LBP-85-45

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
Charles Bechhoefer, Chairman
Dr. James C. Lamb
Frederick J. Shon

In the Matter of	Docket Nos. STN 50-498 OL STN 50-499 OL
HOUSTON LIGHTING AND POWER COMPANY, ET AL.	ASLBP No. 79-421-07 OL
(South Texas Project, Units 1 and 2)	November 14, 1985

MEMORANDUM AND ORDER
(CCANP Motions II and III to Reopen Record)

On October 16, 1985, Citizens Concerned About Nuclear Power, Inc. (CCANP), an intervenor in this operating license proceeding, filed two motions (Motion II and Motion III) to reopen the record of Phase II of this proceeding.[1] Thereafter, CCANP moved to withdraw Motion III (Withdrawal Motion). For reasons set forth herein, we are granting (in part) Motion II, as well as the Withdrawal Motion.

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1 CCANP earlier filed another motion to reopen the Phase II record (Motion I). We granted in part and denied in part that motion. See Memorandum and Order, LBP-85-42, 22 NRC ___ (November 5, 1985).

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A. Background

Hearings in Phase II of this proceeding were conducted during the summer of 1985, and the record has been closed. Proposed findings of fact and conclusions of law have been submitted by the Applicants and CCANP, and are due in the near future from the NRC Staff. The issues included several which raise questions on a very sensitive subject--the openness and candor of the Applicants in their dealings with the NRC, including this Board, and the effect of the Applicants' performance in this area on their character to manage construction and operation of the South Texas Project (STP). In particular, CCANP Contention 10 claims that HL&P's failure to advise this Board in a timely fashion of, inter alia, the Quadrex Report pursuant to the so-called McGuire doctrine reflects adversely on the Applicants' character. See LBP-85-6, 21 NRC 447, 460-63 (1985).

Motions II and III each seek to introduce into the Phase II record documents which, according to CCANP, indicate that certain testimony presented by the Applicants was not wholly truthful. Although filed on the same date, the two motions were kept separate because of the differing circumstances surrounding CCANP's discovery of the particular documents. In particular, CCANP claimed in Motion III that the document for which it there sought to reopen the record should have been--but was not--provided to CCANP prior to the Phase II hearings. Shortly after filing Motion III, however, CCANP realized (through the advice of the Staff) that the document in question had in fact been provided to it

prior to the hearings. CCANP thus advised the Board and parties by telephone of this circumstance; and on November 1, it filed its Withdrawal Motion.

By response dated October 31, 1985, the Applicants opposed Motion II. On November 4, 1985, the Applicants filed a response to the Withdrawal Motion which did not object to the withdrawal of Motion III but sought certain sanctions against CCANP because of language included both in Motion III and the Withdrawal Motion. The Staff's response, dated November 5, 1985, opposed reopening the record through Motion II but offered no objection to the withdrawal of Motion III.

We will treat each of these motions seriatim.

B. Motion II

1. Positions of Parties and Applicable Standards. Motion II seeks to have the record reopened for the purpose of admitting four documents. These documents (hereinafter referred to as Documents 1-4)[2] consist of the typed version of notes taken by Mr. Thrash, Secretary of the STP Management Committee, of four meetings of that Committee (or, in the case of Document 3, a meeting of that Committee with the Chief Executive Officers of the applicant utilities). The meetings were held on December 4, 1980 (Document 1), February 19, 1981 (Document 2),

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2 The documents were designated by CCANP as Exhibits 1-4; but, to avoid confusion with exhibits offered or entered into evidence in the proceeding, we will refer to these documents as Documents 1-4.

February 20, 1981 (Meeting with CEOs, Document 3), and March 19, 1981 (Document 4). The official minutes of three of the meetings in question are in evidence as CCANP Exhibit 108 (meetings of February 19 and 20, 1981) and CCANP Exhibit 109 (meeting of March 19, 1981). The notes of the meetings recorded by Documents 1-3 refer in part to the reasons for HL&P's commissioning of the Quadrex Report and the relationship of the report to the then-forthcoming Phase I hearings. Document 4, in relevant part, includes only a hypothetical discussion of possible outcomes of the Quadrex review.

CCANP claims that these documents undercut the position taken by the Applicants that they did not regard the Quadrex Report as relevant and material to the Phase I issues and hence were not required to provide it to the Board shortly after its issuance, pursuant to McGuire obligations. See LBP-85-6, 21 NRC 447, 461 (1985) and cases cited. CCANP claims that Documents 1, 2 and 3 show that HL&P had intended the Quadrex Report to assist it at the Phase I hearings, and that Document 4 demonstrates the potential significance of that Report and its import to the "licenseability" of the STP. Further, CCANP asserts that these documents demonstrate "that there was a direct link in the minds of HL&P senior management between the commissioning of the Quadrex Report, the Phase I operating license hearings, and the ultimate licenseability of the plant" (Motion II at 5-6, emphasis in original). CCANP concludes that testimony of HL&P officials during Phase II was inconsistent with these documents, and that HL&P did not turn the Quadrex Report over to us early in Phase I because it would threaten the licenseability of STP.

In determining whether to reopen the record, we are bound by the well-known standards which we recently described in LBP-85-42, supra, 22 NRC at ____ (slip op., pp. 3-6). See also our earlier ruling in LBP-85-19, 21 NRC 1707, 1720-21 (1985). Suffice it to say that, given the timing of Motion II, three criteria must be satisfied:

1. The motion must be timely filed;

2. It must address a significant issue; and

3. It must demonstrate that the information sought to be added to the record might potentially alter the result we would reach in its absence.

CCANP concedes that Motion II was not timely submitted, since CCANP could have obtained Documents 1-4 through discovery but failed to attempt to do so. CCANP relies (Motion II, at 7) on one of our earlier rulings which cites authority to the effect that "a matter may be of such gravity that the motion to reopen should be granted notwithstanding that it might have been presented earlier". LBP-85-19, supra, 21 NRC at 1720-21, citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); to the same effect, see Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 804 (1979), vacated in part on other grounds, CLI-80-8, 11 NRC 433 (1980).

In opposing Motion II, the Applicants claim that CCANP's charges are totally without merit and are supported only by its own mischaracterization of the Phase II record and of Documents 1-4. They further claim that the information in Documents 1-4, to the extent relevant to Phase II issues, is at best cumulative and would not modify

the result which we otherwise would reach. Finally, the Applicants point to the untimeliness of Motion II as another reason for dismissing or summarily denying it.

The Staff offers somewhat different reasons for denying Motion II. It stresses the untimeliness of the motion and the ambiguity in the statements in Documents 1-4 upon which CCANP relies. The Staff acknowledges the seriousness of the safety issue to which the documents pertain. But it asserts that the documents are susceptible to many interpretations, "none of which are entitled to conclusive (or indeed much, if any) weight"; and accordingly, that admission of the "documents standing alone" (as sought by CCANP) would provide no probative evidence which would be likely to affect our decision (Staff response at 4). The Staff notes that CCANP's failure to have offered the documents in a timely fashion prevented the possibility of introducing them into the record at the hearing and "deprived the parties of the opportunity to adduce evidence concerning the meaning and import of the documents" (id. at 3).

2. Ruling on Motion II. No party questions the significance of the issue to which Motion II is directed. Nor do we. The real question before us is whether the information in Documents 1-4 would have a tendency to modify the result on Contention 10 which we would reach absent such information. As the Staff observes, there is some ambiguity as to the meaning of certain terms in Documents 1-4. But we nonetheless conclude that the new information could potentially alter the result we would otherwise reach on Contention 10. In particular, the documents

appear to raise legitimate questions about the veracity or completeness of certain evidence now before us for decision and hence of the integrity of the Phase II record on Contention 10.

The crucial fact which these documents could establish is that one of the major reasons for HL&P's having commissioned the Quadrex review was to provide information for use in the Phase I hearings. If proved, such fact would undercut the Applicants' position on Contention 10. The Applicants assert that CCANP's claim is not supported by either the Phase II record or Documents 1-4. The first of these assertions is obvious--if CCANP's claim were clearly established by the Phase II record, CCANP would not have filed Motion II. Contrary to the Applicants' claim, however, the proffered documents do support a connection between the Quadrex Report and Phase I issues beyond that to which the Applicants' witnesses have testified and contrary to the position taken by the Applicants on Contention 10.

In our view, the following scenario could be created by adding Documents 1-3 to the record:

a. The second prehearing conference was held on November 19, 1980. At that conference, the issues for Phase I were approved. The most important question discussed at that conference was whether Phase I issues should include consideration of corrective actions adopted by the Applicants following the April 30, 1980 Order to Show Cause or (alternatively) whether Phase I should be limited to an exploration of the deficiencies leading up to the Show-

Cause Order. See Second Prehearing Conference Order, dated December 2, 1980, at 3-5 (unpublished). We ruled in favor of considering corrective actions during Phase I.

b. The broader aspects of corrective actions involved consideration of whether the Applicants had abdicated (and were continuing to abdicate) responsibility for the project. Abdication of responsibility was one of the indicia of lack of character to which the Commission had referred in CLI-80-32, 12 NRC 281 (1980), the Order which gave rise to the broad Phase I issues.

c. The Phase I issues were discussed at the Management Committee meeting on December 4, 1980 (slightly more than two weeks following announcement of the Phase I issues at the November 19, 1980 prehearing conference). At that meeting, there was discussed a third-party review of engineering as a method for demonstrating at the OL hearing that HL&P was in charge of the entire operation, was competently discharging its responsibilities for overseeing design engineering, and accordingly had not improperly abdicated its responsibilities in this area (Document 1).

d. Accordingly, there was a direct relationship between the commissioning of the Quadrex Report and the Phase I issues (Documents 1, 2 and 3).

e. Further discussion at the February, 1981 Management Committee meetings reflects a difference of opinion as to the relevance of the Quadrex review to the OL hearings. Mr. Goldberg determined it to be relevant, but Mr. Oprea found it not relevant (Document 2). The view of Mr. Oprea, the senior of these two officials, prevailed at the hearing, notwithstanding Mr. Oprea's acknowledgement (in a somewhat different context) that he had less experience to determine reportability than did Mr. Goldberg (Tr. 14170, 14390).

f. A likely reason for the Applicants' adoption of Mr. Oprea's view was the strong negative character of the Quadrex Report and the potential adverse effects on the abdication of responsibility issue to be litigated in Phase I.

To be sure, the Applicants offer explanations for statements in the various documents. They refer to testimony by Mr. Goldberg indicating only a peripheral and incidental use of the results of the Quadrex review at the hearings. Goldberg, ff. Tr. 11491, at 4-5; Tr. 11582-84 (Goldberg). They also assert that the discussion at the December 4, 1980 Management Committee meeting came up only "incidentally" (Applicants' response, at 5). They attribute the discussion to persons unfamiliar with the particular issues to be litigated in Phase I but familiar with the broad scope of NRC licensing proceedings--pointing specifically to the circumstance that the December 2, 1980 Order which

"delineat[ed] Issues A-F" was issued only two days prior to the December 4 Management Committee meeting (id. at 6, fn. 10). That latter claim, however, is misleading: Issues A-F were approved at the prehearing conference on November 19, 1980 (Tr. 306-07) and the approved text (at the suggestion of the Applicants, Tr. 307) was bound into the transcript of that conference (ff. Tr. 307). Absent further information, we must presume that many attendees at the December 4, 1980 Management Committee meeting were familiar with the precise issues to be litigated in Phase I. Furthermore, the Applicants failed to explain the apparent inconsistency between Document 1 (which indicates Mr. Oprea's presence at the December 4, 1980 Management Committee meeting) and Mr. Oprea's testimony in which he indicated that his best recollection was that the Management Committee was first informed of the Quadrex review in March, 1981 (later amended to February, 1981) (Tr. 14103-106).

Because Documents 1-3 can be construed as seriously undercutting the position adopted by the Applicants, and hence as adversely impacting our evaluation of their character, we do not believe that we could render a fair or meaningful decision on Contention 10 without reopening the record to include those documents. Given the potential differences in how these documents may be construed, however, we would not adopt CCANP's proposal merely to incorporate the documents into the record. We believe that testimony of various individuals concerning the meetings in question is necessary to create an adequate record on Contention 10.

On the other hand, we agree with the Applicants that the portions of Document 4 (and to some extent, Document 2) on which CCANP relies,

bearing on the seriousness of the Quadrex Report, are largely speculative, as well as cumulative of some testimony in the record. We do not believe that the record should be reopened to include Document 4. As for Document 2, it is significant not for the seriousness of the Quadrex Report but rather for the relationship of the Quadrex review to the forthcoming nearings, and the apparently differing views within HL&P on that question.

As for the timeliness criterion, we agree with all parties that Motion II should have been submitted earlier--indeed, the material should have been offered prior to the Phase II hearings. But the information in Documents 1-3 is so basic to the Applicants' position on Contention 10 that, as CCANP claims, the record should be reopened to include that information notwithstanding its untimely submittal. We are therefore reopening the Phase II record to include Documents 1-3 and testimony concerning the relationship of the Quadrex review to the Phase I hearings.

The Board envisages the reopening of the record which we find warranted to entail a relatively short evidentiary hearing. To enable us to complete the Phase II record and issue a decision in a timely fashion, we propose a hearing in the Houston, Texas area for December 5 and (if necessary) December 6, 1985. Appropriate witnesses would include Messrs. Goldberg, Oprea and Barker, but possibly would also include Messrs. Jordan and Thrash. We expect to discuss hearing arrangements in the conference call we previously scheduled (for other purposes) for November 15, 1985.

Motion II does not seek discovery. Although we envisage that discovery would possibly be useful, we are not authorizing discovery in view of the time constraints necessary for us to issue our Phase II decision in a timely fashion. We request the Applicants, however, to produce the following documents (to the extent that they may reflect either the reason(s) for HL&P's commissioning of the Quadrex review or a relationship of the Quadrex review to the Phase I hearings):

1. Notes of the meeting of the Management Committee with executive officers (if such meeting took place) on or about December 4-5, 1980.

2. Notes of the Management Committee meetings (including the meeting with executive officers) on January 22 and 23, 1981 (see CCANP Exh. 113, at 5 (p. 4603)).

3. Notes of the meeting of the Management Committee with executive officers on March 20, 1981 (the minutes of which are included in CCANP Exh. 109).

These documents should be provided to the Board and parties by Wednesday, November 27, 1985 (filing date) or Monday, December 2, 1985 (delivery date).

C. Withdrawal of Motion III

In seeking to withdraw Motion III, CCANP acknowledged that it had erred in accusing the Applicants' counsel of withholding important documents from it. CCANP also apologized for its accusations against counsel. Motion III additionally accused HL&P management officials of

presenting perjured testimony during Phase II. The Withdrawal Motion does not retract those allegations but, instead, reiterates them.

The Applicants would permit CCANP to withdraw Motion III, but they ask us to impose sanctions against CCANP for its "baseless and scandalous charges". Specifically, the Applicants would have us strike both Motion III and the Withdrawal Motion "since they contain charges that defame HL&P management and Applicants' counsel." They also would have us admonish CCANP's representative that further unwarranted accusations regarding the integrity of Applicants' counsel or management officials will result in additional sanctions.

Absent objection, we are granting the motion to withdraw Motion III. Although we are not striking from the record either Motion III or the Withdrawal Motion, we wish to put parties on notice of our displeasure at the unfounded and reckless allegations which CCANP has made against Applicants' counsel. Since the allegations of perjury against HL&P management officials are in part closely related to the position taken by CCANP on substantive Phase II issues, we defer any ruling on such allegations pending issuance of our Phase II Partial Initial Decision on those issues. Finally, we note that one of the positions taken by the Applicants in connection with Motion II was based on an erroneous statement of facts, most likely through carelessness, and hence was misleading at best. That, too, warrants our disapproval.

The most serious--partly because of its lack of any basis--is CCANP's attack on the integrity and professional responsibility of Applicants' counsel. As the Applicants point out, this is at least the

second instance in which CCANP has made baseless charges against Applicants' counsel concerning the Applicants' response to Board-ordered discovery. (The other example appears at Tr. 12660-63, 14186-89.) CCANP explained its charges against counsel in Motion III on the basis of its own lack of organization of the material which it previously had received. Most significant, however, is the listing of the allegedly withheld document in the July 2, 1985 transmittal letter to the Board and parties on which CCANP relied in part in its Motion III; in its Withdrawal Motion, CCANP conceded that it had not actually looked at the transmittal letter it had cited (Withdrawal Motion at 4).

In its Withdrawal Motion, CCANP admitted it had been "careless" and it apologized for its carelessness. Similarly, CCANP had apologized for its earlier erroneous charges concerning the Applicants' response to discovery (Tr. 14193-96). Nonetheless, CCANP failed to take appropriate steps to assure the validity of the serious charges it was making. As the Applicants point out, CCANP failed to inquire of Applicants' counsel (or Staff counsel) whether the document in question had been produced; failed to review the documents which were produced; and failed to consult the list of produced documents in the Applicants' July 2, 1985 transmittal. When charges as serious as those against Applicants' counsel are proffered, a party has an obligation to take greater care than did CCANP in asserting those charges.

We recognize, of course, the paucity of resources available to CCANP. Nonetheless, when charges as serious as those in Motion III are

made, lack of resources is no excuse. If charges of this type cannot be accurately documented, they should not be made.

Although intrinsically less serious, the erroneous claims advanced by the Applicants in responding to Motion II (see supra, pp. 9-10) are also inexcusable--particularly in light of the far greater resources available to the Applicants. The Second Prehearing Conference Order, dated December 2, 1980, indicated that the issues set forth in the attachment to that Order had been accepted at the Prehearing Conference. A perusal of the transcript of the November 19, 1980 prehearing conference would have revealed that, at the suggestion of the Applicants themselves, the text of the accepted issues was bound into the transcript. That being so, it is inconceivable to us that the precise issues to be heard in Phase I were not known by at least some of those who attended the December 4, 1980 Management Committee meeting. One of the Applicants' primary responses to Motion II was, therefore, upset by the facts.

We have authority, of course, to strike pleadings which do not live up to the high standards of practice expected before the Commission. 10 CFR § 2.708(c); 10 CFR § 2.713(a); 10 CFR § 2.718(e); see also Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445/6-OL2, Memorandum dated September 17, 1985 (unpublished). However, given the totality of circumstances, including the differing evaluations by CCANP and the Applicants of the completeness and accuracy of testimony of HL&P officials during Phase II (all of which bear on the substance of Phase II issues), we decline to

strike Motion III or the Withdrawal Motion from the record. We warn all parties, however, that we expect more care in the preparation of pleadings than has been demonstrated by either CCANP or the Applicants in the instances described herein.

For the reasons stated, it is, this 14th day of November, 1985

ORDERED

1. That CCANP's Motion II is granted in part; the record of Phase II is reopened to the extent indicated in Section B.2 of this Memorandum and Order;

2. That CCANP's Motion to Withdraw Motion III is granted;

3. That the Applicants' request to strike Motion III and the Withdrawal Motion is denied.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland