

ORIGINAL  
UNITED STATES  
NUCLEAR REGULATORY COMMISSION

---

IN THE MATTER OF:

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

HOUSTON LIGHTING & POWER COMPANY,  
et al.

(South Texas Projects, Units 1 & 2)

LOCATION: BETHESDA, MARYLAND

PAGES: 15711 - 15911

DATE: FRIDAY, MARCH 21, 1986

---

TR-01  
0/1

8603250181 860321  
PDR ADDCK 05000498  
T PDR

ACE-FEDERAL REPORTERS, INC.

*Official Reporters*  
444 North Capitol Street  
Washington, D.C. 20001  
(202) 347-3700

NATIONWIDE COVERAGE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

```

-----x
:
In the Matter of:           :
:                               : Docket Numbers
HOUSTON LIGHTING & POWER COMPANY, :
:                               : STN 50-498 01
et al.                       :                               : STN 50-499 0L
:                               :
(South Texas Project, Units 1 & 2) :
:                               :
-----x

```

Nuclear Regulatory Commission  
Fifth Floor Hearing Room  
4350 East-West Highway  
Bethesda, Maryland

Friday, March 21, 1986

The conference in the above-entitled matter convened at  
9:30 a.m.

BEFORE:

JUDGE CHARLES BECHHOEFER, Chairman  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555

JUDGE JAMES C. LAMB III, Member  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555

JUDGE JUDGE FREDERICK J. SHON, Member  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555

## 1 APPEARANCES:

2 On behalf of the Applicant:

3 MAURICE AXELRAD, ESQ.  
4 JACK R. NEWMAN, ESQ.  
5 DONALD J. SILVERMAN, ESQ.  
6 ALVIN H. GUTTERMAN, ESQ.  
7 Newman & Holtzinger, P.C.  
8 1615 L Street, N.W.  
9 Suite 1000  
10 Washington, D. C. 2003611 On behalf of the Nuclear Regulatory  
12 Commission Staff:13 EDWIN J. REIS, ESQ.  
14 Office of the Executive Legal Director  
15 U.S. Nuclear Regulatory Commission  
16 Washington, D. C. 2055517 On behalf of the Intervenor, Citizens  
18 Concerned About Nuclear Power, Inc.:19 LANNY A. SINKIN, ESQ.  
20 The Christic Institute  
21 1324 North Capitol Street  
22 Washington, D. C. 20002  
23  
24  
25

P R O C E E D I N G S

1  
2 JUDGE BECHHOEFER: Good morning, ladies and  
3 gentlemen. This is the seventh prehearing conference in  
4 this operating license proceeding. The Board here is the  
5 same as the one that presided over hearings last summer,  
6 but for those of you who may not be familiar with this  
7 Board, on my left is Mr. Fred Shon and on my right is  
8 Dr. James Lamb. My name is Charles Bechhoefer.

9 For the benefit of the reporter, would the  
10 parties' representatives identify themselves?

11 MR. AXELRAD: Yes, Mr. Chairman, on behalf of  
12 the Applicants I am here today. My name is Maurice Axelrad,  
13 with the law firm of Newman & Holtzinger. Sitting on my  
14 right is Mr. Jack R. Newman and on my left, Alvin Gutterman.  
15 Seated in back of me is Mr. Donald J. Silverman.

16 MR. REIS: I'm Edwin J. Reis, appearing on  
17 behalf of the NRC Staff.

18 MR. SINKIN: Lanny Alan Sinkin, appearing on  
19 behalf of Intervenors, Citizens Concerned About Nuclear  
20 Power.

21 JUDGE BECHHOEFER: The purpose of this  
22 prehearing conference is really twofold. First, to  
23 determine what matters there are remaining for phase 3  
24 hearings. But also to determine whether there are any left  
25 over matters from phase 2. In that context, we have two

1 additional motions to reopen the record that are before us.  
2 I thought we would deal with the motions to reopen first.  
3 We have a number of questions, but does any party want to  
4 raise any preliminary matters first?

5 MR. AXELRAD: Mr. Chairman, I don't have any  
6 preliminary matters, but I would appreciate it if the Board  
7 could identify for us, perhaps a little more specifically,  
8 exactly what matters the Board intends to take up today and  
9 in what sequence.

10 JUDGE BECHHOEFER: We have just a few questions  
11 dealing with motions to reopen.

12 MR. AXELRAD: Fine. Then you will identify the  
13 matters that you want to discuss with respect to phase 3  
14 before we begin that set of discussions?

15 JUDGE BECHHOEFER: Well, there's really only one  
16 matter, I think, which is what we do with the so-called  
17 drug issue. There may not be a drug issue.

18 MR. AXELRAD: Fine.

19 JUDGE BECHHOEFER: Where it falls, how it should  
20 be considered, whether it should be considered. We have,  
21 essentially, only one issue before us for phase 3. But we  
22 thought we would start with the motions to reopen.

23 I think the Board will just start by asking its  
24 own questions, and then if parties have any further  
25 information they want to provide on these motions, they can

1 do so.

2 First, I would like to ask Mr. Sinkin,  
3 concerning both the fourth and fifth motions, why is the  
4 information in the Briskin/Saltarelli affidavits,  
5 conceptually any different than the side benefit testimony  
6 that we've already got extensively in the record? What  
7 would it add?

8 MR. SINKIN: Our essential argument is that if  
9 you take motion to reopen number 2 in context with motion  
10 to reopen number 4 and motion to reopen number 5, you have  
11 a very clear pattern that when individuals are recorded as  
12 giving their reasons why the Quadrex report was  
13 commissioned, the only reason they provide is that the  
14 Quadrex report was commissioned to prepare for the phase 1  
15 licensing hearings and that that independent, three-point  
16 proof of that as the reason for commissioning the Quadrex  
17 is quite different from the Applicant's position that there  
18 was, perhaps, a side benefit of commissioning the Quadrex  
19 report, that they might be able to answer in hearings in  
20 phase 1; but they did not consider the Quadrex report as  
21 being prepared for phase 1. We think that's a clear  
22 distinction between what is being said in the motions to  
23 reopen and what has been testified to by the witnesses for  
24 Applicants.

25 JUDGE BECHHOEFER: Do you think the deposition,

1 the two depositions in question establish that the Quadrex  
2 report was prepared to respond to phase 1 issues? Or did  
3 they merely state that, as Mr. Goldberg just stated on the  
4 record, and a number of other of witnesses have confirmed,  
5 that the company wanted the background information in case  
6 any questions were raised in the hearings which may or may  
7 not be phase 1? Particularly the Briskin deposition  
8 appears to me to support only the latter.

9 MR. SINKIN: Well, it depends, of course, in  
10 part on how you view Mr. Briskin's deposition, in terms of  
11 the intention to submit the Quadrex report as backup to  
12 Mr. Goldberg's testimony versus Mr. Briskin's affidavit,  
13 which says: That didn't mean backup was being submitted.  
14 It depends on which version you want to accept, as far as  
15 we are concerned on that point.

16 We think, overall --

17 JUDGE BECHHOEFER: Why isn't backup -- why  
18 couldn't that be construed -- why shouldn't it be construed  
19 as having the information available in case the line of  
20 questioning got into that area? What I'm trying to figure  
21 out is what additional this new information would add to  
22 the record, if anything?

23 MR. SINKIN: Well, I think it depends in part on  
24 how the view of the Board is today on the state of the  
25 record. If the view of the Board is that the Quadrex

1 report was prepared for the phase 1 licensing hearings and  
2 that that is indisputable and shown by the record, and that  
3 Applicant's testimony that the Quadrex report was not  
4 prepared for the phase 1 hearings is therefore false, then  
5 this adds nothing to the record.

6 We are not sure that the Board views the record  
7 as it now stands in that light. We think that the addition  
8 of these pieces of evidence and, we would expect, the  
9 cross-examination of these witnesses, would solidify that  
10 particular point in the mind of the Board as to why the  
11 Quadrex report was commissioned.

12 I think, too, that there may be an ambiguity  
13 around the word "issues," whether it is being used in a  
14 capitalized or noncapitalized sense.

15 If the Applicants want to take the position that  
16 the Quadrex report was not with respect to the Issues A  
17 through E, that the issues called into question the  
18 competence of the Applicants, therefore it was relevant to  
19 the Issues, capital "I." If they want to say it was not  
20 relevant to any of the issues -- small "i" -- in the  
21 proceeding, we think that is disputable. There have been  
22 various arguments made in the Applicant's pleadings as to  
23 which way they are going in that respect.

24 The affidavit filed by Mr. Goldberg, if I'm  
25 correct, says issues with a small "i." And the testimony



1 similarly has said that, but there are some ambiguities  
2 this would help clear up. That's a minor point.

3 I think the more important point is that the  
4 Board has set out the contention, in ruling that the  
5 McGuire rule was violated, the Quadrex report should have  
6 been turned over to the Board. The only question remaining  
7 in the Board's mind, as set out in the February 25, 1985  
8 order, was: Did that failure to turn over the report to  
9 the Board reflected adversely on the character and  
10 competence of the Applicants? Part of the decision on  
11 whether it reflects adversely will revolve around the  
12 motivations for not turning it over.

13 The Applicants would have you believe it was a  
14 perfectly innocent error, if error it was. They would even  
15 have you overturn your earlier ruling, but if you insist on  
16 your ruling that the McGuire rule was violated, they would  
17 insist it was an inadvertent, innocent error.

18 We think the evidence was to the contrary, the  
19 report was prepared for the phase 1 licensing hearing,  
20 Mr. Goldberg fully expected to testify about the quality of  
21 Brown & Root's engineering, and we think that's another  
22 reason to have it reopened, because the evidence is  
23 Mr. Goldberg fully expected he would be questioned about  
24 the quality of engineering, one, because he was  
25 vice-president for construction and engineering, two,

1 because he was the new man on the job, and three, because  
2 Brown & Root's construction work had been so poor that  
3 there were obviously going to be some serious questions  
4 about the rest of their work, that they fully expected the  
5 matter to come up.

6 It was not going to be an incidental matter, as  
7 they have since testified, and the Quadrex report was then  
8 central for preparing questions they expected to come from  
9 the Licensing Board, not some matter that was a side  
10 benefit while they were in fact preparing the Quadrex  
11 report for some other reason. I think that would be my  
12 final response to your question. They are claiming the  
13 Quadrex report was prepared for some other reason, whatever  
14 that reason is. The evidence submitted in the motion to  
15 reopen shows that every time they are talking about why the  
16 Quadrex report was commissioned, the only reason anybody  
17 seems to record or remember was to prepare for the phase I  
18 licensing hearings and that's where we say the issue of  
19 false testimony comes into clarity.

20 JUDGE BECHHOEFER: Again I ask, do you mean  
21 prepare for those hearings or just be prepared to answer  
22 questions if they arise, assuming at those hearings?

23 I tried to see if most of the evidence in the  
24 record wouldn't be consistent, including the depositions.

25 MR. SINKIN: I guess in part I would respond

1 that there was prefiled testimony submitted by the  
2 Applicants on engineering that was limited, to a great  
3 extent, to HL&P's engineering oversight and not Brown &  
4 Root's quality of engineering. So it wasn't just a matter  
5 of whether the Board might ask a question out of the blue  
6 and therefore the issue would come up, totally unexpected  
7 to them. They fully expected engineering would be a matter  
8 of controversy and submitted prefiled testimony on  
9 engineering. So if you expect an issue to come up and you  
10 commission a report to prepare for it and the report comes  
11 in highly critical and you don't submit it to the Board,  
12 that's our case for a deliberate withholding of the Quadrex  
13 report from the Board.

14 Part of their defense is the report was not  
15 prepared for the hearing, was not -- that's what  
16 Mr. Goldberg's affidavit says. It was not prepared in  
17 preparation for that hearing.

18 Second, that they only expected it to come up as  
19 an incidental matter and might not come up at all. And  
20 third, therefore, that was not a reason for having Quadrex  
21 prepared. It was a side benefit, if it happened to come up,  
22 they'd have something to answer with.

23 We see that as two distinct stories. They are  
24 very different stories. And you can't have it both ways.

25 So, that's the difference in the record that we

1 see, if this evidence is admitted. And we think "prepared  
2 for the hearings" has a very strict meaning. It's not --  
3 you don't go out and spend \$500,000 on a study because you  
4 think maybe, maybe, maybe, way out in nowhereland the Board  
5 might ask a question you didn't expect. And you come in  
6 with the answer based on this massive study. Maybe it was  
7 a \$300,000 study. Maybe I overstated that.

8 There's a very real difference in our minds and  
9 a very real difference in the credibility of the testimony,  
10 depending on what you decide as to whether it was prepared  
11 for the phase 1 hearing or not.

12 JUDGE BECHHOEFER: If we should decide it was  
13 maybe prepared in part for the hearings but also had the  
14 other purpose that the Applicants have uniformly testified  
15 to, would that make a difference?

16 MR. SINKIN: Well, it seems to me there's  
17 gradations here. Grade 1 is it was never prepared for the  
18 hearings, wasn't considered relevant to the hearings and  
19 issues and all that.

20 Grade 2, well, it might have had a side benefit  
21 that we could answer questions in the hearings, but it  
22 wasn't prepared for the hearings.

23 Grade 3, yes, it was prepared for the hearings  
24 but was also prepared for other reasons.

25 And grade 4 is it was primarily prepared for the

1       hearings and had some side benefits for the other reasons.  
2       The Board will have to decide which of those four stories  
3       they think is the truth.

4                 We think it was prepared primarily so  
5       Mr. Goldberg could testify about the quality of Brown &  
6       Root's engineering before this Board in phase 1 of the  
7       licensing hearings. And all the other items, the status of  
8       the hearings, whether they complete the project on time,  
9       those were the side benefits of the Quadrex report to the  
10      Applicants. The Applicants would put it down at grade 1,  
11      that it wasn't really prepared for the licensing hearings  
12      at all and it was maybe in Mr. Goldberg's mind some side  
13      benefit, but that's all. And that that is -- goes to the  
14      heart of the motivation that would exist for turning that  
15      report over to the Licensing Board or not turning that  
16      report over to the Licensing Board and the motivation is a  
17      key element in deciding whether their failure to turn it  
18      over to the Licensing Board reflects adversely on their  
19      character and competence and so that's where our whole line  
20      of argument goes.

21                JUDGE BECHHOEFER: On the question I just asked,  
22      I would like Applicant's and Staff's response, if they wish  
23      to. I'd ask that.

24                MR. AXELRAD: Yes, Mr. Chairman. I have just a  
25      couple of things.

1           Mr. Sinkin makes the point or tries to make the  
2 point that when people spoke, apart from these hearings,  
3 they described the purpose of the Quadrex review  
4 differently than has been testified to at the hearings, and  
5 he attempts to cite the depositions of Mr. Saltarelli and  
6 Mr. Briskin to that effect. And, quite clearly, as we have  
7 pointed out in our responses, those depositions dealt with  
8 discussions which had taken place at which the overall  
9 purpose of the Quadrex report had not been expected to come;  
10 there was no reason for there to have been a complete  
11 discussion; there was no reason for the individuals  
12 involved, namely Mr. Saltarelli and Mr. Briskin, to have  
13 explained in their depositions some of the other matters  
14 involved if they knew the specific reasons Mr. Goldberg had  
15 in mind. And clearly there was no reason to expect that  
16 there would have been a complete explication in those  
17 depositions of all the reasons that the Quadrex report had  
18 been undertaken.

19           To the response to the second part of  
20 Mr. Bechhoefer's questions, Mr. Sinkin has not really  
21 responded to the question of whether "prepared for  
22 hearings," in his language, means prepared for presentation  
23 at the hearing at the ASLB hearings with respect to  
24 engineering matters which are part of the issue before the  
25 Board, or whether the Quadrex report was viewed as having

1 the incidental benefit of being available if questions  
2 should arise.

3 It is quite clear from all of the testimony this  
4 Board has heard that the Quadrex report was not prepared  
5 for submission at the hearings in phase 1 or at any  
6 hearings before this Board and the depositions of the two  
7 individuals involved are quite consistent in that regard.  
8 And specifically, as Mr. Bechhoefer has indicated,  
9 Mr. Briskin's deposition talks about the information being  
10 available if questions should arise at the hearing and  
11 therefore is clearly consistent with all of the testimony  
12 that has been given before.

13 Mr. Sinkin, in the course of his argument,  
14 stated that the company would not have spent \$300,000 or  
15 \$500,000 or whatever the amount was, simply in order to  
16 have information available if questions would arise at the  
17 hearing, and he is quite right. That is not the reason why  
18 that money was expended. And there was extensive testimony  
19 by Mr. Barker, Mr. Goldberg, and others as to the  
20 project-related purposes for which a report was prepared  
21 and the fact that the report might be available if  
22 questions would arise was just a side benefit. And to the  
23 extent that there might have been any ambiguity at all in  
24 the two depositions, the affidavits that we have provided,  
25 particularly the affidavit of Mr. Briskin, is quite clear

1 on that point.

2 With respect to Mr. Saltarelli, Mr. Goldberg had  
3 testimony even at the phase 2 reopened hearings with  
4 respect to his previous discussions with Mr. Saltarelli and  
5 the fact that he had attempted to -- they had those  
6 discussions in order to convince Mr. Saltarelli of the  
7 importance to the project of having those kinds of reviews  
8 done. Of course, that was then confirmed in Mr. Goldberg's  
9 subsequent affidavit.

10 As to Mr. Goldberg's expectations, he has  
11 testified many times on that subject and, as a matter of  
12 fact, even though Mr. Sinkin has claimed in one of his  
13 pleadings that Mr. Goldberg concocted the side benefit  
14 theory in order to respond to Mr. Sinkin's second motion to  
15 reopen, that side benefit explanation had been provided  
16 from the very first back at the phase 2 hearings in the  
17 summer of 1982. That has been Mr. Goldberg's consistent  
18 explanation of that -- I'm sorry, the summer of '85.

19 It had been Mr. Goldberg's consistent  
20 explanation, even at that time. It is fully consistent  
21 with all logic to expect that a new vice-president for  
22 engineering and construction would have wanted to be sure  
23 at the time that he took over responsibilities in the  
24 project that he knew the status of engineering.  
25 Mr. Goldberg's background, in particular with Stone &



1 Webster, would have led him to want to be sure that he knew  
2 what that status was. And the fact that hearings were  
3 forthcoming and that the information might be useful in  
4 case he was asked questions, as Mr. Sinkin aptly put it, as  
5 a new kid on the block -- the individual just come on the  
6 project and as a vice-president who was in charge of both  
7 construction and engineering -- I think that made it quite  
8 apparent that it would be considered as a side benefit of  
9 that information. But the need is clear on the record,  
10 clear on the undisputed testimony of a number of witnesses,  
11 and nothing in these two depositions, these exhibits that  
12 Mr. Sinkin is trying to get into the record, would cast any  
13 doubt on that consistent testimony.

14 JUDGE BECHHOEFER: Mr. Reis?

15 MR. REIS: Mr. Chairman, first I would like to  
16 mention that of course we have already had reopened  
17 hearings focusing on the question of why the Quadrex report  
18 was commissioned and the question is: Do these things show  
19 anything different?

20 JUDGE BECHHOEFER: That's really what I was  
21 trying to --

22 MR. REIS: Yes. And I don't believe they do.  
23 The first point is there is no showing the witnesses who  
24 had direct and actual knowledge of what went on, was  
25 testified already in this proceeding, and there is no

1 showing that Mr. Saltarelli or Mr. Briskin, even if they  
2 had given their full knowledge at that deposition, which  
3 was not focused on that question at all -- it was an aside  
4 in both depositions -- even if it was focused, there's no  
5 showing that they had complete knowledge, that they were  
6 privy to the thinking of HL&P management or of Mr. Goldberg.  
7 Secondly, and what the Staff believes is very important in  
8 this, is if we look at the commissioning of the Quadrex  
9 report and look at the Quadrex report and how it was  
10 formulated and what it addressed, it addressed problems.  
11 It obviously couldn't have been commissioned to show good  
12 engineering if it was focusing on problems.

13           The testimony is consistent in the record that  
14 when Quadrex was brought on board, they were told to search  
15 out problems. There were certain areas where HL&P thought  
16 there were problems which were given to Quadrex and they  
17 were told to explore those areas.

18           This whole thing indicates, and gives the whole  
19 background of indicating that the report was not generated  
20 and there is no basis to think that it was generated to  
21 show proper engineering, but instead, to look at problems.  
22 And in footnotes 5 and 7 of our last pleading, of March 19,  
23 in replying to motion 5 to reopen, we specifically cite the  
24 record on that.

25           JUDGE BECHHOEFER: Mr. Sinkin, any response to

1 those comments? Anything additional?

2 MR. SINKIN: Well, a couple of points,  
3 Mr. Chairman.

4 First of all, we don't have an affidavit from  
5 Mr. Saltarelli. All we have is Mr. Goldberg's supposedly  
6 reading his affidavit to Mr. Saltarelli and Mr. Saltarelli  
7 agreeing with the essence of it.

8 Secondly, we don't think this is a matter that  
9 should be disposed of simply on pleadings that there are  
10 serious questions raised by the evidence submitted and it  
11 should be dealt with in a hearing with cross-examination.  
12 And as to Mr. Reis' point that the witnesses who had direct  
13 knowledge have testified, I would say, essentially what we  
14 are saying is we think that testimony was false and there's  
15 evidence it -- it has been contradicted. So we can't rely  
16 simply on the fact that the witnesses with the most direct  
17 knowledge have testified, when it is in fact their  
18 testimony that is called into question.

19 I think that's all we have in response to the  
20 remarks that have been made so far this morning. We did  
21 want to direct the Board's attention to one matter related  
22 to motion to reopen number 5, since that is what we are now  
23 discussing.

24 JUDGE BECHHOEFER: I thought we would go through  
25 the few Board questions we have and --

1 MR. SINKIN: Oh, you have more? Fine.

2 JUDGE BECHHOEFER: That's just the first. Then  
3 we'll let all the parties make any additional statements  
4 concerning the motions that they deem necessary.

5 I would like to start with the Applicants on  
6 this question. Why was not the side benefit mentioned in  
7 the direct testimony for phase 2, or the prepared testimony  
8 here?

9 MR. AXELRAD: Mr. Chairman, I don't have the  
10 direct testimony with me, but my recollection, unless it is  
11 faulty, is that the testimony did specifically state that  
12 the information would be available to respond to questions  
13 from regulatory authorities.

14 JUDGE BECHHOEFER: That statement was made but  
15 that isn't -- the side benefit of answering the question  
16 should they be asked by the Board. That's a little  
17 stretching of that. It came up on cross-examination and  
18 Mr. Goldberg readily answered questions on  
19 cross-examination as I recall.

20 MR. AXELRAD: Mr. Chairman, we view the Atomic  
21 Safety and Licensing Board as part of regulatory  
22 authorities. I didn't think there was any distinction  
23 between the hearing arm of the NRC and the administrative  
24 arm of the NRC.

25 I'm sorry, is my answer clear or am I missing

1 something?

2 JUDGE BECHHOEFER: No. I just wondered why the  
3 so-called side benefit wasn't explicitly mentioned in the  
4 direct testimony as such, side benefit of answering  
5 questions should they arise.

6 MR. AXELRAD: Let me just make sure the Board  
7 understands. The purpose of the Quadrex review was to  
8 obtain information that was necessary in order to be able  
9 to conduct and complete the project in an acceptable and  
10 satisfactory fashion. The side benefit of the review was  
11 that if questions arose from any source, they'd be able to  
12 be answered. Those other sources could be co-owners; the  
13 other sources could be the NRC Staff in the course of its  
14 review; the other sources could be the inspection arm of  
15 the NRC; other sources could be the Licensing Board if, as  
16 Mr. Goldberg explained, because of the Board's wide  
17 latitude they might get into other issues. That was all  
18 swept into Mr. Goldberg's thinking about the side benefit  
19 of the review. The side benefit wasn't just the Board.  
20 The side benefit was being able to answer questions if  
21 anybody asked them; that the information was needed in  
22 order to be able to conduct the project properly.

23 JUDGE BECHHOEFER: Should the Board have been  
24 specifically named, particularly in view of the importance  
25 or the prominence which that point had in the minds of

1 people like Mr. Briskin and Mr. Saltarelli, or even -- I  
2 think we have some testimony by Dr. Sumpter to that effect,  
3 if I recall?

4 MR. AXELRAD: Prominence? To the extent it had  
5 prominence in the mind of Mr. Briskin, my recollection is  
6 that it happened to come up in the course of discussions  
7 that he and Mr. Goldberg were having with respect to the  
8 forthcoming hearings and that's why it had that -- it was  
9 coupled in that way in his mind. But as Mr. Briskin's  
10 affidavit indicates, he clearly was aware of the  
11 project-related purposes. I don't think that the  
12 forthcoming hearing or that possible side benefit had any  
13 particular prominence in his mind.

14 To the extent that any other individuals were  
15 involved, certainly Dr. Sumpter was fully, fully aware of  
16 the project-related purposes for which the review was being  
17 conducted.

18 JUDGE BECHHOEFER: I'm not denying the  
19 project-related purpose. But the thought is, wasn't the  
20 side benefit of having it available to discuss with the  
21 Licensing Board at the hearings enough so that, in the  
22 phase 2 direct testimony, that should have been mentioned?

23 MR. AXELRAD: No, Mr. Chairman.

24 JUDGE BECHHOEFER: Specifically.

25 MR. AXELRAD: The only reason that particular

1 side benefit came up in the phase 2 hearings with which it  
2 is now developed is because those were the questions people  
3 were asked. If anyone asked Dr. Sumpter or the other  
4 witnesses: Is one of the side benefits of the review the  
5 ability to answer the questions that are going to come up  
6 in the course of the Staff's review of the FSAR? They'd  
7 say: Sure, that will be an important reason. We know they  
8 will have questions.

9 If someone asked: Isn't it important, an  
10 important side benefit of review that if we have future  
11 meetings of the committee -- they'd say: Sure, it's an  
12 important benefit. We have been talking about those at  
13 management meetings for the past two years. Those are all  
14 side benefits of the review.

15 The reason they didn't develop prominence at  
16 these hearings is because nobody asked about that.  
17 Everybody started to focus about the possible side benefit  
18 of having information if questions came up at the hearings.  
19 I really don't think there was the kind of prominence that  
20 your question is implying, Mr. Chairman. And that's why  
21 the direct testimony didn't focus on it. We didn't go into  
22 trying to identify all of the possible sources of questions  
23 that might have come up. It was covered in a general  
24 fashion and in our minds there was no doubt about what the  
25 prefilled testimony was saying.

1                   JUDGE BECHHOEFER: I take it you would not agree  
2 with what I read in Mr. Sinkin's motion, second motion I  
3 guess -- maybe first as well -- or fifth motion, and maybe  
4 fourth as well, whether failure to mention that directly  
5 would be a McGuire violation or akin to one?

6                   MR. AXELRAD: Yes. I would certainly deny that  
7 anything that Mr. Sinkin says about a McGuire violation has  
8 any validity at all. I think the prefiled testimony was  
9 very, very accurate with respect to the reasons why the  
10 review was conducted, and I think provided information with  
11 respect to the potential side benefits of that review and  
12 that there was certainly an ability on the part of anyone  
13 to question Mr. Goldberg fully with respect to any details  
14 of that testimony that they wanted to inquire about. I  
15 know of nothing in the McGuire rule that spells out the  
16 details that have to be included in the testimony of an  
17 individual that's going to be subject to full  
18 cross-examination. I just don't know how you can try to  
19 devise a rule that specifies every potential connotation  
20 that people may have in mind and require that the  
21 individual visualize that in advance and try to cover it  
22 fully and completely to everyone's satisfaction in prefiled  
23 testimony.

24                   As the Board is well aware, the individual could  
25 even just have appeared at the proceeding and been subject



1 to examination and cross-examination without prefiled  
2 testimony at all. I think the prefiled testimony in this  
3 instance was fully adequate and satisfied all NRC  
4 requirements, both of the regulations and of case law.

5 JUDGE BECHHOEFER: If we were to determine --  
6 hypothetically now, if we were to determine that the direct  
7 testimony should have specifically referred to the side  
8 benefit, would the Applicants want to have the record  
9 reopened for them to explain? Or would they take a chance  
10 on what measures, if any, we might think were warranted  
11 because of that?

12 MR. AXELRAD: I'm not sure I understand that  
13 hypothetical question, Mr. Chairman. I don't know what the  
14 potential decision would say, hypothetically, with respect  
15 to what obligation was violated, how it was violated,  
16 whether it was inadvertent or advertent, whether it has any  
17 significance to the issues before this Board, whether it  
18 impeaches the witness or not. I just cannot conceive, on  
19 the basis of this record and the information that was  
20 provided and everything, all the information in the record,  
21 that the Board could conceivably come out with the  
22 hypothetical judgment that you just described.

23 JUDGE BECHHOEFER: Just assume it for the moment.

24 MR. AXELRAD: What I'm trying to say,  
25 Mr. Chairman, is I have difficulty visualizing that

1 judgment. I can't quite visualize the context in which it  
2 would come up, what the ramifications would be, because it  
3 would be so dependent upon what the Board says in  
4 conjunction with that judgment.

5 JUDGE BECHHOEFER: The context would be that the  
6 side benefit was so well understood, perhaps from as early  
7 as December 1980 at least until throughout the period of  
8 Quadrex review and extending at least until at dinner  
9 that Mr. Briskin talked about, it was so well understood  
10 that it should have been -- and was so important that it  
11 should have been put in as an explicit statement in the  
12 direct testimony.

13 If we should determine that to be the case --  
14 and I'm not saying what implications we would draw from it  
15 -- would the Applicants want to have the record reopened to  
16 permit them to provide an explanation why they didn't  
17 mention it? Why the various witnesses -- mostly  
18 Mr. Goldberg, I think -- why he didn't mention it in the  
19 direct testimony?

20 MR. AXELRAD: Mr. Chairman, I hate to say that  
21 Applicants would not want an opportunity to explain  
22 anything that seems to be troubling the Board, but it seems  
23 to me that Mr. Goldberg has so clearly and consistently  
24 explained what was on his mind from December 1980 until  
25 1985, which is the last time that he testified, and it

1 seems to me that his explanations are so clear and explicit,  
2 that it would seem to me that the Board is fully aware of  
3 his motivations, the reasons why he took actions, the  
4 reasons why he gave testimony and what he meant by his  
5 testimony, that at the present time, without having  
6 consulted either with my client or my cocounsel, I can't  
7 visualize what we would add to that.

8 I think we have presented a fully persuasive  
9 case to the Board and it would seem to me that even if that  
10 kind of hypothetical judgment were made by the Board, the  
11 Board would fully understand that it was an inadvertent  
12 violation of this obligation that the Board has  
13 conceptualized, and that it cannot possibly reflect upon  
14 the character and credibility of the witnesses here. And  
15 of course, that is a key issue before this Board. We are  
16 not really parsing testimony or anything else, the Board is  
17 trying to reach a judgment as to the character and  
18 competence of the Applicants and is trying to do so based  
19 upon its views on the integrity, the character and the  
20 credibility of witnesses it has had before it from senior  
21 management of the company, witnesses that in some instances  
22 have appeared before this Board for at least -- on at least  
23 three or four different occasions over days and days of  
24 testimony. And it appears to us if the Board, on the basis  
25 of all that testimony, does not have complete faith in the

1 credibility and integrity of those individuals, cannot on  
2 the basis of their answers to questions believe that those  
3 individuals gave truthful and candid testimony, I'm not  
4 sure what I could add to that, Mr. Chairman.

5 (Discussion off the record.)

6 JUDGE BECHHOEFER: I would like to get comments  
7 of the other side, not on whether we should open up the  
8 hearing, but whether the side benefit should have been  
9 specifically mentioned, whether that may constitute either  
10 a McGuire violation or something akin to it.

11 MR. REIS: Mr. Chairman, of course the Staff has  
12 said that failing to reveal the Quadrex report before phase  
13 1 -- Staff felt was a violation of McGuire, although Staff's  
14 position has been it was not so serious as in the Three  
15 Mile Island case -- similar to the Three Mile Island case  
16 as to reflect adversely on character and competence. In  
17 this case we don't see a violation of McGuire.

18 When we look at the total context of what the  
19 testimony said, when it said "regulatory authority" -- and  
20 we know the time at which the Quadrex report was dealing,  
21 immediately preceding the hearings -- regulatory authority  
22 had to include this Board and the questions of this Board.

23 Just reading it on the face of the record,  
24 looking at the times talked about and when this issue was  
25 there, this wasn't sometime three years later or three

1 years before, where a regulatory authority was the Public  
2 Service Commission or Railroad Commission of the State of  
3 Texas. This was talk about the time immediately before the  
4 hearings. What other regulatory authority? The phrase  
5 itself indicated this Board.

6 That's all the Staff has.

7 JUDGE BECHHOEFER: Mr. Sinkin?

8 MR. SINKIN: I guess in a sense I would endorse  
9 Mr. Reis' analysis that a report prepared immediately  
10 before the hearings was intended for the hearings.

11 JUDGE BECHHOEFER: I'm not sure that's what he  
12 said.

13 MR. SINKIN: I'm not sure Mr. Reis would agree  
14 with that interpretation of his analysis but that's how it  
15 sounded to me.

16 MR. REIS: Let me make the record very clear  
17 that I don't --

18 MR. SINKIN: The issue raised by the Board -- I  
19 think when you talk about total context, Mr. Reis talked  
20 about total context -- total context goes back to December  
21 3, 1981, when the Applicants first informed the Board and  
22 parties about the existence -- no, actually it goes back a  
23 little earlier than that, December 3, 1981, Applicants sent  
24 a letter to the Board explaining the letter of the Quadrex  
25 report, and nowhere in there is there any mention of the

1 licensing hearings, although other reasons are given such  
2 as NRR might be interested. So they were told about it and  
3 reviews were being conducted for why Brown & Root wasn't  
4 staying apace of construction. There was nothing mentioned  
5 about any side benefit to the Licensing Board at all.

6 Then, I think in Mr. Goldberg's sworn statement  
7 to the NRC investigators is the first time that there seems  
8 to be a link between the licensing hearings and the Quadrex  
9 report, in his explanation of why it was commissioned.  
10 Although there, it is not really very clear at all that he  
11 perceived it as a side benefit or anything of the sort.

12 And then, as has become clear through  
13 cross-examination and motions to reopen and new documents,  
14 that there is a distinct link between the Quadrex report  
15 and the phase 1 licensing hearings, I think we have seen  
16 Applicant's position move in a sense to embrace at least  
17 the side benefit theory, so that there would be an  
18 explanation for all this evidence that has come forward  
19 over the years as to why the Quadrex report was  
20 commissioned, and that there has been a lack of candor from  
21 the beginning as to the relationship between the Quadrex  
22 report and the phase 1 licensing hearings.

23 MR. AXELRAD: If I can have just one very brief  
24 reply, Mr. Chairman? Mr. Sinkin again talks about a shift  
25 in position based on his motions to reopen. That's totally

1 and utterly false. The side benefit theory -- side benefit  
2 explanation was provided before Mr. Sinkin's motion to  
3 reopen was filed.

4 The discussion about informing NRR and not  
5 mentioning the Board -- Mr. Goldberg has clearly explained  
6 why the company thought that NRR, which does review the  
7 engineering aspects of the project, should be informed  
8 fully and completely while the review itself was being  
9 undertaken.

10 Mr. Sinkin is raising matters which have nothing  
11 to do with the questions that the Board raised.

12 MR. SINKIN: Mr. Chairman, if I might be  
13 indulged by the Board, there was an additional point I  
14 wanted to make that I overlooked.

15 It seems to me that what gives the issue  
16 prominence, in relation to your initial question about why  
17 it wasn't mentioned in direct testimony, is the contention  
18 that was being addressed. The contention that was being  
19 addressed was: Why didn't you tell us about the Quadrex  
20 report when you received it? That is the essence of  
21 contention 10, I guess it is whether it reflects adversely  
22 on the character and competence, would revolve around why  
23 they didn't turn it over to the Board. And any information  
24 that the purpose for which the report was commissioned  
25 related to, expected questions from the Board or even

1 questions they hypothetically thought might come from the  
2 Board, would be relevant to that contention and would be  
3 highlighted by that contention and given prominence by that  
4 contention; whereas the other matters Mr. Axelrad touched  
5 upon, such as the management committee or being able to  
6 answer questions to the management committee or other  
7 partners or whatever, were certainly not highlighted in any  
8 way by the existing contentions.

9 JUDGE BECHHOEFER: I have one question now on  
10 some of the discovery questions that we have had a number  
11 of papers filed on. I'll ask the Applicants first. Did  
12 CCANP have any right to discovery after the May 5 date,  
13 after the Brown & Root material -- the protective order on  
14 the Brown & Root material was lifted?

15 MR. AXELRAD: I'm sorry, Mr. Chairman, could you  
16 repeat the question? I didn't hear the question.

17 JUDGE BECHHOEFER: Would CCANP have any right of  
18 discovery or to engage in discovery following the lifting  
19 of the -- I call it protective order, but I'm not sure what  
20 the Court in Texas called it -- on the materials filed in  
21 the Brown & Root HL&P litigation?

22 MR. AXELRAD: Mr. Chairman, there was no  
23 discovery period in effect at that time. The materials, of  
24 course, were from the Brown & Root litigation record, were  
25 available in the courthouse beginning in May, and Mr.



1 Sinkin was well aware of that. He even referred to it in a  
2 pleading or a letter that he filed with the Board sometime  
3 in June. The materials, including additional materials,  
4 were also available beginning in September in Austin. As  
5 the Board itself pointed out, in asking Applicants to  
6 provide some additional information when the hearings were  
7 reopened, Mr. Sinkin, as I recall, had not asked for  
8 discovery with respect to that particular reopening of the  
9 hearing at that time. I think that was later than 1985.

10 But the short answer is that there was not  
11 discovery available at that time, but the information, the  
12 documents, bulk of the documents were obviously readily  
13 available to Mr. Sinkin and CCANP if they had chosen to go  
14 to Matagorda County or Austin.

15 JUDGE BECHHOEFER: My next question goes to  
16 Mr. Sinkin. I am aware that the Staff has taken the  
17 position that CCANP ought to have -- since it was a  
18 publicly available document, they should have undertaken  
19 research earlier. I want to ask Mr. Sinkin what his  
20 response is to why, particularly prior to the second motion  
21 to reopen the record, the depositions in question could not  
22 have been uncovered, so it all could have been considered  
23 in the reopened record in December. I guess that would had  
24 to have been in the September-October period, you would  
25 have had to have discovered it.

1 MR. SINKIN: I presume the assumption in the  
2 question is that CCANP had some discovery rights.

3 JUDGE BECHHOEFER: I'm talking about a publicly  
4 available document now.

5 MR. SINKIN: I'm not sure what the term "publicly  
6 available document means." There was a document room in  
7 Austin that was created for litigation that was Public  
8 Utility Commission dockets that were being heard by the  
9 Public Utility Commission of Texas. CCANP was not a party  
10 to those dockets. I was not a representative of any party  
11 to those dockets. Those were dealing with the Brown & Root  
12 settlement.

13 JUDGE BECHHOEFER: Were they not publicly  
14 available? Anybody walked in off the street, couldn't  
15 anybody have gone through that material, or am I wrong?  
16 This is what I'm trying to find out.

17 MR. SINKIN: I believe you are wrong,  
18 Mr. Chairman. I believe those rooms were available to the  
19 parties in the proceeding and not to anyone walking in off  
20 the street who cared to read what was on the shelf.

21 JUDGE BECHHOEFER: Do the Applicants have any  
22 further knowledge on that?

23 MR. GUTTERMAN: I think I have a little more,  
24 Mr. Chairman. There are two different places in which  
25 documents were available. There were documents available

1 at the courthouse in Matagorda County. Those are documents  
2 that were filed with the Court and that would include  
3 Mr. Saltarelli's deposition. There's also a document room  
4 which was created in connection with the Public Utility  
5 Commission proceeding in which HL&P has put into a public  
6 -- into a document room, which was created to be available  
7 to the parties in the Public Utility Commission proceeding.

8 It is a document room where, to my knowledge,  
9 nobody has ever been denied access to it, whether they  
10 represented a member of one of the parties to the  
11 proceeding or not. My understanding is that the copies of  
12 the documents that were attached to CCANP's motions 4 and 5  
13 to reopen the record were both copied out of the document  
14 room in Austin. They came out of that very same document  
15 room.

16 Also Mr. Sinkin has pointed out, on a couple of  
17 occasions he has been associated with another organization  
18 other than CCANP, which is a party to the PUC proceeding,  
19 an organization called the Cancellation Committee, or  
20 Cancellation Campaign -- something like that.

21 My understanding is that the documents that were  
22 attached to the motions to reopen 4 and 5 were obtained by  
23 a representative from that Cancellation Campaign shortly  
24 before they were filed with this Board.

25 In addition to that, the --

1           JUDGE BECHHOEFER: Can we take that into account  
2 in ruling on timeliness of a party before us? The fact  
3 that it was available to a party in another proceeding with  
4 whom the representative here had some connection? Can we  
5 legitimately rule that CCANP, now, which is the party here,  
6 should have had access and undertaken its -- well, not  
7 discovery as such, but uncovering of information for this  
8 proceeding, just because its representative had a  
9 connection of some sort with another organization involved  
10 in that other case?

11           MR. GUTTERMAN: I want to make sure we  
12 understand, Mr. Chairman, that there are two different  
13 cases here.

14           In motion 4, that dealt with documents which  
15 were filed with the Court and are publicly available to  
16 everybody in the world at the courthouse in Matagorda  
17 County.

18           The issue that you raised arises with respect  
19 only to Mr. Briskin's deposition, which had not been filed  
20 with the Court and therefore was not available at the  
21 courthouse in Matagorda County. As far as whether the  
22 Board can consider that that's a document that's publicly  
23 available, I think as a practical matter, Mr. Chairman, it  
24 is publicly available.

25           As a formal matter, I suppose one could say

1 there is a formal distinction there, that at the time, the  
2 reason the public can get those documents is because HL&P  
3 is willing to make them available to the public and not  
4 because HL&P has opened the doors and put a sign, "Welcome  
5 public" on the front of the doors. There is a distinction  
6 there. I'll agree it's a distinction. But as a practical  
7 matter, these documents could have been obtained much  
8 earlier than we've seen them.

9 Of course, as we have pointed out to the Board  
10 on both occasions, discovery in this proceeding was  
11 unlimited for a long period of time and the very  
12 information that we are now seeing in motions to reopen  
13 could have been discovered back in 1984 or 1983.

14 JUDGE BECHHOEFER: I'm aware of that. I was  
15 trying to focus on the other aspect.

16 Mr. Reis, do you have any further comments on  
17 that question?

18 MR. REIS: My only comment is I think the Board  
19 should look at the realities of the situation and know  
20 organizations or corporations act through individuals.  
21 It's what those individuals actually know and the ability  
22 to get material.

23 Here there is no showing that CCANP lacked the  
24 ability to get the material in Austin as well as in  
25 Matagorda County.

1                   JUDGE BECHHOEFER: Apparently one of those  
2 documents was not at Matagorda County.

3                   MR. REIS: That's true.

4                   JUDGE BECHHOEFER: Mr. Sinkin, anything further?

5                   MR. SINKIN: Yes. I would like to address the  
6 whole question. I don't want to repeat all the arguments  
7 that we have given in our various responses to this  
8 discovery question. Discovery did end for CCANP in 1984,  
9 long before the lifting of the protective order. Formal  
10 discovery rights were over.

11                   As far as their being available in the Matagorda  
12 County courthouse, we are talking about something in the  
13 nature of 3 million pages. And to expect a pro bono  
14 representative with no resources to review 3 million pages  
15 is, I think, unreasonable.

16                   Furthermore, the documents in the Matagorda  
17 County courthouse are not kept in a well ordered manner.  
18 According to the people I have discussed -- whether I  
19 should bother going down to Matagorda County -- the  
20 opinions I heard, it was clear that case was never going to  
21 trial, because all the documents were stuck in boxes and  
22 thrown in a warehouse for the Court, and they were not  
23 easily accessible. That may or may not be relevant.

24                   As far as documents in Austin, I think it would  
25 be incredible if CCANP were held to be responsible for

1 knowledge that an organization that CCANP's representative  
2 happens to belong to might have in another proceeding in  
3 which I am not involved, and which the organization I do  
4 not represent happens to be involved, but I happen to be a  
5 member of the South Texas Cancellation Campaign.

6 When matters came to my attention from Austin  
7 about documents in that room, I would ask the party to the  
8 proceeding, the South Texas Cancellation Campaign, to go to  
9 that room and copy the necessary documents and send them to  
10 me. And you will see that the Applicants are absolutely  
11 correct, they came from that room. There's a little  
12 notation that is required to be put on any document copied  
13 in that room as to who copied it and you will see in the  
14 documents submitted in the motions to reopen, it says "Dan  
15 Harrison, STCC." Mr. Harrison is the representative for  
16 the South Texas Cancellation Campaign in the PUC  
17 proceedings and I simply call him and say, here's what I  
18 heard, will you please go look up this document and will  
19 you please send it to me, copy it and send it to me.  
20 That's how I happened to come to have this information.

21 JUDGE BECHHOEFER: How did you find out about  
22 the information to start out with? Did Mr. Harrison call  
23 you? Or someone in that group?

24 MR. SINKIN: Someone other than Mr. Harrison  
25 called me who is participating in the proceeding.

1 JUDGE BECHHOEFER: I don't care about the name  
2 of the person.

3 I assume that person knew something about the  
4 issues in this proceeding?

5 MR. SINKIN: They were aware of the issues being  
6 litigated by this Board.

7 MR. GUTTERMAN: Can I just add a couple of  
8 points, Mr. Chairman?

9 JUDGE BECHHOEFER: Yes.

10 MR. GUTTERMAN: First of all, the point about  
11 the protective order being in effect, the Court's  
12 protective order during the time of the discovery that CCNP  
13 had available to it, certainly the Court's protective order  
14 was in effect at that time, but that protective order would  
15 not have in any way limited CCANF's ability to take the  
16 depositions of Mr. Saltarelli or Mr. Briskin or to obtain  
17 production of the exhibits to those depositions or the  
18 documents that eventually became exhibits to those  
19 depositions.

20 Secondly, while I don't know whether there  
21 really are 3 million pages of documents filed with the  
22 Court in Matagorda County, I will concede there are a lot  
23 of documents there, but the vast bulk of those documents  
24 are pleadings, interrogatories or responses to  
25 interrogatories, motions, responses to motions. To think



1 of that volume of documents and assume because it is a lot  
2 of paper one can't find anything in it, I think that's a  
3 little bit misleading.

4 JUDGE BECHHOEFER: Do you know whether they were  
5 indexed in any way or were they just sitting in boxes, in a  
6 warehouse?

7 MR. GUTTERMAN: Well, frankly, all I can say  
8 about that is the one time I went down there to get some  
9 documents from the courthouse, they were indexed, but it  
10 was very early in the lawsuit. I wouldn't -- I couldn't  
11 really represent that that was representative of the way  
12 they were maintained years after that.

13 Mr. Sinkin mentioned that he has called and  
14 asked a party to go to HL&P's room in Austin. I think that,  
15 then, is an admission that he's well aware of the existence  
16 of that room and has been aware of it for sometime.

17 I would also point out, I didn't mention before  
18 that in addition to members of -- representatives of  
19 parties in that proceeding going to that room, members of  
20 the press frequently go in that room. In fact, HL&P, from  
21 the day that the lawsuit settlement was first announced in  
22 May of 1985 has routinely made available to remembers of  
23 the press, on request, any part of the material discovered  
24 in the Court or discovered as part of that proceeding.

25 So there has been a very large public

1 availability of the materials generated in the Brown & Root  
2 litigation.

3           The only other point I wanted to add is that  
4 while Mr. Sinkin says that he's just a member of the  
5 Cancellation Committee, he, in fact appeared as its legal  
6 representative in proceedings before the PUC in the prior  
7 PUC docket involving the South Texas project. That's a  
8 little bit more than being just a member, although I don't  
9 know that he has appeared in the current PUC proceeding.

10           MR. SINKIN: Mr. Chairman, number one, there's  
11 no question of my admitting to the existence of that room.  
12 I put the existence of that room in my pleadings to explain  
13 to the Board where the documents are coming from. I never  
14 denied the existence of the room or knowing it was there.  
15 Two, the fact that I represented a party in the HL&P rate  
16 case some years ago has nothing to do with whether I am  
17 representing that party in an entirely different proceeding  
18 in front of the PUC in 1985. I am not representing that  
19 party. I am not consulting with the representative for  
20 that party. I have called upon them to perform favors for  
21 me in that proceeding, and it's up to them whether they  
22 would devote the resources to help me. I am a member of  
23 the organization, but I don't think that gives me any legal  
24 obligation to know what's going on in that proceeding.

25           JUDGE BECHHOEFER: That's all the questions we

1 wanted to ask about the motions to reopen. Do the parties  
2 have any further statements they want to make about the two  
3 outstanding motions? We'll take a break after that.

4 MR. SINKIN: I did want to direct the Board's  
5 attention to one matter. In motion to reopen number 5, we  
6 supplied a sworn deposition by Mr. Briskin, and the  
7 Applicants have responded with an affidavit from  
8 Mr. Briskin. I do want to direct the Board's attention to  
9 page 399 -- excuse me -- 397 of Mr. Briskin's deposition,  
10 which is attached as an exhibit to our motion to reopen 5,  
11 in which Mr. Briskin talks about a meeting.

12 JUDGE BECHHOEFER: What page was that?

13 MR. SINKIN: 397.

14 JUDGE BECHHOEFER: Go ahead.

15 MR. SINKIN: Page 397, Mr. Briskin is discussing  
16 a meeting in the summer of 1981, late spring or May of 1981.  
17 He's talking about sitting at a dinner and discussing with  
18 Mr. Goldberg -- just a moment. I'm going to withdraw that  
19 for the moment, Mr. Chairman. I see something else that  
20 may change my mind about what I was going to say.

21 That was all I had.

22 JUDGE BECHHOEFER: Do the other parties have  
23 anything further on the motions?

24 MR. AXELRAD: I would just like those remarks by  
25 Mr. Sinkin to be stricken from the record since they had no

1 basis in the remarks -- in the transcript that he was  
2 purporting to cite. There is nothing about May in the  
3 transcript.

4 JUDGE BECHHOEFER: Nothing about what?

5 MR. SINKIN: Who said "May"?

6 MR. AXELRAD: You said "late spring or May."

7 JUDGE BECHHOEFER: I thought he said "summer."

8 I was reading it -- it said late spring of '81. Line 4.

9 He's withdrawing any comments on it.

10 MR. AXELRAD: I withdraw my request.

11 JUDGE BECHHOEFER: I think we'll leave it.

12 Let's take a 15-minute break and then we'll come  
13 up with -- talk about --

14 MR. AXELRAD: Mr. Chairman, before we do take  
15 that break, I would like, in order for the parties to be  
16 fully prepared, to make sure after the break exactly what  
17 the Board plans to take up and in what sequence.

18 As I understand it, the only matter left is the  
19 so-called drug use matter?

20 JUDGE BECHHOEFER: That's correct. I'm going to  
21 ask that, but I assume that's correct. We are going to ask  
22 Mr. Sinkin to identify whether he -- he still has an  
23 opportunity to come forward with comments, at least on the  
24 Staff's Issue C -- or on both of your Issue C affidavits.  
25 He had two weeks after the Staff. We may be talking a

1 little bit about that. But the drug is the only issue  
2 identified so far.

3 MR. AXELRAD: On the opportunity -- there was a  
4 specific date specified in the Board's order when  
5 Mr. Sinkin was to specify any issues that he wanted to  
6 raise based upon the affidavits that were filed. That was  
7 this past Tuesday. The Applicants had filed their  
8 affidavits four weeks before that. The Staff was late in  
9 its response. Mr. Sinkin, to my knowledge, did not request  
10 any extension of his opportunity to file anything.

11 If he had asked for such an opportunity to file  
12 late, we would certainly have taken the position that there  
13 was no reason why he could not have filed anything based  
14 upon Mr. Dewease's affidavit this past Tuesday, which was  
15 four weeks after he had received Mr. Dewease's affidavit.  
16 That would then have permitted the Board to consider  
17 argument at this prehearing conference and dispose of any  
18 such matters. If he asked for more time to respond to the  
19 Staff affidavit, we would certainly have argued that the  
20 only time he would be entitled to would be to file any  
21 issues that he had based upon any new information in the  
22 Staff's affidavit, which differed from that that was  
23 contained in Mr. Dewease's affidavit, and there was none  
24 such, at least in the Applicant's view.

25 But the crux of the matter is that Mr. Sinkin

1 did not request any more time to file anything, simply let  
2 last Tuesday's filing deadline go past without saying  
3 anything and I think that certainly prejudices the Board's  
4 ability to hear any of these matters at this prehearing  
5 conference today and dispose of them.

6 Therefore, I think it's incumbent upon the Board  
7 to decide whether Mr. Sinkin is in fact entitled to any --  
8 as a matter of fact, Mr. Sinkin has not asked for any more  
9 time to my knowledge until today.

10 JUDGE BECHHOEFER: We will break until after the  
11 break, before we discuss it, but that was one of the  
12 matters we were going to discuss, and then we'll get into  
13 the drug issue.

14 MR. REIS: Again, the Staff, again, doesn't know  
15 whether Mr. Sinkin has anything. But let me make it clear  
16 that in my letter, although Mr. Sinkin didn't move, I said  
17 in my letter, since my time was extended, Mr. Sinkin's time  
18 ought to be extended. I think that is the posture we are  
19 in.

20 I don't know whether because I said that,  
21 Mr. Sinkin also had to move. I'm not sure at all. I  
22 really don't think so.

23 JUDGE BECHHOEFER: Well, let's talk about that  
24 after the break, but we are going to talk about that  
25 subject. When we get into drugs we are going to discuss

1 first were whether -- well, I don't know about first -- but  
2 we want to discuss whether the drug issue would be barred  
3 by the rulemaking, by the rulemaking, that position which  
4 the Applicants have taken. We would want to discuss  
5 whether the drug issue falls within either Issue C or Issue  
6 F. And then we would want to discuss -- if we decide that  
7 the drug issue should be heard -- how it should be handled.  
8 We have a number of documents dealing with what the  
9 permissible types of discovery should be. I would think we  
10 could discuss to some extent if we should decide that the  
11 drug issue is a proper issue or if we should decide that,  
12 based on some additional information, it might be a proper  
13 issue, we could decide then what kind of discovery would be  
14 allowable.

15 I recognize that the discovery was submitted in  
16 connection with Issue F, but it may well be that we decide  
17 the issue should go someplace else.

18 MR. AXELRAD: Mr. Chairman, that's exactly why I  
19 raised that question about what we are going to argue in  
20 what sequence. It seems to me that we should not be  
21 indulging, in this prehearing conference, in theoretical  
22 arguments on matters which do not have a direct bearing  
23 upon the matters before this Board, and it seems to me it  
24 is important to consider these issues in a proper,  
25 appropriate and orderly fashion.

1           The first question before this Board is not, you  
2 know, whether the drug issue is barred into rulemaking,  
3 although that may be a subissue, but the only thing pending  
4 before this Board now is whether or not the drug issue  
5 question is part of Issue F.

6           JUDGE BECHHOEFER: We have asked for argument on  
7 C.

8           MR. AXELRAD: I understand. I would just like  
9 to go in an orderly sequence.

10           With respect to the question of Issue F, we have  
11 filed a motion for a protective order and that motion for  
12 protective order, among other things, does bring up the  
13 rulemaking question, and I think it's perfectly appropriate  
14 to have argument, if that's what the Board wants, on the  
15 motion for protective order and everything that is  
16 associated with that -- that that's an Issue F question.

17           There is also a motion to compel by Mr. Sinkin  
18 which deals with the discovery on Issue F. We don't  
19 believe that it is necessary to get to that motion for  
20 protective order, because -- to that motion to compel  
21 because we think the motion for protective order, when  
22 decided by the Board, if they can decide it today, for  
23 example, would in fact take care of that.

24           But if the Board still has that question opened,  
25 then we should have an argument on the motion for



1 protective order, but again within the context of Issue F.  
2 If we rule on Issue F, the only question before this Board  
3 would then not be whether the drug use question falls  
4 within Issue C or something like that, but only whether  
5 that issue falls within the limited portion of Issue C  
6 which is still before this Board.

7 The Board has ruled on Issue A, it has ruled on  
8 Issue B, it has ruled on Issue C, except for a limited  
9 update. And we can have a perfectly appropriate argument --

10 JUDGE BECHHOEFER: I can argue with you on the  
11 limited, but --

12 MR. AXELRAD: Whatever the Board reserved in its  
13 partial initial decision with respect to Issue C, that's  
14 the only matter still reserved. The Board disposed of  
15 Issues A, B, and C.

16 If beyond that -- whether it is narrow or not --  
17 whether beyond that reserved portion of Issue C, whether  
18 drug use is something which should be considered by this  
19 Board, that could only be considered in the context of any  
20 motions to reopen Issue A, B, or C by Mr. Sinkin.

21 Now, if the Board wants to consider Mr. Sinkin's  
22 allegations with respect to that matter, in essence, a  
23 motion to reopen Issues A, B, and C, then we can discuss  
24 that in the context of a motion to reopen. But I think  
25 it's extremely important that we discuss these various

1 matters in their proper context, so the Board can apply the  
2 proper standard. And I think it is also extremely  
3 important that we not confuse arguments and not get into a  
4 mix of arguments without either the Board or the parties  
5 being aware of what issue is being addressed in what  
6 context.

7           So I would strongly suggest that we have  
8 argument on our motion for protective order first. Then,  
9 if the Board feels it necessary, have argument on the  
10 motion for protective order. And then, if the Board wishes,  
11 we can have, as apparently invited by the Board's order,  
12 have an argument as to whether the drug question, even if  
13 it does not come within Issue F, falls within the reserved  
14 portion of Issue C. And I think those three arguments  
15 should be kept separately.

16           (Discussion off the record.)

17           JUDGE BECHHOEFER: I think however we want to  
18 term it, the rulemaking issue is sort of basic to any  
19 consideration, or may be basic to any consideration of the  
20 issue as framed in discovery, the discovery responses, and  
21 we will have to hear argument on that. I would just as  
22 soon start with that.

23           MR. AXELRAD: But, Mr. Chairman, we can't  
24 discuss rulemaking in a vacuum.

25           JUDGE BECHHOEFER: Well, you have said that

1 because it is -- in rulemaking it can't be considered.  
2 Basically that's your position. I am not sure I agree with  
3 that. I have given you some other decisions which might  
4 counteract that, but I want to hear argument on that first,  
5 because, if we can't consider it at all, we don't have to  
6 get into anything else, and it's irrelevant whether you  
7 call it a motion for protective order or motion for summary  
8 disposition of F, or whatever context. Your argument would  
9 apply whether it goes into C or F, or whether we should  
10 consider whether it be considered a late-filed contention.

11 MR. AXELRAD: I understand, Mr. Chairman, but in  
12 all fairness to the Applicants, I hope the Board  
13 appreciates that our basic position is that the matters  
14 that Mr. Sinkin is trying to raise is not within the scope  
15 of Issue F and if it's not within the scope of Issue F you  
16 don't have to reach the issue of rulemaking.

17 We have reached that, because it's a help in  
18 consideration Issue F, but Issue F is clear on its face,  
19 and whether the rulemaking doctrine ever applied it is not  
20 at all credible that the issue Mr. Sinkin is trying to  
21 raise falls within Issue F.

22 JUDGE BECHHOEFER: Assuming we agree with you,  
23 we have raised Issue C, and we are also going to ask the  
24 parties to consider whether we should consider it as a  
25 late-filed contention. Because there's plenty of

1 information in there which would support that.

2 MR. AXELRAD: I'm sorry, Mr. Chairman, the  
3 late-filed contention question is the first time the Board  
4 has just raised that. But in any event, it does seem to me  
5 that orderly procedure is to first of all determine, is it  
6 within Issue F; is it within the reserved portion of Issue  
7 C; and then, is it proper for a motion -- is it a proper  
8 motion to reopen, including as a late-filed contention?  
9 And we can argue those things.

10 All I'm trying to do is I want to make sure that  
11 we don't lose track of the issues that are before this  
12 Board. The issues that this Board has to decide is whether  
13 or not the matters Mr. Sinkin is trying to raise fall  
14 within Issue F, for example. And that involves much more  
15 than the simple question of whether it is barred by  
16 rulemaking.

17 As a matter of fact, the question I'm raising is  
18 I think more fundamental and would not require the Board to  
19 seriously consider the rulemaking question.

20 MR. REIS: Mr. Chairman, there are some very  
21 grave questions of the jurisdiction of the Board here,  
22 especially in the light of the recent opinion of the  
23 Commission in the Waterford case. To go out and reach for  
24 things on the basis -- I mean we'll have to address this  
25 after the hearing, but I just want to say something. To go

1 out and reach for this on the basis of what is admittedly  
2 an anonymous telephone conversation, and seek to expand and  
3 reopen the proceeding to reach for these sort of things and  
4 talk about contentions and new contentions without a motion  
5 that addresses the standards in the rules and regulations  
6 that the Commission has again and again reemphasized and  
7 the Appeal Board has again and again reemphasized, to just  
8 throw that out at this point is very improper.

9 If we are talking about a new contention, we  
10 better get a motion in for a new contention, that we can  
11 talk about good cause, that we can talk about a basis for  
12 the contention with specificity, with a showing -- a  
13 late-filed contention that there is evidence to support the  
14 contention. Because the rules for a late-filed contention  
15 are different than contentions at the beginning of the  
16 proceeding and you have to show a basis to go forward, and  
17 there are a lot of things we are going to have to talk  
18 about after this break.

19 JUDGE BECHHOEFER: I'm aware of that. I'm aware  
20 of that.

21 MR. SINKIN: Mr. Chairman, just for our two  
22 cents in this little debate, it seems to me the Board has  
23 indicated if it's not under Issue F, we might want to look  
24 whether it's under Issue C, and if it's not under Issue C,  
25 we might want to look at whether it's a late-filed

1 contention. And the Board has raised the other side of the  
2 issue as, if it is barred by being in rulemaking, then none  
3 of those three can happen. It makes sense that both of  
4 those have to be argued. We don't care which order they  
5 are argued in, but both of them have to be argued. There  
6 is a threshold question, if it's barred by rulemaking all  
7 the rest of the debate becomes irrelevant, but I don't  
8 think the Board is going to make a ruling today whether  
9 it's barred by rulemaking. If you are prepared to rule  
10 today whether it may be barred, maybe we ought to take it  
11 up first and not waste time on the rest of it. If you are  
12 not going to make a ruling today, we are going to have to  
13 address both of them.

14 MR. AXELRAD: I would strongly object to that.  
15 It's almost as if the Board were trying to decide a  
16 constitutional question while there are very simple factual  
17 questions that can be decided, the question whether this is  
18 an appropriate issue under Issue F. And it is not. And it  
19 seems to me --

20 JUDGE BECHHOEFER: Or C. Or C.

21 MR. AXELRAD: But the first question -- the  
22 Board is the only party, the only participant in this  
23 proceeding so far that has raised Issue C. The only thing  
24 that the Intervenor has raised, is this under Issue F.

25 I'm perfectly willing to argue anything the

1 Board wants to hear, but it seems to me that the first  
2 thing the Board should hear is argument with respect to the  
3 matters that are properly before it. And then it can  
4 decide whether it wants to go into other matters which  
5 nobody else has raised before it.

6 MR. SINKIN: Mr. Chairman, I guess I'd make my  
7 argument the other way, too. If the Board is not prepared  
8 to rule today that it is or is not under Issue F, then we  
9 are going to hear debate on all those issues including the  
10 rulemaking issue, anyway, so it doesn't matter what order  
11 we take them up in. If the Board is prepared to rule today  
12 that the issue is not under Issue F, then that may be a  
13 different situation. I didn't sense -- I thought the Board  
14 wanted to hear argument. I didn't sense the Board was  
15 prepared to make rulings today. Maybe that would determine  
16 it. If you are not prepared to make rulings, we are going  
17 to discuss all these issues and it doesn't matter what  
18 order we discuss them in.

19 (Discussion off the record.)

20 MR. AXELRAD: Mr. Chairman, I believe the  
21 parties will be prepared to address these issues in  
22 whatever sequence the Board wants to address them, having  
23 heard our arguments, so this might be an appropriate time  
24 to take the break and then after the break you can tell us  
25 what you want of us.

1                   There are a limited number of sequences that can  
2 arise.

3                   JUDGE BECHHOEFER: We'll take a 15-minute break.  
4                   (Recess.)

5                   JUDGE BECHHOEFER: Back on the record. We have  
6 flipped a three-headed coin and we have decided that we  
7 will start with Issue F first. But then, next we'll  
8 certainly have to discuss the rulemaking point. I guess  
9 the Applicants can lead off on Issue F. In addressing  
10 Issue F, I would like the Applicants to comment on whether  
11 the issue as defined in the responses to interrogatories,  
12 as well as in the pleadings filed by CCANP, would fall  
13 within the introductory language to Appendix B, which  
14 states that: "The Applicants must set forth the managerial  
15 and administrative controls to be used to assure safe  
16 operation." And the definition of quality assurance which  
17 says that: "Quality assurance comprises all those planned,  
18 systematic actions necessary to provide adequate confidence  
19 that a structure, system or component will perform  
20 satisfactorily in service."

21                   If you read those two together the question we  
22 raise is: Wouldn't drug use by plant personnel fit within  
23 the context of that, of that language?

24                   MR. GUTTERMAN: Well, let me see if I can  
25 address this issue, Mr. Chairman. I'm not sure I have the



1 exact language you quoted, but I think I got the general  
2 thrust of it.

3 JUDGE BECHHOEGER: It's in the first and third  
4 paragraphs to the introduction. What I quoted first was  
5 the last sentence of the first paragraph of the  
6 introduction. Secondly I quoted the definition of quality  
7 assurance in the third paragraph.

8 MR. GUTTERMAN: As the Board clearly recognizes  
9 our contention, our position is that the issues CCANP seeks  
10 to raise do not fall within Issue F.

11 Implicit in the way the Board addressed the last  
12 question is the recognition that Issue F deals with only  
13 one question, that question is whether Applicant's quality  
14 assurance program for the operation of the South Texas  
15 project meets the requirements of Appendix B.

16 In looking at the introductory language to  
17 Appendix B, there is some language which is very general in  
18 nature. It, in essence, says quality assurance program  
19 comprises a certain set of actions necessary -- related to  
20 the physical characteristics -- well, I'm not reading it  
21 right. I realize there's very general language in the  
22 introduction to Appendix B. But the fact that there's  
23 general language in that introduction does not alter the  
24 fact that quality assurance programs are comprised of all  
25 of the specific requirements that are set forth in the 18

1 criteria of Appendix B.

2 JUDGE BECHHOEFER: Only those?

3 MR. GUTTERMAN: Yes, Mr. Chairman, I think  
4 that's right. I don't think you'll find any additional  
5 requirements in the introduction that aren't addressed in  
6 the 18 criteria. I think the 18 criteria explain how one  
7 meets the general objectives that are included in the  
8 introduction.

9 The quality assurance system set out by Appendix  
10 B is a system of planning and training, checking,  
11 inspecting, auditing. It does not purport to address  
12 matters such as control of drug use by project employees.  
13 The PSAR that the Applicant has filed -- I invite you to  
14 look at the SAR filed by any Applicant -- the standard  
15 review plan that the Commission uses to judge the adequacy  
16 of these safety analysis reports, the regulatory guides,  
17 the ANSI standards, all of the documents which interpret  
18 and implement Appendix B do not address drugs. That's  
19 shown by the affidavit of -- well, I'd be getting off  
20 talking about the motion for summary disposition which  
21 hasn't been addressed yet.

22 But I think it is clear, on the face of it,  
23 there is no mention at all in Appendix B of control of drug  
24 use. If the Board were to interpret a generalized  
25 statement in the introduction as requiring some control of

1 drug use, the Board would have absolutely no standard to go  
2 by in determining what was an acceptable drug control  
3 program. There's nothing there, nothing in Appendix B that  
4 tells you how to judge that. In essence, the Board would  
5 be writing on a clean slate and reaching its own  
6 determination of what the Board considers is an acceptable  
7 program of controlling drugs. There's nothing in Appendix  
8 B that establishes that standard.

9 JUDGE BECHHOEFER: Just speaking from an overall  
10 standpoint, wouldn't reasonable assurance depend on that?  
11 If -- particularly if an issue -- if indications of  
12 improper drug use were shown, which is one of the questions  
13 we are going to get into later, but assuming that there  
14 were an adequate basis for showing that there was improper  
15 -- either improper drug use or improper administrative  
16 controls applied to that drug use, wouldn't a reasonable  
17 assurance finding in a particular case -- maybe not  
18 generally, but in a case where such an issue was raised,  
19 wouldn't that be necessary and proper?

20 MR. GUTTERMAN: Mr. Chairman, I think the  
21 Commission's regulations have a set of standards by which  
22 Applicants are judged. Implicit in the question is the  
23 assumption that if people were using drugs, their behavior  
24 would be unacceptable and they would do something wrong.  
25 Appendix B establishes a system for detecting that "something

1 wrong" that might be done, a work activity that's done  
2 wrong. That's what Appendix B is focused on. It's  
3 planning the work activities, checking to see that those  
4 plans are properly followed, auditing to verify the work is  
5 done in accordance with the applicable requirements. The  
6 entire focus of the Commission's regulations in this  
7 respect is on achieving the quality-related activities, not  
8 testing the capabilities of the individuals, in the sense  
9 of, are they strong enough or are they in good health, are  
10 they under the influence of strong rays of the sun or  
11 illegal drugs or alcohol or mesmerized by rock and roll  
12 music or whatever may affect somebody's behavior. Those  
13 kinds of things are not addressed in Appendix B.

14 That doesn't mean they are not real or they  
15 shouldn't be of concern. In fact, in this particular, case  
16 the Applicants have a very strong program for controlling  
17 drugs. But that's not an Appendix B program.

18 JUDGE BECHHOEFER: That is what the question is  
19 being raised about, basically.

20 MR. GUTTERMAN: If the chairman understands what  
21 the question is, you are one step ahead of me. Because  
22 reading all the filings of CCANP, I'm not clear what it is  
23 about. But whatever it has to do with, it's got nothing to  
24 do with compliance with Appendix B.

25 JUDGE BECHHOEFER: How about the general

1 language defining quality control, which is the last part  
2 of the introductory paragraph?

3 MR. GUTTERMAN: Could you read a couple of words  
4 just to get me oriented to the sentence you are looking at?

5 JUDGE BECHHOEFER: It says: Quality assurance  
6 includes quality control which comprises those quality  
7 assurance actions related to the physical characteristics  
8 of the physical structural component or system which  
9 provides a means to control the quality of the material,  
10 structure, component or system to predetermined  
11 requirements."

12 MR. GUTTERMAN: I see the sentence you are  
13 directing my attention to. I'm not sure I understand the  
14 question, though.

15 If the Board's question was, does the definition  
16 of quality control imply that control of drug use is an  
17 element of quality control, I think clearly that's not the  
18 case. And I point out to this Board, in phase 1 of this  
19 proceeding, the Board considered the adequacy of Applicant's  
20 quality assurance program for control -- applicable to  
21 construction of the plant, and found it was acceptable and  
22 there is no mention there of control of drug use. And  
23 there was no issue considered by the Board about that. It  
24 was clearly not an issue. It was not a matter that is  
25 addressed in any way in the quality assurance program

1 description that was filed with the Board. It's not  
2 mentioned in any way in the quality assurance section of  
3 the preliminary safety analysis report that was the basis  
4 for the issuance of construction permits. There's no  
5 mention at all about drug control in any of the documents  
6 related to Appendix B, either in this docket or in any  
7 docket that I am aware of, or in any of the various  
8 documents that the Commission and the Staff have issued  
9 that interpret Appendix B and explain what is an acceptable  
10 program to meet the Commission's requirements.

11 JUDGE BECHHOEFER: How about the implementation  
12 of Appendix B? You recognize, I assume, that  
13 implementation is part of the likelihood -- adequate  
14 implementation has long been recognized as part of an  
15 adequate QA program.

16 MR. GUTTERMAN: Certainly it requires that the  
17 requirements of Appendix B be implemented properly.

18 JUDGE BECHHOEFER: Could drug use have an effect  
19 on that? Likely? Could it? Would it?

20 MR. GUTTERMAN: I'd be speculating what people  
21 would do under the influence of drugs, but Appendix B  
22 doesn't establish any requirement for control of the use of  
23 drugs to assure that implementation. It requires the  
24 inspection and checking and auditing functions, and also  
25 training requirements.

1                   Certainly there are other things that might  
2 influence people's behavior that are not addressed by  
3 Appendix B.

4                   I don't think that in any way makes something  
5 that might affect peoples' behavior a part of Appendix B.

6                   You can't have -- I don't see how you could read  
7 into Appendix B a requirement if people have a fight with  
8 their wife, they shouldn't go to work because they might  
9 not be concentrating on their work.

10                   If one tries to apply one's imagination to it,  
11 you can imagine numerous things that might affect somebody's  
12 behavior on the job, but Appendix B doesn't try to get at  
13 assuring quality by controlling those things. It tries to  
14 get at it through a system of audits and inspections. And  
15 drug use, drug -- control of drug use is not a part of that  
16 directly. Although if somebody were on drugs and his  
17 performance on the job was adversely affected by it,  
18 certainly one would expect that the control programs that  
19 are in Appendix B would detect that, would detect the poor  
20 performance of work. That's what those control programs  
21 are designed for, is to detect poor performance on the job.

22                   JUDGE SHON: Mr. Gutterman, what about the point  
23 I think Mr. Sinkin has made a couple of times in his  
24 filings, which is that he is not really addressing the  
25 goodness, the excellence of the drug control program, its

1     adequacy or lack of adequacy. What he is addressing is, in  
2     a sense, management dishonesty. He maintains, not that  
3     this is a bad program or that it may miss people who take  
4     drugs or that there may be drug use on the job, but that  
5     this program, since it is applied in a discriminating and  
6     unfair way, manifests a management attitude that is  
7     inconsistent with proper control of a nuclear power plant;  
8     that is, not managerial and administrative controls used to  
9     assure safe operation that are mentioned in Appendix B,  
10    just the unevenhandedness of its administration represents  
11    that sort of a flaw.

12             MR. GUTTERMAN: Thank you, Judge Shon. I'm  
13    happy to address that, because I think that gets to the  
14    heart of what we were discussing just before the break.

15             That kind of contention, to the extent I can  
16    understand it, clearly goes to whether there is reasonable  
17    assurance that this Applicant will meet -- will comply with  
18    its QA program, not to the question of whether the QA  
19    program meets Appendix B.

20             When the Board set out the six issues, A through  
21    F, to be considered in this proceeding, it encompassed  
22    within Issues A and B, the questions of the character of  
23    the Applicant and whether its performance showed a  
24    character which would be inclined to try to comply with the  
25    Commission's regulations, could be reasonably expected to



1 comply with the Commission's regulations.

2 Issue F was never intended by the Board to  
3 invite a separate litigation of the same kinds of facts  
4 that the Board was considering under Issues A and B.

5 JUDGE BECHHOEFER: Mr. Gutterman, are you  
6 forgetting or ignoring the rulings that go way back to the  
7 early Midland decision, I think, which said that  
8 implementation of a QA program is as significant as the  
9 formal structure of it. I think ALAB-106 was the earliest  
10 decision that said that, that you have to look at the  
11 implementation as well as the paper program.

12 MR. GUTTERMAN: Mr. Chairman, I am not ignoring  
13 that and I'm certainly not arguing that the Board ignored  
14 it in phrasing the issues. I think the Board had that  
15 clearly and directly in mind when it wrote issues A through  
16 F. And I think the Board parsed those issues, among issues  
17 A through F, and issues A and B were issues the Board  
18 established to determine the character of HL&P, to  
19 determine whether the Applicants in general could be relied  
20 upon to carry out and follow the Commission's requirements.

21 Issue F was a much narrower issue. It assumed  
22 that Issues A and B had already been answered and the Board  
23 had reached a judgment about the character of the  
24 Applicants and looked solely at whether the quality  
25 assurance program that had been established for application

1 during the operation of the plants met the requirements of  
2 Appendix B. That's all Issue F is related to and nothing  
3 further.

4 JUDGE BECHHOEFER: Does A and B cover operation  
5 or construction?

6 MR. GUTTERMAN: I think clearly issues A and B  
7 were intended to judge the qualifications of the Applicants  
8 to be given operating licenses.

9 As you recall, Mr. Chairman, this was not an  
10 enforcement proceeding. The entire proceeding has been a  
11 proceeding on application for operating licenses. And in  
12 judging the character and competence of the Applicants, the  
13 issue was the eligibility to be granted operating licenses.

14 JUDGE BECHHOEFER: Wasn't Issue A linked to  
15 their record of past -- the evidence relevant to Issue A, I  
16 would gather, would be limited to the past performance?

17 MR. GUTTERMAN: Mr. Chairman, I agree with you  
18 entirely, exactly what Issue A was related to was past  
19 performance, i.e., the performance of the Applicants during  
20 the construction of the plant.

21 Now that I have Issue A in front of me, I see  
22 the explicit words are, "if viewed without regard to  
23 remedial steps including --" and then the four examples are  
24 included, it says, " -- sufficient to determine that HL&P  
25 does not have the necessary managerial competence or

1 character to be granted licenses to operate the STP."

2           Clearly Issue A was talking about qualifications  
3 for operating licenses.

4           As you recall, I'm sure, Mr. Chairman, during  
5 the course of the phase 1 proceeding, new questions were  
6 raised, new staff inspection reports were issued as the  
7 proceeding was going on and that came in to evidence,  
8 evidence of those inspections, the results of them,  
9 Applicant's responses to them, all came into evidence under  
10 Issue A, even though they weren't past in the sense they  
11 occurred before the Board's December 2, 1980 order, but  
12 they were events that occurred during the construction of  
13 the project.

14           To the extent that there is some issue to be  
15 raised under the matters that are discussed in CCANP's  
16 pleadings, whatever events they are -- and really they are  
17 a little hard to recognize, because the facts don't seem to  
18 relate to what has actually happened -- but whatever they  
19 are, they are matters that occurred during the construction.

20           JUDGE BECHHOEFER: That we can't decide now.

21           MR. GUTTERMAN: I understand that, Mr. Chairman.  
22 But whatever they are, they are clearly intended to be  
23 matters that occurred during the construction of the  
24 project and, as such, to the extent the Board ever  
25 contemplated hearing something about them in Issues A

1 through F, it was clearly under Issues A or B.

2 JUDGE BECHHOEFER: Well, I won't ask you about C,  
3 now, but when we get to talking about C -- that's perhaps a  
4 different question. Right now we are on F.

5 Do you have anything further on F? We'll go to  
6 the other parties if you don't.

7 MR. GUTTERMAN: I'm just reminded that we were  
8 going to talk about the relevance of the rulemakings and I  
9 suppose I ought to reserve that for the second element.

10 JUDGE BECHHOEFER: We want to hear the original  
11 parties first.

12 MR. GUTTERMAN: I want to point out --

13 JUDGE BECHHOEFER: I realize that.

14 MR. GUTTERMAN: -- that our pleading cited the  
15 pendency of two rulemakings was to just point out the  
16 implication that the Commission, in proposing rules that  
17 would require control of drug use, by implication is  
18 suggesting that Appendix B does not address such matters.  
19 I'm not sure that argument is necessary, because I think on  
20 the face of it, what we all know about the history of the  
21 application of Appendix B and nuclear power plants has been  
22 that drug control has not been an element of quality  
23 assurance programs. But that's an added indication that  
24 the Commission itself interprets its requirements as not  
25 currently addressing the control of drugs. That's all I

1 have, Mr. Chairman.

2 JUDGE BECHHOEFER: Let me ask -- well, I'll save  
3 it for the rulemaking part. I guess we haven't heard at  
4 all what the Staff's position is on this, because you  
5 haven't had a chance to file anything. I guess we ought to  
6 hear what the Staff's position on Issue F is.

7 MR. REIS: It is a dispute for discovery between  
8 Applicants and -- but there are broader implications here,  
9 so I will make some comments on it.

10 First of all, I want to put this into the  
11 context of what Mr. Sinkin is trying to get to in the sense  
12 of his answer to the eighth set of interrogatories, where  
13 Mr. Sinkin has said "CCANP does not contend that the  
14 quality assurance program for South Texas will not satisfy  
15 the requirements of Part 50, Appendix B, or revisions or  
16 additions to such QA programs are necessary in order to  
17 satisfy the parts."

18 Now, he goes on and says that he doesn't feel  
19 that HL&P's program for operation of South Texas will not --  
20 he does say that he does not feel that HL&P's QA program  
21 for operation of South Texas will not meet the requirements  
22 of Appendix B, because HL&P lacks the character to properly  
23 implement such a program, which plainly shows it does not  
24 fall under Issue F. If any place, it might have been under  
25 Issue B, which did deal with: Has HL&P taken sufficient

1 remedial steps to provide assurance that it now has the  
2 managerial competence and character to operate South Texas  
3 safely. But mainly from what Mr. Sinkin says, it is not  
4 under F. We have an interpretation that we are talking  
5 about a program. And that is what we were all talking  
6 about when these particular issues were adopted, when we  
7 talked about what evidence would be put in on these issues,  
8 how we were formulating the issues -- we were looking at  
9 the FSAR for operations; that's why it couldn't be heard  
10 originally, why we didn't have the sufficient information  
11 to go into Issue F originally at the original Phase 1  
12 hearings, and that's what we are faced with today.

13 MR. GUTTERMAN: Was the issue limited to that or  
14 did it include likely implementation?

15 MR. REIS: I think at the time --

16 JUDGE BECHHOEFER: It falls under Appendix B,  
17 and I again refer to the ALAB-106 which is probably the  
18 first decision, that was way back.

19 MR. REIS: I agree we can look at implementation  
20 of a program and there's no question about that. And the  
21 implementation of Appendix B can be litigated in the light  
22 of whether Applicant has the character to implement it.  
23 But that wasn't what Issue F dealt with. It dealt with the  
24 program. The program in the square terms of Appendix B.  
25 And that's what we are dealing with. If you are talking

1 about have they the character and competence to carry out a  
2 QA program, that was encompassed within Issue B.

3 What we talked about for Issue F, and what was  
4 raised at the time, was the foursquare written document for  
5 QA of operations. And we could not review that and did not  
6 put evidence in -- and we could not introduce evidence at  
7 phase 1, and that's why we required other phases, because  
8 that wasn't prepared at that time.

9 MR. GUTTERMAN: Well, would Issue B have even  
10 permitted any consideration of --

11 MR. REIS: To the extent --

12 JUDGE BECHHOEFER: -- because they are talking  
13 about corrective actions under A, and I'm not sure this  
14 drug use allegation, at least, would fall there either.

15 MR. REIS: It may be, as the Staff will take the  
16 position, if it's anything, it's a new contention or should  
17 be submitted as a new contention and must be judged under  
18 those standards. It could be that it is not in proceeding  
19 at all and that's really where the Staff is ultimately in  
20 this discussion going to come out, that it is not in this  
21 proceeding, that it must be judged under the standards of  
22 2.714 as a new contention, and whether there is sufficient  
23 information to allow it to be raised as a new contention.

24 Perhaps I'm getting ahead of myself, but I  
25 quoted from paragraph 4 of the response, or answer 4 of the

1 response to the interrogatories, and answer 5 talks about  
2 anonymous telephone calls and information being put forth  
3 on that basis.

4 The Staff will ultimately take the position --  
5 JUDGE BECHHOEFER: We have a lot of questions  
6 about that when we get to it. We recognize there may be  
7 problems with that. But we are going to address that when  
8 we get to it. But we started with this Issue F first.

9 MR. REIS: To reiterate, the Staff, again,  
10 emphasizes that Issue F was only looking at the foursquare  
11 program. I realize what the Midland case said. But that  
12 was not -- when Issue F was drafted, it did not encompass  
13 what was talked about in Midland. What was talked about in  
14 Midland we all talked about in connection with Issue A; we  
15 briefed it in connection with Issues A and B, and that was  
16 in that sense.

17 JUDGE BECHHOEFER: When we talked about QA for  
18 operations, Issue F, did we have any discussions one way or  
19 the other? Was there any record that we limited it to the  
20 program, as such, rather than the likely implementation  
21 during operations?

22 MR. REIS: My recollection -- and I think -- is  
23 that we did limit it to the program at that time. I'm  
24 trying to think of whether there was any particular record  
25 of it. I can't think of it spelled out in any particular



1 prehearing conference order. But it was talked about in  
2 terms of the program.

3 Certainly I agree with the Applicants, that the  
4 Commission's talk about further rules and the need for  
5 further rules shows that the drug problem, and drug issue --  
6 which is a problem and it is an issue -- generically -- is  
7 not of itself under Appendix B.

8 (Discussion off the record.)

9 JUDGE BECHHOEFER: Mr. Sinkin, I guess it's your  
10 turn.

11 MR. SINKIN: Thank you.

12 First of all, Mr. Chairman, I think that the  
13 argument made by Applicants that the quality assurance  
14 program is designed to examine the work done and to catch  
15 any work done by people in a condition where they have not  
16 done the work properly, but is not designed to control the  
17 behavior of the people doing the work, is simply  
18 unreasonable.

19 We know in cases such as Midland, where 27  
20 workers were found to be using drugs, the enforcement  
21 response by the NRC regional officer, Mr. Keppler, regional  
22 director, was to order 100 percent reinspection of all the  
23 work done by anyone who had sold or used drugs.

24 JUDGE BECHHOEFER: That wasn't the Midland I was  
25 referring to in my question, by the way. I was referring

1 to a very early decision.

2 MR. SINKIN: But I think Region 4 has taken a  
3 different approach to drug use, and not required this kind  
4 of major reinspection, to our knowledge. But the idea that  
5 you don't control drug use under Appendix B, but if you  
6 find someone has been using drugs then you go back and  
7 reinspect everything you inspected under Appendix B, I  
8 think is a clear indication that the drug use itself is an  
9 Appendix B problem.

10 JUDGE BECHHOEFER: Was that taken under Appendix  
11 B or some other authority?

12 MR. SINKIN: I can't tell you. I don't know.

13 More specifically, however, I think that rather  
14 than in addition to the introductory sections you called to  
15 the attention of the Applicants, that a reading of criteria  
16 2, as to what constitutes a quality assurance program --  
17 clearly drug use by people doing safety-related work would  
18 fall under the type of activity that should be detected by  
19 such a program.

20 For example, last line on -- well, I don't know  
21 if we have the same version -- in that first paragraph it  
22 states: "The quality assurance program shall provide  
23 control over activities affecting the quality of the  
24 identified structures, systems and components to an extent  
25 consistent with their importance to safety."

1                   Well, obviously one activity affecting the  
2 quality of the structures, systems and components is the  
3 condition of the people performing the work producing the  
4 structures, systems, and components. "Activities affecting  
5 quality shall be accomplished under suitably controlled  
6 conditions." We don't consider that people under the  
7 influence of controlled substances are what this phrase  
8 means by "suitably controlled conditions," that instead, it  
9 means they should not be under the influence of controlled  
10 substances.

11                   Those are matters that a quality assurance  
12 program, in general, must address.

13                   We do think the introductory section has meaning  
14 apart from the 18 criteria, and that it is designed to be  
15 flexible, that the fact that there were not previously  
16 specific instructions about control of drugs results from  
17 the fact that previously, up until three or four years ago,  
18 it was not recognized as a serious problem on nuclear power  
19 plant projects. It has become a serious problem. We would  
20 direct the Board's attention to Business Week magazine,  
21 October 1985, where they focus on the fact that drug abuse  
22 at nuclear power plants has become a major problem.

23                   The NRC has declined to adopt a program to  
24 address that on more than one occasion, leaving it up to  
25 the industry to address it. But the problem has surfaced

1 and has become a problem at nuclear power plants, and we  
2 would argue falls under Appendix B and Appendix B should be  
3 read broad enough to include new problems for which  
4 regulations had not previously been written.

5 As far as Issue F, and what it contains or does  
6 not contain, at the time we were discussing Issue F in 1981,  
7 the Applicants didn't have a quality assurance program for  
8 operations. They were in the process of -- excuse me --  
9 they had a quality assurance program for operations. They  
10 didn't have a fully staffed program for operations. So we  
11 were looking at the fact that there was a program that we  
12 would be able to evaluate, perhaps. Mr. Reis says we were  
13 looking at the foursquare program. We weren't just looking  
14 at the program, we were looking at personnel as something  
15 that would need to be examined. And in 1981, that wasn't  
16 developed well enough for us to look at, so we deferred  
17 consideration of that until a later time.

18 Now we have the personnel. What we are arguing  
19 in our -- regarding the drug use -- is that we not only  
20 have, now, the program and the personnel, we have evidence  
21 on the actual implementation of that program and how  
22 personnel in the operations group will be treated when  
23 found to be in conditions that are not -- that are not  
24 suitable for the safety-related work that they were  
25 required to perform.

1           The fact that it is happening in the  
2 construction phase doesn't mean that it's not relevant to  
3 an operations contention. The whole thrust of a licensing  
4 proceeding is that it is predictive and that has been  
5 stated on more than one occasion and in this proceeding it  
6 has been stated.

7           What we are saying is you now have a basis for  
8 predicting how well the quality assurance program for  
9 operations is going to work by how the operations personnel  
10 have been treated during this drug investigation and its  
11 resulting dismissals or nondismissals of personnel.

12           JUDGE BECHHOEFER: Mr. Sinkin --

13           MR. SINKIN: Yes?

14           JUDGE BECHHOEFER: -- in terms of the issue you  
15 propose to litigate, does it include solely the managerial  
16 treatment of people who are -- who have been found to use  
17 drugs? There was one statement in one of the papers you  
18 filed that indicated that you thought the Applicants had  
19 not been forthcoming with the NRC regional people. Is that  
20 still part of your claim? Or is it solely limited to the  
21 managerial problem?

22           MR. SINKIN: Let me restate it. There's two  
23 parts.

24           The essence of the allegation is that operations  
25 group personnel implicated in the use and/or sale of

1 illegal drugs were protected by management. They were  
2 protected in that people were fired who were found to be  
3 using or selling drugs, but other people in similar  
4 condition were not fired because they would implicate the  
5 operations people, and this effort was made to protect the  
6 operations group from exposure. There was use and sale of  
7 drugs within the operations group.

8 The exposure, that we understand would be -- the  
9 concern would be that the NRC would be very upset if they  
10 found out the operations group was involved in the sale or  
11 use of illegal drugs and that some enforcement action would  
12 undoubtedly follow.

13 The thing that captured our attention, obviously,  
14 when we got this allegation, was that there was a pending  
15 contention before the Licensing Board about whether the  
16 quality assurance program for operations of the Applicants  
17 would be adequately implemented and, in our view, this  
18 would -- this, as a pending matter before -- the one  
19 pending issue before the Licensing Board was the operations  
20 of the plant. And here was the operations group, right in  
21 the middle of what appeared to be a special treatment of a  
22 problem that had been discovered in their group, and that  
23 it would relate to the licensing hearings, too, and we  
24 expressed that directly to the NRC investigative office  
25 when we called with the allegation that this had numerous

1 ramifications and we were urging them to investigate it,  
2 not only because there was apparent drug use in the  
3 operations group, but also because there was apparently an  
4 effort by management to cover it up that would affect about  
5 both the NRC's licensing arm and this Board's inquiries.  
6 That's how we presented the allegation originally to the  
7 office of investigations.

8 JUDGE BECHHOEFER: Does your allegation, then,  
9 as to keeping the NRC informed, was that as to the  
10 preferential treatment or was that as to drug use itself?

11 MR. SINKIN: Well, the allegation is not that  
12 they didn't tell the NRC they gave preferential treatment  
13 to the operations group. They didn't tell the NRC that.  
14 And that could be part of it. The essence of the  
15 allegation was that they took steps to prevent the NRC from  
16 learning that the operations group was involved in the sale  
17 and/or use of illegal drugs.

18 What you are suggesting in your question was  
19 there was a second thing they didn't tell the NRC, and that  
20 is they were going to take those steps. I mean if they  
21 took the steps, that's the issue.

22 JUDGE BECHHOEFER: Are you claiming that NRC  
23 wasn't told anything, that there was anyone involved with  
24 drugs on the site?

25 MR. SINKIN: Oh, no. The firings were in the

1 newspaper of the security guard group; some of them, at  
2 least.

3 JUDGE BECHHOEFER: I see. Okay.

4 MR. SINKIN: The fact of the investigation, the  
5 fact that there were firings, were not hidden facts. What  
6 we are talking about is the allegation that the actual  
7 firing process was conducted in a discriminatory way.

8 JUDGE BECHHOEFER: Okay. Go on.

9 MR. SINKIN: As far as Issue F, that's the  
10 essence of our response.

11 JUDGE BECHHOEFER: Let's hear some responses, if  
12 you have any.

13 MR. GUTTERMAN: Can I have just a minute,  
14 Mr. Chairman?

15 JUDGE BECHHOEFER: Sure.

16 (Discussion off the record.)

17 MR. GUTTERMAN: I can go ahead now.

18 JUDGE BECHHOEFER: Fine.

19 MR. GUTTERMAN: The first point I wanted to make  
20 is while counsel for CCANP read to us from criterion 2,  
21 CCANP's answers to Applicant's eighth set of  
22 interrogatories clearly say that CCANP is not contending  
23 that Applicant's QA program, in the sense of a written  
24 program for plant operations, in any way fails to satisfy  
25 NRC requirements. So I don't understand CCANP is



1       contending in any way that there's an alleged deficiency of  
2       some sort in the Applicant's quality assurance program.

3                JUDGE BECHHOEFER: I read them as saying there's  
4       a deficiency in how it's going to be implemented.

5                MR. GUTTERMAN: Yes, Mr. Chairman. I just  
6       wanted to be sure that distinction was clear. The program  
7       that is on file, that CCANP has conceded meets Appendix B,  
8       does not mention anything about drug control.

9                Also I would just respond to the last comment  
10       about some allegation about concealing something from the  
11       NRC which --

12               JUDGE BECHHOEFER: I saw that in some of the  
13       documentation.

14               MR. GUTTERMAN: In CCANP's?

15               JUDGE BECHHOEFER: Yes.

16               MR. GUTTERMAN: I agree it was there.

17               JUDGE BECHHOEFER: I can't remember which one  
18       but --

19               MR. GUTTERMAN: There's no basis for it at all.  
20       I just wanted to point out that in CCANP's descriptions of  
21       how it came to be making these allegations, it refers to an  
22       anonymous phone call, but it does not represent in any of  
23       its written documents that whoever made this anonymous  
24       phone call to CCANP alleged anything about hiding  
25       information from the NRC. This is totally a speculation

1 that CCANP has come up with based on the allegations it  
2 received in this anonymous phone call.

3 If one goes back and looks at the issues as the  
4 Board adopted them at its December 2, 1980 order, the  
5 conclusion that the issue of judging an Applicant's  
6 character and competence to be granted operating licenses  
7 was intended to be encompassed within issues A and B is  
8 just simply inescapable.

9 Looking at the context of the six issues written  
10 together, one cannot possibly, I don't think, conceive that  
11 the Board had in mind that when we got down to considering  
12 Issue F, that every fact which would be considered under  
13 issues A and B would then be considered anew under Issue F.

14 Clearly what was contemplated was that the Board  
15 would be able to judge Applicant's character and competence  
16 to be granted operating licenses based on the evidence it  
17 would hear under Issues A and B. And in fact, the Board  
18 issued a partial initial decision in March of 1984 in which  
19 the Board concluded that the Applicants had the necessary  
20 character and competence to be granted operating licenses,  
21 reserving only on the question of how the handling of the  
22 Quadrex report reflected on the Applicant's character. And  
23 also asking for an update about Issue C. But we'll discuss  
24 that in a few minutes.

25 JUDGE BECHHOEFER: There were some B questions

1 left open, but they were competence questions.

2 MR. GUTTERMAN: As to character, the only  
3 question that was left open was clearly the handling of the  
4 Quadrex report. The Board clearly did not have in mind at  
5 that point that, having reserved on Issue F, it had  
6 reserved some question about Applicant's character for  
7 implementing the quality assurance program for operations.

8 JUDGE BECHHOEFER: Would these allegations have  
9 been even entertainable under Issues A or B? I'm not sure  
10 they would have been.

11 MR. GUTTERMAN: If one puts aside the question  
12 of timing --

13 JUDGE BECHHOEFER: Putting that aside. Assuming  
14 there was some event, some uncovering of drug use, the  
15 preferential treatment would have been difficult because  
16 you didn't have identified too many operations personnel.  
17 But --

18 MR. GUTTERMAN: I realize CCANP has said that,  
19 but if you look back at the phase I testimony, you'll see  
20 there was a considerable operational staff even then. I  
21 can't really speculate too much, really, what the Board  
22 would have done had this been sought to have been raised  
23 back then. I would point out, on the eve of the start of  
24 the phase I hearing, there was an NRC inspection of an  
25 electrical termination shack on the site, and there were

1 issued raised at the hearing about the handling of that  
2 inspection, about what the inspectors found, whether the  
3 fact that the inspection had been disclosed to the -- the  
4 fact of the imminence of the inspection had been disclosed  
5 to people in the termination shack.

6 Also, it's a matter that occurred long after the  
7 adoption of the December 2, 1980 order, facts which cannot  
8 go directly to anything that was raised and anything  
9 explicitly set out in Issue A. In fact, the work that was  
10 involved that we heard testimony about wasn't even  
11 safety-related work. Clearly it was not something under  
12 the quality assurance program, something specifically  
13 contemplated when the Board wrote it's December 2, 1980  
14 order.

15 Facts of this sort did come up under Issue A.  
16 But Issue A has been decided and the record was closed on  
17 that.

18 The only other point I wanted to make was that  
19 in listening to all of the statements of CCANP's counsel,  
20 looking at all the pleadings that CCANP has filed, no place  
21 is there a single citation of any requirement, any specific  
22 requirement in Appendix B, on Applicant's quality assurance  
23 program for plant operations, that is alleged to have been  
24 violated. There's just nothing there.

25 JUDGE BECHHOEFER: What do you think about the

1 argument about criterion 2, which Mr. Sinkin just mentioned?

2 MR. GUTTERMAN: As I said, Mr. Chairman, CCANP  
3 has itself conceded that Applicant's quality assurance  
4 program for plant operations complies with Appendix B. And  
5 there is nothing in there, nothing in the quality assurance  
6 program of Applicants that is alleged to have been violated.  
7 So there is no violation of criterion 2 that has been  
8 explicitly alleged. All we have is some pointing out that  
9 there is some general language in Appendix B that says that  
10 we should take care to assure there's good quality in a  
11 nuclear plant. Nobody is contesting that. The question is:  
12 Is there a requirement for some specific characteristic of  
13 a quality assurance program that we are alleged to not be  
14 meeting? I haven't heard that at all.

15 JUDGE BECHHOEFER: If we read "program" to  
16 include implementation, consider his comments. Because I'm  
17 not positive -- I haven't decided yet whether  
18 implementation was excluded. I'm not sure that it was.  
19 Assume that it is included for the moment.

20 Would it then -- would these allegations fall  
21 under criterion 2?

22 MR. GUTTERMAN: I don't think so, Mr. Chairman.  
23 There's just no allegation that I have heard that alleges  
24 any violation of the quality assurance program requirements  
25 or any allegation that the quality assurance does indeed

1 violate Appendix B. If we violate 2, then the quality  
2 assurance program either fails to address something that  
3 should have been addressed or there was a violation of the  
4 quality assurance program. I haven't heard any allegation  
5 of either of those.

6 JUDGE BECHHOEFER: The allegation, I guess, is  
7 that the program will not be implemented in accordance with  
8 criterion 2. That doesn't mean that the paper program  
9 doesn't meet the Appendix B, but the allegation, as I  
10 understand it, is the way it is going to be implemented  
11 will not comply with criterion 2. That is what I heard  
12 from Mr. Sinkin just now. And that's a little bit  
13 different.

14 MR. GUTTERMAN: I agree with the chairman, it is  
15 different. And what you just heard is what I heard, too.  
16 It's the allegation about the Applicant's character,  
17 whether they will comply with the quality assurance program.  
18 It's not an allegation about the quality assurance program  
19 itself. And my thesis is that the Board judged the  
20 Applicant's character and whether it could be reasonably  
21 expected to comply with the applicable NRC requirements,  
22 including the requirements of Appendix B, in reaching the  
23 judgment on Issues A and B.

24 JUDGE BECHHOEFER: If we should disagree with  
25 you and determine that implementation was or is included in

1 Issue F, is that, the allegation we have just heard or  
2 assertion we have just heard, a violation or potential  
3 violation of criterion 2?

4 MR. GUTTERMAN: There's a big "if" there,  
5 Mr. Chairman. I don't believe that what I have heard  
6 alleges a violation of criterion 2, no matter how you look  
7 at it, how you parse it, how you turn it upside down or  
8 whatever. There's just nothing there that says that  
9 there's a violation of criterion 2. And the reason for  
10 that is simple. Criterion 2 requires a written program.  
11 And it describes some of the characteristics for the  
12 written program. For there to be a violation of criterion  
13 2, one of two things has to happen. Either you have a  
14 written program that is inadequate because it doesn't meet  
15 criterion 2 or you didn't satisfy your written program.

16 JUDGE BECHHOEFER: Isn't that what is being  
17 alleged?

18 MR. GUTTERMAN: No, Mr. Chairman. That's my  
19 point.

20 JUDGE BECHHOEFER: That it won't be. The  
21 evidence now shows it won't be. That's what I am hearing.

22 MR. GUTTERMAN: To the only extent that is  
23 alleged, it's not pointing at any requirement of the  
24 quality assurance program and saying that in particular is  
25 not going to be followed. It's making a general allegation

1 that these Applicants lack the character to comply with the  
2 applicable requirements. And that, Mr. Chairman, is  
3 exactly what the Board considered in deciding on Issues A  
4 and B.

5 JUDGE BECHHOEFER: I asked you to assume that we  
6 could include implementation in Issue F.

7 MR. GUTTERMAN: Mr. Chairman, what is being  
8 alleged here is not some specific intent to evade some  
9 quality assurance requirement. All I hear alleged is a  
10 general allegation that the Applicants lack the character  
11 and competence, or lack the character to carry out the  
12 requirements applicable to the operation of the plant. In  
13 particular, he says, "the applicable requirements under  
14 Appendix B," but there is no attempt to separate out  
15 Appendix B, and say it is Appendix B in particular they  
16 won't comply with. In fact, there's no allegation there  
17 that in the actions he says are indicative of character  
18 propensity not to comply, that there was any violation of  
19 Appendix B there. There is no allegation that these events  
20 are related to hiring or firing of people for drug use, or  
21 drug abuse had anything to do with Appendix B or a  
22 violation of Appendix B. Appendix B just simply doesn't  
23 enter into it at all and the attempt to connect this  
24 anonymous phone call with Issue F is strained, extremely  
25 strained.



1                   JUDGE BECHHOEFER: Does Appendix B contemplate  
2 that where particular circumstances are shown, the QA  
3 program of one Applicant might have to differ somewhat from  
4 the standardized QA program that is spelled out in various  
5 guidance documents?

6                   MR. GUTTERMAN: Mr. Chairman, that question is  
7 so general that it's hard to say no to it.

8                   Certainly, every plant would have to have a  
9 quality assurance program that is adequate for the  
10 circumstances of that plant. So, certainly I would expect  
11 there would be differences from one to another. There are  
12 different organizations involved in one plant or another;  
13 there are different sites involved. There might be the  
14 possibility of flooding at one site that doesn't exist at  
15 another, so that the quality assurance program of one site  
16 might have specific requirements to address that wouldn't  
17 exist at another. Certainly there are differences.

18                   JUDGE BECHHOEFER: What about if drug use were  
19 shown to exist in one site but is not necessarily assumed  
20 to exist generically? What about that?

21                   MR. GUTTERMAN: Well, Mr. Chairman, I guess I  
22 have two things to say to that. First of all, there's  
23 certainly no basis for saying there's some special problem  
24 in Texas that doesn't exist nationally. In fact, Mr.  
25 Sinkin just cited to us a national journal that talks about

1 drug use in the country. But aside from that, the kind of  
2 problem you are talking about here, drug use, is something  
3 that is not addressed by Appendix B.

4 JUDGE BECHHOEFER: That's what we are trying to  
5 decide.

6 MR. GUTTERMAN: In trying to decide that, I  
7 don't think it's helpful to start off with the hypothesis  
8 that there is a requirement to address drug use. Appendix  
9 B doesn't talk about that. It is hard for me to start off  
10 with a hypothesis that you have a drug use problem that is  
11 found to be of quality concern and then say I don't have to  
12 address it.

13 My point is, Mr. Chairman, the way Appendix B is  
14 structured attempts to assure quality through a certain  
15 series of ways of looking at the question of quality. It  
16 does not attempt to get at it through control of drug use.  
17 There are requirements for training and for planning the  
18 work, for writing written procedures, for writing  
19 engineering specifications and drawings, and it has  
20 requirements for checking for imposition of engineering  
21 requirements on people you procure things from and for  
22 inspecting, for auditing. But it does not say anything  
23 about control of drug use or control of numerous other  
24 things that affect the performance of people in their work.

25 JUDGE BECHHOEFER: Mr. Reis or Sinkin, do you

1 have any further comments? I think after we get done with  
2 this Issue F, we'll probably want to break for lunch and  
3 then come back and talk about the rulemaking later, even  
4 though it affects Issue F as well as the other issues.

5 MR. REIS: Mr. Chairman, when I look at the  
6 gravamen of what is alleged with this drug problem, we are  
7 talking about character, plain and simple character, and  
8 character was what was litigated already in this proceeding.  
9 It was not to be included in Issue F.

10 Whether we talk about it in terms of  
11 implementation or reliability for implementation or how we  
12 parse or mix up the words, character is something that has  
13 passed by in this proceeding.

14 If we are moving to reopen, that's one thing.  
15 If we are moving for new contentions, that's another thing.  
16 But it is not -- it is what we have already passed. The  
17 whole focus of this matter is on character.

18 When we talk about implementation and we get  
19 bound up on whether there be implementation and whether the  
20 Midland decision talked about implementation, in the  
21 context of this proceeding, any of that stuff should have  
22 come in before when we were discussing character. And this  
23 is an attempt to enter by the back door and bring in by the  
24 back door what was shoved out the front door in going to  
25 character again. And it is character.

1           If you look at the matters, he talks about  
2 preferential treatment and so forth -- that is character.  
3 And that is what was heard before, not what is to be heard  
4 now.

5           If we have some motions to reopen, if we have  
6 some motions for new contentions, that's something else  
7 again. We will face those at that time. But whether it is  
8 what is talked about in Issue F, no. The whole thought it  
9 the proceeding in the past was to deal with character and  
10 that is the gravamen of this complaint. It says "lacks the  
11 character to properly implement such program."

12           Well, the program is there and that's what the  
13 issue itself talks about, the program. And it is admitted  
14 the program is there. But the character part is what we  
15 litigated already. And it is quite clear.

16           JUDGE BECHHOEFER: If we were to determine  
17 otherwise, do you believe that drug use is properly  
18 considered under criterion 2? Implementation -- under the  
19 implementation?

20           MR. REIS: The Commission in the past has not  
21 required that the drug -- that a drug program, to my  
22 knowledge, be under criterion 2.

23           As far as implementation of it, if it affects  
24 the work, I don't think so. I don't think the Commission  
25 has looked at it that way, though I am not positive. As

1 far as I know, criterion 2 has not involved implementation  
2 of the drug program and we are not talking here of general  
3 implementation of a drug program. We are talking about  
4 character to implement a drug program and character is what  
5 we were talking about before, and is not involved in this  
6 issue.

7 Let me say further, that I am upset that we are  
8 spending this much time and this depth of discussion on  
9 anonymous telephone calls that say -- and I think they say,  
10 and I don't know what the anonymous telephone calls really  
11 said and I don't know if the one who dialed the number and  
12 mailed the call had direct knowledge, or whether he heard  
13 it from somebody who heard it in a bar somewhere --

14 JUDGE BECHHOEFER: That comes later in the day.

15 MR. REIS: Okay, it comes -- no. I think that's  
16 the primary question and is the question that comes first.

17 What are we dealing with here? Are we dealing  
18 with scuttlebutt and gutter talk or are we dealing with  
19 real things?

20 As far as I can tell, there is nothing here to  
21 say that we are dealing with something real at all.

22 JUDGE BECHHOEFER: We are going to get to this,  
23 but we think we have to discuss this under --

24 MR. REIS: The only thing, when I look at number  
25 5 in the answer to the interrogatories, which is really the

1 heart of what perhaps we get to in Issue F, there's nothing  
2 wrong with personnel being terminated. There's nothing  
3 wrong that they turned up things. It's only that there may  
4 have been a discriminatory termination of people in some  
5 group rather than another group, and we haven't even gotten  
6 to hear whether one group could have been treated different  
7 than another group, because was one group doing real work?  
8 Was one group employed by a different employer who might  
9 have had regulations that prohibited use of drugs off the  
10 job and another group didn't yet, but will put them, in  
11 effect, beforehand? We don't know.

12 JUDGE BECHHOEFER: Isn't that the merits, though?

13 MR. REIS: We don't know anything.

14 JUDGE BECHHOEFER: Isn't that the merits, though?

15 MR. REIS: It goes to the basis of the  
16 contention. And we are talking about dragging in something  
17 very late. And we have to have some basis. And when we  
18 talk about late-filed contentions, certainly the Commission  
19 and the Appeal Boards have emphasized again and again that  
20 you certainly have to spell out the basis of your evidence.  
21 You don't necessarily need basis to put a contention in  
22 earlier.

23 But when you are bringing in something at the  
24 end of a proceeding or mid-proceeding, you certainly have  
25 to show your basis of your evidence, and that isn't shown

1 here.

2 JUDGE BECHHOEFER: Well, that we are going to  
3 get to after lunch, actually; whether it is or isn't. But  
4 until we know where it falls, I'm not sure -- we don't know  
5 what sort of basis has to be shown. If it falls under an  
6 existing contention, you may need a little less than if you  
7 view it as a new contention.

8 MR. REIS: Well, I --

9 JUDGE BECHHOEFER: I guess that's the order we  
10 were discussing things in. Although they all sort of  
11 overlap.

12 MR. REIS: Certainly I think it has been made  
13 clear that contentions should not be strained to expand  
14 things and bring things into contentions that may already  
15 exist in a proceeding.

16 But let me go back to my original point and just  
17 conclude with that.

18 Certainly what we tried before was character.  
19 What was talked about here is character. And certainly  
20 every -- at least for the Staff, we thought the character  
21 issues were completed in this proceeding.

22 JUDGE BECHHOEFER: Mr. Sinkin? I guess you can  
23 respond.

24 MR. SINKIN: It seems that what the Applicants  
25 are arguing -- it's, if you look at their quality assurance

1 program, that it would not be a violation of their quality  
2 assurance program to treat in a discriminatory manner the  
3 operations group, if the operations group were found to be  
4 engaged in the sale and/or use of illegal drugs that  
5 there's nothing in their quality assurance program that  
6 would prevent that. Perhaps, then, we have taken an  
7 incorrect position that their quality assurance program is  
8 adequate. We assumed that their quality assurance program  
9 commits them to the implementation of Appendix B, that it  
10 does fall under criteria 2. It also falls under criteria  
11 16 -- "prompt correction of conditions adverse to quality"  
12 -- that anything that did not meet the requirements of  
13 quality at this project would be a violation of their  
14 quality assurance program and that they would treat it as  
15 such.

16 If it is their position that these kind of  
17 matters are not matters they will treat as falling within  
18 their quality assurance program, then perhaps their quality  
19 assurance program is deficient.

20 We think, in actual fact, that their quality  
21 assurance program commits them to implement Appendix B,  
22 that the violation we are pointing to in this incident is a  
23 violation of Appendix B, and that it is all an unnecessary  
24 debate around a point that should be moot.

25 Also, the Applicants want to characterize



1 Appendix B has somehow set in concrete, when it was written  
2 as to what it would cover. Appendix B is very much a  
3 policy document. It very much says to the Applicants: You  
4 will control all conditions which might affect quality. We  
5 are not giving you a list of every condition that might  
6 affect quality and saying these are every ones that might  
7 control. We are saying, as a matter of policy you are  
8 committing to affect all conditions that might affect  
9 quality and we contend that the use and sale, even, of  
10 illegal drugs by personnel at this project involved in  
11 quality-related activity is something that must be  
12 controlled by their commitment to be a licensee of the NRC.

13 JUDGE BECHHOEFER: You are saying, then, in a  
14 situation where there is some indication -- assume for a  
15 moment that there is some indication of drug use, that in  
16 those situations an Applicant or licensee must include in  
17 its QA program provisions for dealing with that, on an ad  
18 hoc basis, for when those situations are shown to exist.

19 MR. SINKIN: Well, I would think that that might  
20 be saying that the Applicants have to be too specific. In  
21 a sense you have to say, if it's recognized as a condition  
22 adverse to quality, the quality assurance program has to  
23 deal with it.

24 I don't think the Applicants would debate --  
25 maybe they would, but I don't think they would debate that

1 having the operations group involved in the use of illegal  
2 drugs is not a condition adverse to quality, and that they  
3 would want our quality assurance program to address that  
4 condition and address it. It might be useful if they had  
5 specifically in their quality assurance program something  
6 about the use or sale of illegal drugs.

7 See, again, too, we are dealing with criminal  
8 activity. I don't think the quality assurance program has  
9 to go through and specify statute by statute which criminal  
10 activities will not be permitted by people engaged in  
11 quality work. I think they say people engaged in quality  
12 work will not engage in criminal activities. Period.

13 JUDGE BECHHOEFER: Is that part of the QA  
14 program, or perhaps another obligation of an Applicant,  
15 taken care of under some other rule or regulation?

16 MR. SINKIN: Well, our contention is, under  
17 criteria 2 and criteria 16, these are conditions adverse to  
18 quality that should be controlled. If there are other  
19 obligations that the Applicants are under as well as those,  
20 then those are violated, but we were aiming specifically at  
21 the quality assurance issue.

22 The only other point I wanted to make is that  
23 perhaps we would have been better if in answer to  
24 interrogatory 4 we would have simply said: Yes.

25 "Are there any other facts or reasons we contend

1 support a claim that HL&P QA program will not meet  
2 requirements?" We could have answered that yes. Question  
3 5 indicates if the answer to 4 is yes, then we specify what  
4 the allegation is as to why they will not meet the  
5 requirements of Appendix B.

6 The argument made by Mr. Reis is essentially --  
7 JUDGE BECHHOEFER: So your answer 4 was purely  
8 limited to the program as it appears on paper?

9 MR. SINKIN: Answer 4 is not limited to the  
10 paper program. It talks about the implementation of the  
11 program.

12 JUDGE BECHHOEFER: Wait a minute. I may not  
13 have the right numbers here.

14 MR. SINKIN: It says, "to properly implement  
15 said program." Answer 4.

16 You are referring back to the earlier answer  
17 where answer 1 is limited to the paper program.

18 JUDGE BECHHOEFER: Yes. I'm sorry.

19 MR. SINKIN: Yes. Answer 1 is limited to the  
20 paper program; the program itself as written, we did not  
21 perceive as being in violation of Appendix B.

22 What we are talking about is how they are going  
23 to implement the program and I think the chair has clearly  
24 called that out as the crux of the issue. If you include  
25 implementation and that the Board must have a reasonable

1 assurance that the QA program will be implemented, that's  
2 got to be part of Issue F, and it doesn't matter if they  
3 have a paper program if they don't implement it. That was  
4 a ruling a long time ago in the NRC case law.

5 JUDGE BECHHOEFER: But if we go the other way,  
6 the way the original parties suggested, saying Issue F only  
7 includes paper programs, you don't find any problem with  
8 that, then?

9 MR. SINKIN: After hearing the argument today,  
10 we may have a problem with that. If the Applicant's  
11 argument is really, in fact, that their quality assurance  
12 program for operations would not affect in any way the  
13 event that we have described and would not apply to that  
14 event, then we may have a problem with their program. We  
15 assumed that their program would cover such an event and  
16 this was a violation that had been covered up.

17 We did want to make one final point in response  
18 to Mr. Reis' argument. If you take Mr. Reis' argument on  
19 its face, he's saying that you can only hear implementation  
20 problems if they don't rise to a character level under  
21 Issue F.

22 Well, I think that turns the world on its head a  
23 little bit, because obviously if they rise to a character  
24 level, they are even more serious than if they didn't.

25 Issue F does not set out specifically the issue

1 of character. It doesn't have the word "character" in it.  
2 It's a statutory requirement, first of all. It's in the  
3 Atomic Energy Act. It must always be there.

4 If the facts as developed under Issue F  
5 regarding the treatment of the operations group call into  
6 question the character of the Applicants, the Board cannot  
7 evade that issue and not look at it simply because it  
8 doesn't arise under Issue F. I think the Board would have  
9 an obligation to look at it anyway. But it is not  
10 essential for the development of the discovery that we are  
11 asking for, that the Board view this issue as a character  
12 issue solely. We think it is a violation of Appendix B, we  
13 think it is a quality issue, that it's a safety related  
14 issue and it needs to be heard in this proceeding under  
15 Issue F. And if you want to reserve the matter of whether  
16 it rises to the level of character or not to some later  
17 point in the proceeding, that's fine. We can do that and  
18 still go forward with the issue under Issue F.

19 We think it goes hand in glove, and that in a  
20 sense Mr. Reis is correct.

21 If you look at the allegation and assume for a  
22 moment it can be proven, then you have character problems  
23 that you just can't avoid.

24 JUDGE BECHHOEFER: But right now you are calling  
25 it mostly likelihood of improper implementation?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MR. SINKIN: Improper implementation of the quality assurance program, likely -- that's the deficiency.

JUDGE BECHHOEFER: I guess we ought to break for lunch. Does anyone else have any further comments on this particular matter? We'll come back to the rulemaking later. If not, why don't we break until about 2:00.

(Whereupon, at 12:45 p.m., the conference was recessed, to reconvene at 2:00 p.m., this same day.)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

AFTERNOON SESSION (2:00 p.m.)

JUDGE BECHHOEFER: Back on the record. We would like to get, next, to the rulemaking point that the Applicant raised. I have distributed a couple of decisions which might have an impact on that.

My question is, first, in the rulemaking that is referred to, was there any indication from the Commission that adjudication -- there should be no adjudication of drug issues pending that rulemaking? Did they say anything to that effect?

MR. GUTTERMAN: Mr. Chairman, as I recall it, no, there was no discussion of whether the subjects could be considered in adjudication or not. Although I would argue that the implication of the proposal for rulemaking is that there is no NRC requirement applicable to drug control. So the implication of that negative -- that negative implication would go to adjudication, too, since there are no NRC standards applicable that an adjudicatory board would get compliance with.

JUDGE BECHHOEFER: Would not, just in terms of generally authorizing operation, would not there have been an opportunity, if an issue were raised, or would there not be an opportunity to raise an issue, whether a reasonable assurance finding could be made in view of alleged or proven drug use of personnel involved in the project?

1       Could that not be raised as an issue?

2                   MR. GUTTERMAN: Perhaps the best way to answer  
3 your question, just to make sure there's a common  
4 understanding of what it is we are contending in our motion  
5 for protective order, there were really two parts to our  
6 argument.

7                   JUDGE BECHHOEFER: You have reiterated it in  
8 your motion for summary disposition but I don't view any  
9 real difference. Maybe there is, but I haven't perceived  
10 any.

11                   MR. GUTTERMAN: We certainly didn't intend any  
12 difference. There were two parts to the argument that were  
13 made in both places.

14                   The first part is, looking to the fact that the  
15 Commission is conducting rulemakings, as an indication of  
16 the Commission's interpretation of its existing rules, the  
17 fact that the Commission feels the necessity for conducting  
18 a rulemaking on fitness for duty and for including control  
19 of access -- including in the proposed rules for access  
20 authorization a specific requirement about drug users, the  
21 fact that the Commission has proposed both of those implies  
22 very strongly, indicates, that the Commission does not  
23 consider that its existing rules establish such standards.  
24 And certainly that would indicate that there is no such  
25 standard, in the Commission's view, in Appendix B.



1           And, secondly, to the extent that CCANP is  
2 seeking to litigate the need for drug control program or  
3 terms that should be included in Applicant's current  
4 programs for controlling drug use on the site, the fact  
5 that the Commission has a rulemaking under way, in my view,  
6 suggests very strongly, and under the Douglas Point line of  
7 cases, indicates that a Licensing Board should not itself  
8 undertake to judge whether the Applicants for a license  
9 should have such a program. The Commission's regulations  
10 do not currently require such a program and the Commission,  
11 in fact, in this case, is considering on the one hand,  
12 whether it should adopt a rule; and on the other hand,  
13 whether it should perhaps deliberately stay its hand and  
14 not adopt the rule because it may be wiser to leave this  
15 matter to the industry as a matter of self-regulation.

16           In fact, the industry has a set of guidelines  
17 established by the Edison Electric Institute which are  
18 currently being implemented by HL&P and other utilities  
19 around the country, and the Commission is actively  
20 considering whether it ought just leave matters that way  
21 and allow the industry to develop its own set of standards.

22           JUDGE BECHHOEFER: Assuming that were the case,  
23 would you claim that a Licensing Board could not litigate,  
24 as part of its -- assuming all the contention requirements  
25 were met -- are you saying that we couldn't litigate

1 whether a program that involved discriminatory treatment or  
2 alleged discriminatory treatment to different groups of  
3 personnel was adequate? Does that mean we have to accept  
4 any program that industry comes up with, without inquiring  
5 into it? As part of our general reasonable assurance  
6 requirements which the Commission makes, but if we have a  
7 contention we have to make?

8 MR. GUTTERMAN: You sort of mixed a couple of  
9 different questions there. Let me see if I can at least  
10 explain how I sorted them out.

11 As far as the question whether a particular  
12 program as a program is adequate, yes, I think the fact  
13 that the Commission is conducting a generic rulemaking on  
14 whether there ought to be program, a requirement for such a  
15 program and, if so, what the requirements for such a  
16 program should be -- the fact that the Commission has that  
17 under consideration, yes, that excludes licensing boards  
18 from considering the same issue. The Commission is dealing  
19 with that on a generic basis and is not leaving it for  
20 licensing boards to determine on a case-by-case basis.

21 Now, you asked the separate question about well,  
22 how about discriminatory application of that program? Well,  
23 I would first say --

24 JUDGE BECHHOEFER: That is what has been alleged.

25 MR. GUTTERMAN: I understand there's something

1 like that alleged, although I really have trouble  
2 understanding what the allegation is.

3 JUDGE BECHHOEFER: We'll get to that later. But  
4 assuming that's alleged --

5 MR. GUTTERMAN: First of all, for a Licensing  
6 Board to question -- to entertain a question about whether  
7 a program is being properly implemented requires a  
8 Licensing Board first to have in view some standard against  
9 which to judge that program. That standard doesn't exist  
10 now.

11 Of course, I keep hearing this word  
12 "discriminatory," and that's a term one usually hears in an  
13 EEO context. It's not something that comes up --

14 JUDGE BECHHOEFER: "Preferential," I guess, has  
15 been used. That might be proper.

16 MR. GUTTERMAN: I don't think the word  
17 "preferential" really cures it. The real question I would  
18 think a licensing board would consider is whether there are  
19 people being permitted to work on safety-related activities  
20 who, because of some rule the Commission has adopted, ought  
21 not be permitted to do that work. I don't think the rule  
22 exists. I don't think the allegation -- I'm sure it will  
23 be instantly amended to allege this, but so far as I've  
24 heard it to this point, there has been no allegation that  
25 there is anybody doing any work that they are not qualified

1 to do or that people have been doing work that they were  
2 not capable of doing because of something they had ingested  
3 in one way or another.

4 JUDGE BECHHOEFER: Are you saying, for instance,  
5 that if we had allegations that -- at an operating plant  
6 the people in control in the control room routinely used  
7 drugs and the Applicant wasn't aware -- licensee wasn't  
8 doing anything about it at all; they could care less  
9 because there was no specific prohibition -- are you saying  
10 that a licensing board that had that issue would have to  
11 ignore it? This is a specific allegation for a specific  
12 plant, for instance.

13 Could a licensing board make a reasonable  
14 assurance finding if they assumed that were proved?

15 MR. GUTTERMAN: There's a grand leap from the  
16 kinds of things that have been alleged to that, and I'm not  
17 sure I can answer that question with the crispness I'd like  
18 to because deep down inside I'm sure there is some way the  
19 NRC will come up with a basis for keeping the situation you  
20 postulate from occurring.

21 The NRC has not done that with Appendix B. And  
22 the proposed rulemakings that the Commission has under  
23 consideration are two ways in which the Commission is  
24 considering addressing that problem.

25 You recognize the Commission hasn't adopted a

1 rule that prohibits people from drinking alcohol on the job  
2 either. Every licensee controls that. I'm sure every  
3 licensee, as I know HL&P does, has a rule that prohibits  
4 people from being under the influence of alcohol on the job,  
5 or on company property. But I don't know of any Commission  
6 regulation that seeks to control that, and certainly  
7 there's nothing in Appendix B that mentions that.

8 JUDGE BECHHOEFER: Are you saying that if an  
9 intervenor in a case found that people were routinely  
10 overindulging in alcohol and were on the job, in that  
11 situation, they couldn't raise a contention about it?

12 MR. GUTTERMAN: I think what you really are  
13 postulating is somebody contending that people are not  
14 capable of doing their jobs. Whatever the reason. And,  
15 yes, a licensing board can undertake that kind of inquiry  
16 in a proper case.

17 I don't think we have an allegation like that  
18 here. I'm sure we'll hear one shortly.

19 JUDGE BECHHOEFER: Should we not read the -- I'm  
20 just taking it from the response to your discovery,  
21 actually, aren't they saying that management personnel are  
22 allowing certain people to use drugs? To remain on the job?

23 MR. GUTTERMAN: I should point out one thing  
24 that's not in the allegation so far. That is, there's no  
25 allegation that people have been under the influence of

1 drugs on the job or have taken drugs while they were on the  
2 job. There is no allegation of that at all.

3 I suspect there's no allegation of that because  
4 there would be no basis for such allegation, although that  
5 hasn't always stopped allegations in the past.

6 There's a leap here that is going on between the  
7 allegation that people have used drugs and the assumption  
8 that it affects their work performance. And there is no  
9 basis for making that leap that I know of.

10 JUDGE BECHHOEFER: But in talking about the  
11 rulemaking, though, to get back to that, are you saying  
12 that we, even if there were such an allegation, we couldn't  
13 consider it?

14 MR. GUTTERMAN: What I'm saying is for the Board  
15 to consider any allegation there has to be a standard that  
16 they are testing the licensee's performance against. The  
17 whole basis for having the hearing is to determine whether  
18 this Applicant meets the Commission's requirements. There  
19 is no Commission requirement specifically directed to  
20 control of drug use at this point.

21 JUDGE BECHHOEFER: So you are saying if we had  
22 an allegation of extensive drug use, and assuming there is  
23 some basis to it, that we couldn't even look at it,  
24 determining whether the plant should be licensed for  
25 operation? Assuming a proper contention and all that.

1 MR. GUTTERMAN: If you'd just give me a second,  
2 Mr. Chairman?

3 JUDGE BECHHOEFER: Okay.

4 MR. GUTTERMAN: If the contention was that  
5 people weren't doing their jobs properly, there was some  
6 misperformance; yes, a licensing board can and should  
7 undertake a proper contention of that sort, assuming it  
8 meets the other requirements for getting a contention into  
9 controversy. But a contention purely that people who use  
10 drugs are employed at this site -- no, there's no standard  
11 applicable there. If the Board determined that they did or  
12 didn't, there would be no basis for judging whether the  
13 utility had behaved properly.

14 JUDGE BECHHOEFER: How about an allegation,  
15 which is very close to what we may or may not have, but  
16 that people, officials of the company are tolerating some  
17 individuals who are to be engaged in safety-related  
18 activities, using drugs? It may or may not be today, but  
19 people who are to be -- current management, who are the  
20 same people that will be controlling operational management,  
21 are tolerating drug use today. Can we use that as a  
22 predictive of what they will do?

23 MR. GUTTERMAN: I don't think changing the  
24 question that way really changes the answer, Mr. Chairman.  
25 The question still has to come back to: Is there an

1 allegation of failure to comply with the Commission's  
2 requirements; and whether it is action of management or of  
3 somebody lower down, the question still has to be: Is the  
4 allegation that they are not complying with the  
5 Commission's requirements? They are not going to comply  
6 with the Commission's requirements?

7 In a situation where there is no Commission  
8 requirement there is no issue. There may be some  
9 allegation of some other characteristic of their  
10 performance that somebody thinks is improper. If it  
11 doesn't go to Commission requirements, it is not a matter  
12 for an NRC Licensing Board to consider.

13 JUDGE BECHHOEFER: Is that true, even though the  
14 conduct may have a significant impact on safety? I'm not  
15 including everything. I'm assuming the particular conduct  
16 has to have some relationship to safety.

17 MR. GUTTERMAN: In my experience, the Commission  
18 regulations generally go to all aspects of protecting the  
19 safety of the public from the hazards of nuclear power. So,  
20 it is hard for me to postulate a circumstance where there  
21 is no Commission regulation.

22 JUDGE BECHHOEFER: Well, talk about drug use.  
23 Let's talk about that because that's what we have.

24 MR. GUTTERMAN: Talk about drug use. That's the  
25 best example and keeps us from being too hypothetical about



1 it, and that's the example right there.

2 The Commission requirements that are applicable  
3 to employee performance do exist. The requirements in  
4 Appendix B for training and qualification, for checking  
5 people, people's performance, for auditing their  
6 performance. Those are the existing Commission  
7 requirements.

8 There is no requirement specifically directed to  
9 drug use. I mentioned this morning there are a lot of  
10 other things the Commission's regulations do not  
11 specifically address. They do not address alcohol  
12 consumption. They do not address the health of individuals.  
13 You know, somebody's mental health can affect their  
14 performance. Or their physical health; somebody can have a  
15 brain tumor; there are a lot of things that can happen to  
16 an individual that affect their performance. And the way  
17 in which those kinds of things are addressed by management  
18 of a particular utility vary from case to case. The  
19 Commission hasn't addressed specifically how a particular  
20 utility should deal with it.

21 Some -- one utility might have very detailed  
22 physical examinations and another utility might rely more  
23 heavily on observation by supervisors. The way the  
24 Commission gets at that is to require that there be the  
25 checking and auditing functions of Appendix B.

1           It is when the employee doesn't perform their  
2 job properly that the Commission's regulations step in and  
3 draw the line. To prevent that from happening, various  
4 utilities undertake different kinds of programs.

5           In the case of drugs, the Applicants in this  
6 case have a very stringent program for preventing -- there  
7 has been a long-term program for preventing anybody being  
8 under the influence of drugs, possessing drugs, using drugs,  
9 selling drugs on the site.

10           More recently they have gone to the extent of  
11 prohibiting anybody whoever uses drugs from being involved  
12 on the project.

13           JUDGE BECHHOEFER: My question did not assume  
14 whether the program was good, bad, or indifferent. What if  
15 there were no program at all and you had extensive  
16 allegations of drug use, could an intervenor not raise the  
17 question then?

18           MR. GUTTERMAN: That's right. Because the  
19 Commission doesn't require such a program. There is no  
20 requirement for such a program and an allegation of that  
21 sort does not allege a violation of any Commission  
22 requirement.

23           JUDGE SHON: Mr. Gutterman, I would like to take  
24 another look at the notion that the rulemaking on the part  
25 of the Commission is a bar to us examining any aspect of

1 the quality of the program in a particular plant from the  
2 following standpoint: If the Commission has already  
3 started such a rulemaking and then has suspended that  
4 rulemaking, as it has here, for the specific purpose of  
5 finding out what develops, is it not even more important  
6 then for individual programs and programs devised by the  
7 industry itself to be scrutinized in just such tribunals as  
8 this to see what is developing and whether it is  
9 satisfactory, measured against the standard of adequate  
10 protection of the health and safety of the public? That is  
11 one of the things the Commission is going to find out. How  
12 often does this matter come up and how often is it decided  
13 against an Applicant, or in favor?

14 If they are waiting to find out what happens.

15 MR. GUTTERMAN: Judge Shon, I agree with you to  
16 a limited extent. I agree that, if the Commission steps  
17 back to see what happens, it has to have some mechanism for  
18 finding out what happens. That is certainly clear. But I  
19 don't agree that that mechanism is in an adjudicatory board,  
20 because the role of an adjudicatory board is to test  
21 compliance with existing requirements.

22 The way in which the Commission determines the  
23 success or failure of its stepping back and seeing how the  
24 industry goes about addressing the problems of fitness for  
25 duty and those related problems is through its inspection

1 arm. It inspects the performance of every licensee and it  
2 gets feedback in that way to see how the licensees are  
3 performing.

4 It cannot use an adjudicatory board to do that  
5 because the premise of every adjudication is measuring  
6 performance against a legal standard. There is no legal  
7 standard to be measured against here. I think the  
8 situation you are positing is more of a legislative inquiry,  
9 a legislative board rather than an adjudication. It's in a  
10 legislative hearing that a board inquires into something  
11 and makes a factual inquiry. An adjudication measures  
12 against a legal standard.

13 JUDGE BECHHOEFER: I was going to ask him if I&E  
14 also didn't have to measure against -- I don't know that  
15 that was added to yours --

16 JUDGE SHON: I was going to ask him --

17 JUDGE BECHHOEFER: Okay. You ask him that.

18 JUDGE SHON: Does not the inspector function  
19 also have to measure against a standard? They always seem  
20 to, and they at least always give lip service to the notion  
21 that they are doing exactly that.

22 And the second thing is, could not we  
23 investigate or could not we hear allegations that, perhaps,  
24 a developing industry standard was not being met?  
25 Supposing an intervenor came in and said: Well, now the

1 industry has this standard that they are circulating for  
2 use and these people don't come anywhere near meeting that?

3 MR. GUTTERMAN: Let me address the last one  
4 first, since it is closest in our mind.

5 I don't believe that's the case. I don't think  
6 a hearing board could conduct a hearing on compliance with  
7 an industry standard. If the hearing board could do that,  
8 that would be the hearing board standard and NRC standard.

9 Once the agency starts enforcing that standard,  
10 it is no longer a voluntary industry standard, it's an  
11 agency requirement. But I believe that's exactly what the  
12 Commission is not permitting to go on now, what the  
13 Commission has decided to refrain from doing.

14 As far as the inspection and enforcement arm,  
15 there is a limit as far as enforcement, that the agency's  
16 enforcement arm cannot take enforcement unless there's a  
17 violation of a Commission requirement. I don't believe it  
18 is the same limit as far as inspection.

19 The inspectors go out there and observe what is  
20 going on, and certainly there's a relationship when the  
21 Commission tries to judge whether the voluntary industry  
22 programs are being successful. Implicit in that is the  
23 underlying question of whether performance in each plant is  
24 meeting Commission requirements, and do exist.

25 What I am saying is, in the absence of a

1 requirement of the Commission that there be some  
2 restriction about drug users, the Commission may find that  
3 regardless of what utility programs there are, there is  
4 compliance with the Commission's requirements on the  
5 performance of employees, and may find that controlling  
6 drugs is not necessary because in its experience,  
7 performance on the job is adequately controlled through  
8 other mechanisms such as the supervisors who watch and see  
9 whether their employees are performing properly on the job.  
10 Just as an example.

11 JUDGE SHON: If, indeed, simple compliance with  
12 existing standards and no examination of anything where an  
13 existing standard does not pertain is the rule and the law,  
14 why do we continually see required findings of the nature  
15 of: No undue hazard to public health and safety and in  
16 compliance with the Commission's regulations? If they are  
17 both exactly the same thing. I've seen it often enough.

18 MR. GUTTERMAN: Let me think about that for a  
19 second.

20 (Discussion off the record.)

21 JUDGE SHON: For example, in section 50.57(a),  
22 number 2 says: "The facility will operate in conformancy  
23 with the application as amended and the provisions of the  
24 Act and the rules and regulations of the Commission."

25 And number 3 says: "There is reasonable

1 assurance, 1, that the activities authorized by the  
2 authorizing license can be conducted without endangering  
3 the health and safety of the public; and, 2, such  
4 activities will be conducted in compliance with the  
5 regulations of this chapter."

6 Now, if the regulations of this chapter are all  
7 that is required for health and safety, why did they put  
8 them in separately? These are things that are required for  
9 the issuance of an operating license. If they are all the  
10 same thing, it seems -- that seems an odd way to read that  
11 regulation.

12 What I'm suggesting is that it may be that we  
13 should listen to people who tell us that someone is not  
14 producing an adequate drug program, from one aspect or  
15 another, discriminatory or whatever it may be -- someone is  
16 not carrying out an adequate drug program which, although  
17 the Commission has no specific regulation concerning this,  
18 is a threat to the health and safety of the public, so that  
19 we could find that it is in conformity with the regulations  
20 but not that it didn't present any undue hazard to the  
21 health and safety of the public. And we have to find both  
22 separately, according to 50.57.

23 MR. GUTTERMAN: First of all, section 3  
24 contrasts compliance with the regulations in this chapter --  
25 I shouldn't say "contrasts" -- it talks about regulations

1 in this chapter. There are other chapters, too, I believe,  
2 that apply.

3 JUDGE SHON: Sure.

4 MR. GUTTERMAN: But aside from that, if you take  
5 the interpretation you are suggesting, Judge Shon, I think  
6 what you end up with is no restrictions at all on the Board's  
7 jurisdiction or authority. It's almost as if all the Board  
8 had to go on was the Atomic Energy Act itself, and that it  
9 can inquire into anything at all that was alleged to affect  
10 the health and safety of the public.

11 For example, appendix K, I guess it is,  
12 establishes certain requirements applicable to emergency  
13 core-cooling.

14 Under the interpretation that you are positing,  
15 any licensing board would be free to go ahead and consider  
16 whether more stringent standards ought to be imposed.

17 JUDGE SHON: Oh, no. I think there's a good  
18 deal -- case law and everything else, that says you can't  
19 necessarily require more stringent standards than a  
20 specific regulation requires. But where there is no  
21 regulation and there are no standards required -- I don't  
22 think that's the same at all.

23 MR. GUTTERMAN: Of course in the situation we  
24 have here, Judge Shon, what we have is the Commission  
25 specifically considering whether there ought to be such



1 standards. What I'm trying to argue to you is that here we  
2 have a case of the Commission specifically considering  
3 whether there ought to be a standard. And if the Board  
4 were to consider it in adjudication, whether this  
5 particular licensee has a program that's adequate, the  
6 Board would be allocating to itself the same consideration  
7 the Commission is now undertaking generically.

8 JUDGE SHON: Hardly. It's simply that where the  
9 Commission says maybe we should establish a standard, and  
10 then says: Oh, no, let's back off and see what happens;  
11 one of the things that might happen is that the  
12 adjudicatory process would function in the absence of the  
13 standard. And make just this kind of decision in the  
14 absence of a standard.

15 MR. GUTTERMAN: If that were the case, Judge  
16 Shon, what you would have is the NRC establishing its  
17 standards and requirements, case by case in a case law  
18 method. That is not the legal system, that is not the  
19 legal system that Congress has established and the Nuclear  
20 Regulatory Commission has established for controlling the  
21 nuclear industry.

22 JUDGE SHON: I think we perhaps should not  
23 pursue this an awful lot further. I know an awful lot of  
24 things were established on a case-by-case standard before  
25 the Commission got around to making rules. I'm sure that

1 will happen in the future, too.

2 MR. GUTTERMAN: The only point I'm trying to  
3 make, Judge Shon, is that we have a case here where the  
4 Commission has specifically decided not to establish a rule,  
5 to defer establishing a rule for a time to see what the  
6 industry does. And if licensing boards were to step into  
7 the breach and start establishing rules, then the industry  
8 would not be establishing the rule; it would be the agency,  
9 through its licensing board arm, establishing the rules.

10 The Douglas Point line of cases that we cite in  
11 our motion for protective order is specifically addressed  
12 to just that point, and that whole line of cases is  
13 designed particularly to keep the rulemaking of the agency  
14 in the arm of the Commission, in the hands of the  
15 Commission and not delegate it to the adjudicatory boards.

16 JUDGE SHON: The portion of Rancho Seco that  
17 cited Douglas Point that you cited, that was my case.

18 JUDGE BECHHOEFER: I was going to ask you, does  
19 anything in Rancho Seco support what you are arguing that  
20 it stands for? Rancho Seco, to me, was an attempt by an  
21 intervenor to litigate a question under the terms of the  
22 proposed rule, and I distinguish that in a couple of  
23 rulings I passed out in Midland, which I passed copies of  
24 to each of the parties. These are published decisions,  
25 particularly discussions in LBP82-118 -- I could call that

1 a learned point, but that would not be exactly appropriate.  
2 I did have something to do with those decisions.

3 In that decision we were essentially backed by a  
4 Staff position which was saying, you could adjudicate even  
5 under -- when something was in rulemaking you could  
6 adjudicate whatever the old standards, existing standards  
7 were. Whatever those might be. Do you disagree with that?

8 MR. GUTTERMAN: No, Mr. Chairman. I think those  
9 cases, the Midland decisions you were citing, really don't  
10 apply to the situations we have here.

11 In those cases what the Board was talking about  
12 was adjudicating compliance with an existing NRC  
13 requirement, either an interim rule or whatever. And what  
14 distinguishes it from the Rancho Seco case was there the  
15 rule was only proposed. It was not adopted for interim use.

16 In our case, there is no rule being used now.  
17 The Commission is considering the adoption of a rule, and  
18 there is no rule actually in place against which the  
19 Applicant's performance can be measured.

20 JUDGE BECHHOEFER: Then we get back to -- isn't  
21 the current rule the ad hoc resolution of problems as they  
22 arise, in the absence of a general requirement for a  
23 program effort?

24 MR. GUTTERMAN: I don't believe so, Mr. Chairman.  
25 I think there's a clear set of Commission requirements and

1 control of drug use is not one of them, and I don't believe  
2 there is any authority for having an ad hoc establishment  
3 of requirements. I think the Board's task is to measure  
4 this licensee's performance against the established  
5 requirements.

6 JUDGE BECHHOEFER: Mr. Gutterman, do you have  
7 anything further to state about the rulemaking? If not,  
8 we'll go on to Mr. Reis, I'd like to hear the Staff's  
9 position on rulemaking.

10 MR. GUTTERMAN: I'd be happy to hear the Staff's  
11 position, too.

12 JUDGE BECHHOEFER: In the decision I passed  
13 around, we were essentially adopting the Staff position  
14 there.

15 MR. REIS: I don't know if you were adopting the  
16 Staff's position, but let me say that the Applicant's  
17 position is not the Staff's position.

18 From the point of view of whether the  
19 rulemakings that have gone forward and the hiatus in  
20 rulemaking shows that the Commission does not believe drug  
21 control is under Appendix B, I agree with the Applicant as  
22 far as that goes.

23 As far as saying whether Douglas Point is  
24 controlling here, I don't really believe so. In Douglas  
25 Point you had a situation, really, where the Appeal Board's

1 law was: Hold up where it appears that what you are doing  
2 is going to be of no effect because the Commission is going  
3 to generically set a standard. And Douglas Point, that was  
4 essentially the situation; it was shortly to be a  
5 Commission ruling. I don't think we have that situation  
6 here with the action the Commission has taken here.

7 I believe that at least in one other case -- and  
8 I am not familiar with it and couldn't check it over  
9 lunchtime -- the issue of drug use was litigated, and I  
10 believe in Shearon Harris.

11 This does not mean that there should be or needs  
12 to be a program. A program is a particular Commission  
13 requirement and without that, there couldn't be. But if,  
14 for instance, it was alleged -- let's say it was alleged  
15 that, or it was shown that a bunch of operators in the  
16 control room were there having a little party, be it on  
17 alcohol or a controlled substance. There is no question  
18 that there would be an undue hazard and that the Commission  
19 could take action at that point.

20 Well, there are some interstitial areas -- not  
21 all interstitial areas, it has to be substantial, where the  
22 boards can look and fill in, and they have in the past  
23 filled in certain areas and required more.

24 I think, one, though, they were reversed by the  
25 Commission eventually, was the ECCS rule, where they filled

1 in some material on the ECCS rule and then the Commission  
2 said: No, we don't want to go that far. But there wasn't  
3 a question of the Board's jurisdiction; it was a question  
4 of what the safety significance of that was, and the  
5 inerting, in that case, rather than ECCS, it was inerting  
6 that it was thinking of.

7 This does not mean that I am saying that the  
8 drug issue as it is alleged here comes in under Issue F, or  
9 under Issue C. I will get to that at the appropriate time.  
10 But I wanted to make our position clear on particularly  
11 whether it was a Douglas Point situation. It doesn't  
12 appear to be so.

13 JUDGE BECHHOEFER: Does the Staff believe that,  
14 if we were, say, to have a properly framed contention with  
15 a proper basis involving preferential treatment of people  
16 who use drugs, would the Staff say that we were not barred  
17 by the, at least the rulemaking, from considering that?

18 MR. REIS: I would have to see more of the  
19 wording of it to know. It's very hard to give a definitive  
20 answer.

21 Generally speaking, just because I said I would  
22 have to see the wording of it indicates that there may be  
23 some areas that could come in and would be amenable, should  
24 it be possible to file a late-filed contention on this  
25 subject at this time, and meet all the standards of good

1 cause and timeliness and adequate basis, and showing that  
2 you have some real evidence to go forward and all those  
3 things which would have to be met first: Yes, it might be  
4 possible in some way or other to frame something.

5 JUDGE BECHHOEFER: Do you have anything further?

6 MR. REIS: I don't have anything further to say.

7 MR. SINKIN: Mr. Chairman, our position as laid  
8 out in the pleadings is that the entire issue is a red  
9 herring and that it's not an issue at all. We are not  
10 talking about the adequacy of the Applicant's drug  
11 detection program. We are not talking about whether this,  
12 the Applicants meet industry standards in the program they  
13 have designed for the detection and prevention of drug use  
14 on this project.

15 The allegation says there is -- there are  
16 programs in effect for detecting and preventing drug use at  
17 this project; that those programs operated at least  
18 effectively enough to identify certain people who were  
19 involved in the sale and/or use of illegal drugs; and that  
20 once that information was gathered by the program, that the  
21 information was used in a preferential manner. And that is  
22 the issue: How the information gathered by the program was  
23 used by the Applicants.

24 It is not an issue as to the adequacy or  
25 inadequacy of the program itself. Even if the Commission

1 were doing a comprehensive rulemaking on what a drug  
2 program should be, I don't think that would foreclose  
3 litigation of an existing drug program being applied in a  
4 preferential manner. So we think the whole issue raised by  
5 the Applicants of the rulemaking for closing this issue is  
6 simply a red herring. We don't think that we are asking  
7 this Board to establish any rules as to what should be part  
8 or not part of a drug program, detection or prevention  
9 program at a nuclear site. We don't think we are  
10 developing standards through case law litigation rather  
11 than rulemaking, and we think that's a perfectly legitimate  
12 way -- it has happened numerous times before -- but we  
13 don't even think that's what's going on here.

14 I guess our essential response to this whole  
15 thing is that we think the argument is being led astray by  
16 the argument that it's relative to a rulemaking, and that  
17 is not relevant in any way to whether this should be  
18 litigated at any time in this proceeding.

19 JUDGE SHON: Mr. Sinkin, you say you are really  
20 not interested in the effect of the program or anything  
21 like that or the nature of the program or the standards to  
22 be applied in applying the program. And yet doesn't it  
23 seem that, at least by implication, you are suggesting that  
24 one standard to which a drug enforcement program of this  
25 sort should conform is that it should be uniformly and



1 evenhandedly applied to the operations group as well as to  
2 everybody else?

3 MR. SINKIN: Yes.

4 JUDGE SHON: That this should be maybe written  
5 in it somewhere?

6 MR. SINKIN: That is our assumption: that it  
7 should be evenhandedly applied; yes.

8 JUDGE SHON: Well, I say that that appears to me  
9 to be at least a standard of sorts that the program should  
10 conform to.

11 MR. SINKIN: I would agree with you that it is a  
12 standard of sorts. I can't imagine, as I think we said in  
13 our pleadings, that any rulemaking by the Commission is  
14 involved in deciding when Applicants should discriminate as  
15 to those found using or abusing controlled substances on  
16 their projects to give Applicants rules as to which  
17 employees get preferential treatment. I don't think  
18 there's anything in the NRC rules addressing that.

19 JUDGE SHON: I think the proposed rule is to  
20 whom it does apply: to people who have controlled access  
21 to certain areas. It doesn't apply to everybody else;  
22 isn't that true?

23 MR. SINKIN: You are talking about the rule on  
24 access?

25 JUDGE SHON: Yes. Which was folded right in

1 with fitness for duty. I mean the two go hand in hand.

2 MR. SINKIN: I don't think, since we are talking  
3 about the operations group, that the problem of access is  
4 really a problem.

5 JUDGE SHON: Yes. That's true.

6 JUDGE BECHHOEFER: Mr. Gutterman, do you have  
7 any response before we go on to the next section?

8 MR. GUTTERMAN: I just want to point out that  
9 what divides our case from the case Mr. Reis was addressing  
10 is that here the Commission is considering whether or not  
11 there ought to be a rule not, as in the containment  
12 inerting case, what the exact requirements should be.  
13 Actually, I believe that case was a case of interpreting  
14 requirements rather than really whether there should be an  
15 additional one. I thought the Commission disagreed with  
16 the interpretation applied by the Appeal Board.

17 As far as what's going on in Shearon Harris, as  
18 I understand it, the contention that the Licensing Board  
19 considered there was an allegation that construction work  
20 was performed improperly because some employees were under  
21 the influence of drugs. So the allegation was not about a  
22 program for controlling the use of drugs or the application  
23 of that program, it was about the adequacy of construction  
24 work. So I don't think that was a -- the same kind of  
25 contention we are dealing with here.

1           Other than that, I think I have said before  
2 everything I wanted to say covering the main points I  
3 wanted to make.

4           MR. SINKIN: I don't think that's quite accurate  
5 on Shearon Harris. The information we have is that the  
6 Atomic Safety and Licensing Board began hearings about the  
7 first of October on allegations of widespread drug use  
8 among workers at Carolina Power & Light, and that the  
9 allegations are both that the amount of drug use at Shearon  
10 Harris has been understated by CP&L, and that such drug use  
11 may have resulted in improper construction.

12           So, the information being gathered about drug  
13 use apparently is also being challenged at Shearon Harris.

14           I mean, the fact that this Shearon Harris Board  
15 is going straight into investigating drug use at the  
16 project and its possible implications for construction, I  
17 think is a direct parallel to going into drug use and  
18 looking for the implications in its operation.

19           JUDGE BECHHOEFER: Mr. Reis?

20           MR. REIS: That isn't the allegation here,  
21 though. It's an allegation of preferential treatment and  
22 it's a long, long chain we are talking about here. If it  
23 was an evaluation of people in the control room using  
24 controlled substances, or even antihistamines that made  
25 them asleep at the switch, it would be another matter. But

1 here the chain is very long. It's that some were not fired  
2 because they might have implicated those in the control  
3 room. It is very tenuous.

4 JUDGE SHON: But, Mr. Reis, it's not very far  
5 from the other matter that Mr. Sinkin said Shearon Harris'  
6 Board was looking at; that is, the understatement of the  
7 amount of drug usage. That is something that implies a  
8 deceptive action on the part of the company that's  
9 reporting this. That's what he's alleging.

10 MR. REIS: I don't know enough about it to  
11 comment on it, Judge Shon. It depends on what the  
12 understatement was.

13 JUDGE BECHHOEFER: We don't either.

14 MR. REIS: If it was an understatement in a  
15 report to the NRC, then definitely it was a matter of a  
16 misrepresentation to the NRC. If it was an understatement  
17 of the public relations officer getting up and saying  
18 something to a newspaper, that's another matter.

19 MR. GUTTERMAN: Judge Shon, I would just like to  
20 invite the Board to inquire, in the Licensing Board panel's  
21 own records what the licensing board at Shearon Harris is  
22 looking into.

23 JUDGE BECHHOEFER: We haven't done that. I'm  
24 sure we can find out quickly.

25 Shall we go on to C?

1 I think we want to get into whether the  
2 allegations that we have now would fit into Issue C, the  
3 portion of Issue C which we have left as an issue.

4 I guess the Applicant will lead off on that.

5 MR. AXELRAD: I'm sorry, Mr. Chairman. I didn't  
6 hear the beginning of what you said with respect to which  
7 aspect of Issue C we are looking at. We are looking at the  
8 question --

9 JUDGE BECHHOEFER: Whether it fits into whatever  
10 portion of Issue C is left for resolution.

11 MR. AXELRAD: I would like to make sure what  
12 framework we are looking at. So far, no one has claimed  
13 that. This is a board raised, sua sponte question?

14 JUDGE BECHHOEFER: We consider the issue has  
15 been raised by Mr. Sinkin, by CCANC.

16 MR. AXELRAD: But he is not. He's raising Issue  
17 F.

18 JUDGE BECHHOEFER: At this moment we are trying  
19 to see whether it fits under an existing contention.

20 If he -- assuming he misinterpreted Appendix B  
21 and it came under F, we are trying to see if it fits under  
22 C, and perhaps save sometime. At least his final response  
23 on contention C, we haven't discussed exactly what his  
24 rights to respond on contention C are. We are sort of  
25 under the impression that he is not precluded from putting

1 something in under C. And we wanted to be able to discuss  
2 it today. That's why we raised the question. We thought  
3 it might fit under C, which is -- a portion of which is  
4 still open.

5 MR. AXELRAD: Fine. Well, let me put the  
6 Applicant's position before you, then.

7 I believe it is important, just as we viewed  
8 Issue F, in context of all the issues admitted by this  
9 Board a number of years ago, to look at all of the issues  
10 in context, and clearly at that time it was contemplated  
11 that all the issues would be heard together and there was a  
12 very specific framework of issues established.

13 Issue A, in essence, dealt with past actions of  
14 HL&P, and whether those past actions would indicate that  
15 HL&P did not have the necessary managerial competence or  
16 character to be granted licenses to operate the STP.

17 The next logical step was Issue B, which asked  
18 whether HL&P had taken sufficient remedial steps to provide  
19 assurance that it now has the competence and character to  
20 operate STP safely. And between Issue A and Issue B, we  
21 essentially had past actions of the Applicant and whether  
22 or not he has taken adequate remedial actions and whether  
23 or not, taking those two things collectively, he had the  
24 managerial competence and character to operate safely.

25 Issue C, then, added something very limited to

1 Issue B. Issue C, then, sought to focus on the plant  
2 operation for the South Texas project. It added to the  
3 Issues A and B the questions dealing with the organization  
4 for the South Texas project, and in the course of the  
5 proceeding that was interpreted by the Board and by the  
6 parties to refer to organization and staffing for  
7 operations. And the Staff's testimony and the Applicant's  
8 testimony all dealt, under Issue C, with respect to the  
9 organization and staffing for operation, and the Board,  
10 when it issued its partial initial decision, discussed  
11 organization and staffing with respect to Issue C. Not  
12 past activity, not remedial activities, it dealt with  
13 organization and staffing.

14           And then, when the Board, in its partial initial  
15 decision, indicated why it was reserving, stated: Well,  
16 we've looked at organization and staffing but we've looked  
17 at it in 1982, years before the plant is going to go into  
18 operation, and therefore sometime later on in this  
19 proceeding, by the time we get closer to operation, we will  
20 get an update with respect to organization and staffing.  
21 And that is all that the reservation dealt with. It dealt  
22 with the organization and staffing for operation of the  
23 South Texas project, and the affidavits that we have filed  
24 and that the Staff has filed deals with the organization  
25 and staffing for operations. It does not deal in any

1 fashion with respect to drug use questions or anything of  
2 that kind; nor does it need to do that, because that is not  
3 the subject of the reservation by the Board at that time.

4 JUDGE BECHHOEFER: Do you need a specific  
5 reference to drug use? There is an allegation that  
6 staffing for operations tolerates drug use -- does not that  
7 affect their qualifications to operate the plant?

8 MR. AXELRAD: Mr. Chairman, that is not the  
9 allegation the Intervenors have raised. The Intervenor  
10 specifically in the response to interrogatories, indicated  
11 his view that because of actions taken by the company as a  
12 result of drug investigations last year, that the company  
13 does not have the character to operate the plant.

14 It is exactly the kind of question we have been  
15 talking about before. He is raising a character question.  
16 The Board did not, under Issue C, by asking us and the  
17 Staff to update information with respect to organization  
18 and staffing, indicate that it was going to reopen and  
19 reconsider under Issue C any action or any activity which  
20 anybody wanted to raise which somehow dealt with the  
21 character of the company.

22 JUDGE LAMB: How do you view the word  
23 "commitment"?

24 MR. AXELRAD: Those are the ultimate conclusions.  
25 What I have tried to explain, Mr. Chairman, we have words



1 of that kind in each of these contentions, but there's a  
2 step, by step progression and the Board cannot conceivably  
3 have intended by asking for further information with  
4 respect to organization and staffing -- what it meant to  
5 look at was every aspect of what constitutes the type of  
6 thing you look at in determining the character in the  
7 company and its commitment to safe operation.

8 If that was the point intended, it didn't close  
9 out anything in the partial initial decision. It did not  
10 decide Issue A, it did not decide Issue B, it did not  
11 decide Issue C. Because if there were any further  
12 questions that came up with respect to the Applicant's  
13 activities in the intervening years, and those could have  
14 come up under Issue A, and under a reopening of Issue A if  
15 that was sought, then that could automatically, under the  
16 question you just raised, be brought up under the word  
17 "commitment" in Issue C.

18 The only thing that was reserved was  
19 organization and staffing. I can point you to the exact  
20 words in the partial initial decision as to what you asked  
21 people to update.

22 JUDGE BECHHOEFER: Clearly, to me, organization  
23 and staffing relates to the commitment issue. The only way  
24 we are interested in an organization and staffing is to  
25 show incompetence and incommitment.

1           MR. AXELRAD: You will take into account the  
2 organization and staffing with respect to your ultimate  
3 decision about the ability to operate the plant safely, but  
4 you are not going to take another look at everything else  
5 that came in under Issue A or B. You did not indicate at  
6 the time you issued your initial partial decision that by  
7 the time we came to your decision that we would reexamine  
8 everything in A, B, C, D and E, because that somehow deals  
9 with the Applicant's ability to safely operate the South  
10 Texas project. You did not issue a meaningless decision in  
11 phase 1.

12           JUDGE BECHHOEFER: Suppose I tell you that at  
13 least I don't consider the alleged drug allegations as  
14 falling under A or B. And even as subject to consideration  
15 under A or B.

16           MR. AXELRAD: If it doesn't come under A and B,  
17 it sure as hell doesn't come under contention C. If it's a  
18 new contention Intervenor has to raise, then he's got to  
19 raise it. But Issue C, and the reserved portion of the  
20 Issue C, dealt with organization and staffing. How can you  
21 look any other way at the words of your own decision?

22           JUDGE BECHHOEFER: Aren't you getting a  
23 challenge to the qualifications of some of the Staff?

24           MR. AXELRAD: I don't believe so. I don't  
25 believe so. It's a character question that he raised.

1 JUDGE BECHHOEFER: Don't -- aren't there some  
2 character requirements for the staffing?

3 MR. AXELRAD: Character of management, character  
4 of the individuals who decided to allegedly give  
5 preferential treatment to operational personnel. That's  
6 what he's raising, character of the company, not the  
7 character of the operator in the control room.

8 JUDGE BECHHOEFER: How about the character of  
9 the managerial personnel who are taking allegedly  
10 preferential actions?

11 MR. AXELRAD: That's the character of the  
12 company -- the character of the people within the company  
13 who have the ability to make decisions. That's what --  
14 when we talked about the managerial competence of character,  
15 under Issue A and Issue C -- Issue B, we weren't talking  
16 about just the individual at the top of the totem pole.  
17 Obviously, we are talking about people in management  
18 positions.

19 JUDGE BECHHOEFER: The way I viewed this  
20 continued issues is on A and B, basically with occurrences  
21 under construction and how that affected the character, and  
22 then C dealt with operation.

23 MR. AXELRAD: I'm sorry, Mr. Chairman, could you  
24 repeat that?

25 JUDGE BECHHOEFER: C, and to some extent F,

1 dealt with operation. And A and B are construction  
2 deficiencies and how they were or were not remedied, as the  
3 case may be. We found in terms of the matters that we were  
4 examining under A, there wasn't a character problem; save  
5 the Quadrex. But that would make A and B rather different  
6 from C, and would give a little meaning to C.

7 MR. AXELRAD: Mr. Chairman, let me say one thing.  
8 I don't think that a company has two different characters,  
9 one to construct and one to operate. Okay? The company  
10 has management and individuals, and the individuals have a  
11 character and a commitment to satisfy NRC requirements.

12 I'm not sure to what extent you would parse  
13 Issue A so as to have it refer only to construction  
14 deficiencies. It says: "Without regard to remedial steps  
15 taken by HL&P, with the record of HL&P compliance with  
16 Commission requirements" -- et cetera -- that could  
17 reasonably be read: compliance with requirements in effect  
18 up to the time the Board has to reach its decisions,  
19 whether they dealt with the steps that the company was  
20 taking at that time as the Board has put it, construction,  
21 or with respect to these alleged activities that came up  
22 during the construction phase that dealt with the alleged  
23 preferential treatment of operating personnel.

24 I think it's a close question whether Issue A  
25 can be read that way or whether Issue A should be read more

1 narrowly to talk about those particular construction  
2 deficiencies.

3           But Issue C adds nothing to Issue A or B, A and  
4 B, other than the planned organization for operation of the  
5 South Texas project. It does not raise a new or different  
6 kind of character question. And, if the intervenors are  
7 not going to seek to reopen Issue A, or perhaps more  
8 pertinently because Issue B -- because their argument, as I  
9 understand from their answers, is that we violated  
10 criterion 16 of Appendix B by failure to take proper  
11 corrective action when we found out about the problem, that  
12 sounds to me like an Issue B problem, we didn't take  
13 sufficient remedial steps. However, if they are not  
14 seeking to reopen Issue A or B, then what they are going to  
15 have to do, and I think they are already too late to do  
16 that, is to file for a new contention.

17           But, whatever it is that their remedy is, it  
18 does not rise under Appendix C, because that talks about  
19 the planned organization and staffing. That's all that the  
20 Board heard under Issue C, in phase 1, and no one alleged  
21 anything else was next. The Board made a decision with  
22 respect to Issue C, and left a very narrow window open for  
23 reopening, and what Mr. Sinkin is now opening does not come  
24 within that narrow window. And of course he never alleged  
25 it does either. He's on the mistaken basis that he's

1 talking about an Appendix B requirement and he belongs  
2 under Issue F. It's the Board that is giving him an  
3 opportunity to change his argument in midstream.

4 JUDGE SHON: Mr. Axelrad, of course, I wasn't on  
5 this particular Board when the decision at issue was  
6 written. But I note that in the opinion on Issue C, the  
7 Board said, and I'll read it, the last paragraph, in the  
8 section on Issue C:

9 "For these reasons and those more fully set  
10 forth in our findings, we conclude that there is now  
11 reasonable assurance that HL&P will have the competence and  
12 character as well as the requisite commitment to safety to  
13 operate STPs safely. This conclusion is based solely on  
14 information currently of record and will be subject to any  
15 updated information added to the record in phase 3."

16 That's rather broad, as far as "any updated  
17 information."

18 MR. AXELRAD: No, no, but look two paragraphs  
19 above that. Two paragraphs above it it says, "The NRC  
20 Staff, in its review of HL&P plants for operation, has  
21 concluded that HL&P's plant management and operating  
22 organizations meet the requirements of the applicable NRC  
23 rulings and regulations. Although this was preliminary in  
24 nature, we find no reason at this time to disagree. We  
25 anticipate, however, that at a time closer to operation,

1 the Applicants will update information bearing upon the  
2 organization and personnel nor operation and the Staff will  
3 review the updated information. At the time we considered  
4 Issue F, phase 3, we expect the Applicants and Staff will  
5 supplement directly with such updated information."

6 The Board stated that for phase 3, we will  
7 update the information bearing upon organization and  
8 personnel and that's exactly what we have done and that's  
9 exactly what has been left, is the organization and  
10 personnel question.

11 There is another place in this decision where  
12 the Board also refers to its expected updating. I could  
13 find for you the other place where the Board has referred  
14 to what is left open.

15 MR. REIS: In order that the record may be  
16 complete at this place, at this point I suggest that you  
17 look at finding 246, also.

18 (Discussion off the record.)

19 MR. AXELRAD: At page 668 of the procedure, the  
20 Board specifically says -- at the conclusion of part one of  
21 its decision, on page 668 of the printed copy, in the last  
22 sentence it says: "We also expect that during the  
23 consideration of Issue F, QA operation in phase 33, the  
24 Staff will update as appropriate the testimony dealing with  
25 Issue C, dealing with HL&P's organization for operation."

1 That is exactly what the Board was talking about in Issue C,  
2 and that is what has to be updated, the operation for  
3 organization. That's exactly what has to be dealt with.  
4 There was nothing else -- don't misunderstand me, Mr. Shon.  
5 I'm not suggesting that if problems came up between then  
6 and now the Intervenor doesn't have the opportunity to  
7 raise that as a new question, whether it dealt with new  
8 issues, which means he has to reopen -- he has the ability  
9 to file those documents and it will be ruled on by the  
10 Board as appropriate. All we are saying is what he has  
11 raised does not come within Issue F, and it does not come  
12 within the organization and staffing matters which we are  
13 left with in Issue C. What he wants to do is clearly a  
14 reopening on the character question or something else.  
15 It's not what is before the Board right now.

16 (Discussion off the record.)

17 JUDGE BECHHOEFER: I guess at this stage -- have  
18 the Applicants finished on this issue?

19 MR. AXELRAD: Yes, your Honor.

20 JUDGE BECHHOEFER: Let's hear what Mr. Reis has  
21 to say?

22 MR. REIS: Mr. Chairman, I certainly had  
23 interpreted the Board's decision as Mr. Axelrad had.  
24 Particularly when I look at Issue C, and I look at it, it  
25 says "in light of," and gives two things: one is the



1 planned organization for operation and that is organization  
2 for operation that we are talking about; and two is alleged  
3 deficiencies in HL&P's management.

4 Well, that one refers back of its own terms to A  
5 and B and deals with character. So we are only dealing  
6 with organization for management. And the organization for  
7 management is the organization for management talked about,  
8 both in the printed opinion in 19 NRC at several places at  
9 the -- on page 668, where they talk about what you talked  
10 about as being expected for phase 3 -- updating for phase 3,  
11 which is, again, QA for operation, organization for  
12 operation, and in that sense, if you look at page 698,  
13 Mr. Axelrad pointed to that, particularly there, I think  
14 that's the strongest place where it says that what it's  
15 looking for is organization and personnel, not what we have  
16 been talking about, of what is going on at this time in  
17 organizing the plant, but the paper organization, the  
18 charts.

19 That is what was looked at to be brought in at  
20 this time. The FSAR, and the fact that you could lean on  
21 the -- rather -- I misspoke -- the SER, the Staff's SER,  
22 and that that material would be in at this stage and that  
23 you could work on that.

24 Further, in finding 246, it also essentially  
25 says the same thing that the two other citations I gave did.

1 That begins on 786 and goes over to page 788.

2 In essence, I don't want to take a lot of time  
3 repeating, but it is clear throughout the opinion what we  
4 were talking about in issue -- the updating of Issue C, was  
5 the updating closer to operation of the material that would  
6 be in the SER, as to the organization for operation of the  
7 plant.

8 JUDGE SHON: Mr. Reis, I haven't had a lot of  
9 time to go over the material that has been submitted in the  
10 update, but I notice that the Applicants submittal, at  
11 least, included a good deal of material on individuals,  
12 that is, background and things of that sort, about the crew.  
13 Education, experience and things like that, all of which  
14 are important to this point. But, suppose each and everyone  
15 of them had a stamp on the bottom of his biography that  
16 said: "Excluded from drug testing program." Would that be  
17 an important point, too? Would that be included, if he  
18 were excluded from it? This is somebody we are never going  
19 to look at.

20 MR. REIS: You know, I have not had an  
21 opportunity to consult with my technical staff on that  
22 question. But no doubt we do look at the education and the  
23 qualifications of these people who will have key positions  
24 for the licensing of the plant. And if it did come to our  
25 attention that somebody was unreliable for whatever cause,

1 yes, it would be hard to say. I don't have the ANSI  
2 standard before me, and this is the answer see standard for  
3 these key people in the plant -- I don't have it right  
4 before me -- but if they aren't thought to be reliable  
5 people, I can't sit here and say: No, there's nothing  
6 wrong with that. We are going to go ahead and license a  
7 plant. All I can say is, what you are saying, though, I  
8 want to make very clear, is a hypothetical and not the  
9 allegations that we have in connection with Issue F, and  
10 it's not what we have in this situation.

11 JUDGE SHON: It's rather close to what the  
12 allegation to which the Intervenor has brought for this, as  
13 I see it: that these people, regardless of what their  
14 behavior may be, are being shielded from the effects of a  
15 drug testing program. Is this not essentially what --

16 MR. REIS: No.

17 JUDGE SHON: Mr. Sinkin, isn't that essentially  
18 what you are driving at?

19 MR. SINKIN: Yes.

20 JUDGE SHON: While the allegation -- I'm not  
21 making any suggestion about its truth or lack thereof, but,  
22 in effect, Mr. Sinkin alleges that these people are not  
23 being examined according to the usual standard drug testing  
24 program that the company itself feels is necessary.

25 MR. REIS: No. That is not so. It is not shown

1 that these are people that are the ones -- where we have  
2 the organizational chart fleshed out, there is no  
3 indication that they are. That would be in the  
4 organization chart that is fleshed out.

5 JUDGE SHON: That's a question. The term  
6 "operations group," was used. The Applicant has pointed  
7 out several times there is no such thing as an operations  
8 group. There is, of course, that detail, just who the  
9 people are of whom the Intervenor is alleging is shielded  
10 from the consequences of drug use. That is obscure, I must  
11 admit, and would have to be clarified.

12 MR. REIS: In the SER we do pass upon the  
13 qualifications of certain key positions. It is considered  
14 in the SER. We do look at that.

15 What we see here, we can't -- I don't see the  
16 allegations here -- even what's in the answer to the  
17 interrogatories here -- that goes to that and shows they  
18 don't meet those qualifications of the ANSI standards,  
19 which are essentially what we evaluate against in our SER.

20 JUDGE BECHHOEFER: I guess it's your turn.

21 MR. SINKIN: Thank you. First of all, in  
22 relation to --

23 JUDGE BECHHOEFER: First, do you even claim that  
24 what you allege does fall under what we have asked be  
25 updated under Issue C?

1 MR. SINKIN: First of all, I was perfectly  
2 comfortable with it being under Issue F.

3 JUDGE BECHHOEFER: Assume for the moment that we  
4 would not accept it under F, take that as a given from my  
5 question --

6 MR. SINKIN: As a possibility. Right.

7 I think given the wording of Issue C, that it  
8 does deal with the organization and staffing for operations  
9 and whether there is a reasonable assurance that HL&P will  
10 have the competence and commitment to safely operate the STP,  
11 I think certainly the allegation I provided sounds in Issue  
12 C, particularly on the issue of their commitment to safely  
13 operate the STP. If what we are talking about is  
14 protecting the operations group from the consequences of  
15 drug sale and/or use, then that does not demonstrate the  
16 kind of commitment to safely operate STP that we would  
17 expect to find in an Applicant for an operating license.

18 I think it's taking a slightly different view of  
19 the allegation and it does fit there as well as it fits in  
20 Issue F. It is looking at a different facet, looking at it  
21 from a different perspective, and it could easily go into  
22 Issue C.

23 I do want to clarify one thing raised by Judge  
24 Shon. The phrase used by the caller was "operations group."  
25 There is something called a nuclear plant operations

1 department. I don't think operations department,  
2 operations group are that much different. I assume that  
3 there was -- that that is who the caller had in mind,  
4 particularly given the nature of the allegation.

5 I noticed in the opinion that was quoted, the  
6 Board actually spoke to Issue C, and included competence,  
7 character and commitment in the opinion.

8 I think the difference between character and  
9 commitment is commitment is one aspect of character. So I  
10 think it is called out in Issue C, in the commitment to  
11 safely operate.

12 JUDGE BECHHOEFER: That portion of our  
13 discussion -- would you character that reference to  
14 character only insofar as item 2, with the potential to  
15 discuss the character questions?

16 MR. SINKIN: I'm not clear on your question.

17 JUDGE BECHHOEFER: Well, we have two types of  
18 "in light ofs." The second incorporated peculiarities in  
19 Issues A and B. So, referring to character in our  
20 conclusions, would that not have been related to the second  
21 item, Issue C --

22 MR. SINKIN: You are referring to the alleged  
23 deficiencies as the second item? Is that what you mean by  
24 "the second item"?

25 JUDGE BECHHOEFER: Yes. Which essentially

1 incorporates the A and B matters by reference.

2 MR. SINKIN: Quite possibly the character  
3 element in the opinion emerged from item 2. However, the  
4 overall reasonable assurance deals with competence and  
5 commitment to safely operate, and that's based on both  
6 items.

7 All I'm saying is that I think the term  
8 "commitment is not all that much different from character,  
9 and that if you wanted to include -- issue two -- I mean,  
10 Issue C gives you the opportunity, I think, to include not  
11 only the allegation but all character aspects of the  
12 allegation that come out. It's perhaps more comprehensive  
13 than Issue F.

14 Over and over again both the Applicants and  
15 Staff have said that the updating was on organization and  
16 staffing. Well, essentially we are updating, too, on  
17 staffing. We are updating on the management attitude  
18 towards the staff of the operations group; and that is,  
19 that they are a protected group who does not face the same  
20 disciplinary reaction as other groups when found to be in  
21 violation of project programs.

22 JUDGE BECHHOEFER: That's Judge Shon's  
23 hypothetical. I say that was Judge Shon's hypothetical.

24 MR. SINKIN: Right.

25 I don't think we are looking -- it seemed to me

1 that Mr. Reis was saying we are looking only at the paper  
2 organization, and I don't think we were looking only at the  
3 paper organization. We were looking at the qualifications  
4 of the personnel who were involved, or to be involved in  
5 operations. And the wording of Issue C, the -- those are  
6 aspects of the competence and commitment issue which is in  
7 Issue C.

8 So, on the whole we find the allegation does fit  
9 into Issue C, and perhaps better in the sense of Issue C  
10 being more comprehensive than Issue F, including commitment;  
11 but we would still argue that F deals with whether you are  
12 going to adequately implement the quality program, and you  
13 are not going to unless you have the commitment. There's  
14 case law about quality assurance has the term "commitment."  
15 Do the Applicants have the commitment to implement it?  
16 That's the issue.

17 All I'm saying is Issue C is a little more  
18 explicit than Issue F, as including commitment in there,  
19 but I don't see Issue F not including commitment just  
20 because the word isn't there.

21 (Discussion off the record.)

22 JUDGE BECHHOEFER: Does anybody have anything  
23 further that falls into C. Then after we finish that, I  
24 think we'll take a short break after that. Why don't you  
25 -- let's finish on Issue C.



1                   MR. AXELRAD: Fine. Just a couple of points.  
2                   One is I want to make sure that there was not any  
3                   misunderstanding as to the argument I was making with  
4                   respect to Issue C. I'm not suggesting that the words  
5                   "competence" and "commitment" in Issue C don't include  
6                   within them as what has been talked about as character.  
7                   Issue C took all the information from A and B, and said  
8                   when you look at all that information plus HL&P's planned  
9                   organization for operation of the South Texas project, do  
10                  you still find whether or not they have the compensation,  
11                  commitment, character to operate the plant safely? Issue C  
12                  was very, very broad. What I was saying was with the  
13                  narrow issue that was left to be updated, did not deal with  
14                  past deficiencies, only with the prospective planned  
15                  organization for operation.

16                  Mr. Sinkin has clearly raised a question not  
17                  with respect to the future organization and staffing. He  
18                  has raised a question with respect to the character of the  
19                  Applicant based upon his actions in 1985, his alleged  
20                  preferential treatment of people.

21                  He has not raised, explicitly said he was not  
22                  talking about the adequacy of the drug detection program,  
23                  whether it meets the standards. He is not arguing at all  
24                  with the fact that we now have a program in effect which  
25                  tests every individual, including all operations staff,

1 both upon hiring as a base line with respect to past  
2 employees that there will be random testing of all  
3 employees including operation group personnel, that the  
4 program is fully adequate.

5 What he is raising is only an allegation based  
6 upon a past action. And that's what I say the reserved  
7 issue under Issue C does not include.

8 JUDGE BECHHOEFER: Let's take a 15-minute break.  
9 When we come back we have a number of questions to ask,  
10 Mr. Sinkin particularly, about what he is actually alleging.

11 (Recess.)

12 JUDGE BECHHOEFER: Back on the record. At this  
13 point the Board would like to find out in a little more  
14 detail, if we can find out in more detail, what exactly  
15 CCANP would offer in the nature of a basis for litigation;  
16 whether what we've read in the responses to interrogatories  
17 are all that we would find, or not?

18 MR. SINKIN: As the answers to interrogatories  
19 set forth, Mr. Chairman, the allegation was an anonymous  
20 allegation received by CCANP, that was communicated to the  
21 NRC and other investigative agencies. The essence of what  
22 we were told is in the answers to interrogatories. There  
23 isn't any more that I can provide.

24 JUDGE BECHHOEFER: Do you know the name of the  
25 individual who made the telephone call? It's anonymous to

1 us. Do you know the name? Could you provide us the name?

2 MR. SINKIN: Mr. Chairman, in phase 1 of this  
3 proceeding Intervenors were required to reveal their  
4 confidential sources, and as a result of that, we adopted a  
5 policy that anyone calling us was instructed that if they  
6 had any information to provide to us, they should not give  
7 us their name. They should call us and we could either  
8 assign a code name or they could just call whenever they  
9 wanted to call and we would not inquire as to their name.

10 In the case of this allegation, I think I  
11 recognized the voice. I would not care to speculate as to  
12 the identity of the caller. The allegation was provided  
13 anonymously. There was no name given when the allegation  
14 was given.

15 JUDGE BECHHOEFER: If we were to indicate that  
16 we might feel free to go ahead and litigate it, what,  
17 exactly, would we have to litigate?

18 We could not, I don't think, just put into the  
19 record that you have an anonymous call to that effect.  
20 Could you indicate now to the Board, for instance, the name  
21 -- and I'm saying right now -- could you tell the Board,  
22 alone, the name of the person, some idea that he's at all  
23 familiar with the facts that are being alleged and whether  
24 he would be willing to testify if we were to go to the  
25 hearing?

1 MR. SINKIN: Are you saying provide it directly  
2 to the Board but not to the other parties?

3 JUDGE BECHHOEFER: Well, maybe as a first step.  
4 I'm not saying it would never go to the other parties. It  
5 would have to go to the other parties.

6 MR. SINKIN: That's what I thought.

7 JUDGE BECHHOEFER: I'm saying how could we  
8 litigate your claim? If we should decide it fit under some  
9 category or other, how would we litigate this?

10 MR. SINKIN: First, grant my motion to compel so  
11 I could get some discovery. Then we pursue that and we  
12 gather the evidence that you'll need in order to resolve  
13 the issue.

14 JUDGE BECHHOEFER: Are you asking us to say that  
15 an anonymous telephone call that you supplied under oath is  
16 sufficient as a basis for us to initiate -- to, in effect --  
17 whether you call it accepting a contention or not -- but is  
18 that a sufficient basis to litigate a particular issue?

19 MR. SINKIN: I guess I would point out that in  
20 the Applicant's pleadings they have filed various  
21 affidavits and statements that there were, in fact,  
22 polygraph tests given during the time period that we are  
23 alleging. We have newspaper stories that there were, in  
24 fact, people fired that do link -- they have mentioned the  
25 Wackenhut investigation; the newspaper stories do link the

1 stories to the Wackenhut security guards; there are items  
2 that indicate that the allegation is coming from a real  
3 base of an event.

4 JUDGE BECHHOEFER: The person might have read  
5 the newspaper.

6 MR. SINKIN: The person might have read the  
7 newspaper. I don't know whether the person read the  
8 newspaper or not. But the allegation that was provided was  
9 that more was going on here than met the eye.

10 JUDGE BECHHOEFER: What I'm trying to say is:  
11 How could we judge whether there was any substance at all  
12 to that? Or whether it's even worth inquiring further  
13 about?

14 MR. SINKIN: It's a difficult problem. I don't  
15 have the answer to that.

16 I think the seriousness of the allegation  
17 warrants at least permitting us to engage in the discovery  
18 we've tried to engage in and then to respond to a motion  
19 for summary disposition when we've had a chance to conduct  
20 some discovery.

21 JUDGE BECHHOEFER: Can we even -- do we even  
22 have enough, assuming this were just an initial contention  
23 and we were supplied with allegations that an anonymous  
24 phone call had revealed certain information, would we have  
25 enough even to say that the basis was adequate to admit a

1 contention and to permit discovery? We would have to at  
2 least have reached the point of view that there's an  
3 adequate basis for whatever was alleged before we even  
4 allowed any discovery to occur.

5 MR. SINKIN: I'm just trying to refresh my mind,  
6 Mr. Chairman, on the original allegations submitted by  
7 CCANP. It seems to me we filed contentions that there had  
8 been intimidation and harassment of quality control  
9 inspectors and that that information had been provided to  
10 us but we were not required to reveal the source of that  
11 information at that time. We filed it as a contention that  
12 we intended to litigate and it was accepted. The basis was  
13 information we had from inside the plant.

14 JUDGE BECHHOEFER: I can't remember whether you  
15 revealed the name of Mr. Swayze or not. We knew about him  
16 a long time ago.

17 MR. SINKIN: I think that was a lot later than  
18 the acceptance of the contentions, but I'm just not real  
19 clear in my own mind.

20 I think there's a policy question here,  
21 Mr. Chairman, where we are in the position where this Board  
22 has previously ruled that we have to reveal our  
23 confidential sources so we have adopted this instruction as  
24 a way to protect people who want to provide information,  
25 and they have provided it to us without a name. So we then

1 bring the information to the Board and the Board is left  
2 with that as a basis: We think the information is credible,  
3 we think the person is credible and the nature of the  
4 information they provided seemed credible.

5 MR. NEWMAN: You don't know who it is.

6 MR. SINKIN: That's the best we can offer.

7 JUDGE BECHHOEFER: Weren't we at least told  
8 earlier in phase 1 that quality control inspectors had  
9 alleged that they were being harassed? That you had direct  
10 -- I can't remember the early stages --

11 MR. SINKIN: I don't either.

12 JUDGE BECHHOEFER: It tells me that an  
13 unidentified source with no apparent relationship to the  
14 plant at all -- somebody that might have just read the  
15 newspapers and be opposed to the plant saying: I'll bet  
16 Mr. Sinkin would like to hear an allegation of this sort.

17 MR. SINKIN: Well, Mr. Chairman, we took the  
18 allegation first to the office of investigations and asked  
19 them to investigate it.

20 JUDGE BECHHOEFER: I'm aware of that.

21 MR. SINKIN: We did not bring it Board at that  
22 time because we wanted to allow a chance for OI to  
23 investigate before we brought any information to the Board.

24 When it became clear that our discovery time was  
25 going to run out and they were too busy to conduct the

1 investigation, we were forced to go ahead with discovery  
2 and reveal the allegation through answering interrogatories  
3 and through our discovery inquiries. I hope that some day  
4 the office of investigations will look into this matter.  
5 Until that time, the only way we have to pursue it is  
6 through discovery.

7 JUDGE BECHHOEFER: I inquired yesterday. OI is  
8 going to give you a response. They haven't got it yet --  
9 fairly shortly.

10 Did you convey to OI the substance of what is in  
11 this response to an interrogatory? Are they even looking  
12 into alleged preferential treatment of various personnel?  
13 Or are they, instead, only looking at the question of  
14 whether Region 4 was kept informed or the NRC was kept  
15 informed of drug use, drug control programs at the site?

16 MR. SINKIN: In the oral conversation on October  
17 25, 1985, I communicated to the office of investigations  
18 that we had the allegation that there had been an internal  
19 investigation at the plant into the use or sale of drugs;  
20 that investigation had identified numerous personnel,  
21 through the use of lie detectors, who apparently had  
22 engaged in the use or sale of drugs; that some of those  
23 personnel were fired, some of those personnel were not  
24 fired; that those that were not fired were not fired  
25 because they would implicate the operations group; and we



1 discussed at that time that there was a pending issue  
2 before the Licensing Board as to the quality assurance  
3 program for operations which we said we thought this was  
4 relevant to and it would be nice if there could be a speedy  
5 investigation on that grounds; and that there -- and that  
6 we were aware that the NRC did not normally investigate  
7 drug use but that if it was an operations group that was  
8 involved in drug use there was a clear quality concern that  
9 might bring the NRC into such an investigation and that  
10 protecting that group would be something that would be  
11 obstructing the NRC. And we agreed that we would provide  
12 to the office of investigations in writing the allegation  
13 about the preferential treatment -- the drug use by  
14 operations, excuse me, and that we would provide to the  
15 Justice Department the allegation of obstruction of the  
16 NRC's investigation responsibilities.

17 We did provide to the office of investigations  
18 the allegation just as it is set forth. It may not be word  
19 for word. It's the same allegation.

20 JUDGE BECHHOEFER: I see. That was my inquiry,  
21 do they have before them essentially what's being brought  
22 before us. Did you give them a name?

23 MR. SINKIN: No. No. It was provided to them  
24 as an anonymous allegation. And they agreed to investigate  
25 it.

1           JUDGE BECHHOEFER: If we were to determine to  
2 start a question for litigation that we would need  
3 something more than that, would there be any way for you to  
4 really supply more, if we should determine that in order to  
5 effectively litigate something we would need at least a  
6 starting point? In litigation we would probably need a  
7 witness to come in and say, at least say what he apparently  
8 told you.

9           MR. SINKIN: Mr. Chairman, I think that's a very  
10 different standard than is applied normally to matters to  
11 be heard before a licensing board, that a witness has to be  
12 produced to the Licensing Board to testify to the matter  
13 before the Licensing Board accepts it for litigation. You  
14 are going into the merits.

15           JUDGE BECHHOEFER: To some extent that may be  
16 true. But is it not true that there has to be at least  
17 enough basis to know whether there is something behind the  
18 contention? Wouldn't the adequacy of the basis depend in  
19 part on who the individual was, or the likelihood of the  
20 Licensing Board ever being able to use that information?

21           MR. SINKIN: We did not intend to rely on the  
22 testimony of the allegor in proving the case. I intended  
23 to rely on discovery and being able to prove the case  
24 through the questions and documents that we are seeking to  
25 have answered by the Applicants. And we do find ourselves

1 in the situation of essentially conducting an investigation  
2 that no one else has taken the time to conduct for whatever  
3 reason.

4 JUDGE BECHHOEFER: What is your point of view of,  
5 I'll call it the alternative type of discovery which was  
6 outlined in one of the Applicant's papers that was filed  
7 recently. Would that -- if that were the case, would that  
8 serve your purpose?

9 MR. SINKIN: I assume you are referring to  
10 something about numbers. I seem to remember them referring  
11 to that.

12 JUDGE BECHHOEFER: I am referring to that, yes.

13 MR. SINKIN: I would have to refer to that,  
14 Mr. Chairman. I don't even remember where that was.

15 MR. AXELRAD: In the response to the motion to  
16 compel. Page 14 of the Applicant's response to the motion  
17 to compel.

18 MR. SINKIN: No. We don't find that adequate,  
19 Mr. Chairman. There may be an intermediate ground in  
20 between what we've asked for and what the Applicant's have  
21 suggested.

22 For example, if we can have the person tested by  
23 polygraph identified by a letter or a number to start with,  
24 with the employer of that person, their position at the  
25 project at the time they were tested, and the reasons

1 provided for why they were tested, the questions -- I don't  
2 want to be held to this off-the-top-of-my-head list, I am  
3 trying to move to some middle ground -- if they want to  
4 know the questions asked -- if the problem was the  
5 revelation of names, we perhaps can get around that by  
6 assigning them some identifying number as long as we are  
7 able to relate the name to the specific organization or the  
8 number to the specific organization of that person, their  
9 position, employer, how the allegations provided by that  
10 person were treated, follow-ups, results of investigations,  
11 that kind of thing, that might give us enough to resolve  
12 the issue without going into the actual identities of the  
13 persons involved. That is not to say we don't also want  
14 the actual programs and procedures for the drug program,  
15 I'm just talking about the problem of identifying people.  
16 And all of that can be under a protective order, too. We  
17 don't have any objection to protective orders being  
18 fashioned that prevent the unauthorized release of any of  
19 this information we receive.

20 JUDGE BECHHOEFER: I would like to ask -- I  
21 would like to go to the other parties for a moment. Assume  
22 for the moment that we were to -- if we were to decide that  
23 this issue fit under C, that it wasn't a new contention as  
24 such, would we have authority to require an additional  
25 development of a basis?

1           For instance, the matters I talked about, the  
2 name of the individual, his position or the means by which  
3 he acquired whatever knowledge that was transmitted by the  
4 anonymous phone call, and his willingness to testify.  
5 Would we have a basis? Would we have legal basis for  
6 imposing those requirements before we permitted the  
7 contention, litigation of the contention or issue or  
8 whatever it might be called to proceed any farther?

9           I don't need the answer to this under, if we  
10 consider it a late-filed contention because I think under  
11 the third of the criteria, we clearly could require it then.  
12 My question is: If we consider it under -- as falling  
13 under an existing contention, such as C, or even F for that  
14 matter, could we require, before we allowed it to be  
15 litigated, the additional showing that we outlined?

16           MR. AXELRAD: Mr. Chairman, let me parse that  
17 question in two different fashions because you put a lot  
18 into it. With respect to Issue F, we have filed a motion  
19 for summary disposition of Issue F, and the Intervenor has  
20 to respond to that motion for summary disposition and  
21 presumably the Board is going to rule as to whether or not  
22 these matters -- since that's an issue that is specifically  
23 raised under our motion for summary disposition and all the  
24 parties have to respond, the Board will rule on that  
25 question. And presumably it will use the standards with

1 respect to summary disposition. We don't think the  
2 Intervenor have raised any issue under any matter of  
3 material fact under Issue F which would preclude the grant  
4 of a motion for summary disposition. So let me put F aside.

5 JUDGE BECHHOEFER: Put F aside for the moment.  
6 We may decide that almost as a matter of law as it is set  
7 up. But be that as it may -- assume --

8 MR. AXELRAD: And I think you would under our  
9 motion for summary disposition or even earlier if you  
10 wanted to.

11 Now, under C, the question is whether this  
12 matter comes within the area that was reserved by the Board  
13 under Issue C.

14 JUDGE BECHHOEFER: I'm saying if you assume for  
15 this question that we find that it does, could we, prior to  
16 allowing it be litigated, require the additional  
17 specification that we have outlined, legally require?

18 MR. AXELRAD: What I was going to say is the  
19 answer to that question is based upon what the Board  
20 intended when it permitted -- when it required updated  
21 information and indicated that issues could be raised with  
22 respect to updated information.

23 With respect to the information, the similar  
24 circumstance that we had previously as to the reserved  
25 information under Issue B, the Board, in essence, treated

1 that as the equivalent of a motion for summary disposition.  
2 The Applicants and the Staff had filed affidavits, and the  
3 Intervenor, in order to be permitted to litigate anything  
4 with respect to the reserved issue was, in essence,  
5 required to satisfy the equivalent of the standard for a  
6 motion for summary disposition and he did not raise any  
7 issues or material fact that was proper for litigation.

8 Similarly, in these circumstances it would seem  
9 to me that if the Intervenor is trying to reserve this  
10 under the reserved matters under Issue C, as opposed to a  
11 new contention or reopening or something of that kind, he  
12 would have to submit sufficient information in order to be  
13 able to withstand the motion for summary disposition. He  
14 would have to submit some factual information.

15 Whether the particular information would have to  
16 be the name of the individual and how you acquire the  
17 information about his willingness to testify or whether  
18 some other kind of specific information would do it, I'm  
19 not certain. But clearly there has to be something other  
20 than an anonymous allegation; anonymous allegation has  
21 never been enough to permit litigation of any matter before  
22 the agency. There has to be, as the Board has pointed out  
23 before, at the very least what would be required under a  
24 contention, which is something filed with sufficient  
25 specificity and basis and with sufficient particularization

1 to know that there is a matter here that deserves  
2 litigation. A bald allegation -- there are cases dealing  
3 with this -- a bald allegation without any support is just  
4 no basis to conduct any kind of proceeding at all.

5 It is very clear what the Intervenor is trying  
6 to do. He is trying to conduct a fishing expedition  
7 through discovery based upon an anonymous telephone call.  
8 He says he doesn't know who this individual is, and yet he  
9 considers the information to be credible. He doesn't know  
10 anything about the information. He doesn't know anything  
11 about this so-called preferential treatment of operating  
12 personnel. What he knows is what he has been able to read  
13 in the newspapers.

14 Yes, there have been guards terminated. Yes,  
15 Wackenhut, who was a contractor that provides security  
16 services, has a policy under which anyone who is implicated  
17 in use of drugs on site or off site can be terminated under  
18 Wackenhut policy. That was not the policy of the company  
19 prior to January 1 of this year. The company now has a  
20 policy under which anyone can be terminated for any drug  
21 use off site as well as on site.

22 If there were any project employees who were  
23 implicated with respect to off-site use before this, they  
24 were not terminated because that was not the company policy  
25 up to that time.



1                   There were no allegations of on-site use by  
2 project personnel. The so-called preferential treatment  
3 that Mr. Sinkin is referring to is obviously either  
4 Mr. Sinkin's confusion of what the anonymous individual  
5 told him or what the anonymous individual's confusion was  
6 as to what the various policies were as applied to project  
7 employees versus guards working for Wackenhut.

8                   What we have here is a whole concoction based  
9 upon an anonymous telephone call.

10                  JUDGE BECHHOEFER: You are saying if it was a  
11 Wackenhut guard that called in the complaint that somebody  
12 else who was a HL&P employee wasn't terminated, that would  
13 be expected by the way the program was set up at that time?

14                  MR. AXELRAD: No one knows who called Mr. Sinkin  
15 and what his knowledge or what his motivation was. But the  
16 whole thrust of everything that we are hearing here is that  
17 all that Mr. Sinkin has is an anonymous telephone call  
18 without any specifics whatsoever, and that provides no  
19 basis for admission of a contention or for the Board's  
20 consideration of it for litigation. And by whatever  
21 standard, whether he uses it as a standard, standard for a  
22 new contention, standard for a contention for the first  
23 time, standard for reopening a proceeding, if it's a  
24 standard for a late-filed contention, there is no standard  
25 at all including the standard for a motion for summary

1 disposition. Under none of these standards would there be  
2 for litigation at a proceeding something based on a bald  
3 allegation from an anonymous source.

4 JUDGE BECHHOEFER: Would this apply as well if  
5 it were purely a new contention at the beginning of a  
6 proceeding?

7 MR. AXELRAD: Yes.

8 JUDGE BECHHOEFER: Would you apply the same  
9 standard?

10 MR. AXELRAD: Well, certainly you'd have to have  
11 specificity and basis and there has to be sufficient  
12 particularization as a part of the requirement to show  
13 there's something worth looking into.

14 Mr. Sinkin has said he's the only one interested  
15 in investigating this matter. That may be his curiosity,  
16 but that has nothing to do with what comes up before the  
17 Board. Maybe he properly acted by going to OI, and OI is  
18 looking into it; and if, as a result of OI's investigation,  
19 something comes up that does need to be reviewed and he  
20 gets the investigation, maybe at that time he'll have  
21 something to file. Or maybe OI, on the basis of what they  
22 are looking into, will bring to the attention of the Board  
23 there's a matter that deserves the Board's attention. But  
24 as the Board is well aware, the fact that there's a pending  
25 investigation in itself is clearly not a basis for allowing

1 a contention. There was an explicit Commission decision  
2 just recently.

3 JUDGE BECHHOEFER: They said that specifically.  
4 The Commission said that in the context of reopening the  
5 record. But there may be some overall implication of what  
6 they said to other cases as well. Because they did say  
7 that -- the Commission outlined some of the reasons why OI  
8 conducts investigations. I think that was Waterford,  
9 earlier in January, something like that.

10 MR. REIS: Yes.

11 MR. AXELRAD: Yes. But in essence, what  
12 Mr. Sinkin is saying to the Board is what he really needs  
13 to do is conduct discovery in order for him to be able to  
14 find out whether he really has a matter to bring to this  
15 Board for litigation. And that is clearly not permitted.  
16 The regulations are very specific on that point. You get a  
17 contention admitted only on the basis of the information  
18 that you as an intervenor have. You are not entitled to  
19 discovery in order to be able to have a contention  
20 introduced, and Mr. Sinkin clearly does not have even the  
21 beginning of enough factual information in order to get a  
22 contention admitted, and what he's telling the Board: Well,  
23 you let me have discovery and I'll prove to you that I've  
24 got enough for a contention. That is not the way the  
25 system works.

1           Mr. Sinkin is going to have to rely upon the  
2 system as it exists and not upon the system he would like  
3 in his world.

4           JUDGE BECHHOEFER: Mr. Reis?

5           MR. REIS: I think the Board has ample power to  
6 do what it says, generally under .718 on the chairman's  
7 powers to control the course of proceedings.

8           I agree with you that Waterford dealt with  
9 reopening a hearing. But the reasoning of the Commission  
10 in Waterford is applicable here.

11           There, we not only had an allegation -- we had  
12 an allegation, of course here, that OI -- I&E -- or -- OI  
13 was looking into. And they said that wasn't enough to  
14 reopen a record or to start things going. And I think that  
15 is very important.

16           Further, they also pointed out that newspaper  
17 articles -- which is something similar here to what we have  
18 here, unnamed, anonymous sources coming in, it's not enough  
19 to open a record.

20           Further, we don't know whether this unnamed  
21 source, this anonymous source, whom we can't tell here has  
22 firsthand knowledge or second-hand knowledge or third-hand  
23 knowledge.

24           Thirdly, in Catawba, the Commission Catawba case,  
25 I think it's at 833 -- it's an '83 or '84 case, the

1 Commission talked about it. It's reasoning is instructive:  
2 When things come up late in a proceeding the tests are  
3 harder. The later and the longer the proceeding has, the  
4 more you need in the nature of showing something tantamount  
5 to evidence in order to reopen.

6 We just don't have anything along that line here.

7 JUDGE BECHHOEFER: Given the 15 months or so  
8 that we have until projected fuel loading, would this be  
9 considered late in the proceeding? Do you look toward the  
10 end or toward the beginning?

11 MR. REIS: Oh, I think you look toward the  
12 beginning of the proceeding, and I think that was so in the  
13 Catawba case, where there was talk about new contentions  
14 and whether they had to await final Staff documents or  
15 whether things were alleged on the knowledge of that time.

16 The talk was definitely the later in the  
17 proceeding it is, and if it isn't just the beginning of the  
18 proceeding, the more you need to have more specificity and  
19 more basis, the more you need allegations or information  
20 tantamount to evidence.

21 I think the Commission's reasoning is, in both  
22 the Catawba Gas, which was '83, CLI83-19, 17 NRC 1041. And  
23 in the Waterford case, which was decided in January 30th of  
24 this year, I think these things are needed.

25 When I look at what the Intervenor has done here

1 in order not to give us the name, what he says he did, he  
2 instructed people not to give their names so he could make  
3 faceless allegations to the Board and now, on the basis of  
4 these faceless allegations, he wants to bootstrap himself  
5 into a hearing? That's what I just heard.

6 He told people who called him up, don't give me  
7 your name because I'd have to turn it over, therefore I  
8 won't have information to give to the Board. I don't think  
9 we can conduct business this way. And so I say on the  
10 basis of what is said in his answers to interrogatories and  
11 what is the policies indicated in these cases, and also in  
12 the statement of policy by the Commission on the conduct of  
13 proceedings and the need to move them ahead and see that  
14 there are real issues set out, in 13 NRC as well -- in 13  
15 NRC, statement of conduct on litigation proceedings, or  
16 something like that -- all these things indicate that: Yes,  
17 you have the power to require definite statements of what  
18 is there to see whether there is a basis to litigate these  
19 new things late in the proceeding.

20 It is true, if they are shoehorned into a  
21 present contention maybe the rules on raising new  
22 contentions need not apply. But they are new issues, and  
23 to the same extent in embarking on looking at new issues, I  
24 think you have to follow the Commission's reasoning and  
25 find that you need some definite material tantamount to

1 evidence before even discovery is allowed.

2 JUDGE BECHHOEFER: If we should require further  
3 specificity or further delineation of the basis, would we  
4 be engaging in what the Appeal Board said was not proper,  
5 in, I think it was Allen's Creek, some time ago? The  
6 biomass case.

7 MR. REIS: In the biomass case, what was a part  
8 of the contention and basis of the contention was an office  
9 of technology report on biomass that said, in essence:  
10 Well, this looks like a very feasible technology. What we  
11 had in that case was the question of whether there was an  
12 alternate source of energy from biomass. And an Office of  
13 Congressional report said there was.

14 This was spelled out in the contention of  
15 Mr. Alexander in that case. Therefore, that case did not  
16 deal with what we have here. We had a basis in that case.

17 The Board went on in that case and said: Oh,  
18 this doesn't look real to us and we'll dismiss it because  
19 it seems off the wall. But there was a basis. And if you  
20 read the Appeal Board and you read the Board below and what  
21 was submitted with that contention, that contention had a  
22 basis. It wasn't that some scientist at some point said  
23 maybe there was, or said there was the ability to have  
24 biomass from sea farms and convert that to -- the biomass  
25 to electricity and thus substitute for the need for the

1 Allen's Creek nuclear plant. You had a definite basis in a  
2 report by the Congressional branch of the office of  
3 technology. Further, it was at the beginning of the case.

4 JUDGE BECHHOEFER: Is that different from the  
5 sworn statement of an individual? A party, a lawyer --

6 MR. REIS: Very different. I believe there are  
7 cases of late -- and I think it was also in Waterford,  
8 though not in this opinion -- where the Board said -- the  
9 Appeal Board in that case I believe it was -- that the  
10 statements of attorneys do not create issues of fact. It  
11 must be a statement or representation -- must be a  
12 statement of the one with personal knowledge.

13 JUDGE BECHHOEFER: I was referring to the  
14 statement of an attorney as recording the substance of an  
15 anonymous call.

16 MR. REIS: No. That is not enough. Because in  
17 the Waterford case -- and that was the Appeal Board  
18 Waterford case just prior to this, late last year I think  
19 -- the Appeal Board said the affidavits of attorneys that  
20 there is information that somebody told me something, that  
21 there is a reason to go forward, is not enough. It must be  
22 the affidavit of the one who can give testimony in this  
23 court.

24 Essentially the reason in that case that was  
25 used was any evidence in NRC proceedings must be proper



1 evidence in the rule -- I forget which rule it is -- which  
2 governs evidence, which says it has to be competent.

3 JUDGE BECHHOEFER: 743, I think.

4 MR. REIS: If it is 743, that's fine. But  
5 whichever.

6 Essentially the Board said this was not  
7 competent evidence so it could not be tantamount to  
8 evidence.

9 The same thing, Mr. Sinkin's statement, no  
10 matter how true it is and how accurately he reported what  
11 was told to him, was nothing but hearsay and does not  
12 provide a basis to go forward.

13 JUDGE BECHHOEFER: Mr. Sinkin, do you have a  
14 response or reply?

15 MR. SINKIN: I may have misunderstood the  
16 Board's question. I thought the Board asked me how can we  
17 litigate this matter if we don't have more than a anonymous  
18 allegation and I responded: By allowing me discovery so we  
19 can have evidence to resolve the matter. I didn't perceive  
20 the question: How do we accept this allegation for  
21 litigation? I didn't realize that's what you were asking  
22 me. I was asking you how we go forward with litigation.

23 JUDGE BECHHOEFER: I see.

24 MR. SINKIN: The information provided just now  
25 by the Applicants, that Wackenhut has a policy of anyone on

1 site or off site is fired and the Applicant's have, or had  
2 a different policy until recently -- I think that's in some  
3 of their pleadings, that there may be some confusion on the  
4 policies -- these are arguments to the merits. They want  
5 to represent what the policies are without allowing  
6 discovery on the policies. They want to say there's  
7 confusion on the policies without allowing any discovery as  
8 to what the policies were at various times.

9 Also, too, as I understand the allegation that  
10 was made, it's saying that there were people who were not  
11 fired who would have implicated the operations group. Now,  
12 the group of people who were fired were apparently  
13 Wackenhut guards.

14 So, as this is becoming clearer, as I'm getting  
15 some information, at least through the Applicant's  
16 affidavits and other things, it would appear that there  
17 were people fired and Wackenhut guards were the people not  
18 fired because they would implicate the operations group  
19 people.

20 So, if there was a preferential application of  
21 the Wackenhut policy of firing people on or off, for on- or  
22 off-site use, that may be the heart of this whole  
23 allegation that there was preferential treatment given  
24 within the Wackenhut organization in order to protect the  
25 HL&P operations organization.

1 JUDGE BECHHOEFER: HL&P, did they have any  
2 control over how Wackenhut ran its program?

3 MR. SINKIN: We don't have any discovery yet,  
4 your Honor, whether they did or didn't. It's their --  
5 security contractor and the decisions made by their  
6 security contractor are their responsibility. If they  
7 didn't exercise the responsibility, then that's another  
8 issue.

9 (Discussion off the record.)

10 JUDGE BECHHOEFER: Actually, the Board has  
11 reached several decisions in conjunction with the drug  
12 allegations.

13 We have determined -- and we'll spell this out  
14 in more detail later -- but basically we have determined  
15 that the allegations do not fall under Issue F. Basically,  
16 that is shown by the programmatic practices that the NRC  
17 has engaged in in requiring QA programs and the existence  
18 of the rulemaking, which shows to us that the Commission  
19 doesn't consider that it falls under Appendix B, but is  
20 considering an alternate route. So we do not think that it  
21 falls under F.

22 Secondly, we've determined that the existence of  
23 the rulemaking does not bar litigation of the allegations  
24 under -- either under Issue C or as a new contention. But,  
25 third, we have not yet reached a decision as to whether or

1 not the allegations would fall under Issue C.

2 Fourth, if we were to litigate the allegations  
3 as a new contention we would have to consider the five  
4 factors set forth in 2.714 for late-filed contention.

5 Now, we have determined that in any event, we  
6 will not accept the allegations for litigation unless we  
7 have considerably more detail as to really what the  
8 allegations are and what the basis for the claim or  
9 contention is. We had thought that the name of the  
10 individual, the basis for his or her information, the  
11 willingness of the individual to testify would be factors  
12 that would at least assist us in determining whether or not  
13 something should be litigable. We will not say that if we  
14 had that we would litigate it. But we will say that we  
15 would have to have that or an equivalent degree of  
16 particularization before we would be willing to litigate it.

17 Next, sixth, we believe that assuming CCANP  
18 desires to litigate this contention, it should submit  
19 information such as is outlined above, that we just spelled  
20 out. If it chooses to consider it as a new contention, it  
21 also should submit information which will allow us to  
22 evaluate the other factors of 2.714 A. We believe the  
23 information of the type we've requested would, at the very  
24 least, fall into the third criteria under 714, the ability  
25 to contribute to the record, or whatever it says.

1                   Now, we will give CCANP the option. If CCANP  
2 wants to rely on whether or not we feel it falls into  
3 contention C --

4                   MR. SINKIN: I didn't hear you, sir.

5                   JUDGE BECHHOEFER: We'll give you the option.  
6 If you believe that you will take a chance as to whether we  
7 believe it falls under C, which we have not decided, you  
8 don't have to submit the 714 information, although we still  
9 would require the other type of information such as the  
10 name, basis and willingness to testify, that type of thing.  
11 We still would require that.

12                   If you would wish to have it considered either  
13 alone or alternatively as a new contention, you should then  
14 include also the 714 arguments, the various factors; and in  
15 either event, the other parties will have a chance to  
16 respond before we decide whether a certain thing is  
17 litigable. And until we decide an issue is litigable, we  
18 don't think we would authorize discovery.

19                   So, insofar as the motion for protective order  
20 is based on whether the allegations fall into Issue F, I  
21 guess we grant that. I don't think we are granting all  
22 aspects of it; we are not agreeing to all the claims as to  
23 rulemaking and that type of thing. I guess we will grant  
24 the motion for protective order, insofar as it is --  
25 insofar as it relates to the allegations as an aspect of

1 Issue F, which is, I guess, all that is really set forth.

2 We are not necessarily ruling that similar  
3 discovery would not be permissible under some other issue  
4 or contention, but we are not authorizing it yet until we  
5 decide whether there is another issue or contention.

6 Finally, if CCANP desires to submit the name of  
7 the individual plus his or her qualifications and  
8 willingness to testify, if that is a basis for our  
9 willingness to accept the basis for contention, we will  
10 permit Mr. Sinkin to file that solely with the Board; and  
11 then if we decide that the information creates enough --  
12 creates enough of an issue that we would otherwise consider  
13 it for litigation, we would then work out some sort of a  
14 protective order so that the information -- assuming the  
15 individual desires confidentiality --

16 MR. AXELRAD: I'm sorry, I didn't hear the  
17 beginning of that. Did you say submit the name of the  
18 individual only to the Board?

19 JUDGE BECHHOEFER: That's correct.

20 MR. AXELRAD: Not the information. Just the  
21 name of the individual.

22 JUDGE BECHHOEFER: I'm not sure. To the extent  
23 that the information would include the basis for knowledge  
24 -- the basis of the individual's knowledge of the  
25 allegations, I think all of that could be submitted only to

1 the Board; and then if we reject the contention or the  
2 issue, we don't think it ever has to be submitted to any  
3 other party. The other parties -- their position is not  
4 being eroded.

5 If we decide perhaps it does create the basis  
6 for another issue, we would not rule on it until we turned  
7 over all the information to the other parties under some  
8 sort of protective order which we would work out at that  
9 time.

10 What we are saying is you won't be -- your  
11 positions will not be eroded without our giving you a  
12 chance to respond. But we are also saying that if the  
13 individual reveals his name only to the Board and if we  
14 decide that that person doesn't have any basis for any  
15 allegations he's making, we may return the material to  
16 Mr. Sinkin and just not reveal who it was. No one would  
17 know. I think it's really a privacy consideration which,  
18 if it developed -- we believe to effectively litigate this  
19 question, at least the source of the information and  
20 perhaps the likelihood of the individual or the willingness  
21 of the individual to make known the allegations is  
22 important.

23 I'm not sure, unless Mr. Sinkin comes up with  
24 some other basis for the same contention or some alternate  
25 allegation -- alternate basis for the same -- for the

1 allegation, I'm not sure that we should even get into  
2 litigating this.

3 So, basically what we are saying is we need more  
4 information. We would like to try to set a schedule for  
5 this.

6 Mr. Sinkin, probably if he supplies information  
7 to us in camera, you could send just a cover letter to the  
8 other parties saying that you supplied the information.  
9 You don't have to reveal the information until we decide  
10 what it's worth. They ought to know that you have supplied  
11 us information.

12 To the extent you don't object to having them  
13 have the information, you can put it in whatever you send  
14 them.

15 Mr. Sinkin, what would be a schedule under which  
16 you could determine -- I assume at the very least you would  
17 have, to the extent you were going to rely on a person's  
18 identity, you'd have to contact them and discuss it with  
19 them, so you'll need a little time on that.

20 Do you have any suggestions as to timing?

21 MR. SINKIN: Mr. Chairman, I'm almost certain we  
22 will simply drop the allegation, but if we could have a  
23 week, that's fine.

24 JUDGE BECHHOEFER: I want to make sure you have  
25 enough time because if you decide you may make the



1 allegation -- if you have to discuss it with the individual,  
2 I want to give you enough time to do that and prepare any  
3 paper you might want to file.

4 MR. SINKIN: I can almost assure you,  
5 Mr. Chairman, that the individual will not want his name  
6 supplied to the Board under these conditions. But I will  
7 certainly call and ask the individual and I don't think  
8 that will take me more than 24 hours. I'm saying a week  
9 because that will give me a few extra days.

10 JUDGE BECHHOEFER: Okay. We'll set by March 28,  
11 you will file something, either with us, confidentially  
12 with copies of whatever you can reveal to the other parties;  
13 or alternatively, if you are dropping allegation, you can  
14 tell all the other parties.

15 I think another thing we ought to resolve today  
16 is -- you have an opportunity -- whether you have an  
17 opportunity to further respond to the Issue C affidavits.

18 MR. SINKIN: I did want to address before we get  
19 into that, the point that you raised about the option. It  
20 seems to me if the Board -- the Board has all the arguments  
21 presented by the parties on whether the issue falls under  
22 Issue C or not. If the Board is going to find it does fall  
23 under Issue C -- and I understand there's a question, do I  
24 have a chance to respond to the materials filled on Issue C.  
25 Assuming I have a chance to respond on the materials filed

1 on Issue C, it doesn't seem to me that there's any reason  
2 for me to do all the work to prepare a motion for a new  
3 contention if the Board is going to rule it falls under C,  
4 and I shouldn't be given an option of either filing a  
5 motion for new contention or risking whether the Board will  
6 say yes on C. I think I should be given the option of  
7 waiting to see what the Board does on C, and then if they  
8 say no on C, then it would be a signal that they consider  
9 it to be a matter for a new contention.

10 JUDGE BECHHOEFER: We were trying to save a  
11 little time.

12 MR. AXELRAD: Mr. Chairman, perhaps I was  
13 confused, but it was my understanding that the type of  
14 information the Board has asked Mr. Sinkin to supply, the  
15 Board said it would need either under Issue C or as a new  
16 contention: The name of the individual, the basis for the  
17 information. Am I confused about that?

18 JUDGE BECHHOEFER: But the alternative was -- we  
19 would need that in any event. We would also need the other  
20 -- that goes to the third item of 714.

21 MR. AXELRAD: I understand, Mr. Chairman. But  
22 if Mr. Sinkin is saying he will probably drop the  
23 allegation because he doesn't want to provide that  
24 information to the Board, then what difference is there  
25 whether it's under Issue C or under a new contention?

1           MR. SINKIN: It would be in the eventuality I  
2 was not dropping allegation. I wanted to go back and  
3 clarify.

4           MR. AXELRAD: I see. I was confused.

5           JUDGE BECHHOEFER: Maybe the option is unfair.  
6 Maybe we should wait. If you come forward with the  
7 information, then we can indicate to you how we come out on  
8 that and give you an opportunity to file further, assuming  
9 you filed within a week and then we would be able, probably  
10 by that time, to decide fairly rapidly whether we felt it  
11 fit under C or not.

12                   (Discussion off the record.)

13           JUDGE BECHHOEFER: What we've decided, you can  
14 file by next Friday. We are not saying it has to be in our  
15 hands by next Friday, but you have to file it by Friday.  
16 We should be able, even assuming the mails may be slightly  
17 slow, we should -- if you decide to pursue the issue, we  
18 should be able to decide by, I'd say approximately the  
19 following Friday, maybe the Monday after that, whether we  
20 think it should be a new contention or not. And then we  
21 would give you --

22           MR. AXELRAD: Mr. Chairman, can you speak up,  
23 please?

24           JUDGE BECHHOEFER: I was saying I was going to  
25 ask Mr. Sinkin -- assuming we would say it had to be a new

1 contention, if the information gave rise to enough of a  
2 question to create a new contention or create a litigable  
3 issue, how much further time might you need to address the  
4 714 factors?

5 MR. SINKIN: I would not need more than a week,  
6 I'm sure, to do the 714. But there's another problem that  
7 has come to my mind at this point. The Board is ordering  
8 us to take certain actions or risk losing this contention  
9 altogether. I think we are entitled to a written order  
10 from the Board and an opportunity to appeal that decision  
11 to the Appeal Board before making a final decision on  
12 whether we will comply.

13 JUDGE BECHHOEFER: I don't think that's  
14 appealable. You'd have to get directed certification.

15 MR. SINKIN: I make a motion for directed  
16 certification.

17 JUDGE BECHHOEFER: We are going to put this out  
18 in a prehearing conference order, but I think the record of  
19 this proceeding could serve.

20 MR. SINKIN: I don't think your microphone is on.

21 JUDGE BECHHOEFER: Oh. You are right.

22 Well, the ruling which will eventually be in a  
23 prehearing conference order -- we are not going to get it  
24 out today, possibly can get it out Monday or Tuesday. But  
25 I don't think that's -- I know that's not appealable as a

1 matter of right. And I think the Appeal Board would say  
2 that this is -- will be equally appealable after the  
3 issuance of an initial decision in phase 3 initial decision.  
4 So that my guess is that the Appeal Board would not grant  
5 directed certification. But I can't, obviously, predict  
6 everything they are going to rule on. But we think we can  
7 know, assuming you file by next Friday, whether you wish to  
8 pursue that. And you can be assured that we will not  
9 reveal -- if you file a name, we are not going to reveal it  
10 to anybody until we discuss it further with all the parties.

11 MR. SINKIN: Okay.

12 JUDGE BECHHOEFER: If you want, you could even  
13 hand-deliver it to me and I'll put it in our safe after I  
14 read it. No one is going to have access through us, anyway.  
15 And if we decide not to accept it, we would, if you wish,  
16 return everything you sent to us.

17 MR. SINKIN: Okay.

18 JUDGE BECHHOEFER: Whether we need a further  
19 prehearing conference or whether we would work out a  
20 protective order on the telephone or not, I'm not sure.  
21 But you might want to try it on the phone.

22 There are some precedents for protective orders  
23 so that -- we will issue a prehearing conference order, but  
24 I think that we want the effective dates to precede that.  
25 Just given the fact that we would very much like, if we

1 ever hold a hearing at all, we want to make sure it would  
2 be after the summer.

3 It's clear to me that we will not have a hearing  
4 starting May 6th, I think it was, no matter what we rule on  
5 all these issues. If we do admit some issues, there is  
6 going to be some discovery and, well, I just think we could  
7 announce now that there won't be a hearing starting May 6,  
8 I guess the date was.

9 At the very least it should -- we have to  
10 proceed so that if there should be a hearing, it will be  
11 held this summer, I think.

12 Concerning your response to the Issue C  
13 affidavits, we have heard something from all the parties.  
14 Does anybody have anything further to say on that before we  
15 decide? I gather the Applicants don't think Mr. Sinkin  
16 should have any further opportunity, or if any, limited to  
17 new information on the Staff affidavit.

18 I gather the Staff would not put those limits on  
19 it. Am I correct?

20 MR. REIS: The Staff would not put those limits  
21 on it, but the Staff does believe that it is limited -- of  
22 course the question is how broad Issue C is. The  
23 Applicant's affidavit and the Staff's affidavit only went  
24 to the organization and we feel that Mr. Sinkin should be  
25 responding to that.

1                   We filed our material on the 14th. I guess,  
2 looking at the time, Mr. Sinkin would have until the 21st  
3 or whenever.

4                   JUDGE BECHHOEFER: We figured two weeks, I think.  
5 The 28th.

6                   Will you mail or hand-serve it?

7                   MR. SINKIN: Mail.

8                   JUDGE BECHHOEFER: 28th, plus five days,  
9 whatever that is.

10                  MR. SINKIN: I think I figured it as April 2nd,  
11 but I could be wrong.

12                  MR. REIS: That sounds reasonable.

13                  (Discussion off the record.)

14                  MR. AXELRAD: Mr. Chairman, I don't want to be  
15 arguing over just a few days, but the record should reflect  
16 that the Intervenors had our affidavit for 28 days by the  
17 time the date was due; secondly, they had the draft SER  
18 well before, which is basically very similar to the  
19 information now contained in the attachment to the  
20 affidavit that was submitted by the Staff; thirdly, the  
21 Staff's affidavit, by and large is very similar to the  
22 information that was contained in the Applicant's affidavit,  
23 so there isn't really, I don't think, any significant new  
24 information in there, and two weeks from March 14, it would  
25 seem to me to be ample. This is particularly true, I think,

1 in view of the Board's indication, which we fully share,  
2 that if there is going to be -- if there is going to be any  
3 phase 3 hearing, it should be held this summer; and  
4 therefore, if there are going to be any matters that have  
5 to be litigated, they should be identified as quickly as  
6 possible.

7 If the Intervenors had responded to at least the  
8 Applicant's affidavit, we could at least have argued those  
9 questions today and we would know what matters, if any, we  
10 were going to have to litigate on that basis.

11 Since that did not happen, and the Staff  
12 obviously will need some kind of opportunity to respond to  
13 whatever the Intervenors raise before the Board rules and,  
14 therefore, there's going to be an extra step involved in  
15 that chain. So that has to be taken into account.

16 Secondly, I think it is very important to make  
17 sure that the Intervenors understand that the information  
18 or whatever it is they do file in response to these  
19 affidavits, similarly to the practice that the Board  
20 adopted in connection with the Issue B update, the items  
21 that they identified, that they believe they should  
22 litigate, they should provide enough information as if they  
23 were responding to a motion for summary disposition so the  
24 Board would be sure that anything that is going to be  
25 litigated there is something specific that does deserve



1 litigation.

2 (Discussion off the record.)

3 JUDGE BECHHOEFER: The Board will accept a  
4 filing as late as April 2nd, but it should include enough  
5 of the details so that we can evaluate whether there is a  
6 genuine issue of fact to try.

7 That filing should not include anything about  
8 the drug issue. You don't have to spend time repeating  
9 that. We have gotten all the information we need on the  
10 drug issue plus what you are going to file in the future,  
11 on the 28th. So we don't want to hear further arguments  
12 whether or not drugs fall within contention C. I think  
13 we've got enough on that.

14 This other affidavit -- doesn't have to be an  
15 affidavit, but it should be information which would at  
16 least enable us to determine whether there's another  
17 legitimate issue under Issue C.

18 MR. SINKIN: I just want to be clear on one  
19 thing, Mr. Chairman. Does that mean that the Board is, sua  
20 sponte, considering the allegation as possibly falling  
21 under Issue C? I can certainly ask you today to please so  
22 consider it.

23 JUDGE BECHHOEFER: No. We have considered that  
24 you have asked that. You can put that one sentence in.  
25 What I'm saying is: I don't want to hear a reiteration of

1 all the arguments we have heard today. The Board is not  
2 raising this sua sponte, but the Board thought it could  
3 conceivably fall under that. We haven't so ruled. We  
4 haven't decided one way or the other. But since we may be  
5 asking you to file the information, if we consider it only  
6 as a new contention, you'll have to file something later,  
7 but we will try to keep into account all the varied filing  
8 dates, varying responsibilities. But, anyway, for March  
9 28th you'll file information on drugs, and on April 2nd,  
10 you'll file any further information on the Applicant's and  
11 Staff affidavits.

12 MR. REIS: Mr. Chairman, there is one thing, one  
13 other date. You mentioned that you canceled the hearing  
14 for May 6, I take it, or indicated you were canceling the  
15 hearing.

16 JUDGE BECHHOEFER: I don't think anybody is  
17 going to be ready to go to hearing on May 6th.

18 MR. REIS: There is also a testimony filing date  
19 of April 14th, and I think ought to make it clear that we  
20 don't have to file testimony on April 14th.

21 JUDGE BECHHOEFER: That's equally clear for all  
22 parties.

23 If any party foresees anything to go to hearing  
24 on on May 6th, then those dates would still hold. But I  
25 don't think anybody has described to me any issue that we

1 could go to hearing on on May 6th. Correct me if I'm wrong.

2 MR. AXELRAD: Mr. Chairman, if we could go back  
3 to Issue C, if the Intervenors file by April 2nd,  
4 Applicants would like until April 14 to respond and suggest  
5 that the Staff have until April 17th to respond. April 2nd  
6 is a Wednesday. April 14th would be a Monday. And April  
7 17th would be a Thursday.

8 JUDGE BECHHOEFER: The Staff usually wants five  
9 days.

10 MR. REIS: I would prefer five days. The 1st  
11 would be fine, if that's a Monday. It would be -- make it  
12 the 21st, instead of the 19th.

13 (Discussion off the record.)

14 JUDGE BECHHOEFER: I guess we will set April as  
15 the date CCANP will file; April 14 the date Applicants will  
16 file; and we'll go to April 21st for the Staff response.

17 MR. AXELRAD: There's obviously the possibility  
18 that as a result of all of this there will be nothing to  
19 litigate.

20 JUDGE BECHHOEFER: That's correct.

21 MR. AXELRAD: And also the possibility there  
22 will be something to litigate.

23 In view of the summer schedule for a hearing,  
24 and in order that people be able to plan ahead of time,  
25 could we at least tentatively set a period of time for the

1 hearings this summer so that we will know how to plan  
2 accordingly?

3 JUDGE BECHHOEFER: I wanted to raise one other  
4 question which may or may not produce further litigation.

5 First I would like to inquire of Mr. Sinkin, for  
6 the record, are you going to submit anything on the -- or  
7 have you submitted anything on the hurricane design matters  
8 that we thought had to be supplemented?

9 MR. SINKIN: No. We have not submitted and do  
10 not intend to submit anything on the tornado missile issue.

11 JUDGE BECHHOEFER: With respect to the hurricane  
12 issue, the issue is still open for construction -- whether  
13 the facility has been adequately constructed to withstand  
14 hurricanes. We did not grant summary disposition on that.  
15 We held that open pending issuance of the SER, and so far  
16 the SER hasn't been issued. Do we have any latest estimate  
17 on the SER?

18 MR. REIS: Best estimate we have right now is  
19 early April.

20 JUDGE BECHHOEFER: Early April?

21 MR. REIS: Early April.

22 JUDGE BECHHOEFER: I believe we had originally  
23 considered that CCANP should have about 30 days to look  
24 over the SER. I can't remember if that went into an order  
25 or not. It may have.

1           MR. REIS: I don't recall it, your Honor. I  
2 don't recall it at all. Nor do I recall that it's common  
3 practice to give any general time after a SER to comment on  
4 the SER at all.

5           MR. AXELRAD: I assume --

6           JUDGE BECHHOEFER: This would be a response -- I  
7 thought, in ruling on the hurricane issue we had put a  
8 footnote in or something saying that while we wouldn't  
9 accept new information concerning design, we would consider  
10 construction information and any information filed within  
11 30 days would not be untimely. But maybe we didn't say  
12 that. I sort of recollected we might have.

13           MR. AXELRAD: It seems to me, Mr. Chairman, that  
14 reviewing the portion of the SER that deals with hurricane  
15 or tornado protection would not require 30 days, and that  
16 could clearly be done by Intervenors within a period of a  
17 week from when the SER issues.

18           JUDGE BECHHOEFER: Do any of the parties have a  
19 copy of our sixth prehearing conference order? I can't  
20 remember if I put a time in there or not.

21           MR. GUTTERMAN: I have the order right here,  
22 Mr. Chairman. I'm just turning through it. If it would be  
23 faster to hand it up, I'll be happy to do that.

24           Let's see -- I'm reading the footnote at page 6  
25 of the sixth prehearing conference order. There the Board

1 says, "Any filing by CCANP within 30 days after the release  
2 of the SER, a discussion of this subject will not be  
3 subject to timeliness objections as long as the information  
4 relied on stems from the SER."

5 JUDGE BECHHOEFER: That's what I had recollected.

6 MR. REIS: Mr. Chairman, if this hearing is  
7 going to go on for more than another five minutes, I have  
8 to make a phone call for a personal reason, right now.  
9 Otherwise my wife will kill me.

10 (Laughter.)

11 JUDGE BECHHOEFER: I think we will hold to the  
12 30 days, and also, at least today, we won't set a date for  
13 summer. We will try to discuss it shortly and maybe have a  
14 conference call. Or we may want to see whether there are  
15 any matters that are even open for litigation before we try  
16 to set a time frame for litigating that. There may not be.

17 I might say on the hurricane matter,  
18 construction matter, there was one newspaper article that  
19 we were supplied by Mr. Sinkin some time ago, which raised  
20 questions as to the construction of the HVAC system, and  
21 the adequacy of that to withstand tornadoes. We may ask  
22 the parties for some comments on that after the SER issues.  
23 This was supplied to us last summer as part of an article  
24 that dealt with the cooling pond, I think.

25 There was another statement in there concerning

1 construction -- something having to do with the HVAC system  
2 not being constructed adequately to withstand hurricanes.  
3 I'm not sure whether it has any validity, but we may ask  
4 the parties to tell us what they have on this subject. I  
5 haven't looked it up yet. But I'll put you on notice that  
6 we may do that.

7 Also, newspaper articles supplied to us during  
8 the hearings last summer. We may at least request -- it  
9 was not specific enough for us to really know what portion  
10 of the HVAC system was being referred to, and whether it  
11 will be covered in the SER or not. So we may ask the  
12 parties to try to identify what that was, whether it has  
13 any implications for construction to withstand hurricanes.

14 MR. REIS: Mr. Chairman, I would appreciate it  
15 if you would send me a copy of the newspaper article. I  
16 have no idea whether I ever even received it or where it  
17 might be today, if it was just a newspaper article handed  
18 out that was not formally served. I have no idea of what  
19 this is all about or what we are talking about.

20 JUDGE BECHHOEFER: It was formally served. In  
21 fact, in my initial draft of PID 2, I referred to it, but  
22 we may want to put it out earlier because I don't know when  
23 PID 2 will come out.

24 MR. REIS: If it was officially served, I'm sure  
25 I can get it.

1           JUDGE BECHHOEFER: I will call you Monday, I  
2 guess, or if you come downstairs, I'll even give you the  
3 reference. I'll give the other parties the reference, too,  
4 if you need it. But if you want to just look at it, you  
5 can.

6           MR. REIS: Okay.

7           JUDGE BECHHOEFER: I can certainly give you the  
8 reference and the day it was served on us because I  
9 referred to it.

10           Do we have anything further? I guess we have  
11 nothing further. Any other party want to raise anything?  
12 I know Mr. Reis is in a hurry now.

13           MR. AXELRAD: I do want to make sure that I note  
14 a couple of things.

15           One, we received today a motion from Mr. Sinkin,  
16 a motion to compel document production. I assume that  
17 since that dealt with the drug use questions that similarly  
18 we don't have to answer that motion because that is no  
19 longer within Issue F? Am I correct, Mr. Sinkin?

20           MR. SINKIN: That's correct. Having not read  
21 the motion, I assume that's correct --

22           That's correct, yes.

23           MR. AXELRAD: We have a pending motion for  
24 summary disposition of Issue F.

25           MR. SINKIN: I assume there's no need to respond



1 to that since it has been ruled that the allegation doesn't  
2 fall under Issue F.

3 MR. AXELRAD: I believe the only thing  
4 Mr. Sinkin was raising under Issue F was drug use and it's  
5 not under there. Of course, we submitted a lot of material  
6 with our motion for summary disposition. I just don't want  
7 the Staff to have to answer that needlessly, or Mr. Sinkin,  
8 if in fact, in essence, Issue F is no longer with us.

9 I think it's up to --

10 (Discussion off the record.)

11 JUDGE BECHHOEFER: I think that although he has  
12 said he doesn't have anything to litigate under Issue F, if  
13 Mr. Sinkin should respond -- motions for summary  
14 disposition have to be satisfactory on their face. I  
15 haven't looked at it, so I don't want to preclude him from  
16 filing a response.

17 Certainly I would say if Mr. Sinkin doesn't  
18 respond, and the Staff certainly doesn't have to respond --

19 MR. REIS: The trouble is on a motion for  
20 summary disposition, the Staff's reply is due at the same  
21 time. All replies are due at the same time.

22 JUDGE BECHHOEFER: You are right.

23 MR. SINKIN: Why don't we handle that one this  
24 way: Let me look at it tomorrow, over the weekend,  
25 whatever, talk to Ed early next week and notify the parties

1 if we intend to respond. If we don't intend to respond,  
2 nobody needs to respond.

3 MR. REIS: That would be fine.

4 JUDGE BECHHOEFER: I think that's satisfactory.  
5 I have skimmed it, but I haven't really read it in enough  
6 detail to know whether it is satisfactory or not.

7 MR. AXELRAD: The only other thing I wanted to  
8 ask the Board is whether you would have any ability to give  
9 us any kind of an estimate as to when you might be ready to  
10 rule on the pending motions to reopen phase 2; when you  
11 might issue the decision on phase 2; and when you might  
12 rule on your order to show cause to Mr. Sinkin?

13 (Discussion off the record.)

14 JUDGE BECHHOEFER: It's hard for me to predict.  
15 I would say at least another month.

16 MR. AXELRAD: On all three?

17 JUDGE BECHHOEFER: Pardon?

18 MR. AXELRAD: On all three items?

19 JUDGE BECHHOEFER: Yes. I can't predict exactly.  
20 Is there anything further? If not, the hearing  
21 hearing conference will be adjourned. We'll issue an order  
22 as soon as we can.

23 (Whereupon, at 5:35 p.m., the hearing was  
24 adjourned.)

25

CERTIFICATE OF OFFICIAL REPORTER

This is to certify that the attached proceedings before the UNITED STATES NUCLEAR REGULATORY COMMISSION in the matter of:

NAME OF PROCEEDING: HOUSTON LIGHTING & POWER COMPANY,  
et al.  
(South Texas Project, Units 1 & 2)

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

PLACE: BETHESDA, MARYLAND

DATE: FRIDAY, MARCH 21, 1986

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission.

(sig) *Joel Breitner*

(TYPED)

JOEL BREITNER

Official Reporter  
ACE-FEDERAL REPORTERS, INC.  
Reporter's Affiliation