGE BECHHOEFER: I didn't recall where it
19 happened. Okay.

20 MR. SINKIN: If I remember correctly, it was in
21 San Antonio.

22 JUDGE BECHHOEFER: Okay. I just didn't know
23 what that meant. I remember the occasions, but not the
24 locale.

25 Mr. Axelrad, I guess. In your comments, I

1 would like you to discuss whether or not ALAB 379 and at
2 least the holding and perhaps a lot of the language
3 should not be confined to sequestration of staff
4 witnesses as distinguished from other witnesses.

5 MR. AXELRAD: Fine, Mr. Chairman. Mr. Sinkin's
6 motion for sequestration cites no law, and cites very
7 little in the way of factual support. In the course of
8 his argument today, he chose to review our fifteen page
9 memorandum in opposition that we filed last night, and to
10 pick out of it one sentence which talks about the fact
11 that under NRC practice, motion for sequestration may be
12 granted in the discretion of the Board if the parties
13 seeking sequestration can demonstrate the witness'
14 credibility is in issue and the sequestration is
15 necessary to enhance full disclosure of all relevant
16 evidence.

17 The totally ignores the entire legal discussion
18 and chooses not to respond to it. Clearly in NRC
19 proceeding, sequestration orders are not granted as a
20 matter of right, and the sequestration rule has to be
21 applied with a sensitive concern for the special nature
22 of NRC proceedings.

23 From ALAB 379, ALAB 379 did deal with a
24 situation involving staff witnesses, but I see nothing in
25 that decision or the discussion by the appeal board that

1 limits the basic principals expressed by the appeal board
2 to cases in which staff are witnesses.

3 JUDGE BECHHOEFER: Isn't there a fundamental
4 difference between staff witnesses who, I think, by
5 practice if not by rule are supposed to evaluate all of
6 the evidence presented and give their technical opinions
7 on all of it, as distinguished from a party's witnesses
8 who are expressing their own view; isn't there a
9 fundamental difference in those two?

10 MR. AXELRAD: There is a difference, but it
11 does not go to the question of the ability of a party to
12 contribute to development of a full record nor does it go --
13 the differences does not apply to the need of a party to
14 a proceeding to be able to participate in a proceeding
15 fully and completely. The deprivation of assistance of
16 witnesses to a party is as important a matter for an
17 Applicant or indeed an intervenor as it would be to the
18 staff.

19 The Applicant could no more deal effectively
20 with the testimony of others or indeed with respect to
21 participating in even the cross-examination of its own
22 witnesses and being able to respond properly and
23 developing redirect without the advice and assistance of
24 needed witnesses.

25 And of course when we get to the matter of

1 sequestration of counsel, there's even a more fundamental
2 right involved.

3 JUDGE BECHHOEFER: Should there be a
4 distinction, though, between assisting counsel on
5 technical questions, scientific technical questions, as
6 distinguished from other types of factual evidence of
7 whether certain things were or were not done? Should
8 there be some sort of distinction made between those two?

9 MR. AXELRAD: There may be a distinction under
10 some circumstances and obviously when you --

11 JUDGE BECHHOEFER: And was not the ALAB 379 in
12 particular, dealing with an order which sequestered both
13 staff and Applicant witnesses, I think the terms that I
14 read in that were to encourage spontaneity -- well, is
15 that -- on a scientific question, encourage spontaneity
16 on a scientific question, the way I read it.

17 Now, is that --

18 MR. AXELRAD: Mr. Chairman, that is the exact
19 question on which the appeal board reversed the licensing
20 board. The licensing board sequestered to encourage
21 spontaneity and the appeal board held that that was
22 completely wrong, that was an improper basis for
23 sequestration.

24 JUDGE BECHHOEFER: Right, for the staff only.

25 MR. AXELRAD: Well, perhaps the other parties

1 did not participate in the appeal. I think there's one --

2 JUDGE BECHHOEFER: It was my understanding
3 however that all of the witnesses had been sequestered,
4 and only the staff appealed the decision so that the
5 decision properly should only be limited to the staff. I
6 understand the sequestration continued in that case
7 insofar as non- staff witnesses were concerned.

8 MR. AXELRAD: But we have to go back to one
9 specific point. As the appeal board noted in that case,
10 sequestration orders are not common in NRC proceedings;
11 because of a special -- probably they said because of a
12 special nature of NRC proceedings. We would not be able
13 to give you cases on all fours because sequestration is
14 not used very frequently and therefore hasn't been much
15 occasion to appeal. Whether the situation maybe a simple
16 factual matter of some kind, where it makes not too much
17 difference whether assistance of witnesses are needed in
18 preparation for the testimony of witnesses or with
19 counsel is not involved it may well be that there's not
20 going to be a big fight about it.

21 We didn't particularly fight about
22 sequestration in the first phase of this proceeding,
23 because the instances in which it was sought were not all
24 that significant. And as a matter of fact, in a couple
25 of instances where there was an argument at one point the

1 Board granted it and at one point, I recall the Board did
2 not.

3 But the basic point is that unlike what Mr.
4 Sinkin is trying to allege he is not entitled to
5 sequestration as a matter of right. He has to make
6 certain showings and that comes very clearly from the NRC
7 decision. And there's that decision that I pointed to at
8 Page 2 of our memorandum, by the way, on Page 2 of the
9 memorandum, three lines from the bottom, where we say
10 "see Id." That is incorrect. That should be ALAB 379.

11 But at that point, the Board made clear that it
12 is not inclined to sequester witnesses on the basis of
13 unsupported assertions. And that is exactly what we have
14 here, from CCANP.

15 As we go on to discuss in our brief, they refer
16 to in arguments to support their sequestration request,
17 the first is that there are -- they are allegedly
18 entitled to a presumption that there may have been a
19 conspiracy. Mr. Sinkin made it even more concrete just a
20 minute ago, we have to assume that he's right, that's
21 where he's coming from.

22 Now, that is not a basis for a sequestration
23 decision. In order to be able to get sequestration under
24 NRC practice, which we assume is fully appropriate, you
25 have to show something beyond a simple assertion. And as

1 a matter of fact, in this particular situation, he's got
2 less than just a naked assumption. Not only does he not
3 provide anything in support of his allegation of
4 conspiracy, but in this particular proceeding, in this
5 particular docket, because of those allegations of
6 conspiracy that he made in December of 1981, the NRC
7 staff went out and investigated those allegations and in
8 82-02, they found that there was no basis for it, that
9 there had been no withholding of this report from the
10 NRC, in essence that there was no conspiracy.

11 So he is even worse off than did case where he
12 was just making an unsupported allegation, he has an
13 unsupported allegation which, in fact, has been rebutted
14 by information developed by the staff.

15 Now, of course, he's going to argue when it
16 gets to be his turn that the staff's a co-conspirator,
17 also. There's no end to where that particular argument
18 will go.

19 His next argument, why witnesses should be
20 sequestered is because they were engaged in common
21 decision making. And when the Board I believe asked them
22 what is -- or maybe he just volunteered what is the
23 common decision, he cited like three different decisions
24 that I recall that might have been a common decision.
25 There is no common decision; what he has to do is to

1 indicate what kind of decision -- what specific decision
2 is he he talking about and more importantly, he has to
3 make some preliminary showing of some kind that witnesses
4 engaged in some form of common decision making and also
5 some indication that under oath, the witnesses would lie
6 or tell their testimony.

7 All of these innocuous remarks about witnesses
8 harmonizing their testimony, that's not what he's saying.
9 He's saying that he thinks these witnesses will lie, that
10 they will listen to somebody's else's testimony and they
11 will lie to make their testimony equivalent to what
12 they've heard. He has provided not a single shread of
13 indication that anyone would lie to this board, whether
14 it's a lay person or a lawyer.

15 And then, he argues that the Board, itself, has
16 raised the issue of apparent inconstistencys in the
17 previous testimony by Messrs. Jordan, Goldberg, Frazar
18 and Oprea, thereby creating a separate issue of
19 credibility.

20 That is completely wrong, the Board has not
21 raised in any issue of credibility. I've seen nothing in
22 the Board's order which says that they think that our
23 witnesses lie.

24 What they said, what the Board said in its
25 order that's they've looked at those previous statements,

1 and they want the witnesses to come in and explain why
2 did it they did not refer to certain matters. I don't
3 think the Board would likely accuse witnesses under oath
4 who have appeared before this Board of days and days on
5 end of lying. Certainly not on the basis of a request
6 that they come in and provide further clarifying
7 information and testimony.

8 What has happened here is that there is no
9 issue of credibility, and Mr. Sinkin has pointed to
10 nothing that would show it.

11 And then when the Board asked him whether or
12 not he has any evidence that they would make -- that the
13 witnesses, that he is seeking to subpoena, should be
14 sequestered because they have or would express differing
15 views, he alludes to 82-02 which he said he doesn't have.
16 That is no way to respond to a Board's question. There's
17 nothing in 82-02 that -- Mr. Robertson's statement that
18 would indicate that he would say anything different than
19 Mr. Goldberg said with respect to releasing the report or
20 making a 50.55 (e) report. That's sheer innuendo from
21 Mr. Sinkin.

22 And then when he talks about Mr. Poston, he
23 says that the minutes show Mr. Poston repeatedly raised
24 the question of providing the report to the NRC. That is
25 a lie. There is one minute that one -- set of minutes

1 where Mr. Poston raised that question. And the question
2 was answered. There were no repeated questions and I
3 dare Mr. Sinkin to show us minutes where that question
4 has repeatedly been raised. Just because someone asks a
5 question, doesn't mean he has a different view.

6 I think Mr. Sinkin is taking great advantage of
7 this Board which hadn't had the opportunity to review the
8 multitude of documents that he is now citing.

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1 MR. AXELRAD (Cont'd): The Board was clearly
2 correct in asking Mr. Sinkin about this balancing of
3 interest. That is what the sequestration question is
4 all about. And there is no doubt that Applicants will
5 be severely handicapped in developing a full and
6 complete record before the Board without the assistance
7 of their witnesses. And I will --

8 JUDGE BECHHOEFER: I was going to ask you
9 about why you -- assuming that some witness or at least
10 one of the witnesses is allowed to be a representative,
11 I guess the term is, why would you be that handicapped?

12 MR. AXELRAD: Well, let me answer the question
13 this way, Mr. Chairman.

14 JUDGE BECHHOEFER: Assuming for the minute
15 that we should allow you Mr. Goldberg, why would you be
16 handicapped by not having --

17 MR. AXELRAD: Let me answer the question
18 differently, okay? It is the burden of CCANP to show
19 why it is entitled to sequestration and who should be
20 sequestered from whom. And I think the answers to your
21 question is different depending upon who is going to be
22 sequestered.

23 As we've indicated on page 7, for example, Mr.
24 Goldberg's testimony involves, among other things,
25 extensive testimony on the reportability of certain

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1 items. He discusses many of the discipline findings.
2 Those are complex questions of nuclear plant design.
3 While Mr. Goldberg is testifying, it would be very
4 difficult for us not to have, for example, Dr. Sumpter
5 available to assist us who is one of the individuals who
6 is most knowledgeable with respect to those same
7 reportability questions. It might even be useful, for
8 example, for us to be able to ask some questions of Mr.
9 Stanley from Quadrex who again has been dragged into
10 this by Mr. Sinkin without any showing at all that an
11 employee of a consultant who wrote the very report
12 itself was in any way involved in any conspiracy.

13 What I'm trying to say is what Mr. Sinkin has
14 done is he hasn't asked even that individual A be
15 sequestered while individual B is testifying. What he's
16 done is listed ten individuals or eleven individuals
17 counting lawyers and asked that they all be sequestered
18 from each other, which means that for a large part of
19 the proceeding all of those people would be unavailable
20 to us if the sequestration motion was granted. And he's
21 shown no reason why, for example, Mr. Powell should be
22 sequestered while Mr. Stanley is testifying or vice
23 versa.

24 It is a burden of the mover for sequestration
25 to both identify the basis and the reasons for the

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1 sequestration motion and to show why the balance of
2 factors weighs in his favor and he's completely failed
3 to do that. Moreover, he's completely failed to
4 identify what it is he means by a sequestration. He's
5 asked the Board for clear and complete instructions. He
6 hasn't said what those clear and complete instructions
7 should be. We don't know what he wants. Does he want
8 those people outside the courtroom? Does he want them
9 prohibited from reading the transcript? There are any
10 number of things that sequestration can mean. He hasn't
11 identified any of those.

12 With respect to sequestration of lawyers, Mr.
13 Sinkin says that his arguments with respect to calling
14 of lawyers are equally applicable to the question of
15 sequestration. Well, that is utterly wrong. The
16 sequestration of lawyers is in essence partial
17 disqualification. What sequestration of lawyer means is
18 that the lawyers would not be able to be present in the
19 courtroom during a significant portion of their case.
20 Mr. Sinkin would say, well, that's very little
21 hardship. After all, the lawyers have participated in
22 preparing the case, they can now presumably turn it over
23 to John Doe and John Doe can handle it just as easily
24 from the counsel's table as the lawyers who have been
25 working on the case for many months, as a matter of 11436

1 fact, for many years.

2 Well, that is utterly ridiculous. Getting to
3 the point of the beginning of the hearing is an
4 important part of the proceeding. But, of course, it's
5 not the end-all. What happens in the courtroom, in the
6 trial room is the most important part of the
7 proceeding. We have been working on this case off and
8 on with respect to Phase II, I guess, since the end of
9 1981, beginning of 1982, as soon as it became clear what
10 kind of questions were going to be coming up in Phase
11 II. We didn't know specifically what issues were going
12 to be coming up, but we certainly had some idea what
13 those issues were going to be. You have before you here
14 three lawyers who have devoted, well, I guess it's three
15 and a half or four years in preparation of this case,
16 plus the amount of time that was spent in the conduct of
17 Phase I which would provide a lot of background
18 information which is part of this. To think that we
19 could now just pass the baton to somebody who would come
20 in either from our firm or from any other firm and that
21 that would not create a serious hardship upon the
22 Applicants is, as I said before, preposterous.

23 The Board has already made the determination
24 that disqualifying the attorneys in this case would pose
25 a severe hardship upon the Applicants. Disqualification

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1 through the route of sequestration would create just as
2 big a hardship, and I'm sure that the chairman and the
3 other members of the Board recognize that.

4 The cases which we cite identify very clearly
5 why the courts are extremely reluctant to sequester
6 attorneys. And, as a matter of fact, I don't believe
7 that we've -- I shouldn't say that. It's clear that in
8 order for sequestration to be done, there would have to
9 be concrete evidence that the attorneys' presence will
10 obstruct and impede the agency's proceedings. And Mr.
11 Sinkin has shown nothing of the kind in this
12 proceeding.

13 The right to counsel is extremely important
14 under the Constitution, under the APA and under the
15 NRC's regulation, and it's always been construed to mean
16 counsel of the party's own choosing. It's incumbent on
17 anyone who wishes to disrupt that relationship to prove
18 to the agency or to the court pointing out on precise
19 grounds why impropriety exists and how that would
20 threaten the integrity of the proceeding.

21 He hasn't done that. Mr. Sinkin has done
22 nothing of the kind. He again in talking about
23 Applicants' attorneys has talked about, quote, to
24 minimize a natural inclination to harmonize testimony,
25 closed quote. There is no doubt what he's saying. He

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1 is saying that he thinks that the attorneys would lie if
2 they would stay in the proceeding, listen to the
3 testimony of other witnesses and then testify themselves
4 afterwards. That is insulting in view of the fact of
5 these witnesses or attorneys to fully rely on their duty
6 to act on their ethical codes.

7 And I do think it is important, as has been
8 pointed out by Mr. Reis earlier this morning, to read at
9 least part of the quotation from Gettis versus U. S.,
10 and I just read the last two sentences by Justice
11 Marshal where he says, "I find it difficult to conceive
12 of any circumstances which would justify a court's
13 limiting the attorney's opportunity to serve his client
14 because of fear that he may disserve the system by
15 violating accepted ethical standards. If any order
16 barring communication between a defendant and his
17 attorney is to survive constitutional inquiry, it must
18 be for some reason other than a fear of unethical
19 conduct." And that obviously applies even more strongly
20 to a sequestration order which would prevent an attorney
21 from representing his client before the agency.

22 The last comment that I have from my brief
23 would just be to mention Rule 615 of the Federal Rules
24 of Evidence which excludes from sequestration under
25 Subsection 3, "a person whose presence is shown by a

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1 party to be essential to the presentation of his cause."
2 And in U. S. Versus Reeder, that provision was clearly
3 understood and interpreted as "It would clearly allow
4 the attorney to remain present in the courtroom as an
5 exception to the exclusionary rules for witnesses." So,
6 whatever the rule otherwise might be, obviously in the
7 case of an attorney the exception to the sequestration
8 Rule 615 would permit the attorney to stay in court.

9 Now, I'd like to take just a minute to go back
10 over my notes of Mr. Sinkin's remarks just to see if
11 there's anything which I did not cover.

12 JUDGE BECHHOEFER: Well, you might comment on
13 would the Applicants suffer any prejudice if Messrs.
14 Poston, Powell and Robertson, not assuming they will be
15 called, but if they were to be called, should be
16 sequestered at the outset? I'm assuming that we will
17 not have the occasion to rule at this point or we won't
18 want to rule whether they should be, whether the
19 subpoena should be enforced. But would you be
20 prejudiced if they were not able to consult you or your
21 witnesses?

22 MR. AXELRAD: Yes, Mr. Chairman. I cannot
23 tell what types of questions would arise on
24 cross-examination of our witnesses and what type of
25 inquiry I would need to make in order to be able to

1 either participate in redirect or anything of the kind.
2 It seems to me that we need to have access to all of our
3 witnesses, and by the same token we need to have access
4 to people outside of our witnesses who may in some way
5 have something to contribute.

6 Mr. Powell is chairman of the IRC. I'm not
7 sure what kind of question might come up that would make
8 it useful for us to contact him. I think the burden
9 really has to be in the other direction. Mr. Sinkin has
10 to show some basis for justifying sequestration before
11 we have to, you know, go in the other direction to
12 determine whether prejudice would ensue. Whether or
13 not -- well, simply with respect to Mr. Robertson, Mr.
14 Robertson who is away right now will be back sometime
15 early next week and it may well be that in the course of
16 examination of witnesses, a question would arise that we
17 may need to consult Mr. Robertson about and I would want
18 to feel completely free at any time in the full
19 representation of my client's rights to be able to talk
20 to anyone who may have some information to contribute.
21 He is, in addition, a perfect example of the type of
22 expert that we may, in fact, need to talk to if a
23 question comes up in the cross-examination of either Dr.
24 Sumpter or Mr. Goldberg with respect to a particular
25 finding, it may be useful for us to ask Mr. Robertson 11/11

1 about it.

2 JUDGE BECHHOEFER: How about Mr. Poston or did
3 you answer -- I guess you didn't mention him.

4 MR. AXELRAD: I didn't answer specifically.
5 But again, Mr. Sinkin is seeking to subpoena Mr. Poston
6 based solely upon the, as far as we can see from what he
7 has cited, the minutes of a couple of meetings of the
8 management committee.

9 I have no reason right now to think that there
10 would be any reason for me to consult with Mr. Poston,
11 but I fail to see how the record in this proceeding
12 would benefit from arbitrarily barring me from the
13 possibility of talking to Mr. Poston if for some reason
14 I thought it was appropriate in the course of preparing
15 or conducting our case.

16 Obviously, you know, in that type of instance
17 we're not talking about the same type of prejudice that
18 would occur or hardship that would occur if you were to
19 bar Mr. Newman, Mr. Gutterman and myself from the
20 courtroom. We're talking about two events of quite
21 different magnitude of hardship. But I see no reason
22 why an Applicant in this proceeding should be forced to
23 suffer any type of hardship at all and why he shouldn't
24 be able to conduct his case as he sees fit in order to
25 make the most complete record possible.

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1 I should respond to Mr. Sinkin's remarks that
2 somehow Applicants here took the risk of sequestration
3 by continuing to retain counsel and obviously Mr. Sinkin
4 has the argument backwards. CCANP is the one that in
5 its letter admitted that it would not suffer hardship if
6 counsel would remain counsel for Applicants even if they
7 were to be called as witnesses. If Mr. Sinkin had
8 reviewed the matter, he would have known that under
9 those circumstances, sequestration of attorneys is very
10 unusual, to say the least, that there's a very high
11 threshold before any sequestration could take place.
12 And if he felt at that time that not being able to
13 sequester counsel would have presented a problem for
14 him, that would have been the time for him to raise that
15 question. And obviously he did not and he's the one who
16 took the risk of the present situation.

17 And I must admit, I do not recall anything
18 about at the sixth prehearing conference where Mr.
19 Sinkin mentioned anything about sequestering lawyers.
20 He talked about the fact that he might move to sequester
21 witnesses. He said that, as I recall it, that if panel
22 testimony was being presented, that that should not
23 impede his ability to request sequestration. But I do
24 not recall his talking about sequestering counsel as
25 such at that time.

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1 All of the cases that Mr. Sinkin has raised
2 with respect to this --

3 JUDGE BECHHOEFER: Did not Mr. Sinkin at the
4 sixth prehearing conference actually read off the list
5 of several attorneys among the witnesses that he said he
6 was considering calling? It's my recollection that he
7 specifically mentioned, maybe not all of the attorneys,
8 but one or two of them. You and Mr. Newman
9 specifically. I'm not sure about the others.

10 MR. AXELRAD: I just don't recall.

11 JUDGE BECHHOEFER: That's my recollection, but
12 I don't have the transcript with me, so --

13 MR. AXELRAD: I just don't recall his raising
14 the name of counsel as part of any discussion of
15 sequestration. But that's not a major point, in any
16 event.

17 And I will just end by reminding the Board once
18 more that almost everything that Mr. Sinkin has said is
19 based upon pure unsupported speculation. At one point
20 in the course of his remarks he said -- he was referring
21 to some potential witnesses, I think this is a quote,
22 we're almost certain that there were different views.
23 He has no basis for that statement. He has no reason to
24 expect different views. He has not pointed to one shred
25 of evidence, one document that would indicate there were

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1 any different views.

2 That concludes my part, Mr. Chairman.

3 MR. REIS: Mr. Chairman, I'll be very brief.

4 First of all, the question has come up of the
5 Midland case. In ALAB 379, there is question that the
6 only ones who appealed in that case were the Staff. The
7 Appeal Board only dealt with the Staff. But the case as
8 a whole indicates that sequestration is not a matter of
9 right in these proceedings and that makes it contrary
10 very much with the Federal Rules of Evidence where it is
11 a matter of record. So, there is no right of
12 sequestration; therefore, one seeking it as to any other
13 motion to sustain his burden of sequestering witnesses,
14 we feel here that what Mr. Sinkin has said is just a
15 matter of conjecture and he has not sustained that
16 burden that is on the proponent of any motion under NRC
17 practice.

18 Secondly, I want to go on and say that the
19 basis of this probably is that in NRC proceedings, as
20 the Appeal Board talked about, testimony is prefiled.
21 Therefore, the things that usually lead to sequestration
22 and the theories for sequestration just don't apply to
23 our Board type proceedings where you have prefiled
24 testimony.

25 Now, thirdly, and this is my final point.

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1 there was question of whether we would sequester certain
2 employees of HL&P which were named by Mr. Sinkin of
3 CCANP as potential witnesses, but which were --

4 JUDGE BECHHOEFER: One of them was San
5 Antonio.

6 MR. REIS: What?

7 JUDGE BECHHOEFER: One of them was an employee
8 of the City of San Antonio, be that as it may, Mr.
9 Poston.

10 MR. REIS: Well, at least as to Mr. Robertson,
11 I'm not sure as to Mr. Poston, but as to Mr. Robertson
12 and others, I think the case of Upjohn versus the United
13 States at 449 U. S. 383 which dealt with not this
14 question but the question of how far privilege extended,
15 attorney/client privilege extended, also might affect
16 the ability to issue at least a complete sequestration
17 order as to any employee of HL&P in that the attorneys
18 for HL&P, they have a right to talk to their client
19 which includes, according to the Upjohn case, reading of
20 the Upjohn case, would include lower-level employees
21 such as Mr. Robertson even if they don't intend to call
22 them, and they have a right to talk to them during the
23 course of the proceeding.

24 Therefore, if there was to be any
25 sequestration order entered, it could not possibly

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1 affect, as I read -- as I abstract from the Upjohn case,
2 the Upjohn case is not directly in point, but as I
3 abstract from the principles of the Upjohn case, the
4 ability of Mr. Newman, Mr. Axelrad, et al, to talk to
5 these employees during the course of the proceedings.

6 JUDGE BECHHOEFER: How does that reconcile
7 with the federal rule which was quoted which seems to
8 talk in terms of one single representative chosen by the
9 Applicants? I mean, it seems to talk about one --

10 MR. REIS: Well, I think it's a question of
11 the extent and what is said to the employee. But I do
12 think there is -- there may very well be a problem. The
13 Supreme Court in Upjohn went off on attorney/client
14 privilege and essentially said that attorney/client
15 privilege extended to lower acting employees who were
16 acting within the scope of their corporate duties or
17 their duties to the corporation. And to that extent, to
18 the extent that Mr. Newman's firm might want to consult
19 them on what went on and talk to them about their
20 testimony, that would seem to be appropriate here within
21 the scope of the Upjohn case.

22 MR. AXELRAD: Excuse me, Mr. Chairman. Could
23 you move that pile of paper so that I could see you?
24 I'm having difficulty hearing you. The pile --

25 JUDGE BECHHOEFER: I'll make that one higher

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1 then.

2 MR. REIS: As I say, I don't think the case is
3 directly on point, but I think it's reasonable, it leads
4 to the point that there would be problems in issuing a
5 blanket sequestration order for even those employees of
6 HL&P which Mr. Sinkin has named but Mr. Newman has not
7 named as potential witnesses.

8 JUDGE BECHHOEFER: Mr. Sinkin, do you have
9 any, I hope, brief response?

10 MR. SINKIN: Brief, yes.

11 The Applicants and the NRC staff take the
12 position that our allegation of conspiracy is total
13 conjecture, fantasy, paranoia, whatever. What we see
14 when we look at the Quadrex event is first we see the
15 Quadrex report, then we see how NRC personnel responded
16 when they saw the Quadrex report. Then we see how HL&P
17 personnel responded when they saw the Quadrex report.
18 And we notice a diametrically opposed response that only
19 three of the Quadrex findings are reported by HL&P, the
20 rest is not reported. The report is not turned over to
21 the Board. And that's a product of a meeting of three
22 people initially, Mr. Goldberg, Dr. Sumpter and Mr.
23 Robertson, who are joined in by Mr. Powell. That Mr.
24 Powell and Mr. Robertson then later discuss again
25 whether they should turn this report over to the NRC and

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1 don't change their mind about what to do.

2 MR. AXELRAD: I'm sorry. Did you say Mr.
3 Robertson and Mr. Powell?

4 MR. SINKIN: I do believe that's what I said.
5 I could be wrong. I think it's Dr. Sumpter and Mr.
6 Powell. No, I take it back. I'll get it right this
7 time. Dr. Sumpter and Mr. Robertson subsequently
8 discuss it again and come to the same conclusion. That
9 what we have is a group of people making a decision that
10 seems to fly in the face of everything in the
11 regulations, the reactions of the NRC and what they
12 should have done.

13 That alone is to us enough evidence to raise
14 the issue of conspiracy. It is not that we have a
15 smoking gun where they've written a memorandum saying
16 let's conspire. You don't have to have that. That's
17 how it became a contention was our original allegation
18 of a conspiracy. That in order to prove that
19 contention, we are entitled to question witnesses under
20 circumstances that facilitate our proving that
21 contention. And that if the Applicants are allowed to
22 proceed as they would like to proceed, it would severely
23 restrict our ability to prove that contention.

24 Now, we very deliberately use the phrase
25 inclination of harmonized testimony because we wanted to

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1 bring it down to that level. We're not saying that they
2 will necessarily lie. We are saying that if witness A
3 knows that witness B testified in a certain way, there
4 will be a natural inclination for witness A to testify
5 in a very similar way. That doesn't necessarily mean
6 witness A is lying.

7 For example, again, back to the example
8 earlier today, Mr. Reis says he suggested that the
9 report be turned over, Mr. Newman agreed to the
10 suggestion and Mr. Newman agrees to that representation
11 of the event. Well, if Mr. Newman had not heard Mr.
12 Reis say it was just a suggestion, he might have not
13 have used the word suggestion. He might have said Mr.
14 Reis said we had to turn it over. That's the kind of
15 thing we're looking for and that's the kind of thing
16 that we won't get if each witness knows just how the
17 other witness has testified.

18 We think that once the withholding has taken
19 place, once the finding of a McGuire violation has taken
20 place, those are events which trigger an inquiry into
21 why they took place. And for that inquiry to be
22 complete, it has to explore the very possibility we have
23 raised, that this was a deliberate, willful act that has
24 a great deal to do with the level of enforcement, that
25 has a great deal to do with the implications for

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1 character and competence.

2 We have a whole series of events here. There
3 was no report to the Board, there was no report to the
4 NRC staff of other than the three findings. All four
5 management witnesses of HL&P managed to testify
6 throughout Phase I and never mentioned Quadrex. It
7 spreads from the original group of four to Mr. Oprea and
8 to Mr. Jordan. They suddenly don't mention Quadrex.
9 Mr. Frazar doesn't mention Quadrex. Nobody thinks to
10 mention Quadrex in questions which the Board's order of
11 February 26th said such a mention was either appropriate
12 or mandatory. So, that was at least a view of the Board
13 as to what was going on here. A question was asked
14 where it was mandatory Quadrex be mentioned and it
15 wasn't mentioned. That's what we're talking about as
16 the prima facie case, that something is going on here
17 that the Board needs to fully explore.

18 As far as whether the Board's order raised an
19 issue of credibility, I think Mr. Axelrad simply carried
20 it too far. He said the Board didn't charge them with
21 lying. Well, that's not what we're looking for. Was
22 the issue of credibility raised? That's what
23 sequestration is all about. It was raised by the Board
24 calling upon the witnesses to explain why they didn't
25 mention Quadrex, to explain why they were able to

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1 testify all those days about performance of Brown & Root
2 in a certain way in light of the fact that they had the
3 Quadrex report on their desk. Obviously a question had
4 been raised as to their credibility. The Board was
5 making no decision in its order. The Board was making
6 no accusation in its order. The Board was specifically
7 raising the question.

8 As far as Mr. Stanley being involved in the
9 conspiracy, perhaps I was misunderstood. I did not say
10 that Mr. Stanley was involved in the conspiracy. I said
11 that Mr. Stanley will be questioned about what was to be
12 reported to the NRC, what he was told about what was to
13 be reported to the NRC, and a test of whether that
14 conforms to the recollections of Mr. Goldberg, Dr.
15 Sumpter and those that worked with Mr. Stanley on his
16 report.

17 As far as what do we want from sequestration,
18 I think the record will reflect that earlier today we
19 did identify many of the aspects of sequestration, what
20 we want. That witnesses not discuss with each other
21 each other's testimony. That witnesses not read
22 newspaper accounts of the testimony of other witnesses.
23 That they not watch television, news reports of the
24 testimony of other witnesses. That they not be
25 consulting with the attorneys as to what other witnesses

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1 have testified to. Those are some of the things that we
2 would seek in the sequestration order.

3 JUDGE BECHHOEFER: Can we control it to what
4 to tell them --

5 MR. SINKIN: You can tell them. If they're
6 watching television and stories about what's going on in
7 Bay City comes on, they can turn it off. You can tell
8 them that. Whether they do it or not is up to them. We
9 can ask them about it when they come.

10 Mr. Axelrad asked about the attorney's
11 hardship and the role -- he should feel free to consult
12 with these witnesses if it's appropriate in carrying and
13 conducting of the case. Well, that would be true all
14 the time. All the time. That's an argument for never
15 sequestering. So, it doesn't tell us very much that he
16 feels he should be free at any time to consult. Then we
17 would never have sequestration.

18 As far as the sixth prehearing conference, all
19 I can say is we brought up who we wanted to call as
20 witnesses and we put Applicants on notice we intended to
21 call counsel as witnesses and we intended to ask for
22 sequestration of witnesses, particularly on the issue of
23 credibility. It was clear that that's what we were
24 calling the Applicants' attorneys for. Two and two
25 makes four. We're going to call the Applicants'

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1 attorneys on credibility, we're going to sequester the
2 witnesses on credibility, that means we're going to
3 sequester the attorneys on credibility.

4 Those are the only responses I really have.

5 JUDGE BECHHOEFER: I think we will have to
6 take a break before we decide.

7 MR. AXELRAD: Mr. Chairman, if I may have just
8 one last word.

9 Mr. Sinkin says that what we said about
10 hardship didn't tell very much because there would be
11 hardship in every case. Well, that's exactly the
12 point. There is a balancing of factors that's required
13 in every case and in every case depriving a party of
14 full access to its knowledgeable people is a hardship on
15 a party. That is why the burden is upon the mover for
16 the sequestration order to show that there is an
17 appropriate basis for sequestration and that's exactly
18 the argument we made.

19 Mr. Sinkin has not met that burden. All that
20 he's shown is speculation and speculation which is
21 contravened by the very findings of the Staff's 82-02
22 investigation. When he talks about a conspiracy
23 contention, there is nothing in the contentions that say
24 anything about conspiracy. He may feel free to choose
25 that that's his basis for the reasons why the failure to

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1 report, but that wasn't supported by him in anything
2 that he's filed so far and there is certainly nothing
3 that would support his sequestration motion.

4 JUDGE BECHHOEFER: Let's take a break and
5 we'll aim for fifteen minutes, but it may be a few
6 more.

7 (Recess.)

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1 JUDGE BECHHOEFER: Back on the record. We've
2 reached a decision on the two questions before us.
3 First, with respect to the attorneys, the Applicant
4 attorneys, we have decided that they will not be called
5 as witnesses, at least at this time, and until after the
6 hearing of other witnesses. We think there must be a
7 showing of absolute or not absolute, but at least
8 necessity demonstrated by unique facts demonstrating a
9 clear necessity for the testimony of the attorneys in
10 question. So at this stage, we will not call attorneys.

11 We've also decided that we will not sequester
12 the attorneys even if they are called. We've drawn a
13 balance between, one, the lack of showing of a -- lack of
14 a clear showing of necessity; two, the attorneys are
15 officers of the court, or the Board, and they have a
16 special obligation to tell the truth beyond that even of
17 witnesses, I think. So -- and third, we think there
18 would be a extreme hardship on the Applicant if we were
19 to sequester any or all of their attorneys.

20 So on those three bases we will not require
21 their sequestration.

22 In terms of the other witnesses, however, we
23 have decided to sequester two of the witnesses, assuming
24 they are to be called. And those two are Mr. Robertson
25 and Mr. Poston. And we have reached that decision with

1 the full knowledge that we have not yet ruled on whether
2 they will be called, but I might say that we believe that
3 our lack of sequestration of certain of the other
4 witnesses will make it more probable that we will call
5 upon Mr. Robertson or Mr. Poston to testify. We believe
6 Mr. Robertson particularly might be an independent voice
7 at the particular meeting determining what aspects of the
8 Quadrex, what findings of the Quadrex report would be
9 reported independent of the other witnesses.

10 And therefore, we will order sequestration for
11 Mr. Robertson and Mr. Poston. And the sequestration
12 should be that they will not be in the hearing room, that
13 the -- that no witnesses will discuss their testimony
14 with those witnesses; and that applies to all of the
15 other witnesses; and that they should not see the --
16 Messrs. Robertson and Poston should not see the
17 transcript; they should avoid, if they can, newspaper and
18 television accounts of the proceedings, and they are not
19 to be briefed by either the lawyers or the witnesses upon
20 what the testimony has been.

21 And I guess that -- now they will be -- their
22 direct testimony will be in response to Mr. Sinkin, so
23 presumably Mr. Sinkin could decide what they'll be asked
24 on direct, if they are called, assuming they are called.

25 So that there's no need to discuss even -- if

1 they are called, there's no need to discuss with them
2 prior witnesses' testimony. So that's the basis for our
3 ruling on the various motions. With that, I guess we're
4 prepared to start with Mr. Goldberg?

5 MR. AXELRAD: Could we have a minute, Mr.
6 Chairman?

7 JUDGE BECHHOEFER: Yes.

8 MR. PIRFO: If I may while Applicantsre
9 consulting, just one -- I don't want to make a big deal
10 of it, but there's one sort of glaring gap in the details
11 of the sequestration order, and that's with regard to
12 other spectators in the courtroom talking to the --
13 Messrs. Robertson or Poston. You said that they should
14 not talk to any of the lawyers or other witnesses and
15 they should not discuss their testimony with other
16 witnesses. But you didn't say anything about other
17 spectators. And I would think that given everything else
18 you've said, as a natural corillary to this would be that
19 they would not discuss it with anybody else the
20 courtroom.

21 MR. SINKIN: I think the best way to ois to
22 start with the witness, the witness is not to discuss
23 with anyone the testimony of other witnesses in this
24 proceeding. That would cover people who are here, people
25 who had -- newspapers, whatever. The witness should not

1 discuss with anyone.

2 MR. PIRFO: I think that's what the Board said --

3 JUDGE BECHHOEFER: That's what we intended, if
4 we didn't say it.

5 MR. AXELRAD: I assume you are talking about
6 the oral testimony. Obviously, written testimony,
7 prefiled testimony, has been made available to Mr.
8 Robertson and Mr. Poston for --

9 JUDGE BECHHOEFER: Yes, we are talking about
10 their responses to cross examination or board
11 examination.

12 MR. SINKIN: Assuming that that's already been
13 done, if it hasn't been done, we would like no further
14 distribution to them of prefiled testimony.

15 MR. AXELRAD: I see no basis upon which
16 intervenors are entitled to what Mr. Sinkin has just
17 said. Testimony either that has been or not been
18 provided to them to the extent that it's already part of
19 the record available to all, I see no reason why we
20 should now make an ex post facto --

21 MR. SINKIN: Mr. Chairman, it is the equivalent
22 of direct testimony which was not available to them. If
23 they haven't seen it by now, they shouldn't see it.

24 JUDGE BECHHOEFER: I guess that's right. If
25 they haven't been shown the testimony at this stage they

1 should not be given it. If they have been given it
2 already, has that -- so be it. That's sort of comparable
3 to the newspapers and television.

4 MR. SINKIN: Maybe I ought to stick with that
5 for just a second because there's also if they have been
6 given it but haven't read it, it seems to me that what we
7 don't want them doing is reading other people's testimony
8 in any form prior to coming. And if they haven't done so
9 by now, they should be told not to.

10 MR. REIS: That suggestion is out of time.
11 That should have been a suggestion at the prehearing
12 conference sometime ago. At this time, it is really,
13 it's after the horse is out of the barn.

14 JUDGE BECHMOEFER: I think if they have been
15 given the testimony already, we will not impose
16 restrictions on the direct testimony. The restrictions
17 on cross-examination responses, I think, are probably
18 more relevant in any event. But so that just for those
19 two prospective witnesses, I should say.

20 MR. AXELRAD: Just to make sure that I
21 understand, Mr. Chairman, you have not yet ruled that
22 those two witnesses will in fact be called. We will have
23 an opportunity as was promised to file a motion to quash.

24 JUDGE BECHHOEFER: That's correct. We did say
25 that it was more likely that they would be called, given

1 the fact that we weren't sequestering certain of the
2 other people whose testimony we already have.

3 MR. AXELRAD: I understand. And the most that
4 they would be called on would be the subjects that have
5 already be identified by Mr. Sinkin in his identification
6 of witnesses and the matters on which he wishes their --
7 to have them testified. He had limited scope in the
8 documents that Mr. Sinkin has filled; he cannot enlarge
9 upon that scope; that would be the -- even if we lose the
10 motion to quash, they would testify only with respect to
11 those subjects, those subjects identified.

12 JUDGE BECHHOEFER: Yes, there were two
13 different documents. But yes, those documents.

14 MR. SINKIN: Okay. And earlier today, we
15 raised our concern that the decision on calling them be
16 made earlier, as in tomorrow morning. We would like to
17 re-urge that tomorrow morning we decide, if those three
18 witnesses are called as it impacts the questions we would
19 ask witnesses already being called.

20 MR. AXELRAD: Mr. Chairman, we cannot possibly
21 prepare a motion to quash by tomorrow morning. To be
22 clear, we suggested that the motions to quash not have to
23 be filed until the conclusion of all the direct
24 testimony. The Board said in the course of a conference
25 call, it would be sometime before the end of the hearing

1 session next week. There was not an adequate notice to
2 us to prepare a motion to quash by tomorrow morning. We
3 really do need until sometime next week.

4 MR. SINKIN: Mr. Chairman, it was set out that
5 these would be oral arguments, there would not be a need
6 for a written motion and the Applicant represented in the
7 conference call that they were perfectly prepared to show
8 that these witnesses should not be called; they've been
9 on notice for some time that these witnesses were going
10 to be called, ever since the 6th prehearing conference,
11 on most of them.

12 MR. AXELRAD: And the Board clearly made a
13 statement that even though a written motion was not
14 necessary, that a written motion was permissive.

15 JUDGE BECHHOEFER: The Board will not hear that
16 argument tomorrow. We do want to hear more of what the
17 other witnesses have to say first. So that we're not
18 arguing completely hypothetically, there may be questions
19 that we've outlined a few ourselves, that the current
20 witnesses can't answer. But let's wait and see.

21 MR. AXELRAD: Fine, Mr. Chairman, I would like
22 to make one other thing clear, since we've listened to
23 the to the sequestration, as I understand it, we, as
24 lawyers, are not to divulge to either Mr. Robertson or
25 Mr. Poston any of the oral testimony that's given in this

1 proceeding. But there is no -- and we are not to provide
2 them with copies of the prefiled testimony if they
3 already have it. But apart from those two restrictions,
4 there are no restrictions on our ability to communicate
5 with Mr. Robertson and Mr. Poston. Is our understanding
6 of the limitations a fully appropriate one?

7 JUDGE BECHHOEFER: We did not intend to
8 preclude you from contacting those people about other
9 matters but you shouldn't be discussing with them the
10 testimony --

11 MR. AXELRAD: The testimony of others.

12 JUDGE BECHHOEFER: Of others here, all of the
13 HL&P witnesses, staff witnesses, et cetera. Well, we
14 will decide on whether they're to be called prior to the
15 time the staff gets on.

16 Are you ready at this point to put Mr. Goldberg
17 on?

18 MR. AXELRAD: Before we do that, we are
19 prepared to proceed with our case but it might be useful
20 to first identify, mark for identification, six of the
21 exhibits which are referred to in Mr. Golberg's
22 testimony. If the Board wishes to, we had attached to
23 our letter of June 26th, 1985, when we provided the
24 testimony of our listing and the testimony of our
25 witnesses, we also provided a list of exhibits. And that

1 might be -- it was attached to our letter of June 26,
2 1985.

3 The six exhibits I'm about to discuss are
4 exhibits that will be marked 57, 58, 59, 60, 60. and 62.
5 Unfortunately, we did not reproduce and bring copies of
6 Exhibit 62; we will try to have those by tomorrow
7 morning.

8 So let me just deal with the first five.
9 Exhibit No. 57, is a document -- Exhibit 57 is a document
10 consisting of six pages of handwritten notes by Mr.
11 Goldberg dated April 13, 1981, entitled "Preliminary
12 review, 1:00p.m." I might say, we will provide the three
13 copies to the reporter. The members of the Board and the
14 other parties already have copies of all these exhibits,
15 so we did not plan to provide them.

16 We do have, I believe, a couple of additional
17 sets if it would be convenient to the Board.

18 Applicant Exhibit No. 58 is a one page
19 memorandum dated April 15, 1981, to J. R. Sumpter, from
20 J. H. Goldberg, and the subject is Quadrex review of
21 Brown & Root engineering problem categorization. And the
22 document includes on it some handwritten notes by Mr.
23 Standley. Applicant Exhibit 59 --

24 JUDGE BECHHOEFER: By who?

25 MR. AXELRAD: The notes on Exhibit 58?

1 JUDGE BECHHOEFER: Yes.

2 MR. AXELRAD: By Mr. Standley.

3 JUDGE BECHHOEFER: Okay.

4 MR. AXELRAD: Applicant Exhibit 59 consists of
5 two typewritten pages and three handwritten pages which
6 are excerpts from notes of the minutes of the April 27,
7 1981, minutes of the STP management committee.

8 Applicant's Exhibit Number 60 is a document
9 entitled, "Design Review of Brown & Root engineering work
10 for the South Texas Project," prepared by the Quadrex
11 corporation, and dated May, 1981; it consists of three
12 volumes. The version which has been prepared for the
13 reporter is contained in two binders, binder one includes
14 volume one and two and binder two includes volume three.

15 Applicant exhibits No. 61 is a two page letter
16 dated May 7, 1981, from Mr. J. H. Goldberg to Mr. E. A.
17 Salterelli of Brown & Root, Inc., and the subject is
18 South Texas Project Quadrex engineering review.

19 I would identify Applicant's Exhibit No. 62 but
20 I will not be able to provide copies for the court
21 reporter until tomorrow. It consists of a two page
22 letter dated May 8, 1981, from Mr. Salterelli of Brown &
23 Root to Houston Lighting & Power Company, attention of J.
24 H. Goldberg, and the subject is South Texas Project,
25 Quadrex engineering review, dated May 8, 1981, and it

1 includes an enclosure (1) entitled "Brown & Root Review
2 of South Texas Project Quadrex Engineering Review, (May
3 1981)," with -- which is approximately 40 pages, I would
4 think, and an enclosure (2) entitled "Summary of Brown &
5 Root Findings on South Texas Project, Quadrex Engineering
6 Review (May 1981), (Item 4.4.2.1a) /b class," which, in
7 addition to the title sheet, includes -- consists of,
8 rather, four pages.

9 So I would now ask for those six Exhibits to be
10 marked for identification as 57, 58, 59, 60, 61 and 62.

11 MR. SINKIN: No objection.

12 MR. PIRFO: No objection to their being mark
13 for identification.

14 JUDGE BECHHOEFER: Okay, without objection,
15 those exhibits will be so marked.

16 (Applicant Exhibit No. 57, 58, 59, 60, 61
17 and 62, were marked for identification.)

18 MR. AXELRAD: At this point, the Applicants are
19 prepared to call their first witness, Mr. Jerome H.
20 Goldberg.

21 MR. AXELRAD: Mr. Chairman, Mr. Goldberg has
22 been previously sworn.

23 JUDGE BECHHOEFER: Yes.

24 JEROME H. GOLDBERG

25 testified further upon his oath as follows:

1 DIRECT EXAMINATION CONTINUED

2 By Mr. Axelrad:

3 Q Mr. Goldberg, please state your full name for
4 the Board.

5 A Jerome H. Goldberg.

6 Q Mr. Goldberg, you have before you a document
7 entitled "Testimony on Behalf of Houston Lighting & Power
8 Comany, et al, of Jerome H. Goldberg consisting of 71
9 pages?

10 A Yes, I do.

11 Q Have you read that document and are you
12 familiar with it?

13 A Yes, I am.

14 Q Do you have any corrections, deletions or
15 modifications that you wish to make to this testimony?

16 A Yes, I do.

17 Q Please give us those corrections.

18 A On Page 3, Line 16, in place of the word
19 "B&R's," substitute the word "the."20 On Page 17, Line No. 2, add the words after the
21 second "the," "notes for the."

22 JUDGE BECHHOEFER: Where was that.

23 THE WITNESS: Page 17, Line No. 2.

24 THE WITNESS: So it will now read "portion of
25 the notes for the minutes."

1 On Page 26, Line No. 17, before the letters
2 "CFR," insert the No. 10.

3 On Page 54, Line No. 26, after the word
4 "board," place a period and a new sentence starts with
5 the word "until" and after 1981, remove the period and
6 replace with a comma.

7 On Page 42, Line No. 18, delete the words "had
8 subcontracted with NUS for," and substitute the word
9 "initiated." It would now read: "B&R initiated
10 a re-analysis."

11 That concludes my corrections.

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Q (BY MR. AXELRAD) Mr. Goldberg, could you --

JUDGE BECHHOEFER: Mr. Goldberg, there are a couple of other corrections that I want to ask you about maybe whether they should be made. On page 21, line 10, should the word "these" be "there," T H E R E?

THE WITNESS: No, I think the word "these" looks appropriate to me.

JUDGE BECHHOEFER: Okay. You wrote it, so --

THE WITNESS: Well, you know, being an engineer, we sometimes don't always use the best English.

JUDGE BECHHOEFER: Then on page 60, line 9, should there not be a comma after testified?

THE WITNESS: I think that would be probably appropriate.

JUDGE BECHHOEFER: Okay. I guess that can be added then.

THE WITNESS: I did see one spelling error someplace, but I can't find it.

JUDGE BECHHOEFER: Well, on that page 60, I was wondering what you meant by what you testified to or whether you testified to it or whether it was at the time you testified. There is a difference in meaning there.

THE WITNESS: I think the comma is

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1 appropriate.

2 JUDGE BECHHOEFER: Okay.

3 Back to you, Mr. Axelrad.

4 Q (BY MR. AXELRAD) Mr. Goldberg, I would like
5 to go back to page 42 where you made a change in line
6 18. Could you please explain for us the reason for that
7 change?

8 A Yes. We knew a reanalysis had been in
9 progress and at the time I wrote this testimony I got
10 confused with a later analysis that was also performed.
11 The analysis that was underway at the time of the
12 Quadrex review was one being performed by Brown & Root.
13 Subsequently, in late 1981 and prior to the time that
14 Brown & Root was removed from the job, they had
15 contracted with NUS to perform a further analysis which
16 was completed by NUS under Bechtel's direction.

17 Q Mr. Goldberg, is this testimony, these 71
18 pages as you have now modified them, true and correct to
19 the best of your knowledge, information and belief?

20 A Yes, it is.

21 Q Do you adopt this testimony as modified as
22 your testimony in this proceeding?

23 A Yes, I do.

24 MR. AXELRAD: Mr. Chairman, Applicants move
25 that the testimony on behalf of Houston Lighting & Power

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1 Company of Jerome H. Goldberg as modified be admitted
2 into evidence in this proceeding.

3 JUDGE BECHHOEFER: Any objection?

4 MR. SINKIN: Yes, Mr. Chairman. CCANP served
5 this morning a motion to strike which does address
6 certain portions of Mr. Goldberg's testimony. The
7 essential problem we perceive was the inclusion of the
8 testimony of the ultimate resolution of a given finding
9 as to its reportability. We argue in the motion that,
10 number one, the contention itself speaks to notifying
11 the NRC within twenty-four hours. That is the
12 notification aspect of 50.55(e).

13 The contention does not include the actual
14 determination of reportability. So, testimony on the
15 actual determination of reportability is not appropriate
16 under this contention. Furthermore, if such testimony
17 were given, it would raise an issue that we were not on
18 notice to be litigated here which is the adequacy of
19 HL&P's resolution of a particular item as to whether it
20 should have been reported or not. So, we have gone
21 through Mr. Goldberg's testimony and specified the
22 sentences or paragraphs that contain that kind of
23 information and ask that they be struck.

24 MR. AXELRAD: Mr. Chairman -- is Mr. Sinkin
25 finished?

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1 MR. SINKIN: Yes.

2 JUDGE BECHHOEFER: Should we go line by line
3 as he had mentioned?

4 MR. AXELRAD: Yes, I was going to do that.
5 But I was just going to mention that, first of all, we
6 would disagree with his basic approach. I do think we
7 have to go line by line because the arguments on each
8 item might be different. But clearly we disagree with
9 Mr. Sinkin's belief that the ultimate reportability of
10 any item has no relevance to whether or not the
11 Applicants acted correctly in not reporting a document.
12 Obviously, if Applicants had reported only three items,
13 for example, and it turned out that fifty were
14 reportable, that would have been relevant. So, clearly
15 with respect to any item which Applicants failed to
16 report within twenty-four hours, whether or not that
17 item was, in fact, ultimately found to be reportable, we
18 believe to be very relevant.

19 But, in any event, beyond that general
20 argument, we should turn to each item and we can discuss
21 why that particular sentence which Mr. Sinkin seeks to
22 strike should remain in the testimony.

23 The first one appears at page 36, line 20.
24 And the sentence which Mr. Sinkin seeks to strike
25 relates to an item which HL&P did, in fact, submit as

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1 potentially reportable. And after the item had been
2 submitted as potentially reportable, it was, in fact,
3 determined by HL&P not to be reportable and the NRC was
4 so advised.

5 The fact that HL&P had conservatively
6 submitted something as potentially reportable and, in
7 fact, later on had found that it was not reportable is a
8 direct and appropriate reflection on the fact that
9 HL&P's standard for reporting Quadrex' finding was
10 conservative and that, as of a May 8, 1981 decision on
11 reportabilities, were conservative.

12 JUDGE BECHHOEFER: Mr. Sinkin, did you take
13 into account the potential effect on character of
14 whether a matter that had been reported later turned out
15 to be not reportable?

16 MR. SINKIN: No, Mr. Chairman, we don't --

17 JUDGE BECHHOEFER: In their view, that is,
18 because I don't think your witnesses -- I don't think
19 Mr. Goldberg is trying to say anything other than HL&P
20 determined that it wasn't reportable. I don't think
21 he's trying to get the Board to say, yes, you were
22 right.

23 MR. SINKIN: Well, but to do what Mr. Axelrad
24 is saying they will do, which is to say here's proof
25 that we took the conservative approach, we notified the

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1 NRC of something that turned out not to be reportable,
2 then whether they correctly determined that it was
3 reportable or not becomes an issue if it's going to have
4 any weight in showing that they were conservative. If
5 they made an error, then they weren't conservative. If
6 they were correct, then they were conservative. That's
7 what they want to argue. We say it's just that kind of
8 debate that was not in the contention and that was not
9 an issue in this proceeding.

10 I'd also like to respond to Mr. Axelrad's
11 overall point that the number of reported findings would
12 be relevant. I don't think it's the number ultimately
13 reported that's relevant. It's the number notified
14 that's relevant. If there were a number of other
15 findings notified, that might make some difference in
16 the determination of this contention as written. But
17 the number that were found reportable or not does not
18 address the contention about the failure to notify the
19 NRC within twenty-four hours.

20 I think they're clearly raising the adequacy
21 of the reportability determination, and that's what
22 we're saying is not a subject of these hearings.

23 MR. AXELRAD: Mr. Chairman, with respect to
24 the specific findings which the Board has directed is a
25 subject of this proceeding, it is not credible to

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1 discuss them without discussing whether or not they were
2 reportable and, therefore, the fact that the Applicants
3 submitted it as potentially reportable and later on
4 found it was not reportable is clearly relevant. I
5 don't see how you can shut your eyes to that.

6 MR. SINKIN: Mr. Chairman, if I may.

7 JUDGE BECHHOEFER: Mr. Sinkin, were you trying
8 to raise a point?

9 MR. SINKIN: I wanted to add something else.

10 If the issue is whether, as stated, many
11 findings beyond those actually reported within
12 twenty-four hours should have been reported, then the
13 basic assumption is the three that were reported should
14 have been reported. There's no question that the three
15 that were reported should have been reported. The fact
16 that it ultimately turned out not to be reportable is a
17 very different analysis. The notification analysis is
18 the twenty-four hours done in limited time with limited
19 information. The reportability analysis is a completely
20 different kind of analysis and does not show whether
21 they make a correct notification.

22 As a matter of fact, I assume the Applicants'
23 position is this was a correct notification, that they
24 should have notified the NRC of this finding. They're
25 saying it proves they were conservative. That puts it

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1 in the ambit of those that they should have notified.
2 But the question of reportability is a completely
3 separate question.

4 MR. AXELRAD: Mr. Sinkin, you assume
5 incorrectly.

6 JUDGE BECHHOEFER: I might say that the Board
7 has decided that the particular line of question here is
8 just part of the fact of circumstances regarding a
9 particular finding and I don't think we can cut it off
10 that closely. I think we ought to know all the facts
11 and circumstances in order to judge character both
12 ways. And we also think that the Commission's
13 guidelines, at least in 50.55(e), require the
14 notification or reportability of what they call
15 potentially reportable items and it contemplates that
16 some of them will not end up being reportable. And I
17 think all the fact and circumstance will take that into
18 account for all of the ones we are looking at.

19 So, I think we will deny the motion for that
20 line anyway. I must say I haven't read the others, so I
21 don't know whether they're all based on the same
22 theory.

23 MR. SINKIN: Well, we better walk through
24 them.

25 JUDGE BECHHOEFER: There are only two more for

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1 Mr. Goldberg.

2 MR. SINKIN: That's correct.

3 JUDGE BECHHOEFER: So, let's go through the
4 ones on Goldberg and then we can wait till later and
5 I'll have a chance to read it more carefully for the
6 others.

7 MR. AXELRAD: The next one appears at page 37,
8 line 23. In this particular instance what happened was
9 that on May 8, 1981, HL&P determined that those findings
10 were not reportable, as stated in the testimony here,
11 when the Bechtel task force issued its assessment of
12 Quadrex' findings in March of 1982. It identified its
13 findings as being potentially reportable and accordingly
14 it says that was a specific recommendation of the task
15 force, as the testimony states, HL&P notified the NRC
16 that that was potentially reportable.

17 But the sentences that Mr. Sinkin wishes to
18 have struck is that subsequently Bechtel confirmed that
19 the design had not been released for construction and
20 therefore was not reportable, which was the reason it
21 had not been reported back in May of 1981 and therefore
22 the NRC was notified that it was not reportable. And
23 what Mr. Sinkin is trying to do is to cut the story off
24 in midstream where HL&P had notified the NRC because of
25 the Bechtel recommendation, but he wishes to exclude

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1 from the record the portion that reflects that Bechtel
2 in essence changed its mind once it got the additional
3 facts. And that is again wholly inappropriate,
4 particularly in view of the reason that the Board
5 expounded on before.

6 MR. SINKIN: Well, under the facts and
7 circumstances of the Board, I'm not sure that this one
8 doesn't stay in, too. We see the same argument here
9 that it addresses notification, it does not address
10 reportability. And the ultimate determination of
11 Bechtel was a determination based on a later study, a
12 more in-depth study than was possible in twenty-four
13 hours and led to a decision on reportability. But it's
14 basically the same argument.

15 JUDGE BECHHOEFER: We will deny the motion on
16 that one as well. We will leave the testimony in.

17 MR. AXELRAD: The last one is a sentence
18 beginning at line 1 of page 47 that deals with the
19 filtration of the MEAB exhaust. And after explaining
20 that the design feature, that design feature that
21 Quadrex had suggested be reviewed, that proves to be
22 found acceptable, the point is made that the correctness
23 of that decision was later confirmed by Bechtel. In
24 other words, that sentence just simply says that Bechtel
25 afterwards confirmed the correctness of HL&P's May 8,

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1 1981 decision that this finding was not reportable. We
2 believe that's relevant and important.

3 JUDGE BECHHOEFER: We'll deny that one as well
4 and leave the testimony in, leave the sentences in.

5 Are there any other objections to Mr.
6 Goldberg's testimony?

7 MR. SINKIN: No.

8 MR. PIRFO: The Staff has no objections.

9 JUDGE BECHHOEFER: Okay. Mr. Goldberg's
10 testimony will be admitted into the evidence and will be
11 bound in the record as --

12 MR. AXELRAD: I just have a few questions of
13 Mr. Goldberg with respect to the exhibits at this
14 point.

15 JUDGE BECHHOEFER: Okay.

16 Q (BY MR. AXELRAD) Mr. Goldberg, will you
17 please turn to page 14 of your testimony. Do you have
18 in front of you a copy of a document that's been marked
19 for identification as Applicants' Exhibit 57?

20 A Yes, I do.

21 Q Is this the same document which you identify
22 as Applicants' Exhibit 57 in answer 19 of your prefile
23 testimony?

24 A Yes, it is.

25 Q Please turn now to page 15 in answer 22. Do

1 you have in front of you the document that has been
2 marked for identification as Applicants' Exhibit 58?

3 A Yes, I do.

4 Q Is this that document, the same document which
5 you identified as Applicants' Exhibit 58 in answer 22 of
6 your prefile testimony?

7 A Yes, it is. However, it's got a number of
8 notations on it that are not mine.

9 Q Thank you, Mr. Goldberg.

10 Will you please turn to page 17 of your
11 testimony, answer 24 on page 17. Do you have in front
12 of you a copy of a document that's been marked for
13 identification as Applicants' Exhibit 59?

14 A Yes, I do.

15 Q Is that document the same document which is
16 identified as Applicants' Exhibit 59 in answer 24 of
17 your prefile testimony?

18 A Yes, it is.

19 Q On that same page 17, if you will turn to
20 answer 27. Do you have before you the documents, the
21 two binders which collectively have been marked for
22 identification as Applicants' Exhibit 60?

23 A Yes, I do.

24 Q Are those documents the same documents which
25 are identified as Applicants' Exhibit 60 in answer 27 of

1 your prefile testimony?

2 A Yes, it is.

3 Q Please turn to --

4 JUDGE BECHHOEFER: Let me inquire one thing.
5 I have not seen either of those copies, but are those
6 copies without any extraneous notes or anything like
7 that in any of the margins?

8 MR. GUTTERMAN: On thumbing through it, Mr.
9 Chairman, I see some initials on, oh, I guess you'd call
10 it the cover page, it's a page numbered I in the top
11 right-hand corner that are handwritten in. Other than
12 that, yeah, I do see a couple of little marks and I
13 believe this is a copy of -- the same copy that was
14 distributed originally to the Board.

15 JUDGE BECHHOEFER: That's why I asked the
16 question.

17 MR. GUTTERMAN: The people that have been
18 doing all this copying for us apparently used the same
19 master.

20 MR. AXELRAD: Essentially it is our belief it
21 is a clean copy except for some possible interlineation
22 in a couple places and some initials on the title
23 sheet.

24 JUDGE BECHHOEFER: Okay.

25 MR. SINKIN: Excuse me. I got a little lost.

11481

1 Are you doing Volume 1?

2 MR. AXELRAD: No, all the volumes collectively
3 are Applicants' Exhibit 60.

4 MR. SINKIN: Where were the initials?

5 MR. AXELRAD: There was an initial on the
6 title sheet of Volume 1, MEP in the upper right-hand
7 corner, and similar initials on the title sheet of
8 Volume 2 and Volume 3.

9 MR. SINKIN: The same initials?

10 MR. AXELRAD: MEP.

11 MR. SINKIN: And when you say interlineation,
12 you mean there's underlinings?

13 MR. GUTTERMAN: I saw one word written in,
14 handwritten in someplace --

15 MR. SINKIN: Just the term that Mr. Axelrad
16 used, interlineation --

17 MR. GUTTERMAN: Well, he was using my term
18 that I said to him. That's what I meant by it. There
19 was one place that I saw it looked like a handwritten
20 notation in the text.

21 MR. SINKIN: On your copy are there
22 underlinings of various portions?

23 MR. GUTTERMAN: I haven't spotted any. If you
24 have a particular page you'd like me to look at.

25 MR. SINKIN: Page 3-7.

11482

1 MR. GUTTERMAN: No.

2 JUDGE BECHHOEFER: Our page 3-7, at least on
3 the copy we have, had quite a few things underlined.
4 I'm just trying to make sure we know what copies are
5 going into the record.

6 MR. AXELRAD: Okay. The copy that we produced
7 for the Board apparently and the parties apparently as
8 you've indicated had some markings on it. But I believe
9 that we tried to get a clean copy for purposes of the
10 exhibits.

11 JUDGE BECHHOEFER: Okay. That's what I was
12 wondering.

13 Q (BY MR. AXELRAD) Mr. Goldberg, if you will
14 turn to page 22 of your testimony and answer 31. You
15 have before you a copy of a document which has been
16 marked for identification as Applicants' Exhibit No. 61?

17 A Yes, I do.

18 Q Is this document the same document which you
19 identified as Applicants' Exhibit No. 61 in answer 31 of
20 your prefile testimony?

21 A Yes, it is.

22 Q On the same page, if you turn to answer 32, do
23 you have before you a copy of a document which has been
24 marked for identification as Applicants' Exhibit No. 62?

25 A Yes, I do.

11483

1 Q Is that document the same document that you
2 have identified as Applicants' Exhibit 62 in your answer
3 32?

4 A Yes, it is.

5 MR. AXELRAD: Mr. Chairman, three copies of
6 Exhibit 62, Applicants' marked for identification
7 Exhibit 62, have been provided for the Court Reporter.
8 At this time we would move that the three documents
9 marked for identification as Applicants' Exhibit 60, 61
10 and 62 be admitted into evidence based upon the
11 representations which are contained in the prefile
12 testimony of Mr. Goldberg which have been admitted into
13 evidence and their subsequent identification by Mr.
14 Goldberg. That's just Exhibits 60, 61 and 62.

15 MR. SINKIN: Let me understand, you're not
16 moving into evidence Exhibit 68 now?

17 MR. AXELRAD: That's correct.

18 JUDGE BECHHOEFER: I have an inquiry about,
19 well, maybe related to more than one document. But turn
20 to 61, Exhibit 61. What are the numbers on the
21 left-hand side or are they not on the copies that are
22 being put into evidence?

23 MR. AXELRAD: On the left-hand side of --

24 JUDGE BECHHOEFER: Page 1.

25 JUDGE SHON: Left-hand margin. Yours

11484

1 apparently --

2 JUDGE BECHHOEFER: What's going into the
3 record? Does it have anything like that on it?

4 (No hiatus)

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1 MR. GUTTERMAN: The copies we're putting into
2 the record don't have that. I can explain what those
3 numbers are, though, just for curiosity's sake if nothing
4 else. Those are numbers from a microfilming operation,
5 documents were reproduced, the documents that were sent
6 to the Board and parties, reproduced in microfilm and
7 those numbers were stamped for identification in the
8 microfilming process and not intended to be part of the
9 document.

10 JUDGE BECHHOEFER: I see, now is the document
11 going into the record, does it have the initials F.T. at
12 the upper right-hand corner?

13 MR. GUTTERMAN: The copy we've marked for
14 identification has handwritten in the upper right- hand
15 corner J. Briskin, and it's stamped received May 8th,
16 1981, JWS Briskin. I suspect that means that it's a
17 different copy. But it's the same document that we
18 identified to you.

19 JUDGE SHON: Mr. Gutterman, would you represent
20 to us that any differences between your documents and the
21 ones we have on hand are not matters of substance and
22 will not enter in any way into the meaning of the
23 document or the matters -- upon which the witness might
24 be cross-examined.

25 MR. GUTTERMAN: I could certainly represent

1 that any differences I know about are insignificant and
2 not differences of substance. I do represent that, yes.
3 I don't know what substance somebody else might attach to
4 them, but I don't know of any substance.

5 JUDGE BECHHOEFER: Is there any objection? I
6 take I you've offered all of these.

7 MR. AXELRAD: No, I've not offered all of
8 these. I've offered only the last three, 60, 61 and 62.

9 MR. SINKIN: Other than their being too heavy
10 to carry around, we have no objection to them.

11 MR. PIRFO: The staff has no objection.

12 JUDGE BECHHOEFER: Those three documents,
13 Applicant 60, 61 and 62, are admitted into evidence.

14 MR. AXELRAD: Thank you, Mr. Chairman. This
15 completes Applicant direct testimony of Mr. Goldberg.
16 Mr. Goldberg is now available for cross-examination.

17 JUDGE BECHHOEFER: Mr. Sinkin, do you have any
18 line of cross examination that you could finish in
19 fifteen minutes or so? I don't think we want to go much
20 after 6:00.

21 MR. SINKIN: I tell you what I'm willing to do,
22 Mr. Chairman, I'm willing to go fifteen minutes later
23 tomorrow night and make up the fifteen minutes now,
24 rather than begin and go for so short a time. We'll go
25 until 6:15 tomorrow.

1 JUDGE BECHHOEFER: Anybody have any objection
2 if we adjourn until tomorrow, then?

3 MR. AXELRAD: No, we don't, Mr. Chairman. The
4 one thing that it might be useful to do is to ascertain
5 what the expected cross-examination will be. We will
6 need to know whether our next witness should be here,
7 particularly since tomorrow is Friday and then Saturday.
8 I assume the parties have given to the Board their
9 estimates of cross examination time.

10 JUDGE BECHHOEFER: It doesn't look to us like
11 any witness other than Mr. Goldberg will be heard
12 tomorrow or Saturday, half of Saturday day that we have
13 gotten scheduled. So we don't even know -- it possibly
14 will go into even -- it may well be that we will not even
15 be finished with Mr. Goldberg by the end of Monday, we
16 don't know.

17 MR. AXELRAD: On Monday, as the Board will
18 recall --

19 JUDGE BECHHOEFER: We are including -- I'm
20 sorry, I wasn't sure about Mr. Jordan's schedule of
21 Monday which was still open.

22 MR. AXELRAD: What we will do on Monday, Mr.
23 Jordan will be in the hearing room, on Monday morning.
24 And as soon as the cross-examination -- as soon as the
25 limited appearance are completed, which hopefully might

1 be before noon, we would hospital that Mr. Jordan can be
2 taken even if Mr. Goldberg has not been finished yet so
3 has that we can accommodate Mr. Jordan's schedule.

4 JUDGE BECHHOEFER: We fully anticipate that,
5 for counting time purposes, we were thinking that Mr.
6 Goldberg could be on later in the afternoon on Monday.
7 But if you wanted to juggle your witnesses in some other
8 order, that might be all right, too. But it does not
9 look like -- Dr. Sumpter I guess is your next witness,
10 after Jordan.

11 MR. AXELRAD: Dr. Sumpter, yes.

12 JUDGE BECHHOEFER: Doesn't look like he would
13 be called before -- well, certainly not this week.

14 MR. AXELRAD: Okay. Could we have any
15 estimates of time for Dr. Sumpter and Mr. Standley so
16 that we can estimate --

17 JUDGE BECHHOEFER: We don't have that. We are
18 getting it witness by witness.

19 MR. AXELRAD: Would it be possible to ask the
20 parties to bring you with an estimate for Dr. Sumpter and
21 Mr. Standley so that we have some idea of who we need by
22 Tuesday or Wednesday, because you know people are not
23 always available and we'd like to be able to plan their
24 presence. Mr. Standley comes from California.

25 JUDGE BECHHOEFER: Mr. Axelrad, would you like

1 to carve out a particular day for Mr. Standley and take
2 him that day whatever the --

3 MR. AXELRAD: No, that would be a little awkward,
4 it's difficult enough to carve out time for Mr. Jordan,
5 limited appearance and finishing Mr. Goldberg and we do
6 have a sequence of witnesses, except for Mr. Jordan,
7 which we would like to follow, which which we think
8 provides a better flow for the record. I appreciate the
9 Board's concern in that regard. I guess if we could get
10 from the parties, some rough approximation of how long
11 their cross examination of Dr. Sumpter might be, and I
12 guess of Mr. Jordan, since he will be on Monday then I
13 think we'll be able to have a rough idea as to whether it
14 will be necessary for Mr. Standley to return. If we
15 could ask the parties to do that tomorrow, I'm not asking
16 for that information right now. If they could inform the
17 Board tomorrow, the expected time frame of Mr. Jordan and
18 for Dr. Sumpter.

19 MR. SINKIN: It might be Saturday afternoon
20 before I could comply with that request. I can give them
21 Dr. Sumpter probably tomorrow. But for Mr. Jordan, I
22 think it will be Saturday afternoon.

23 MR. AXELRAD: That's fine.

24 JUDGE BECHHOEFER: Okay. As far as we're
25 concerned, you still don't have any problem in your plan

1 until the witness comes. I might say that some of Mr.
2 Sinkin's proposed questions to Mr. Goldberg, he mentioned
3 a certain number of questions derived from the deposition
4 of Mr. Goldberg earlier by the State of Text, and that's
5 included in his time estimates here.

6 MR. AXELRAD: Okay.

7 JUDGE BECHHOEFER: Now, we haven't seen that
8 deposition. So it's hard for us to judge exactly how
9 long it's going to take.

10 MR. AXELRAD: That's fine.

11 JUDGE BECHHOEFER: By the way, I'm not
12 suggesting that we be provided it, either, until we get
13 into a big dispute over whether something is relevant or
14 not.

15 MR. PIFRO: It can wait until after we adjourn.

16 JUDGE BECHHOEFER: Pardon me?

17 MR. PIRFO: It can wait until after we adjourn.

18 JUDGE BECHHOEFER: Anything further before we
19 adjourn? We're starting tomorrow at 9:00 o'clock, we're
20 adjourning for for the day.

21 (Hearing adjourned for the day at 6:00 p.m.,
22 July 11, 1985.)

23

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25

1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

3 BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

4 In the Matter of) Docket Nos. STN 50-498 OL
5 HOUSTON LIGHTING & POWER) STN 50-499 OL
6 COMPANY, ET AL.)
7 (South Texas Project, Units 1)
8 and 2))

9 TESTIMONY ON BEHALF OF HOUSTON LIGHTING & POWER COMPANY,
10 ET AL.,
11 OF JEROME H. GOLDBERG

12 Q.1 Please state your name and current position.

13 A.1 I am Jerome H. Goldberg, Group Vice President - Nuclear
14 of Houston Lighting & Power Company (HL&P).

15
16 Q.2 Have you previously testified in this proceeding?

17 A.2 Yes. I testified in May and June of 1981 and June,
18 1982.

19
20 Q.3 Describe your educational and professional
21 qualifications.

22 A.3 My educational and professional qualifications are
23 generally described in my earlier testimony in Phase I
24 of this proceeding.

25

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27

28

1 Q.4 Has your position with HL&P changed since you last
2 testified in this proceeding.

3 A.4 Yes. On February 1, 1985, I was elected to the
4 position of Group Vice President - Nuclear. As a
5 result of this promotion and the retirement of Mr.
6 Oprea, formerly Executive Vice President-Nuclear, I
7 also assumed his responsibilities. I report directly
8 to Mr. Don D. Jordan, Chairman of the Board and Chief
9 Executive Officer of HL&P.

10

11 Q.5 What experience have you had in the interpretation and
12 application of the NRC reporting requirements, particu-
13 larly reporting under 10 CFR § 50.55(e)?

14 A.5 During the 9 years I was with Stone & Webster and in
15 much of my prior experience at the Quincy shipyard, I
16 have been involved in analysis of technical questions
17 very similar to the questions involved in application
18 of 10 CFR § 50.55(e). Such questions generally involve
19 evaluations of alternative designs, the safety of
20 alternative designs and the relative significance of
21 deficiencies in design and construction. While at
22 Stone & Webster, personnel reporting to me were
23 responsible for performing the evaluations of
24 reportability of deficiencies pursuant to 10 CFR
25 § 50.55(e) and 10 CFR Part 21 and I reviewed and
26 supervised their work. After coming to HL&P in October
27 1980, the licensing personnel for the South Texas

28

1 Project reported to me and I personally reviewed and
2 approved HL&P's written reports to the NRC pursuant to
3 10 CFR § 50.55(e).
4

5 Q.6 What is the purpose of your testimony?

6 A.6 The purpose of my testimony is to describe the
7 commissioning and development of the Quadrex Report,
8 HL&P's handling of that Report, including its notifica-
9 tion to NRC of the review by the Quadrex Corporation
10 (Quadrex) and, pursuant to 10 CFR § 50.55(e), of
11 various Quadrex findings, and the provision of the
12 Report to the Atomic Safety and Licensing Board (Board
13 or Licensing Board). In addition, my testimony
14 describes my understanding of the Quadrex Report when I
15 testified in May and June 1981, as well as my views on
16 the adequacy of B&R's services of Brown & Root, Inc.
17 (B&R) at that time. My testimony shows that HL&P
18 properly reported the appropriate Quadrex findings to
19 the NRC pursuant to 10 CFR § 50.55(e), that HL&P's
20 delay in providing the Quadrex Report to the Licensing
21 Board was due to a good faith belief that the subject
22 matter of the Report and the hearing were not directly
23 related, and that I was truthful and candid in my
24 testimony before the Board. It also explains why HL&P
25 did not inform the Board prior to September 24, 1981,
26 that it was considering replacing B&R as architect
27 engineer and construction manager.
28

1 Q.7 Why did HL&P decide to initiate a review of B&R
2 engineering in 1981?

3 A.7 When I assumed my position as HL&P Vice President of
4 Nuclear Engineering and Construction in October 1980, I
5 met with HL&P's key managers for the South Texas
6 Project (STP or Project), and had discussions with
7 various engineers who had been involved in the Project.
8 I was, of course, well aware that B&R had never
9 previously engineered a nuclear power facility. I
10 learned that B&R had recently developed its Systems
11 Design Assurance Group, and that a lot of system design
12 work lay ahead. I also found that there was a general
13 concern regarding the limited numbers and experience of
14 the B&R engineering personnel. In addition, in discus-
15 sions with my engineering staff, they identified a
16 potential weakness in B&R's nuclear analysis capa-
17 bility. These observations coupled with my own obser-
18 vations of the status of the Project, which was less
19 advanced than I would have expected after seven years,
20 caused me to question the strength of B&R's engineering
21 organization.

22 These impressions about B&R engineering were based
23 largely on discussions with members of my own Project
24 team. Since they had been involved with the Project
25 for some time, there was a potential for bias on their
26 part and I felt it would be desirable to bring in an
27 outside organization that had never previously been
28

1 associated with the Project to get an objective and
2 expeditious third party assessment of B&R's nuclear
3 engineering and design activities. I expected the
4 review to assist me in judging what improvements were
5 needed to complete the Project successfully, and also
6 provide information I would find useful for discussions
7 of the status of the Project with HL&P management, the
8 co-owners of STP and regulatory authorities.

9 I discussed my desire for a third party independent
10 assessment of B&R engineering with Mr. Oprea in late
11 1980. Mr. Oprea concurred with my judgment that such a
12 review would be appropriate. Mr. Oprea and I also
13 discussed the matter with Mr. Jordan, and he agreed
14 with our decision to go ahead with such a review.

15
16 Q.8 How did Quadrex come to be selected to perform the
17 review?

18 A.8 I had three principal criteria. The organization had
19 to have the necessary skills to perform a competent
20 evaluation of an architect-engineer. It had to have
21 sufficient qualified personnel available to perform the
22 review on a tight schedule. Finally, I wanted the
23 organization to be independent, that is, it could not
24 have had prior substantial involvement in the Project.

25 The major architect-engineer firms were clearly
26 competent to do such a review. However, I was aware
27 that it was highly unlikely that they would be willing
28

1 to critique the work of another architect-engineer.
2 Among the consulting firms that appeared to have
3 adequate technical qualifications were Management
4 Analysis Company, NUS, Quadrex, Torrey Pines, and
5 Teledyne. Each of these firms, with the exception of
6 Quadrex, had significant prior or ongoing involvement
7 in the Project. Quadrex had had some prior contact
8 with the Project but its involvement had been brief and
9 limited to assistance in planning HL&P manpower needs,
10 an effort which did not relate directly to any of the
11 technical issues involved in an engineering review of
12 B&R.

13
14 Q.9 What was the assignment given to Quadrex?

15 A.9 We told Quadrex we were interested in ascertaining
16 B&R's understanding of the significant nuclear engi-
17 neering technical issues of then current concern in the
18 nuclear industry. In other words, I wanted to gain a
19 better feel for whether B&R was in the "main stream" of
20 nuclear engineering practice as reflected in the
21 industry. We also asked Quadrex to review certain
22 specific areas in which we had reasons to believe that
23 B&R might be experiencing difficulty. The assessment
24 was to assist in benchmarking the status of the Project
25 and identifying opportunities for improvement in the
26 performance of B&R's engineering work. I was not
27 interested in an analysis of B&R's procedures, because

1 I knew that there are many different ways to organize
2 and perform an engineering job successfully. The
3 objective of the review was to see if B&R understood
4 the task before them, and to get some feeling for where
5 they stood in accomplishing that task.

6

7 Q.10 How was the Quadrex review carried out?

8 A.10 Based on information provided by HL&P, Quadrex prepared
9 a series of technical questions about the STP design
10 and also identified various design documents to be
11 reviewed. The questions were supplied to B&R and then
12 there was a series of meetings between Quadrex and B&R;
13 first to clarify the questions, and later for B&R to
14 answer them. These meetings were organized generally
15 along discipline lines. In addition to getting answers
16 to their questions, Quadrex asked B&R to identify
17 documentary evidence, such as calculations, drawings
18 and reference documents, that could be examined in
19 support of the answers. As a result of these meetings,
20 Quadrex identified specific documents it desired to
21 review. Dr. James Sumpter, then HL&P's Manager,
22 Nuclear Services, who served as coordinator of the
23 Quadrex review, arranged for these documents to be
24 provided to Quadrex. There was an additional series of
25 meetings between Quadrex and B&R after Quadrex had had
26 an opportunity to review the B&R documents. These
27 meetings all took place during February and March of

28

1 1981. The Quadrex Report was based on Quadrex's review
2 of these documents and the information obtained from
3 B&R.

4
5 Q.11 In what ways did HL&P participate in the review?

6 A.11 Our objective was to obtain an independent third party
7 assessment, so we tried to keep HL&P involvement to a
8 minimum, but it was not possible to eliminate HL&P
9 entirely from the process. Dr. Sumpter acted as
10 coordinator, as described in his testimony. Although
11 HL&P provided assistance, Quadrex was in complete
12 control of the review. Quadrex wrote the questions to
13 be answered by B&R, ran the meetings with B&R and had
14 complete editorial control of the report.

15 My personal involvement was essentially limited to
16 discussions with Dr. Sumpter regarding the scope and
17 objectives of the Quadrex review, suggestions regarding
18 the categorization of findings in the Quadrex Report,
19 and participation in the meetings at which Quadrex
20 briefed HL&P on the status of its work. Throughout all
21 of these activities, I refrained from injecting my
22 personal views into the Quadrex Report and I emphasized
23 to HL&P personnel my desire to receive Quadrex's
24 independent views.

25
26 Q.12 Did you discuss with NRC your plans for having the
27 Quadrex review performed?

28

1 A.12 When we decided to go ahead with an independent
2 assessment of B&R engineering, I informed the NRC's
3 Project Manager for STP, Mr. Donald Sells of that fact.
4

5 Q.13 Did Quadrex brief you on the results of its review as
6 it progressed?

7 A.13 Yes. There were briefings on March 18, April 13, and
8 April 30, 1981.
9

10 Q.14 Please describe the March 18, 1981, briefing.

11 A.14 The March 18 briefing was a relatively short meeting,
12 perhaps a couple of hours with Dr. Sumpter and Mr.
13 Loren Stanley, Quadrex's Project Manager for this
14 review. Mr. Stanley described some of his impressions
15 of B&R design up to that point. I don't have detailed
16 notes of the meeting, but I have looked at an outline
17 that Mr. Stanley apparently prepared for his presenta-
18 tion at the meeting. In view of the brevity of the
19 session, I am fairly sure that he did not cover all of
20 the points in his outline.

21 It was apparent that even at this early stage of
22 its review Quadrex was convinced that B&R was far
23 behind what most architect-engineers would have
24 accomplished at that stage of the project and that B&R
25 was not performing some aspects of the design in an
26 orderly fashion.

27 Q.15 Please describe the April 13 briefing.
28

1 A.15 Mr. Stanley and Mr. Larry Wray, Vice President,
2 Engineering of Quadrex presented their briefing. In
3 addition to myself, I believe that Mr. David Barker,
4 Mr. John Blau, Mr. Joseph Briskin, Dr. Sumpter and Mr.
5 Cloin Robertson were present. As I recall, the meeting
6 took place in the conference room across the hall from
7 my office and the Quadrex personnel spoke from a number
8 of overhead slides, each of which had textual material
9 relating to some of their current findings, grouped by
10 disciplines. The meeting lasted several hours, and I
11 stepped in and out, as other business called me to my
12 office.

13 I have reviewed my notes of the meeting, which
14 apparently listed the topics covered by Quadrex.

15 I do not remember the details of the presentation
16 but it is my recollection that Quadrex summarized a
17 large number of findings on a discipline by discipline
18 basis. Since we had asked Quadrex to focus on areas in
19 which we suspected that B&R was experiencing difficul-
20 ties, it was to be expected that some problems would be
21 identified. However, there were a significant number
22 of Quadrex findings. At this meeting Quadrex did not
23 explain the severity or importance of the various
24 findings, but several impressed me as being of a
25 potentially significant nature, depending on the
26 results of the review. One of these was computer code
27 verification. Quadrex stated that while its review was

1 continuing there was some indication of problems in
2 this area. HL&P asked Quadrex to look closely at this
3 matter and provide more detail because it could be of
4 great significance to us.

5 In the course of the presentation we asked ques-
6 tions from time to time to get a better understanding
7 of the basis for one finding or another. Some of my
8 questions sought the technical bases for Quadrex
9 findings of inadequacies in B&R's design practices
10 which, in some cases, I did not find to be unusual or
11 inconsistent with industry practice as I knew it.
12

13 Q.16 Did the Quadrex personnel identify any of their
14 findings as being reportable or potentially reportable
15 to the NRC?

16 A.16 No. The discussion was fairly general, and I expected
17 Quadrex to provide more specific information in its
18 written report. During the meeting, I marked on my
19 notes a number of areas in which it appeared that the
20 Quadrex concerns, if they were accurate and factually
21 supported, could lead to the identification of
22 reportable deficiencies. However, I thought that it
23 was first necessary for Quadrex to complete its review,
24 determine which findings it believed to be accurate and
25 supported by facts, and provide us with specifics that
26 we could evaluate. During the discussion I believe
27 that I suggested, as reflected in my later memorandum
28

1 of April 15, 1981 to Dr. Sumpter (Applicants Exhibit
2 58), that Quadrex categorize the findings in its final
3 report in such a manner that anything that might pose a
4 serious threat to plant licensability -- areas where we
5 had not satisfied NRC requirements applicable to STP --
6 would be in a "most serious" category.

7
8 Q.17 Please describe the briefing on April 30.

9 A.17 At that meeting Mr. Stanley and Mr. Wray of Quadrex
10 presented the highlights of their findings, with the
11 use of a series of overhead slides. In addition to
12 myself, I believe that Mr. Edward Turner, Mr. Blau, Dr.
13 Sumpter, and Mr. Donald Betterton were present.
14 Quadrex described in broad terms some of their generic
15 findings and the highlights of their discipline
16 findings. Quadrex gave a similar briefing for B&R the
17 following day. The purpose of both briefings was to
18 give HL&P and B&R some advanced information on the
19 results of the review.

20 During the briefing Quadrex described its findings
21 and HL&P personnel asked questions to get at their
22 basis. There were more findings discussed at this
23 briefing than had been discussed at the prior
24 briefings, but my overall impression was essentially
25 the same. The Quadrex findings suggested that B&R was
26 having difficulty in completing the design; that it
27 lacked experience in the aspects of the design that are
28

1 unique to nuclear plants and that design work in many
2 areas was either in an early stage of development or
3 not yet begun. Quadrex also cited concerns about the
4 adequacy of B&R design work in some areas, such as HVAC
5 design and computer code verification. In addition
6 there were some findings which appeared to constitute
7 Quadrex opinions on the most efficient way to carry out
8 particular aspects of nuclear design work, rather than
9 findings of a failure of B&R to perform in accordance
10 with NRC requirements or generally accepted industry
11 practice.

12 One question which was raised at the briefing was
13 whether Quadrex's generic findings were based on the
14 discipline findings or represented additional independent
15 findings of fact. Quadrex stated that the generic
16 findings were based on the discipline findings.

17
18 Q.18 Why did you not consider any of the described findings
19 as potentially reportable to the NRC at that time or
20 immediately initiate a review for reportability?

21 A.18 Although by that time Quadrex personnel had completed
22 their review, we still did not have the benefit of
23 their written findings, rationale and support, which
24 were essential to an effective review for report-
25 ability. It was clear, however, that there might be
26 some potentially reportable deficiencies identified in
27 the Quadrex Report, and Mr. Robertson and I discussed

1 the steps to be taken to review the document immedi-
2 ately upon its receipt. As a result, I wrote a letter
3 on May 6 to B&R (Applicants Exhibit 61) which I discuss
4 further in my testimony below.
5

6 Q.19 Can you identify Applicants' Exhibit 57?

7 A.19 Yes. Exhibit 57 is a copy of my notes (referred to in
8 A.15 above) from the Quadrex briefing on April 13,
9 1981.
10

11 Q.20 In Applicants' Exhibit 57 a number of the items in the
12 outline format have an asterisk next to them, and there
13 is a note at the bottom of the page next to an asterisk
14 that says "potentially reportable." Did you mean to
15 indicate by your notes that the items that you had
16 marked with an asterisk were then "potentially
17 reportable" within the meaning of the NRC Staff
18 guidance on implementation of 10 CFR § 50.55(e)?

19 A.20 No. As I previously mentioned, at that time the
20 Quadrex views were preliminary and I thought it
21 necessary that Quadrex complete its review before any
22 reportability judgment could be made. My notes only
23 indicate that these particular subjects were general
24 areas in which further Quadrex review might identify
25 reportable deficiencies. In most cases it turned out
26 otherwise.
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1 Q.21 When potential deficiencies come to your attention, and
2 you cannot tell whether or not they are reportable, why
3 would you not report them immediately to the NRC as
4 "potentially reportable"?

5 A.21 The amount of time a licensee may take to evaluate a
6 concern before determining whether it should be
7 reported to the NRC is not specified in NRC
8 regulations. The NRC guidance on conformance with
9 Section 50.55(e) encompasses a category of "potentially
10 reportable" with the thought that licensees would make
11 decisions more promptly on whether to report an item if
12 it could be handled informally while an evaluation was
13 under way. But, even before a licensee reports
14 something as "potentially reportable" it must know
15 enough to determine whether there really exists a basis
16 for concern. I did not believe that I had that basis
17 until I reviewed the text of the Quadrex Report and the
18 documented bases for its findings.

19
20 Q.22 Are you familiar with Applicants' Exhibit 58?

21 A.22 Yes. Exhibit 58 is a memorandum I wrote to Dr. Sumpter
22 on April 15, 1981, giving him my suggestions about the
23 categories into which Quadrex should group its
24 findings.

25 This memorandum was written a few days after the
26 April 13 meeting with Quadrex and documented my
27 thoughts on categorization of findings in the Quadrex

28

1 Report. I wanted Quadrex to group the findings in a
2 way that would simplify the task of identifying items
3 that might be reportable to the NRC and would also
4 assist in setting priorities for corrective action.
5

6 Q.23 Was your proposed set of categories used in the Quadrex
7 Report?

8 A.23 Quadrex modified the categories. My memorandum
9 proposed a "most serious" category encompassing
10 failures to meet NRC requirements applicable to the
11 STP. Quadrex apparently believed that my categories
12 were defined too narrowly and would not include all of
13 its findings of consequence to licensing. Thus, they
14 broadened the most serious category to include matters
15 that, in their judgment, had significance for licensing
16 purposes, whether or not NRC requirements were satis-
17 fied. The Quadrex Report ended up including many items
18 in the "most serious" category which related not to
19 safety but to potential delay of the licensing process.
20 For example, finding 4.3.2.1(n) related to the selec-
21 tion of types of electrical isolation devices. Quadrex
22 noted that B&R was still evaluating alternative devices
23 and recommended that a Technical Reference Document
24 (TRD) be developed to guide designers on the use of
25 such devices in the design. Such a TRD would be based
26 on the results of the B&R evaluations which were still
27 underway.
28

1 Q.24 Please identify Applicants' Exhibit 59.

2 A.24 Exhibit 59 is the portion of the minutes of the April
3 27, 1981, STP management committee meeting in which I
4 discussed the Quadrex review and the then anticipated
5 report.

6
7 Q.25 Please explain the notation at the second page of
8 exhibit 59 that the Quadrex findings in the "most
9 serious" category would be reportable to the NRC.

10 A.25 I do not recall whether I said those particular words.
11 However, at that time I would have expected the Quadrex
12 Report to be based on the system of categorization
13 proposed in my April 15, 1981, memorandum (i.e., that
14 it would identify failures to meet applicable require-
15 ments in a "most serious" category). I had reached no
16 judgment on reportability at that time and could not
17 have done so until we had undertaken our own report-
18 ability review.

19
20 Q.26 Did Quadrex provide another briefing on May 7, 1981?

21 A.26 Yes. The May 7 briefing accompanied delivery by
22 Quadrex of its report.

23
24 Q.27 Please identify Applicants' Exhibit 60.

25 A.27 Exhibit 60 is the "Design Review of Brown & Root
26 Engineering Work for the South Texas Project," which I
27 have generally referred to as the "Quadrex Report."

28

1 Q.28 Please describe the May 7 briefing.

2 A.28 The May 7 briefing was held at HL&P's offices. In
3 addition to myself, Dr. Sumpter and several other HL&P
4 personnel, Mr. Saltarelli, Senior Vice President and
5 Project General Manager of B&R, was present with the
6 key members of his staff.

7 The purpose of the briefing was to facilitate the
8 reportability review by B&R and HL&P and the Quadrex
9 presentation was limited to the findings in the "most
10 serious" category. The discussion began with the
11 generic findings. B&R personnel took issue with the
12 broad observations in the discussion of the first two
13 generic findings and it was apparent that a discussion
14 of the generic findings would be lengthy and likely to
15 focus on perceptions rather than facts. I then asked
16 Quadrex to confirm my understanding that the generic
17 findings were based on the discipline findings.
18 Quadrex agreed that they were and, at my suggestion,
19 proceeded to discuss only the "most serious" discipline
20 findings.

21 The briefing lasted through the morning. There
22 were some questions, but after the first portion of the
23 meeting, little argument about the findings.

24 At the end of the meeting B&R asked whether its
25 reportability review should be limited to the most
26 serious discipline findings. Based on Quadrex's
27 statement that the generic findings were based on the

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1 discipline findings, I agreed that only the most
2 serious discipline findings need be reviewed. The B&R
3 personnel then went off to perform their reportability
4 review.

5
6 Q.29 What was your reaction to the Quadrex Report?

7 A.29 I received the Report with mixed emotions. The Report
8 was very helpful in providing an independent view of
9 the status of the Project design activities. Quadrex
10 identified a lot of design work that had not yet been
11 done, and this confirmed my initial judgment that the
12 B&R engineering effort was well behind where it should
13 have been at that point in the Project schedule. There
14 were some design deficiencies mentioned by Quadrex, but
15 for the most part these were deficiencies which had
16 previously been identified on the Project and were
17 being resolved.

18 We had asked Quadrex for a limited review of
19 important aspects of the B&R design and wanted to
20 obtain results promptly. It was not an audit. The
21 Report generated many questions but few answers. With
22 limited exceptions, these questions did not relate to
23 whether B&R design work to date or the B&R design
24 process violated NRC requirements. Rather, Quadrex
25 identified many areas where the B&R design had not
26 proceeded on an efficient and well-coordinated basis.
27 The concerns resulting from the Quadrex Report were for

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1 the most part not of a regulatory nature (except to the
2 extent that delays in producing an acceptable final
3 design would inevitably delay licensing, as well as
4 construction), but the findings had to be addressed
5 fully and on a prioritized basis in order to get the
6 design activities in a mode to support a reasonable
7 Project schedule.

8 Some of the findings simply reflected Quadrex's
9 view of the best way of performing certain engineering
10 functions. HL&P did not share Quadrex's view of some
11 of these matters and did not agree, in some instances,
12 that B&R's methods were either inappropriate or
13 deficient. For example, finding 4.3.2.1(b) noted that
14 B&R had not prepared a top level document on separa-
15 tions criteria. Use of such a document is a good idea,
16 but it is not an NRC requirement, and I have seen other
17 projects successfully completed without such a docu-
18 ment. Other findings referred to B&R designs which
19 were either not yet begun or were in preliminary
20 stages. For example, finding 4.7.3.1(a) noted that B&R
21 had not yet developed criteria for jet impingement
22 protection on unbroken piping systems. Since the
23 criteria would apply to piping design which B&R had not
24 yet done, the finding did not deal with a design error,
25 although it did highlight a serious concern about the
26 progress of B&R design work.

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1 In summary, I regarded the Quadrex Report as a
2 consultant's review containing advisory opinions of the
3 type often reflected in the many technical consultant
4 reports commissioned during the long course of the
5 construction and operation of a nuclear power plant.
6 The Report provided useful confirmation of my concerns
7 about the adequacy of B&R's engineering organization
8 and its lack of experience. While the Report did not
9 suggest that the design of the STP was fundamentally
10 flawed, it did point out that these were important
11 problems in the management of B&R's engineering
12 activities.

13
14 Q.30 When you received the Quadrex Report, what did you do
15 to fulfill HL&P's reporting requirements?

16 A.30 Prior to receipt of the Report, I wrote to Mr.
17 Saltarelli, the Project General Manager of B&R,
18 pointing out that the Report would be received on May 7
19 and that HL&P would require B&R to review the Report
20 and advise on the reportability of the Quadrex findings
21 by the following day. The May 7 briefing by Quadrex
22 was the first step in this review. As I have men-
23 tioned, at the close of the meeting I directed B&R to
24 focus its review on the most serious discipline
25 findings. Their cognizant engineers then reviewed the
26 Report. They convened a meeting later that afternoon

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1 and evening to review the most serious discipline
2 findings to determine their reportability. Mr.
3 Robertson and Dr. Sumpter attended that meeting.

4 The next day, May 8, I received a letter from Mr.
5 Saltarelli providing advice on the reportability of the
6 Quadrex most serious discipline findings (Applicants
7 Exhibit 62). Upon receipt of that letter, I convened a
8 meeting of Dr. Sumpter, Mr. Robertson, and myself
9 (which I refer to below as the "HL&P review team") to
10 go through the findings, review B&R's advice and make
11 our decisions on reportability.

12 Q.31 Please identify Applicants' Exhibit 61.

13 A.31 Exhibit 61 is a copy of my May 6, 1981, letter to Mr.
14 Saltarelli directing B&R to advise HL&P on the report-
15 ability of the Quadrex findings and to develop a plan
16 to resolve the Quadrex findings.

17
18 Q.32 Please identify Applicants' Exhibit 62.

19 A.32 Exhibit 62 is a copy of Mr. Saltarelli's May 8, 1981,
20 letter providing B&R's advice on the reportability of
21 the Quadrex findings. Attachment B to the letter is
22 the specific advice regarding each of the "most
23 serious" discipline findings.

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1 Q.33 Please describe the meeting of the HL&P review team.

2 A.33 I used the attachment to Mr. Saltarelli's letter as a
3 check list. We read each of the findings and B&R's
4 advice, and then we considered whether the finding was
5 reportable. Our review identified three potentially
6 reportable deficiencies. When it became apparent that
7 at least one item would be reportable we called Mr.
8 Michael Powell, the Chairman of the HL&P Incident
9 Review Committee (IRC), and he joined our meeting.
10 After the meeting Mr. Powell phoned the NRC and
11 reported the three items that we had identified as
12 potentially reportable:

13 (1) Concerning the heating, ventilating
14 and air conditioning (HVAC) design
15 - that certain faulted condition
16 heat loads may not have been
17 considered in the design of
18 portions of the safety-related HVAC
19 system.

20 (2) Concerning computer program (code)
21 verification - that the verifica-
22 tion program lacked visibility to
23 the user as to whether or not the
24 program versions in use had been
25 verified.

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1 (3) Concerning shielding analysis -
2 that certain shielding calculations
3 affecting safety-related design may
4 not have been verified consistent
5 with the requirements for verifica-
6 tion of safety-related calcula-
7 tions.

8
9 Q.34 Was it the usual practice at HL&P for Dr. Sumpter, Mr.
10 Robertson and yourself to conduct reportability
11 reviews?

12 A.34 No. The usual practice at that time was that anyone
13 who identified a concern that should be reviewed for
14 reportability would notify appropriate supervisory
15 personnel. Such personnel would review the information
16 and determine if it warranted a review for report-
17 ability. If such a review was warranted, the matter
18 would then be reviewed for reportability by the HL&P
19 IRC, made up of the Team Leader, Nuclear Licensing; the
20 Project QA Supervisor in the Houston office; and the
21 Supervising Project Engineer -- Design Engineering.
22 Mr. Robertson, as Licensing Manager, and I both would
23 have occasion to review decisions on reportability made
24 by the IRC, and we both would review and approve the
25 written Section 50.55(e) reports to the NRC.

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1 Q.35 Why was the usual IRC review not used to determine
2 reportability of the Quadrex findings?

3 A.35 The Quadrex Report was different from the matters
4 usually considered by the IRC -- it covered a wide
5 scope of design considerations, contained a large
6 number of findings and raised a number of questions
7 that required an in-depth understanding of nuclear
8 engineering design and design processes. I felt the
9 reportability determinations needed to be made by our
10 most senior engineers, ones who had the greatest
11 experience in the nuclear design process. The team I
12 chose, Dr. Sumpter, Mr. Robertson and myself, repre-
13 sented the most experienced HL&P nuclear engineers.
14 Dr. Sumpter, who was HL&P's Manager, Nuclear Services,
15 had 11 years of professional experience in nuclear
16 engineering and design activities. Mr. Robertson,
17 HL&P's Manager of Nuclear Licensing, had 15 years of
18 nuclear engineering experience. I had 26 years of such
19 experience. Each of us was very familiar with the
20 requirements of 10 CFR § 50.55(e) and had previously
21 considered reportability questions on numerous
22 occasions.

23
24 Q.36 What criteria did the HL&P review team use on May 8,
25 1981, to determine whether findings on the Quadrex
26 Report were reportable under 10 CFR § 50.55(e)?

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1 A.36 Determinations of reportability under 10 CFR 50.55(e)
2 require the application of technical and engineering
3 judgment to a series of three criteria identified in
4 the regulation: These three criteria are:

5

6 First, a deficiency in design or construction must
7 be identified.

8

9 Second, the deficiency must have the potential, if
10 left uncorrected, to affect adversely the safety
11 of plant operations.

12

13 Third, the deficiency must represent

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15 (i) a significant breakdown in any portion of
16 the quality assurance program under
17 Appendix B to CFR Part 50; or

18 (ii) a significant deficiency in final design
19 as approved and released for construction
20 such that the design does not conform to
21 the criteria and bases stated in the
22 safety analysis report or construction
23 permit; or

24 (iii) a significant deficiency in construction
25 of or significant damage to a structure,
26 system, or component which will require
27 extensive evaluation, extensive redesign

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or extensive repair to meet the criteria and basis stated in the safety analysis report or construction permit or to otherwise establish the adequacy of the structure, system, or component to perform its intended safety function; or (iv) a significant deviation from performance specifications which will require extensive evaluation, extensive redesign, or extensive repair to establish the adequacy of a structure, system, or component to meet the criteria and bases stated in the safety analysis report or construction permit or to otherwise establish the adequacy of the structure, system, or component to perform its intended safety function.

Unless all three criteria are satisfied, a finding is not reportable. We applied these criteria to the Quadrex findings. Of course, since the Quadrex Report dealt only with design, parts (iii) and (iv) of the third criterion had no bearing on our decision.

Q.37 In determining whether a finding was reportable as a significant breakdown in the QA program for STP, what weight, if any, did the HL&P Review Team give to the

1 fact that the finding did not pertain to an activity
2 that had resulted in a design released for construc-
3 tion?

4 A.37 We did not conclude that a finding was not reportable
5 as a significant breakdown in the QA program solely
6 because it did not pertain to an activity that had
7 resulted in a design released for construction. For
8 example, the HL&P review team determined that findings
9 4.2.2.1(a) and 4.8.2.1(d) regarding computer code
10 verification and shielding calculations, respectively,
11 were potentially reportable as significant breakdowns
12 in the QA program without considering whether either
13 finding related to an activity that had resulted in the
14 issuance of a design released for construction.

15
16 Q.38 Which of the findings in the Quadrex Report did the
17 HL&P review team review on May 8, 1981, for report-
18 ability under 10 CFR § 50.55(e)?

19 A.38 We reviewed the discipline findings in Section 4 of the
20 Quadrex Report which were designated by Quadrex as
21 being the "most serious." The other findings in the
22 Quadrex Report were not specifically reviewed at that
23 time.

24
25 Q.39 Why didn't the HL&P review team specifically consider
26 the reportability of other findings?

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1 A.39 We wanted to focus our attention on the findings that
2 were most likely to have reportability implications.
3 Quadrex had indicated that if we reviewed the "most
4 serious" findings we would have examined all of those
5 matters with the potential for reportability. In
6 addition, the other discipline findings in Section 4 of
7 the Quadrex Report were not reviewed by HL&P on May 8,
8 1981, because the characterization of them by Quadrex
9 indicated that they were not reportable. Quadrex
10 classified the discipline findings into five groups:
11 "most serious findings," "serious findings," "note-
12 worthy findings," "potential problem findings," and
13 "other findings." The "serious findings" were not
14 reportable because they did not relate to safety but
15 only to "the generation of reliable power." (Quadrex
16 Report p. 4-1). The "noteworthy findings" were not
17 reportable because they did not relate to safety but
18 only to "project schedule and/or cost increases." Id.
19 The "potential problem findings" were not reportable
20 because they did not identify a deficiency but only
21 identified a subject warranting "further investi-
22 gation." Id., p. 4-2. Finally, "other findings" were
23 not reportable because they did not identify a signifi-
24 cant deficiency but only identified "minor items or
25 items that are not amenable to corrective action." Id.

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1 The generic findings in Section 3 of the Quadrex
2 Report were not specifically reviewed for reportability
3 because the Quadrex Report stated that they were "based
4 on the detailed evaluation of each discipline presented
5 in Section 4 of this report." Id., p. 3-1. As I
6 mentioned previously, Quadrex had in our meeting on May
7 7, confirmed this view. Consequently, by reviewing the
8 "most serious" discipline findings, we were aware of
9 all of Quadrex's findings of fact that might be
10 reportable under 10 CFR § 50.55(e).

11 Although we did not specifically review each
12 generic finding to determine its reportability on May
13 8, each of us read the generic findings on May 7-8.
14 Consequently, we were sensitive to the concerns
15 expressed in the generic findings when we reviewed the
16 discipline findings for reportability on May 8, 1981.

17
18 Q.40 The Bechtel Task Force report, entitled "An Assessment
19 of the Findings in the Quadrex Corporation Report,"
20 March 1982, (Applicants' Exhibit 63), at p. A-5, states
21 that one statement in generic finding 3.1(b), regarding
22 errors in verified calculations, was not the subject of
23 a specific discipline finding. Was the HL&P review
24 team aware of this on May 8, 1981?

25 A.40 No. It was our belief on May 8, 1981, based upon the
26 advice of Quadrex, that the generic findings were based
27 upon the discipline findings and we did not review

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1 finding 3.1(b). However, we were aware of Quadrex's
2 concern and had it in mind when we reviewed the
3 discipline findings, which included instances of
4 calculational errors. In any case, as is discussed in
5 the testimony of Sidney A. Bernsen and Frank Lopez,
6 Jr., finding 3.1(b) does not identify a potentially
7 reportable deficiency.
8

9 Q.41 The Quadrex Report defined the "most serious findings"
10 as "those that pose a serious threat to plant licens-
11 ability because either (a) the findings would prevent
12 the obtaining of a license or (b) the finding could
13 produce a significant delay in getting a license, or
14 (c) the finding addresses a matter of serious concern
15 to the NRC at this time." (Quadrex Report, p. 4-1).
16 Why didn't HL&P decide to report all of the "most
17 serious" findings under 10 CFR § 50.55(e) based upon
18 this definition alone?

19 A.41 The definition of "most serious findings" did not
20 automatically imply "reportability" under 10 CFR
21 § 50.55(e). For example, some of the Quadrex "most
22 serious" findings, such as 4.7.3.1(a) and 4.8.2.1(f),
23 related to an activity which had not been completed by
24 B&R or which was to be performed in the future by B&R.
25 The fact that an activity had not yet been completed
26 "could produce a significant delay in getting a li-
27 cense" but would not necessarily identify a "deficiency
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1 in design or construction." Similarly, a finding might
2 address "a matter of serious concern to the NRC at this
3 time" but that is not necessarily a "deficiency in
4 design or construction." Thus, the fact that a finding
5 fell within Quadrex's definition of "most serious" did
6 not establish that the finding was reportable.

7

8 Q.42 Please explain why something that has not been
9 commenced or completed would not necessarily be a
10 deficiency in design or quality assurance for design?

11 A.42 Designing a nuclear plant is generally an iterative and
12 evolutionary process. Consequently, some structures
13 and systems are designed and even constructed based
14 upon preliminary but conservative assumptions, and
15 later design activities are undertaken to determine
16 final loads applicable to the structures and systems.
17 Since the original assumptions are usually conserva-
18 tive, these final calculations are confirmatory in
19 nature and are not expected to result in the need for
20 structural alterations. If a final calculation
21 identified that a preliminary assumption was non-
22 conservative, that condition might be reportable.
23 However, the fact that certain design activities may
24 have not yet commenced or been completed generally does
25 not mean there is a deficiency in a design or in
26 quality assurance.

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1 A.43 In its reportability review on May 8, 1981 did the HL&P
2 review team rely solely on the information provided in
3 the Quadrex "most serious" discipline findings?

4 A.43 No. In addition to the findings we had other informa-
5 tion in the Report such as the Questions, Answers and
6 Assessments as well as our knowledge of the Project,
7 and other information available to us, including the
8 results of B&R's review (Applicants' Exhibit 62.) We
9 also had the benefit of Dr. Sumpter's insight gained
10 through his contacts with Quadrex, as well as the
11 information gained by Dr. Sumpter and Mr. Robertson
12 while attending the B&R meeting in the late afternoon
13 and evening of May 7, 1981. In addition, we brought to
14 the May 8 meeting our considerable background and
15 experience as nuclear engineers.

16
17 Q.44 What consideration did you give to the possibility that
18 findings may not have been reportable individually but
19 that, as a group of two or more, they might be report-
20 able as a significant breakdown in the QA program for
21 STP?

22 A.44 We were aware that Quadrex had identified what it
23 considered to be generic findings that encompassed
24 findings from more than one discipline. During our
25 review we were alert to the possibility that several
26 findings might identify deficiencies that collectively
27 could have constituted a significant breakdown in the

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1 QA program for STP. However, we did not discern from
2 the discipline findings any pattern of deficiencies in
3 the design QA program for STP or any systematic failure
4 to implement the QA program other than the matters we
5 reported to the NRC.

6
7 Q.45 Please identify the items which the HL&P review team
8 determined to be potentially reportable on May 8, 1981,
9 and explain why they were determined to be potentially
10 reportable.

11 A.45 As I mentioned before, we found three items to be
12 potentially reportable. First, as reflected primarily
13 in findings 4.4.2.1(a) and (b), faulted condition heat
14 loads were not considered in the design of portions of
15 the HVAC system. B&R, in its May 8, 1981, assessment
16 (Applicants' Exhibit 62), had identified findings
17 4.4.2.1(a) and (b) as being potentially reportable.
18 HL&P agreed that this item was potentially reportable
19 because it identified a deficiency in the design of the
20 HVAC system, some design drawings for the HVAC system
21 had been released for construction, and the failure of
22 the HVAC design to account for certain faulted heat
23 loads might, if left uncorrected, have adversely
24 affected the ability of plant operations personnel
25 and/or equipment to perform safety functions during an
26 accident.

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1 Second, as reflected in finding 4.2.2.1(a), the
2 methods for identifying whether the computer code
3 version in use had been verified lacked adequate
4 visibility to the users of those codes. B&R, in its
5 May 8, 1981, assessment (Applicants' Exhibit 62),
6 identified finding 4.2.2.1(a) as not reportable because
7 its preliminary assessment of this matter found
8 procedural problems only. Nevertheless, HL&P
9 approached this finding conservatively and determined
10 that it was potentially reportable. The finding
11 identified a deficiency in the process of design which
12 represented possible breakdown in the QA program for
13 STP (i.e., inadequate controls on the use of unverified
14 codes) that might have resulted in the use of unveri-
15 fied computer codes in safety-related design activi-
16 ties. Until a detailed assessment could be made, it
17 could not be determined whether there were design
18 deficiencies that could adversely affect the safety of
19 operation.

20 Finally, as reflected in finding 4.8.2.1(d), B&R
21 did not treat shielding calculations as being safety-
22 related and therefore may not have verified the
23 calculations in accordance with its practice for
24 safety-related calculations. B&R, in its May 8, 1981,
25 assessment (Applicants' Exhibit 62), indicated that
26 some shielding calculations might be safety-related but
27 stated that finding 4.8.2.1(d) was not reportable
28

1 because it would not impact the safe operation of the
2 plant or the public health or safety. Nevertheless, we
3 decided to treat it as potentially reportable, because
4 it appeared to identify a deficiency in the design
5 process which represented a significant breakdown in
6 part of the QA program for STP (i.e., a systematic
7 failure to perform verifications). Without further
8 review it could not be determined whether this
9 deficiency might have created significant flaws in the
10 design which could adversely affect the safety of
11 operations. Where it is not possible to determine
12 promptly whether a deficiency could adversely affect
13 the safety of operations, it is HL&P's practice to
14 inform the NRC of its existence as a potentially
15 reportable item if the deficiency otherwise satisfies
16 the reporting criteria. After the NRC has been
17 notified, HL&P determines whether or not the deficiency
18 is, in fact, reportable. This practice is consistent
19 with the NRC's "Guidance-10 CFR 50.55(e), Construction
20 Deficiency Reporting" dated 4/1/80, pages 6-7. After
21 the NRC was notified that this finding was potentially
22 reportable, HL&P determined that shielding calculations
23 are generally considered in the industry not to be
24 safety-related and therefore that any failure to verify
25 these calculations was not a deficiency in the QA
26 program for STP.

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1 Q.46 Did HL&P notify the NRC after May 8, 1981, that any
2 other findings in the Quadrex Report were potentially
3 reportable?

4 A.46 Yes. On March 15, 1982, HL&P notified the NRC that one
5 additional matter was potentially reportable. This
6 matter, as reflected in findings 4.3.2.1(a) and
7 4.8.2.1(a), related to a common instrument air line in
8 the Fuel Handling Building (FHB) HVAC system which
9 Quadrex identified as violating the single failure
10 criterion. B&R, in its May 8, 1981, assessment
11 (Applicants' Exhibit 62), identified findings
12 4.3.2.1(a) and 4.8.2.1(a) as not reportable because the
13 design for this system was incomplete and had not been
14 released for construction. For the same reason, HL&P
15 determined on May 8, 1981, that these findings were not
16 reportable. However, when the Bechtel Task Force
17 issued its assessment of the Quadrex findings in March
18 of 1982 (Applicants' Exhibit 63), it identified these
19 findings as being potentially reportable. Accordingly,
20 since this was a specific recommendation of the Task
21 Force, HL&P notified the NRC that the FHB HVAC common
22 instrument air line design constituted a potentially
23 reportable deficiency. Subsequently, Bechtel confirmed
24 that the design of the FHB HVAC common instrument air
25 line had not been released for construction. Conse-

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27
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1 quently, HL&P informed the NRC on April 8, 1982, that
2 this item did not meet the criteria for reportability
3 under 10 CFR § 50.55(e).

4

5 Q.47 With respect to each finding that the HL&P review team
6 determined not to be reportable, do you remember
7 precisely the basis for that determination?

8 A.47 After more than four years it is difficult to recall
9 the precise reason why a finding was determined not to
10 be reportable on May 8, 1981, particularly since, as I
11 have previously described, there could be several
12 reasons why any item would not be reportable. However,
13 with respect to each finding discussed in the following
14 portion of my testimony, I have described at least one
15 reason why such finding was not reportable at that
16 time.

17

18 Q.48 What does finding 4.1.2.1(b) state?

19 A.48 Finding 4.1.2.1(b) states as follow:

20 There was no evidence of Civil/Structural evaluation of
21 the reasonableness of postulated internal missiles or
22 that the criteria for internal missiles presented in
 TRD 1N209RQ013-A had been implemented in the design
 (see Question C-9).

23 Q.49 Please explain why finding 4.1.2.1(b) was not poten-
24 tially reportable.

25 A.49 In May, 1981 the design activities associated with
26 protection against internal missiles had not yet
27 commenced. Finding 4.1.2.1(b) was not potentially

28

1 reportable because it did not identify a deficiency in
2 a design or in quality assurance for design but rather
3 an activity to be performed in the future by B&R as
4 part of its remaining design work.
5

6 Q.50 What does finding 4.3.2.1(a) state?

7 A.50 Finding 4.3.2.1(a) states as follows:

8 The common instrument air line, as depicted in FSAR
9 drawing 9.4.2-2 attached to Question R-6, does not meet
10 the single failure criterion required by IEEE 279-1971
11 and 10 CFR 50 (see Question E-15). The occurrence of
12 this design error in the late 1970's in concert with
13 the B&R response to other single failure criterion
14 questions suggests that B&R is not sufficiently
15 experienced in the performance of a Failure Mode and
16 Effects Analysis that crosses discipline boundaries.⁽⁵⁾
17 In most organizations, the I&C discipline would detect
18 and immediately correct this type of design error by
19 performing a rigorous examination of the separation
20 provided between redundant divisions in the safety-
21 related portions of the plant for all involved disci-
22 plines.

23 (5) Instrument line blockage was identified as a
24 potential concern for single failure analyses in the
25 1970 period when an early B&W plant had three instru-
26 ments connected to two piping taps. Technicians
27 repeatedly replaced the instrument connected to one tap
28 because it read differently than the other two instru-
ments connected in common to the other tap; only later
did they discover that a blocked instrument line was
causing the two common instruments to read erroneously.

22 Q.51 Please explain why finding 4.3.2.1(a) was not poten-
23 tially reportable.

24 A.51 As discussed above in connection with HL&P's 1982
25 notification to NRC, the design of the common instru-
26 ment air line had not been released for construction.
27 The finding did not identify a significant breakdown in
28

1 the quality assurance program for design because it
2 addressed only a limited aspect of design and did not
3 suggest the existence of a systemic deficiency.

4

5 Q.52 What does finding 4.3.2.1(d) state?

6 A.52 Finding 4.3.2.1(d) states as follows:

7 No formal methodology or documentation exists to verify
8 adequate separation or the single failure criterion
(see Questions E-1, E-8, and E-19.)

9 Q.53 Why was finding 4.3.2.1(d) not potentially reportable?

10 A.53 We knew that B&R had a formal design verification
11 procedure in place. With respect to the documentation
12 Quadrex was looking for, "formal" documentation is
13 neither universally used nor required by the NRC and in
14 my experience many nuclear projects have been success-
15 fully completed without formal documentation of the
16 type noted by Quadrex. Since finding 4.3.2.1(d) did
17 not identify a deficiency in a design or in quality
18 assurance for design it was not potentially reportable.

19

20 A.54 What does finding 4.3.2.1(n) state?

21 A.54 Finding 4.3.2.1(n) states as follows:

22 It is planned that various types of isolation devices
23 will be used. Actual devices are still under evalua-
24 tion and qualification. There is no existing document
25 that provides guidance to the designers on the circuit
26 application of these various types (e.g., optical
27 couplers vs. fuses vs. relays, etc.). It is our
28 opinion that lack of such a document (TRD) could result
in design errors and licensing problems (see Question
E-14).

27

28

1 Q.55 Why was finding 4.3.2.1(n) not potentially reportable?

2 A.55 This Quadrex finding was identifying that isolation
3 devices were still under evaluation by B&R and that
4 the design had not yet been developed. A TRD of the
5 type mentioned by Quadrex could be a useful tool, but
6 until B&R began to select isolation devices there would
7 be no need for such a document.

8

9 Q.56 What does finding 4.5.2.1(b) state?

10 A.56 Finding 4.5.2.1(b) states as follows:

11 EDS did not perform a design review or design verifica-
12 tion of preliminary loads transmitted to B&R; these
13 loads have, however, been used as a basis for plant
14 design (see Questions C-4 and M-8).

13

14

15 Q.57 Why did the HL&P review team determine that finding
16 4.5.2.1(b) not potentially reportable?

17 A.57 Preliminary designs are often used as a basis for
18 design and construction activities, subject to later
19 verification. This is true not only at STP, but at
20 every other nuclear project with which I am familiar.
21 Where preliminary data is used, it is industry practice
22 to include an extra margin of safety to minimize the
23 likelihood that the final design will require changes.
24 Since these preliminary data are carefully controlled
25 to assure they are later finalized and verified, their
26 preliminary use does not represent a deficiency.

27

28

1 Q.58 What does finding 4.6.2.1(n) state?

2 A.58 Finding 4.6.2.1(n) states as follows:

3 Assumptions regarding the availability of various heat
4 sinks under varying plant conditions should be re-
examined (see Question N-17).

5 Question N-17 provides further details, stating that
6 B&R should have analyzed the temperature of the water
7 in the Essential Cooling Pond (ECP) under conditions of
8 normal shutdown of two units as well as the condition
9 actually analyzed by B&R (normal shutdown of one unit
10 and a loss of coolant accident (LOCA) in the other
11 unit).

12

13 Q.59 Why was finding 4.6.2.1(n) not potentially reportable?

14 A.59 B&R had performed an analysis of the ultimate heat sink
15 (Essential Cooling Pond or ECP) that did consider the
16 combinations of plant conditions identified in the NRC
17 guidance. This analysis was described in FSAR section
18 9.2.5. B&R had subcontracted with NUS for a reanalysis
19 of the heat loads to the ECP and that reanalysis was
20 underway at the time of the Quadrex Review. Thus, the
21 re-examination Quadrex was recommending was already in
22 progress. The finding did not identify either a design
23 deficiency or a breakdown in quality assurance.

24

25

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28

1 Q.60 What does finding 4.7.3.1(a) state?

2 A.60 Finding 4.7.3.1(a) states as follows:

3 B&R has not yet developed a criteria for jet impinge-
4 ment protection on unbroken piping systems (see
5 Question P-20). A future TRD is planned.

6 Q.61 Why was finding 4.7.3.1(a) not potentially reportable?

7 A.61 The analysis of the effects of postulated pipe breaks
8 had not yet been performed and the "criteria" referred
9 to by Quadrex would be necessary only when such
10 analyses were commenced. Finding 4.7.3.1(a) did not
11 identify a deficiency in a design or in quality
12 assurance for design.

13 Q.62 What does finding 4.7.3.1(b) state?

14 A.62 Finding 4.7.3.1(b) states as follows:

15 Approximately 50% of the reviewed SDDs do not yet
16 contain system operating temperatures (see Question P-
17 1).

18 Question P-1 provides further details in support of
19 this finding. Question P-1 states that, of the sixteen
20 SDDs which were reviewed by Quadrex, eight identified
21 system design temperatures, seven did not identify a
22 design temperature directly but did provide a reference
23 for enabling the designer to determine the temperature,
24 and one did not identify either a system design
25 temperature or a reference for obtaining the tempera-
26 ture. These temperatures were used in performing
27 preliminary stress analyses.
28

1 Q.63 Why was finding 4.7.3.1(b) not potentially reportable?

2 A.63 All but one of the SDDs contained system design
3 temperatures or referenced a document that did. The
4 single SDD in which a temperature had not been identi-
5 fied was for a system that had not been designed or
6 released for construction. This isolated example in
7 which one SDD did not contain a design temperature did
8 not constitute a significant breakdown in a portion of
9 the quality assurance program for STP.

10

11 A.64 What does finding 4.7.3.1(k) state?

12 A.64 Finding 4.7.3.1(k) states as follows:

13 B&R assumptions for seismic to nonseismic boundary
14 anchors are probably unconservative and difficult to
technically justify as adequate (see Question P-29).

15 Q.65 Why was finding 4.7.3.1(k) not potentially reportable?

16 A.65 Finding 4.7.3.1(k) was not potentially reportable as a
17 design deficiency because the design for the boundary
18 anchors was not released for construction. It was not
19 potentially reportable as a significant breakdown in QA
20 because the TRD on which it was based was in draft
21 status and still undergoing review.

22

23 Q.66 What does finding 4.8.2.1(a) state?

24 A.66 Finding 4.8.2.1(a) states as follows:

25 The instrument air piping, between the valves actuated
26 by redundant radiation monitors and the valves that
27 divert air flow through safety-related filter trains in
the FHB HVAC exhaust subsystem, does not meet the
single failure criterion (see Question R-6).

28

1 Q.67 Why was finding 4.8.2.1(a) not potentially reportable?

2

3 A.67 This finding is already addressed in response to the
4 questions regarding finding 4.3.2.1(a). As discussed
5 there, the design of the common instrument air line had
6 not been released for construction and the finding did
7 not identify a significant breakdown in any portion of
8 the QA program for STP.

9

10 Q.68 What does finding 4.8.2.1(b) state?

11 A.68 Finding 4.8.2.1(b) states as follow:

12 No procedures exist that define the minimum qualifica-
13 tion requirements for ALARA reviewers. Some design
14 drawings have been reviewed and signed off for ALARA.
15 There is limited evidence that proper follow-up has
16 occurred to verify incorporation of ALARA specified
17 designs (see Question R-1).

16 Q.69 Why was finding 4.8.2.1(b) not potentially reportable?

17 A.69 Finding 4.8.2.1(b) does not identify a deficiency in a
18 design that was released for construction or a signifi-
19 cant breakdown in any portion of the QA program. As
20 with other engineering personnel, ALARA reviewers were
21 selected by the B&R Engineering Project Manager, who
22 was responsible to assure that they were qualified to
23 perform their assigned functions. Additionally, B&R's
24 procedure required that the ALARA reviewer sign all
25 relevant design drawings to verify that the cognizant
26 engineer had incorporated, as appropriate, the comments
27 of the ALARA reviewer. Although this procedure could

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1 have been improved as suggested by Quadrex in its
2 assessment of B&R's response to Question R-1, it was
3 adequate to ensure that the ALARA review process was
4 properly controlled and performed by qualified
5 individuals. We agree with the emphasis which Quadrex
6 placed on ALARA and believe our program was, and is,
7 consistent with that view. HL&P had instituted an
8 ALARA program that was one of the most comprehensive in
9 the industry. In addition to requiring the designers
10 to address ALARA considerations in design, HL&P was
11 requiring a separate design review for ALARA
12 considerations.

13
14 Q.70 What does finding 4.8.2.1(c) state?

15 A.70 Finding 4.8.2.1(c) states as follows:

16 Modification of the MAB HVAC system to eliminate filter
17 media needs to be re-examined (see Questions R-5 and
R-29).

18 Q.71 Why was finding 4.8.2.1(c) not potentially reportable?

19 A.71 Finding 4.8.2.1(c) did not identify any deficiency in a
20 design or in quality assurance for design. These
21 filters were eliminated in the course of the construc-
22 tion permit review and the Construction Permits were
23 issued based on an analysis that showed the plant would
24 meet Appendix I without such filters. Reexamination of
25 the decision to eliminate the filters was appropriate
26 because source term assumptions were changing as a

27
28

1 result of the TMI-2 accident. Bechtel has since
2 confirmed that the addition of such filters to the MAB
3 exhaust is unnecessary.
4

5 Q.72 What does finding 4.8.2.1(e) state?

6 A.72 Finding 4.8.2.1(e) states as follows:

7 B&R has not correlated radiation zones to the shielding
8 design and shielding design has not adequately
9 considered ISI requirements or the potential locations
for temporary shielding (see Question R-10).

10 Q.73 Why was finding 4.8.2.1(e) not potentially reportable?

11 A.73 The plant design was based on B&R's original shielding
12 analysis. As the plant design evolved B&R was doing
13 confirmatory analyses. This aspect of the design
14 (ALARA) is dynamic, changing with the development of
15 plant design and was an ongoing activity. This is
16 consistent with industry practice. The finding
17 identified a requirement for future work and not a
18 deficiency in the design.
19

20 Q.74 What does finding 4.8.2.1(f) state?

21 A.74 Finding 4.8.2.1(f) states as follows:

22 Radiation zone drawings based on accident conditions
23 have not been prepared (see Question R-30).

24 Q.75 Why was finding 4.8.2.1(f) not potentially reportable?

25 A.75 The requirement for radiation zone drawings based upon
26 accident conditions was a post-TMI requirement that B&R
27 had not yet addressed in its design work. The finding
28 was not potentially reportable because it did not

1 identify a deficiency in a design or in quality
2 assurance for design but rather an activity to be
3 performed in the future by B&R as part of its remaining
4 design work.

5

6 Q.76 What does finding 4.8.2.1(g) state?

7 A.76 Finding 4.8.2.1(g) states as follows:

8 A design basis governing removable concrete block walls
9 was not evident (see Question R-11).

10 Q.77 Why was finding 4.8.2.1(g) not potentially reportable?

11 A.77 The design basis for removable concrete walls was still
12 in the process of development. Accordingly, the
13 finding was not potentially reportable because it did
14 not identify a deficiency in design or in quality
15 assurance for design but a concern for an activity to
16 be performed in the future by B&R as part of its
17 remaining design work.

18

19 Q.78 Did you give any consideration to submitting the entire
20 Quadrex Report to the NRC Staff under 10 CFR
21 § 50.55(e)(1)(i)?

22 A.78 Yes, I did. Given the nature of the findings in the
23 Quadrex Report and the fact that only three of the
24 findings were determined by the HL&P review team to be
25 potentially reportable, the Report as a whole did not,
26 in my judgment, identify any widespread breakdown in
27 quality assurance or suggest that a significant amount

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1 of the safety-related design was flawed. Consequently,
2 I did not believe it would be appropriate to submit the
3 entire report under 10 CFR § 50.55(e).

4

5 Q.79 When did you first inform the NRC of the existence of
6 the Quadrex Report?

7 A.79 As I mentioned before, after we decided to perform an
8 independent third party assessment of B&R engineering,
9 I mentioned that fact to Mr. Donald Sells, the NRC
10 Project Manager for STP. In April 1981, when receipt
11 of the Quadrex Report appeared to be imminent, I called
12 Mr. Sells again and told him that the report was due
13 soon and that some Section 50.55(e) reports might
14 result. I offered to give Mr. Sells and Nuclear
15 Reactor Regulation (NRR) a briefing on the Report as
16 soon as it became available. When he asked whether we
17 planned to file the Report with the NRC I told him that
18 we would not, but that the NRC could review it at HL&P
19 at its convenience.

20 Since both Mr. Sells and I were going to be in Bay
21 City the first week of the Phase I hearings, which was
22 the week after receipt of the Report, that appeared to
23 be the best, earliest opportunity to meet with him. We
24 met during the course of the week of May 11, 1981. The
25 meeting lasted about twenty minutes. I told Mr. Sells
26 about the three potentially reportable items that had
27 been reported to NRC Region IV and that one of those

28

1 items had been identified as potentially reportable by
2 B&R, while the other two had been identified by HL&P in
3 its review of the Report. I explained that there was a
4 large number of findings and I briefed him regarding
5 the general areas of concern. I told Mr. Sells that
6 HL&P intended to take an in-depth look at the issues
7 identified in the Report and that we would take all
8 necessary corrective actions. I also told him again
9 that the Report would be available for NRC review at
10 the Project site.

11

12 Q.80 Why did you discuss the Quadrex Report with Mr. Sells
13 instead of with NRC Region IV?

14 A.80 I believed NRR was the appropriate arm of the NRC to
15 inform regarding the Quadrex Report in view of the fact
16 that, generally, the NRC's technical and engineering
17 expertise was, at that time, concentrated in NRR. I
18 would have gone to Bethesda to brief NRR staff had it
19 not been for the earlier opportunity presented by the
20 ASLB hearings in Bay City. I understood the Region's
21 area of interest to be in the identification of
22 particular deficiencies representing departures from
23 regulatory requirements rather than the general
24 efficiency of the design process. I believed that in
25 advising the Region of the potentially reportable
26 deficiencies as required by 10 CFR § 50.55(e), and in

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1 advising NRR by my discussions with Mr. Sells, I was
2 being completely candid in my dealings with the NRC
3 Staff.

4

5 Q.81 Did you brief Mr. Jordan and Mr. Oprea on the Quadrex
6 findings?

7 A.81 Yes. I discussed the status of the review with Mr.
8 Oprea from time to time in separate conversations and
9 called him about the Report on May 7 and 8. Once the
10 HL&P review team decided that three items were
11 potentially reportable, I promptly informed Mr. Oprea.

12 On May 11, I met with Messrs. Jordan and Oprea and
13 provided them a briefing on the Quadrex findings. I
14 told them of the large number of findings in the Report
15 and described their significance. This included both
16 the identified weaknesses in the B&R engineering
17 organization and the large amount of design work yet to
18 be performed, especially the lack of analyses to
19 confirm the preliminary design. I described the three
20 items which had been reported to the NRC and explained
21 the potentially serious nature of the computer code
22 verification issue. I also mentioned that a number of
23 the findings were based on incomplete information or
24 premised on views of engineering practice that I
25 believed to be not supported by industry practice.

26

27

28

1 Q.82 Prior to submitting the Quadrex Report to the Licensing
2 Board in September 1981, did HL&P keep the Quadrex
3 Report secret?

4 A.82 No. The Quadrex Report was treated like numerous other
5 reports and studies on the Project. It was distributed
6 to individuals who would have a reason to want the
7 information contained in it. There were no instruc-
8 tions that it be kept secret.

9 I did consider whether it should be sent to the
10 NRC, particularly in light of Mr. Sells' original
11 inquiry during our April telephone call. There was no
12 regulatory requirement that it be submitted to the NRC,
13 and I decided not to do so. I knew that if the Report
14 were transmitted to the NRC, it would be sent, in the
15 ordinary course of business, to the Public Document
16 Room. It had been written rather hurriedly and, in
17 some cases, on the basis of incomplete information. I
18 knew that it reflected some judgments about acceptable
19 engineering practice which I did not share. I believed
20 that there was a high likelihood that the Report could
21 be misread or quoted out of context if it were made
22 publicly available without extensive explanatory
23 materials -- a situation which, as it turns out, has
24 occurred. I had, of course, made clear to the NRC that
25 the Report would be available for its review.

26 Q.83 Did you participate in a meeting regarding the Quadrex
27 Report with NRC Region IV on September 8, 1981?

28

1 A.83 Yes. In August of 1981 Mr. Oprea suggested that Region
2 IV would be interested in hearing about the Quadrex
3 Report. He arranged for a meeting with Region IV
4 personnel, and he and I participated in a meeting on
5 September 8 with a large group of NRC personnel. We
6 described the Quadrex review and its results, including
7 the areas reviewed, the number and significance of the
8 findings and HL&P's plans for resolving the findings.
9 The Region emphasized the importance of disposition of
10 all of the findings and we agreed that we would do so.

11
12 Q.84 Was there a discussion at that meeting regarding HL&P's
13 reporting obligations as they related to the Quadrex
14 Report?

15 A.84 Yes. Mr. Seyfrit asked whether there were any addi-
16 tional potentially reportable findings beyond the three
17 that had been identified in May. He also asked if we
18 had considered whether the Report as a whole might be
19 reportable. We assured him that if we identified any
20 additional potentially reportable findings, we would
21 promptly report them. Either at that meeting, or
22 later, we also advised him that we could see no basis
23 for reporting the entire Quadrex Report.

24
25 Q.85 At pages 20-21 of its Memorandum and Order of February
26 26, 1985, the Licensing Board discussses the obligation
27 of parties "to keep licensing or appeal boards informed
28

1 of newly developing information bearing on issues
2 pending before such boards," i.e., the so-called
3 "McGuire doctrine." Were you aware of such obligation
4 in 1981?

5 A.85 Yes. I may not have been familiar with the term
6 "McGuire doctrine", but I was aware of HL&P's obliga-
7 tion to advise the Licensing Board of new information
8 that could affect its decision regarding matters under
9 its review.

10

11 Q.86 When you received the Quadrex Report did you consider
12 whether HL&P was obligated to provide it to the
13 Licensing Board?

14 A.86 Yes, I did. However, I understood that the hearing was
15 aimed primarily at construction and construction-
16 related QA problems -- not design questions. My
17 testimony described HL&P's Project organization,
18 including the HL&P engineering organization and its
19 responsibilities, but I did not view this description
20 as being a focus of the hearing. The Quadrex Report
21 did not raise any question with respect to the manner
22 in which construction was performed or the adequacy of
23 construction QA. Because, in my view, the Quadrex
24 Report did not relate to the issues in the licensing
25 hearing, I did not believe the Report should be
26 furnished to the Licensing Board until September 1981.
27 I did not discuss with HL&P's licensing counsel whether

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1 the Report should be provided to the Board. At that
2 time HL&P's counsel advised me that counsel to the NRC
3 Staff had taken the position that the Licensing Board
4 should be given the Report. I agreed to do so.
5

6 Q.87 Did you view the Quadrex Report as a report on QA?

7 A.87 No. There were quality concerns addressed in the
8 Report, such as the three items that HL&P identified as
9 potentially reportable, but I viewed this report as
10 being primarily focused on the efficiency of B&R's
11 engineering activities, not its QA program. The
12 important message of the Quadrex Report was not that
13 the quality of the engineering products or processes
14 was deficient (although there were a few such concerns)
15 but rather that the B&R engineering organization was
16 weak and unlikely to support the Project without
17 substantial, additional improvement. I did not, and do
18 not, view the Quadrex Report as identifying weaknesses
19 in QA (either as administered by the QA department or
20 within the engineering organization) but rather as
21 pointing up problems in engineering itself -- problems
22 of a type not likely to be identified by the QA
23 function.
24
25
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1 Q.88 In view of the reporting obligation under the McGuire
2 doctrine, please explain why HL&P did not inform the
3 Board prior to September 24, 1981, that it was
4 considering replacing B&R as architect-engineer and
5 construction manager?

6 A.88 When I testified in June of 1982, I explained the
7 sequence of events that lead to the replacement of B&R
8 as architect-engineer and construction manager. As I
9 explained then, the Licensing Board was promptly
10 notified when an agreement in principle was reached
11 with Bechtel to replace B&R. Until that took place
12 there was no meaningful information to convey to the
13 Board.

14 Although early in 1981 I had suggested to Mr.
15 Jordan that it might be advisable to determine whether
16 there were options in the event that B&R could not
17 complete the job on a reasonable schedule, it was not
18 until June 29, 1981, that HL&P decided to seriously
19 investigate whether there were qualified contractors
20 that would be willing to replace B&R as architect-
21 engineer and construction manager. Once that decision
22 was made Mr. Oprea and I contacted a number of
23 qualified firms to determine their interest. I then
24 prepared a Request-for-Proposals, received and
25 evaluated proposals and interviewed each of the
26 candidate companies. It was only after the completion
27 of this evaluation process that we were in a position
28

1 to recommend to the STP Management Committee, the HL&P
2 Board of Directors and the Chief Executive Officers of
3 the Project owners that HL&P enter into negotiations
4 with Bechtel. The dates at which these approvals were
5 received were September 12, 14, and 15, respectively.
6 At that point it was still uncertain whether Bechtel
7 would agree to acceptable contract terms; in fact,
8 important basic contractual matters remained to be
9 resolved during the following week. When the negotia-
10 tions with Bechtel reached a point at which it was
11 apparent that there were terms that would be acceptable
12 to both companies the Licensing Board was promptly
13 informed of the transfer of responsibilities. The
14 actual preliminary agreement with Bechtel was not fully
15 executed until October 3, 1981.

16 Until HL&P had determined that a qualified company
17 would be willing to replace B&R on acceptable terms,
18 HL&P could not be certain that any change would occur.
19 Moreover, I did not see any reason why the Board should
20 be informed prior to that time because the
21 determination to seek a replacement for B&R was based
22 on cost and schedule concerns, not QA or nuclear safety
23 related considerations that might be of interest to the
24 Board.

25 It would have been irresponsible of HL&P to
26 announce the replacement of B&R before it was certain
27 to occur. A premature announcement would have had a
28

1 significant adverse effect on Project activities. Many
2 people would have immediately begun to seek other
3 employment and it would have become more difficult to
4 recruit new employees. Morale of B&R employees who
5 remained on the job would have been adversely affected
6 and attention to detail would have suffered. It was
7 thus essential to be certain of the decision before
8 making the announcement that B&R might be replaced.
9

10 Q.89 Have you reviewed your May and June 1981 testimony in
11 this proceeding in preparation for this hearing?

12 A.89 Yes. I have reviewed the portions of my 1981 testimony
13 that mentioned B&R's performance of engineering.
14

15 Q.90 At the time you testified in 1981, what was your view
16 of the adequacy of B&R's services?

17 A.90 When I joined HL&P in October, 1980, I had questions
18 about the adequacy of B&R's services on STP generally.
19 I was aware of the limited nature of B&R's prior
20 nuclear experience, the Show Cause Order and the less
21 than adequate progress of the Project. Progress on the
22 Project during the early part of 1981 was below B&R's
23 earlier projections and it was clear that construction
24 was being delayed by the failure of B&R to complete the
25 design on schedule. I began suggesting to HL&P
26 management in early 1981 that, to keep its options
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1 open, HL&P should explore whether an experienced
2 architect-engineer would be available to complete the
3 project, if that became necessary.

4 As I testified in 1982, there was a meeting of
5 executives of the Project owners and B&R on April 10,
6 1981, at which time we discussed the need to attract
7 more experienced personnel to B&R. I expressed my view
8 that B&R needed to make a number of improvements to its
9 engineering department, involving the addition of
10 experienced personnel in key technical positions.
11 Additionally, B&R needed to acquire a senior executive
12 with nuclear experience to take complete charge of
13 their STP activities.

14 After the April 10 meeting I met with B&R execu-
15 tives and we were successful in achieving some needed
16 improvements, including reorganization of engineering
17 to improve lines of authority and a recruitment program
18 which included hiring bonuses and improved compensation
19 for relocation expenses. There was also consideration
20 of employing some experienced subcontractors for
21 specific design tasks. These were positive steps that
22 I found encouraging. On the other hand, B&R had
23 resisted my suggestion that it hire a senior nuclear
24 executive who would report directly to the President of
25 B&R. This step, in my judgment, was absolutely
26 essential and Mr. Jordan had undertaken to pursue this
27 question with higher levels of B&R management. In view

1 of B&R's position, I urged even more strongly that HL&P
2 ascertain whether an alternative was available.
3 Recognizing, however, the enormously complex nature of
4 employing another architect-engineer, I could under-
5 stand that HL&P management had to explore, and perhaps
6 exhaust, every possibility of improving B&R's perfor-
7 mance before formally soliciting the interest of the
8 industry in taking over the job.

9 So, at the time I testified I was not satisfied
10 with B&R's engineering and management resources. The
11 Quadrex Report had confirmed my concern about the
12 adequacy of B&R's engineering resources. However,
13 meaningful steps had been taken to attract more
14 experienced engineers and subcontract part of the
15 design effort, and HL&P was still discussing with B&R
16 the need for an experienced senior nuclear executive.

17
18 Q.91 Do you now believe that you should have mentioned
19 either the Quadrex Report or your concerns regarding
20 B&R's engineering services in response to the questions
21 at the portions of your testimony cited in the Board's
22 February 26, 1985, Memorandum and Order?

23 A.91 No. Although it was not the purpose of my testimony to
24 address the engineering capabilities of B&R, when asked
25 about these issues I did mention my concerns. I
26 discussed the fact that B&R had never before designed a
27 nuclear plant and that it was experiencing problems of
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1 a type that were commonplace in the industry in the
2 early 1970's (Tr. 1158), and that B&R was taking steps
3 to acquire additional resources to cope with its task.
4 I also mentioned that HL&P had identified to B&R "a
5 number of areas that . . . [were] in need of strength-
6 ening, both in terms of talent, as well as in terms of
7 depth of talent." Tr. 2386. I mentioned a need to
8 bolster B&R engineering in the areas of cable tray
9 supports, design of seismic pipe supports, technical
10 management and acquisition of a more senior technical
11 leader to provide over-all technical direction. I also
12 discussed the need for "other changes relative to the
13 way they are structured in order to bring more focus of
14 management attention to the needs of the South Texas
15 Project." Tr. 2387. And finally, I stated, that I was
16 not satisfied with the B&R engineering organization and
17 I hoped that B&R management was not satisfied because
18 there were "substantial improvements that can yet be
19 made." Tr. 2404.

20
21 Q.92 Specifically, please explain why you did not mention
22 these subjects at Tr. 1095-96.

23 A.92 At those pages Mr. William Jordan, representing CEU,
24 referred to a statement on page 5 of my direct testi-
25 mony which stated that HL&P administered the contracts
26 with B&R and Westinghouse, and asked me to identify
27 other major contractors. I answered that they were the
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1 two major contractors. Mr. Jordan then asked if any of
2 the other contractors had responsibility for QA and QC.
3 I answered that by pointing out that a number of
4 contractors were under subcontract to B&R.

5 It would not have been appropriate to mention
6 Quadrex in response to these questions because Quadrex
7 was neither a major contractor, nor did it have QA or
8 QC responsibilities for STP. Neither did the questions
9 call for an assessment of B&R's performance of design
10 work.

11
12 Q.93 Why did you not mention these subjects at Tr. 1143-52?

13 A.93 At these pages Mr. Jordan and the Licensing Board asked
14 questions regarding the types of B&R design documents
15 routinely reviewed by HL&P and how such reviews were
16 performed. Since these questions dealt with the normal
17 HL&P process of reviewing B&R design by HL&P's engi-
18 neers nothing in the discussion suggested to me that it
19 would have been appropriate to mention the Quadrex
20 Report. The Quadrex Report did not address the subject
21 of what type of design documents HL&P did or should
22 have reviewed. Neither did it focus on problems in the
23 relationship between the HL&P and B&R engineering
24 organizations.

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1 Q.94 Why did you not mention these subjects at Tr. 1158-59?

2 A.94 At these pages Mr. Hager asked me how I perceived the
3 problems facing me at the time I accepted the position
4 of Vice President, Nuclear Engineering and Construc-
5 tion, of HL&P. My answer to this broad question was
6 very general. I mentioned that many of the problems at
7 STP were ones that were common-place in the nuclear
8 industry in the early seventies and that the newer
9 requirements made the tasks involved in designing a
10 nuclear plant more difficult. I suggested that B&R may
11 have been caught off guard by these new requirements,
12 but that it was "recognizing the magnitude of the task
13 and [was] acquiring additional resources of quality and
14 experience nature to cope with those tasks." I then
15 went on to say that HL&P was also increasing its
16 experience base.

17 I believe my answer addressed the question appro-
18 priately. I described my perception of the problems,
19 which included a recognition of difficulties in
20 addressing the newer requirements, and a general need
21 for more experienced personnel. It did not enter my
22 mind to single out the Quadrex Report for mention,
23 because it was only one source of my perception of the
24 Project problems, and in any event, did not contribute
25 to my perception of the problems at the time I accepted
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1 the job. I believe my answer clearly stated that there
2 was a need for improvement of B&R's resources on the
3 Project.
4

5 Q.95 Why did you not mention these subjects at Tr. 2404-06?

6 A.95 At these pages Mr. Reis, counsel to the NRC staff,
7 asked me about the adequacy of B&R's management of
8 design. My answers recognized that there had been
9 substantial improvements, but that I was still not
10 satisfied and hoped that B&R management was not
11 satisfied either. I then stated that where B&R was not
12 meeting minimum requirements these matters were being
13 brought to the attention of B&R management and would be
14 corrected. I emphasized our determination "to
15 encourage B&R to acquire the resources to improve the
16 quality of their effort."

17 Mr. Reis then inquired about the "principal problem
18 areas" in which B&R's design activities had been found
19 "lacking." I discussed a number of problem areas we
20 were then addressing, HVAC, shielding analyses and
21 consideration of faulted condition loads. These were
22 all matters addressed in the Quadrex Report. The first
23 two of these had, a few days earlier, been the subject
24 of "potential reportability" notifications to Region
25 IV. While I cannot remember it with certainty, from my
26 review of the transcript I suspect that I was about to
27 mention the computer code verification concern as well,
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1 but Mr. Reis interrupted to clarify a point. After the
2 clarification he shifted immediately back to questions
3 about the adequacy of construction. My omission of the
4 computer code area was due to the interruption.

5 The question did not call for any mention of the
6 Quadrex Report. My answer mentioned several of the
7 specific deficiencies identified in the Quadrex Report,
8 and knowledge of the Report, itself, was not necessary
9 to understand my answer. I believe my answers in these
10 pages and elsewhere did convey my view that B&R needed
11 to improve its design capabilities.

12
13 Q.96 In the CCANP Motion to Reopen the Phase I Record, CCANP
14 accuses Mr. Oprea of giving "what appears to be
15 misleading testimony to the ASLB in June of
16 1981" In support of that accusation, CCANP
17 cites an excerpt from your testimony before the Public
18 Utility Commission of Texas. (CCANP Exhibit "A" to the
19 foregoing Motion to Reopen, Tr. 1378-80). In that
20 excerpt, and in the immediately preceding pages you
21 testified before the Texas PUC regarding your sugges-
22 tions to Mr. Jordan and Mr. Oprea prior to June 29,
23 1981 that HL&P explore the availability of alternatives
24 to completing the Project without B&R as A-E. Have you
25 previously testified on this subject before the
26 Licensing Board?

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1 A.96 Yes. In my testimony on June 15, 1982, (Tr. 10518-20),
2 I explained that starting in January of 1981 I
3 suggested to HL&P management on several occasions that
4 HL&P explore the marketplace to determine the
5 availability of alternatives for completing the Project
6 without B&R as A-E. I also mentioned that I made this
7 same suggestion not long after the April 10, 1981,
8 meeting when B&R made clear that it would not be
9 receptive to my urging that it acquire a senior nuclear
10 executive to assume overall direction of the Project.
11 (Tr. 10,417).
12

13 Q.97 Did you consider your discussions with Mr. Jordan or
14 Mr. Oprea regarding your suggestions of exploring
15 alternatives to be discussions regarding removal of
16 B&R?

17 A.97 No. I think this is reflected in my June 1982
18 testimony before this Board. After describing the
19 discussions that took place regarding the exploration
20 of alternatives, in response to a question from Judge
21 Hill I specifically stated that " . . . there was
22 absolutely no conversation or decision that I am aware
23 of prior to June 29 along the lines of seriously
24 considering replacement of Brown & Root " Tr.
25 10519.
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1 Q.98 Exhibit "A" to the CCANP Motion to Reopen cites Mr.
2 Oprea as responding "No, I have not," to the question
3 "Have you had any discussions with any of your staff or
4 other individuals after the show cause order regarding
5 removal of Brown & Root?" Do you consider that answer
6 as inconsistent with your testimony or as misleading?

7 A.98 No. I do not think it was unreasonable for Mr. Oprea
8 to have understood that question to ask about serious
9 discussions focused on the removal of B&R rather than
10 our discussions about the need to explore alternatives.
11 When, in answer to a question about Mr. Oprea's
12 testimony before the Texas PUC (Tr. 1378), I suggested
13 that Mr. Oprea's recollection was different than mine,
14 I really did not have in mind anything other than our
15 discussions about the advisability of exploring other
16 alternatives and I immediately pointed out (TR. 1379),
17 as I did before this Board in 1982, that there were no
18 serious discussions regarding removal of B&R before
19 June 29, 1981. I think Mr. Oprea took our conversa-
20 tions as part of discussions we had from time to time
21 about the desirability of exploring our options and not
22 a discussion about "the removal of Brown & Root" and he
23 was right.

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1 Q.99 In your review of other portions of your testimony, did
2 you find any answers that you now believe would have
3 called for you to mention the Quadrex Report or your
4 views at that time concerning B&R's engineering
5 services?

6 A.99 No. My answers were responsive to the questions and
7 there was no instance in which mentioning the Quadrex
8 Report would have contributed to the substance of my
9 answer. I did mention my views concerning B&R's
10 engineering services in response to the few questions
11 that dealt with that subject. I believe that all of my
12 testimony was truthful and candid and that I responded
13 properly to the questions that I was asked.

14

15 Q.100 What is your opinion regarding how HL&P's commissioning
16 and handling of the Quadrex Report reflects on HL&P's
17 character and competence?

18 A.100 I believe that HL&P demonstrated both competence and
19 good character in the commissioning and handling of the
20 Quadrex Report. In the current regulatory environment
21 independent design reviews have become a standard
22 technique, but in 1980-81, when HL&P decided to
23 commission the Quadrex review there was little or no
24 precedent for such reviews. In the circumstances then
25 confronting HL&P and myself, I believed such a review
26 would contribute measurably to our understanding of the
27 Project. We kept the Quadrex review independent of
28 HL&P to obtain unbiased results, and imposed very tight

1 deadlines so that we would get timely information. As
2 a result, the Report was written under great time
3 pressures and HL&P did not get the opportunity to
4 provide Quadrex with comments that would have helped
5 put the findings in a clearer perspective. Neverthe-
6 less, the Report provided valuable insights into the
7 engineering problems which were constraining progress
8 on the Project.

9 HL&P was candid about this report with the NRC.
10 When the review was commissioned, I told the NRR
11 Project Manager about it, and when the Report was
12 received I described the findings to him. Our review
13 for potentially reportable findings was undertaken
14 promptly on receipt of the Report. Although B&R advised
15 that only one item was reportable, HL&P performed its
16 own independent review and reported two additional
17 items that appeared to be potentially reportable.

18 Application of 10 CFR § 50.55(e) requires
19 engineering judgment based on the specific facts.
20 Although I am confident that our judgments were
21 correct, I recognize that others may reach differing
22 conclusions with respect to one or another of the
23 findings. Such differing professional opinions would
24 not, in my view, in any way negate the fact that HL&P
25 made a good faith review of the findings and made
26 responsible judgments on reportability.

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1 On our compliance with the "McGuire doctrine," I
2 would not propose to quarrel with any judgment the
3 Board may make. However, our course of action was based
4 on our understanding of the issues before the Board and
5 our very different perception about the basic thrust of
6 the Quadrex Report. But even if the Board feels
7 otherwise, I would hope that our failure to furnish the
8 Report to the Board would not diminish the credit which
9 belongs to HL&P for commissioning the Report, and for
10 dealing fairly with the NRC Staff in advising them of
11 that fact and, subsequently, offering to share with
12 them the information in the Report.

13 In terms of the relationship of the Report to the
14 ultimate decision to seek alternatives to continuing
15 with B&R, we were aware of many of the basic problems
16 in B&R's engineering organization before we received
17 the Report. The Report helped to confirm my judgment,
18 but it was not a major factor in our decision to
19 seriously explore the possibility of replacing B&R in
20 the summer of 1981. To the extent it had an impact, it
21 underscored not deficiencies in B&R's QA/QC program but
22 rather the basic question of whether B&R could be
23 relied on to finish the Project on a reasonable
24 schedule. The Project would not have moved forward if
25 there had been a fundamental flaw in the design or a
26 serious question about B&R's ability to control the
27 design process to assure its quality. B&R was not,
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1 however, terminated for these reasons. The decision
2 was a complex business judgment based largely on cost,
3 schedule and contract feasibility. Speaking for
4 myself, I did not regard these matters as being within
5 the Board's interest. But even if I am wrong, we were
6 just beginning to wrestle with that problem in June of
7 1981. Practical considerations required care against
8 premature public disclosure of our investigation into
9 the feasibility of replacing B&R. The Board was
10 informed as soon as that judgment was reached.

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CERTIFICATE OF OFFICIAL REPORTER

This is to certify that the attached proceedings before
the UNITED STATES NUCLEAR COMMISSION in the matter of:

NAME OF PROCEEDING: EVIDENTIARY HEARING
HOUSTON LIGHTING AND POWER COMPANY,
ET AL (SOUTH TEXAS PROJECT, UNITS 1
AND 2)

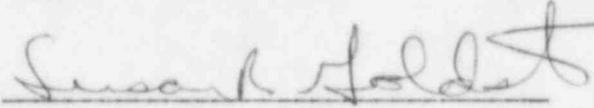
DOCKET NO. : STN 50-498-OL
STN 50-499-OL

PLACE: BAY CITY, TX

DATE: Thursday, July 11, 1985

were held as herein appears, and that this is the
original transcript thereof for the file of the United
States Nuclear Regulatory Commission.

R. Patrick Tate, CSR



Susan R. Goldstein, CSR

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