UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	X	
HOUSTON LIGHTING & POWER CO.	X	Docket No. 50-466
(Allens Creek, Unit 1)	X	

TEX PIRG'S MOTION FOR RECONSIDERATION OF ALAB 535;MOTION FOR CLARIFICATION OF ALAB-535; RESPONSE TO APPLICANT'S MOTION FOR RECONSIDERATION OF ALAB-535; RESPONSE TO NRC STAFF'S MOTION FOR CLARIFICATION OF ALAB-535;MEMORANDUM ON DUE PROCESS NOTICE

BRIEF BACKGROUND

In Dec. 1973 a FR notice was published. On March 11 and 12, 1975 a "public hearing" was held in which none of the public was a party. The transcripts of that meeting show that there was no real cross examination nor attempt to closely examine the applicant nor the NRC staff to determine the detailed facts necessary to see if the requirements of NEPE and the Atomic Energy Act were met.There are many recent events that indicate that other plants may have been built without the claimed "thorough review". Five plants were built with the same defective computer program used to design for earthquake protection. Even WASH-1400 had many errors that were quickly detected when others looked at it. Now the NRC Staff says that all of the B & W plants were defective. The "NuggetFile" shows that the public was not informed of all the problems of nuclear safety.This failure to keep the public fully informed is probably the worst thing that the nuclear industry has done to cause opposition to nuclear power. Even if it could be made "safe", the public will never believe it now.

In 1975 the Applicant announced that it was not going to build the Allens Creek plants. Newspapers carried the story. In May of 1978, after a three year delay caused by the Applicant, a defective FR notice limited contentions to "changes in the plant design". After Tex PIRG complained that the notice was defective, the Board properly published a new FR notice, but it was still much too restrictive. It would have prevented discussion of most safety issues even though they had never been discussed in public.The Board seemed further intent on preventing public participation by allowing very little time to prepare "valid contentions". The prior Board Chairman had required that the NRC Staff assist intervenors by meeting with them and allowing them sufficient time to study the environmental and safety reports. The present Chairman

prevented this from being carried out. As a consequence, most people, even attorneys, doctors, and college professors, were unable to become parties because they did not know how to prepare "valid" contentions. The point is that not only was the FR notice defective , but the whole failure of the process to inform the interested public is a denial of Constitutional Due Process as will be shown later. Most of the affected public never got any notice(who reads the FR).Of those that did, most would have not attempted to intervene because of the huge burden to meet the unduly tough restrictions. Of those that attempted, most did not appeal because by their prior treatment they felt that it was hopeless since clearly the "NRC does not want public input". In fact Tex PIRG was told not to appeal the "new evidence" motion because "it would be a waste of time".

On April 4,1979 the Appeal Board reversed and remanded to the ASLB (ALAB-535) their decision to require "new evidence" and "change in plant design" contentions. The Appeal Board limited their decision to the questions before it, but remanded for further action. No doubt the Appeal Board thought it obvious that defective notice is no notice and that the lower Board would require the publication of the corrected notice. They no doubt had noticed that the Board in Sept.1978 had republished the notice when it found that the first notice was defective. Yet still the Applicant, Board, and to some extent the Staff still take the "hard line" view that public participation should be limited instead of encouraged. It has been admitted that the Applicant made the conscious decision to object to everything that any intervenors might raise, apparently in the belief that it would discourage us, bury us in paperwork, and make us "go away". It has had the opposite effect. Many other people have called Tex PIRG to ask how they could get involved and some have specifically stated that they did not formally intervene because of how difficult it was to find contentions that would be valid.

The Appeal Board order was on April 4,1979. On April 12,1979, the Board issues an Memorandum and Order which limited itself to those that had won their appeal.In general it said they could amend their contentions within the next 30 days. Unlike Sept. 1978, they did not issue a new FR notice. On the same day, April 12,1979, the Applicant asked for a reconsideration of ALAB 535. On April 18,1979,the Staff asked for "clarification" of ALAB-535. The Staff asks whether 10 CFR 2.714(a) should apply to all contentions and if a new FR notice is required. We shall now attempt to answer these questions.

MEMORANDUM

Everyone knows that Due Process requires that one affected by government action be given notice and the opportunity to be heard. The courts have defined what the above standard really means and the Adminstrative Procedures Act, 5 USCA 554(b), tells us how it applies to adminstrative proceedings such as ours.

5 USCA 554(b) states: Persons entitled to notice of an agency hearing shall be timely informed of-(1)the time, place and nature of the hearing;(2)the legal authority and jurisdiction under which the hearing is to be held; and(3)the matters of fact and law asserted. It is clear that the prior notices given were defective in failing to tell the affected people within 50 miles of the plant site both the nature of the hearing and the matters of fact and law asserted. The prior notices failed to tell people that they could raise contentions without the restrictions of plant changes and after Dec. 9, 1975 new evidence. Some and perhaps many people or groups failed to petition to intervene or failed to get their contentions accepted because of this defective notice. Some of these people did not appeal their denial, but due process does not require that everyone appeal their decisions against them in order to receive the proper notice. Both the Adminstrative Procedure Act and the Constitution require correct notice before action against the person.

Professor Davis in his Adminstrative Law Thesis at Section 8.04 states that it is the fairness of the complete procedure, not just the written notice, that decides if due process is met. In our case not only was the written notice defective but the process used after that was unfair. For example the approximately 30 people who petitioned to intervene in response to the Sept. 11, 1978 FR notice were given only a very few days to prepare their contentions. It was a near impossible task as was proven by the fact that only three contentions by two parties(both attorneys) were accepted as valid from this group of people. All these people were effectively denied the right to a hearing because the short time to prepare valid contentions that met all the NRC regulations guaranteed that they would not be even able to take part in the hearings. There is nothing fair about that process, therefore Professor Davis would require a corrected notice be published.

There have been many court cases that related to whether the notice was sufficient, but most of them say about the same thing so I will mention only the major ones. The leading case is probably Gonzales v. U.S.,348 U.S. 407,99 L Ed 467,75 S Ct 409(1954). In it it was held that due process was not had because the government failed to furnish a man with a copy of its recommendations made to the appeal board in the Selective Service System. The same day the Court held that due process was denied to a man because the FBI did not furnish him with a copy of its investigative report and so deprived him of a fair hearing. Simmons v. U.S., 348 U.S. 397. The above cases relied on Morgan v. U.S.,304 U.S. 1,18 which held that due process required that one get a reasonable opportunity to know the claims of the opposing party and to meet them which meant that they were entitled to be fairly advised of the government proposal and to be heard upon that proposal before the government issued its final command.

Three Federal Appeals Court decisions explain the above cases somewhat more. In Hess & Clark v. FDA,495 F_2 975(1974) it was held that notice requires specific nature of facts and evidence on which agency proposes to take action so that an informed response which places all relevant data before the agency can be made. In Golden Grain Macaroni v. FTC ,472 F_2 882 cert denied 412 U.S. 918(1972) it was held that notice requires that one be informed as to the matters of law and fact such that the party understand the issues and be afforded full opportunity to a hearing. In Brotherhood of R.R. Trainmen v. Swan, 214 F_2 56(1954)it was held that one gets a reasonable opportunity to learn the claims of opposing parties and to meet them.

Several state courts have addressed the sufficiency of notice problem. Some state that the notice must be specific.252 SW 990,994; 269 NYS 116. Others say the nature of the proceedings must be known, 53 A_2 175,176; 70 NW_2 267,272. Still others say that one must be apprised of what is going on,59 P_2 41,43; 236 NYS 89,93. Finally one states that due process means opportunity to be present at a hearing , to know the nature and contents of all evidence and to present any relevant contentions and evidence that party may have. In Re Amalgamated Food Handlers, Local 653-A, 70 NW_2 267,272.

In summary it is clear that both the federal Administrative Procedure Act and Constitutional Due Process as defined by court decisions require that a corrected Federal Register notice be made. In the most simple terms the complete process must be fair. All those that may be affected by the granting or denial of a construction permit at the Allens Creek site must have access to a notice in the Federal Register that tells them the nature of the hearing and what matters of fact and law will be considered and decided at the public hearing. For the notice to be reasonable it must specifically state the nature and contents of all evidence and contentions that will be allowed. These requirements can not be met by stating that certain issues or contentions can not be raised when in fact they should be allowed. There is no requirement that a personal notice be hand carried to each person within 50 miles of the proposed plant, but it is required that the notice published in the Federal Register fairly and correctly state what the issue is in the proceeding. In the case where the notice lets anyone that shows up become a party then a general description of the issue would suffice. But where , as with the NRC regulations, the contentions raised will determine whether one gets to be a party, then it is necessary that the notice correctly specify the limits upon the contentions. Otherwise the agency by unduly limiting contentions could always discourage intervention and limit the intervenors to those few that were stubborn, rich, trained in the law and willing to appeal to the court of last resort. This proceeding has many people who tried to intervene, and others who never made the first attempt but would if a correct notice was published. Both groups will be denied , at least for a while, their due process rights if no correct notice is given.

Although there should be no need for the petitioners to meet the late intervention requirements after a three year delay caused by the applicant, most intervenors could meet them. To the extent that the new contentions raised were raised by others they could be consolidated. There is no other way for their interest to be met since there is no state proceedings to consider the same issues. Since some others have been allowed to raise new contentions within 30 days of April 12,1979, there would be very little delay in publishing the correct notice and allowing everyone a chance to intervene under the same groundrules. Otherwise later someone could sue in District Court to enjoin construction because they were not given correct notice.

Therefore Tex Pirg believes that the ALAB-535 should be affirmed except that it should specifically direct the lower Board to publish a corrected notice in the Federal Register.

Tex PIRG's attorney is having a difficult time finding rules of practice that apply to the appeal board under the present situation, but as a minimum we should have 10 days plus 5 days for service by mail to respond to the NRC staff motion for clarification as stated in 2.730(c). That would give us until May 3,1979 to respond. If for any reason the Appeal Board makes a new order prior to receiving this material, then this material should be considered as a Motion for reconsideration of that Order.Or as an alternative, I ask that the Appeal board consider this material as a Motion for Directed Certification of the question- When a notice has been found to be defective does a new corrected notice have to be published so that others besides those that won their appeals may get a chance to intervene under the corrected notice?

Respectfully submitted,

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CERTIFICATE OF SERVICE

I sent the above materials to the following by U.S. mail or hand delivery this 28th day of April,1979:

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Robert H. Culp
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