

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

12/28/79

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF'S CONSOLIDATED RESPONSE TO APPEALS OF  
EUGENE MUELLER, KATHRYN OTTO, PATRICIA L. STREILEN AND DONALD D. WEAVER

On November 29, 1979, and December 12, 1979, respectively, Eugene Mueller filed a notice of appeal and supplemental brief challenging the Licensing Board's Order dated November 19, 1979, insofar as it designated his filings of July 10, 1979, and September 25, 1979, as a request to make a limited appearance statement rather than as a petition for leave to intervene. In a notice of appeal dated December 10, 1979, and supplemental brief dated December 14, 1979, Kathryn Otto, Patricia L. Streilen and Donald D. Weaver challenge the same Licensing Board Order, in that it had also designated them as limited appearers in the captioned proceeding. For the reasons set forth below, the Staff opposes the appeals of all four of these individuals.

BACKGROUND

On June 18, 1979, a "Supplemental Notice of Intervention Procedures" (Supplemental Notice) was published in the Federal Register at the Licensing Board's direction (44 Fed. Reg. 35062). It is fair to say that this notice was prompted by a series of decisions of this Board which had (1) found previous notices of

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opportunity to intervene in this proceeding too restrictive<sup>1/</sup> and (2) discussed possible republication of the prior notices. See ALAB-535, 9 NRC 377 (April 4, 1979); ALAB-539, 9 NRC 422 (April 23, 1979); ALAB-544, 9 NRC 630 (May 3, 1979).

The relevant history of the proceeding was summarized by this Board in ALAB's 535 and 539 and need not be rehearsed in detail here. Briefly, however, the May and September, 1978 notices were found too restrictive by this Board because the Licensing Board had limited permissible contentions to those that dealt with either changes in the generating station resulting from the cancellation of one unit, or information arising after this Board's affirmance<sup>2/</sup> of the Partial Initial Decision in this matter.<sup>3/</sup>

In ALAB-539, in the process of denying the Staff's motion for clarification of ALAB-535, this Board found that republication of a notice providing opportunity for intervention was neither "necessary or desirable,"<sup>4/</sup> inter alia because it was "at least doubtful that the limitation served to discourage potential petitions (although, as recognized in ALAB-535, it may have had an effect upon the choice and development of contentions which were set forth in the petitions filed)." <sup>5/</sup>

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<sup>1/</sup>The notices which were found too restrictive by this Board are dated May 31, 1978 (43 Fed. Reg. 23666) and September 11, 1978 (43 Fed. Reg. 40328), respectively.

<sup>2/</sup>ALAB-301, 2 NRC 853 (December 9, 1975).

<sup>3/</sup>2 NRC 776 (November 11, 1975).

<sup>4/</sup>9 NRC at 426.

<sup>5/</sup>Id., at 427.

Thereafter, in ALAB-544, in ruling upon a motion for reconsideration of ALAB-535 filed by TEXPIRG (an intervenor in this proceeding), this Board noted the uncertainty created by TEXPIRG with regard to whether potential intervention petitions had, in fact, been discouraged by the "improper limitation"<sup>6/</sup> in the 1978 notices. While not directing the Licensing Board to republish the notice providing an opportunity to intervene, this Board stated that "it would not be appropriate for us to forbid republication." (emphasis in original)<sup>7/</sup> Finding that it was in the public interest to do so, the Licensing Board published the above-mentioned Supplemental Notice. The Supplemental Notice provided, inter alia, that:

[A]ny person (other than those persons and organizations which filed petitions for leave to intervene pursuant to the above notices of May 31 and September 11, 1978), who did not file a petition pursuant to those notices because of the restrictions on permissible contentions contained therein, and who wishes to intervene as a party to this proceeding must file a written petition for leave to intervene in accordance with the provisions of 10 C.F.R. 2.714. Such person shall state that he failed to file a petition for leave to intervene pursuant to the Board's notices of May 31 and September 11, 1978, because of the restrictions on permissible contentions contained in those notices.

In response to that notice, over 60 individuals requested leave to participate in the proceeding, either as limited appearers or as full parties.

On August 6, 1979, the Licensing Board issued an Order (44 Fed. Reg. 47653) which set October 15-19, 1979, as the dates for a special prehearing conference in this proceeding, and provided that all contentions were required to be filed by September 14, 1979. Subsequent to the special prehearing conference, on November 19, 1979, the Licensing Board issued the Order which is the subject of these appeals.

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<sup>6/</sup>9 NRC at 632.

<sup>7/</sup>Id.

ARGUMENT

Taken as a group, the individuals who have filed the instant appeals have raised three alleged errors committed by the Licensing Board in establishing procedures to be followed in the proceeding subsequent to its decision to "renotify" this case. First, it is argued by all of the appellants save Mr. Mueller that publication of a notice in the Federal Register alone deprives them of due process of law, since members of the public may not actually receive this type of notice.<sup>8/</sup> However, that argument is totally unavailing to the appellants, it being well settled that publication of agency rulings or regulations in the Federal Register is "notice to all of the world" of their contents. Lynsky v. United States, 126 F.Supp. 453, 455 (Ct. Cl. 1954); Federal Crop Insurance Company v. Merrill, 332 U.S. 380, 384-385 (1945); Federal Register Act of 1935, 44 U.S.C. §1507.

Further, pursuant to Section 189a of the Atomic Energy Act, as amended, 42 U.S.C. 2239(a), and 10 CFR §2.104(a), the specified method for publication of a notice providing an opportunity for intervention in NRC licensing proceedings is the placement of such a notice in the Federal Register. No other notice is required. By arguing that Federal Register notice is inadequate, the appellants challenge the statute and the above-mentioned regulation. A challenge to a Commission regulation such as 10 CFR §2.104(a) is, of course, prohibited by 10 CFR §2.758, absent a showing, not made here, of "special circumstances."

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Although it is not clear from their brief, appellants are obviously making this argument in the context of the May and September, 1978 notices, which they apparently never saw. They obviously read and petitioned for leave to intervene pursuant to the June 18 Supplemental Notice.

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The second argument, made by all of the appellants, concerns the requirement of the June 18, 1979 Supplemental Notice that all petitioners state that their failure to file petitions pursuant to the earlier notices was a result of the restrictions contained in those notices. Mr. Mueller states that this requirement is improper because "the Licensing Board lacked the authority to establish that order"<sup>9/</sup> and it violates "my rights as a taxpayer citizen."<sup>10/</sup> The other three petitioners argue that "the requirement of a statement of or proof of intimidation by the restrictions in prior notices denies due process."<sup>11/</sup> However, Mr. Mueller fails to explain why the Licensing Board lacked authority to establish its order. Similarly, the remaining petitioners fail to explicate the reasons why the order in question denied them due process of law.

The Licensing Board's requirement (that petitioners allege forbearance from previously filing petitions because of restrictions contained in earlier notices) was entirely proper. As is made clear from a reading of this Board's decisions in ALAB's 535, 539 and 544, the single question remaining in controversy (as a procedural matter) after issuance of those opinions was whether additional petitions would have been filed but for the restrictions in the May and September, 1978 notices. Thus, the Supplemental Notice was an attempt to verify that (1) the individuals filing petitions had read the prior notices and (2) that they had made a decision not to file a petition because the issues which they sought to raise

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<sup>9/</sup> "Supplemental Brief," dated December 12, 1979.

<sup>10/</sup> "Notice of Appeal," dated November 29, 1979, p. 1.

<sup>11/</sup> "Supplemental Brief in Support of Appeals of Kathryn Otto, Patricia L. Streilen and Donald D. Weaver," dated December 14, 1979, p. 3.

would not be litigable under the terms of those notices. It was eminently reasonable for the Licensing Board to seek this information, since if new petitioners had not read the prior notices, they would not have filed in any case and could not now be heard to complain. In addition, if new petitioners sought only to raise issues at this time which could have been raised even under the prior "restrictive" notices, there was no reason to entertain those petitions either. In short, the Licensing Board's Order properly invited new intervention from the only class of people who could legitimately complain about restrictions in the prior notices.

Finally, Mr. Mueller argues that the Commission's Rules of Practice provide that contentions do not have to be filed until 15 days prior to the special prehearing conference, and that the Licensing Board's requirement that contentions be filed by September 14, 1979 (instead of September 30, 1979) violated that regulation.<sup>12/</sup> Thus, he implicitly argues that his contentions were timely. However, as this Board has already pointed out in this proceeding, a Licensing Board may, under 10 CFR §2.711(a), alter the time periods otherwise established by the Rules of Practice.<sup>13/</sup> Thereafter, in an opinion which dealt with procedural matters surrounding the October 15-19 prehearing conference, this Board expressed approval of the Licensing Board's alteration of the time period set forth in 10 CFR §2.714 for the filing of contentions, stating:

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<sup>12/</sup> Mr. Mueller did not file contentions until September 25, 1979, and attempted to justify his tardiness on the grounds that he had not read the Licensing Board's August 6 Order and had been told by friends that he would have until September 30, 1979, to file contentions. (Tr. 757-763). We do not know whether Mr. Mueller, in fact, read the August 6 Order. We do know, however, that he was served with a copy of that Order by the Commission's Docketing and Service Section on August 8, 1978. He, therefore, was on notice that September 14, 1979, was the deadline for filing contentions. In any case, the fact that he failed to read the August 6 Order or the Federal Register notice containing that Order is patently insufficient to establish good cause for the late filing of contentions. 1092 104

<sup>13/</sup> ALAB-564, \_\_\_ NRC \_\_\_ (September 19, 1979), fn. 4.

The Licensing Board has scheduled a special prehearing conference to begin on October 15, 1979. Among the principal matters to be taken up, it appears, are the large number of pending intervention petitions and proposed contentions. In that regard, the Board established September 14th as the final date for the filing of contentions. In setting that date, the Board cut back the time normally allotted by the rules. Its purpose in doing so seems to have been to allow time for the applicant and staff to take a position, in writing, on the acceptability of the intervenors' contentions in advance of the conference.

Although such a procedure is not specifically sanctioned by the Rules of Practice, we have no essential difficulty with it. To the contrary, particularly where a large number of intervenors are involved (many with a long list of contentions), it makes a good deal of sense to structure the proceeding so that all participants know, before they arrive at the conference, what position the proponents of the plant are taking on the various contentions. 14/

In addition, this Board recognized that:

The Rules do not seem to deal explicitly with the filing of objections to contentions. Under the format laid down by the Rules, however, if contentions are not filed until 15 days before the conference, then the applicant and staff would likely not be able to state until the conference itself which contentions they thought to be inadmissible. 15/

The Licensing Board's August 6 Order certainly provided the petitioners with more than sufficient time in which to frame contentions. The publication of the Supplemental Notice on June 18, 1979, effectively gave the petitioners approximately three months in which to prepare a statement of issues which each wished the Licensing Board to consider. In addition, from the time of

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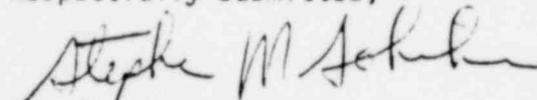
14/ ALAB-565, \_\_\_\_\_ NRC \_\_\_\_, (October 1, 1979), pp. 3-5.

15/ Id., at p. 5, fn. 10. Indeed, as the rules are currently written, if a petitioner fails to file contentions until 15 days prior to the conference (and the contentions are mailed), the Staff's response would technically not be due for 20 days, i.e., five days after the prehearing conference had commenced. See 10 CFR §§2.714(c) and 2.710. Needless to say, such a situation would hardly expedite consideration of the proffered contentions.

the August 6 Order, each individual had one month in which to finish preparation of contentions. Mr. Mueller, or any other petitioner for leave to intervene, cannot be heard to complain if he or she waits until the last possible moment to prepare and submit contentions. It is reasonable to expect that individuals who file petitions for leave to intervene should have in mind, at the time of their original filing, the issues which they wish to explore. It was certainly reasonable for the Licensing Board to expect that those issues could be framed as contentions on or before September 14, 1979.

For all of the above reasons, the Staff believes that the appeals of Messrs. Mueller and Weaver, Ms. Streilen and Ms. Otto should be dismissed, and that the Licensing Board's Order of November 19, 1979, should be affirmed insofar as it designated them as limited appearers in this proceeding.

Respectfully submitted,



Stephen M. Sohinki  
Counsel for NRC Staff

Dated at Bethesda, Maryland,  
this 28th day of December, 1979.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S CONSOLIDATED RESPONSE TO APPEALS OF EUGENE MUELLER, KATHRYN OTTO, PATRICIA L. STREILEN AND DONALD D. WEAVER" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk by deposit in the Nuclear Regulatory Commission internal mail system, this 28th day of December, 1979:

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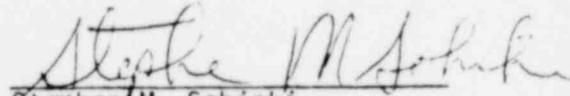
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