

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

THE ATOMIC SAFETY AND LICENSING BOARD

Sheldon J. Wolfe, Esquire, Chairman
Dr. E. Leonard Cheatum, Member
Gustave A. Linenberger, Jr., Member



In the Matter of -)
HOUSTON LIGHTING AND POWER COMPANY) Docket No. 50-466 CP
(Allens Creek Nuclear Generating)
Station, Unit 1))

ORDER
(December 4, 1979)

On November 9, 1979, pursuant to 10 C.F.R. § 2.707, Applicant filed a Motion For Dismissal of TexPirg for failure to comply with the Board's discovery orders. On November 14, 1979, TexPirg filed a Response in opposition thereto. On November 21, 1979, Applicant filed a Motion For Leave To Reply to TexPirg's response. While the moving party has no right to reply, 10 C.F.R. § 2.730(c), we grant said motion for the reason stated therein. Consequently we allow the filing of TexPirg's Reply dated November 26, 1979. We also allow the filing of Mr. Doherty's Response of November 23, 1979, which opposed Applicant's Motion For Dismissal. On November 29, 1979, the NRC Staff filed a Response opposing Applicant's motion.

Applicant argues that TexPirg has failed to comply with our Memorandum and Order of July 12, 1979,^{1/} which had granted in part and denied in part Applicant's

^{1/} In the Memorandum and Order of July 12, 1979, we had directed, in pertinent part, that TexPirg resubmit its answers to Applicant's first and second sets of interrogatories, which should be signed under oath or affirmation by the person with knowledge of the information contained in each of said answers and who had been authorized by TexPirg to submit such answers.

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Motion to Compel Further Answers dated June 21, 1979.^{2/} It asserts that, in violation of the Memorandum and Order, TexPirg did not resubmit answers to Applicant's First Set of Interrogatories and that instead TexPirg's attorney, Mr. Scott, simply duplicated the answers previously submitted by Mr. John Doherty on March 27, 1979 and attached an affidavit stating that he had answered the interrogatories, which were then filed on July 23, 1979.^{3/} Applicant also asserts that, during the deposition proceeding on September 12, 1979, Mr. Scott was evasive, admitted he had no personal knowledge of the answers to Applicant's First and Second Set of Interrogatories, and improperly fended off questions concerning the interrogatories by invoking the attorney-client privilege. Finally, it asserts that TexPirg's Responses to HL&P's Third Set of Interrogatories filed on September 7, 1979 improperly contained the affidavit of Mr. Clarence Johnson rather than an affidavit of its expert witness, Mr. Sansam.

The gravamen of Applicant's Motion For Dismissal is that TexPirg's resubmitted answers to HL&P's First and Second Sets of Interrogatories did not comply with the Board's Memorandum and Order dated July 12, 1979. It argues that, during the deposition taken on September 12, 1979, Mr. Scott admitted that he did not have any personal knowledge of the answers, that he had not submitted the answers in the expert witness sense but, rather as an attorney, had submitted

^{2/} Contrary to Applicant's assertion at page 2 of its Motion for Dismissal, the Board did not issue another Order dated July 12, 1979 in response to Applicant's Motion To Compel of June 21, 1979. Said Order was issued pursuant to § 2.718 in light of Applicant's Motion For Further Procedures Relating To TexPirg Intervention filed on June 28, 1979, and was not issued pursuant to § 2.740(f).

^{3/} Mr. Doherty had left TexPirg's employ before July 23, 1979.

them as TexPirg's responses, and that other answers were signed simply in his capacity as TexPirg's attorney (Motion For Dismissal, p. 9).

We have reviewed Applicant's Motion To Compel Further Answers dated June 21, 1979. Therein, inter alia, Applicant argued (1) that TexPirg's March 27, 1979 answers to Applicant's first interrogatories, as signed by Mr. Doherty, and TexPirg's June 6, 1979 answers to Applicant's second interrogatories, as signed by Mr. Scott, had not been signed under oath or affirmation as required by 10 C.F.R. § 2.740b(b), and (2) that various conflicting statements had raised a serious question of whether Mr. Doherty had been authorized to answer interrogatories on TexPirg's behalf. Page 7 of said Motion To Compel reads as follows:

"Based upon TexPirg's failure to comply with the provisions of 10 C.F.R. § 2.740b(a) and (b), Applicant requests the Board to issue an order requiring TexPirg to resubmit its answers to the Applicant's first and second setof interrogatories, . . . , to be signed under oath or affirmation by the person with knowledge of the information contained in each of the answers to said interrogatories and who has been authorized by TexPirg to submit such answers." (Underscoring added).

Inexplicably Applicant had inserted, as an additional requirement, the underscored words in its request without supporting argument as required by § 2.740(f)⁴

4/ Indeed there could not have been argument in support of the requested insertion. § 2.740b does not require that the officer or agent of a party signing answers to interrogatories shall have knowledge of the information contained in those answers. Further, in its Motion To Compel of June 21, 1979, Applicant did not state that, pursuant to § 2.740(b)(1), it had requested previously the identification of persons having knowledge of any discoverable matter and that TexPirg had failed to respond or objected to that request. 1535 291

and without alerting the Board that such an insertion had been made. Apparently, neither the Staff, in its response of July 2, 1979, nor TexPirg, in its Response of July 5, 1979, was aware of this insertion and of its significance. The Board, unalerted, proceeded to incorporate the requested wording into its Memorandum and Order of July 12, 1979. We do not approve of such an unsupported insertion, especially when it is used in an effort to dismiss a party. Accordingly, upon our own motion, we strike the aforementioned underscored wording from our July 12th Memorandum and Order, and deny Applicant's Motion For Dismissal.^{5/}

In passing we note that, under Federal Rule of Civil Procedure 33 (from which § 2.740b is derived), while answers to interrogatories addressed to a corporation or other juridical person must speak of the composite knowledge of the party, it is not required that an attorney signing the answers as an agent of the party must have personal knowledge of the facts. A fortiori, it was neither improper for TexPirg's attorney to sign and resubmit answers to interrogatories previously submitted by Mr. Doherty nor for Mr. Clarence Johnson, as an officer of TexPirg, to sign the answers to HL&P's Third Set of Interrogatories. Finally, we note parenthetically that TexPirg would be estopped to deny either the authority of the person chosen by it to speak for it, or to deny the truthfulness of the answers. See 4A Moore's Federal Practice Paragraph 33.07.


Since TexPirg does not object, Applicant shall have thirty (30) additional days within which to initiate and complete discovery upon TexPirg's contentions

^{5/} At this juncture it would be premature for the Board to determine whether Mr. Scott must withdraw as counsel for TexPirg if he becomes an expert witness. See Canon 5 of Code of Professional Responsibility, DR 5-102.

(which had been admitted prior to October 15, 1979) with the time beginning to run as of the date this Order is served. Further, since we agree with TexPirg that Applicant has failed to communicate its problems to said intervening party, counsels for Applicant and TexPirg shall confer informally and counsel for TexPirg shall identify the person or persons having the technical knowledge in subject areas covered by each of TexPirg's contentions.

Dr. Cheatum and Mr. Linenberger concur.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Sheldon J. Wolfe, Esquire
Chairman

Dated at Bethesda, Maryland
this 4th day of December, 1979.