UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANT'S RESPONSE TO TEXPIRG'S MOTION FOR CERTIFICATION OF QUESTIONS TO THE APPEAL BOARD

On December 22, 1978, petitioner Texas Public Interest Research Group (TexPirg) filed a motion with the Licensing Board requesting certification of three questions to the Appeal Board. The Applicant files this response to petitioner's motion and urges the Board, for the reasons discussed below, to deny the request for certification. */

I. BACKGROUND

The three questions which petitioner requests the Board to refer to the Appeal Board all relate to the scope of the Board's Order of August 14, 1978, and the Corrected Notice

*/ Petitioner does not cite any provisions of the Commission's regulations in support of its motion. 10 CFR §2.718(i) and Appendix A, V(f)(4) to Part 2 provide for certification of questions to the Appeal Board (by virtue of 10 CFR §2.785(b)(1)), but certification presumes that the Licensing Board has not yet ruled on the question. If the Licensing Board has ruled on the question, 10 CFR §2.730(f) provides that the Board's ruling may be referred to the Appeal Board (by virtue of 10 CFR §2.785(b)(1)). Consumers Power Co. (Midland Plant, Units 1 and 2) ALAB-152, 6 AEC 816, 818 n. 6 (1973). Since the Board has previously ruled on petitioner's questions, Applicant will treat petitioner's motion for certification as a motion for referral under §2.730(f).

of Intervention Procedures (Corrected Notice), published in the Federal Register on September 11, 1978 (43 F.R. 40328). In issuing the August 14 Order and the Corrected Notice, the Board permitted contentions to be filed by petitioners for leave to intervene with respect to (1) the proposed changes in the plans for ACNGS */ and (2) new information or new evidence not available at the time of the Appeal Board's decision in this proceeding on December 9, 1975. **/ Petitioners' first two questions seek Appeal Board review of the Board's requirement that contentions be based upon "new information" or "new evidence" not available at the time of the Appeal Board's decision in December 1975. Petitioners' third question apparently seeks review of the December, 1975 cut-off date for new evidence or new information assuming that the Board properly imposed the constraints on contentions.

The background of the issuance of the Board's August 14, 1978 Order and the Corrected Notice is set forth in the Board's Memorandum and Order dated November 30, 1978 which denied petitioner's motion to modify the August 14 Order and the Corrected Notice. In the Memorandum and

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*/ The requirement that contentions be based upon proposed changes in the plans for ACNGS was first set forth in the Board's Notice of Intervention Procedures published in the Federal Register on May 31, 1978 (43 F.R. 23666).

**/ Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Units 1 and 2) ALAB-301, 2 NRC 853 (1975).

Order, the Board chronicled the steps which lead to the issuance of the August 14 Order and the Corrected Notice. (Memorandum and Order, pp. 1-5). In sum, the Board decided to permit contentions to be filed by petitioners for leave to intervene in this proceeding based upon proposed design changes made since the time ACNGS was deferred in 1975, and based upon new information or new evidence not available at the time of the Appeal Board's decision in December, 1975. In reaching this decision and issuing the Corrected Notice, the Board in effect permitted untimely petitions for leave to intervene to be filed without the requisite showing of good cause and a discussion of other factors as required by 10 CFR §2.714(a). */

In its Memorandum and Order of November 30, 1978, the Board also noted that petitioner had failed to file a petition for leave to intervene, timely or untimely, in response to the original Notice of Hearing published in this proceeding on December 28, 1973. Accordingly,

> Having slept upon its rights either in not having timely intervened in this case prior to January 18, 1974 or in not having moved for leave to file an untimely petition for leave to intervene which, inter alia, would have had to have shown good cause for failure to file on time, PIRG (and indeed the other petitioners) cannot be heard to urge that permission should be granted to propose unbounded contentions. (Memorandum and Order, p. 7. emphasis added).

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*/ It should be noted that in response to a request from the Board, both Applicant and Staff stated their position that no additional notice of hearing was required since any further proceedings on the application were, in effect, a continuation of the duly noticed (38 FR 35521, December 28, 1973) initial proceedings on the application. Applicant's Response to Licensing Board's Order of March 23, 1978 (April 14, 1978); NRC Staff's Response to Licensing Board's Order of March 23, 1978 (April 10, 1978).

II. REFERRAL IS NOT WARRANTED UNDER THE CIRCUMSTANCES OF THIS CASE

Petitioner has failed in its motion to discuss the requirements for referral under the Commission's regulations and how the circumstances of this case meet those requirements. Indeed, petitioner has failed to articulate any cogent reasons to this Board as to why referral would be justified in this case.

A. Criteria Under §2.730(f) For Referral

The NRC regulations set forth in 10 CFR §2.730(f) proscribe interlocutory appeals from the Licensing Boards to the Appeal Board. The exception to this proscription is where the Licensing Board in its discretion determines that a prompt review of its ruling "is necessary to prevent detriment to the public interest or unusual delay or expense . . . ." Id. In such circumstances, the Licensing Board may refer its ruling to the Appeal Board for decision. */

But it must be noted that the general policy of the Commission does not favor certification of a question during the pendency of a proceeding (Public Service Company of New Hampshire et al. (Seabrook Station, Units 1 and 2), ALAB-271 1 NRC 478, 483 (1975)) and certification is the exception and not the rule (Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station) and Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-300, 2 NRC 752, 759 (1975)).

*/ The Appeal Board may refuse to accept a referral from the Licensing Board where there has been no strong showing that §2.730(f) criteria have been met. See, e.g. Consumers Power Co. (Midland Plant, Units 1 and 2) ALAB-438, 6 NRC 638 (1977); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1191, n. 2 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-293, 2 NRC 660 (1975).

B. Petitioner Has Failed to Demonstrate that Referral Of The Board's Ruling Is Warranted Under The Criteria of § 2.730(f)

Beyond a general assertion that referral at this time may prevent "future delay" in this proceeding, petitioner nowhere addresses the criteria for referral as specified in 10 CFR § 2.730(f). The reference to "future delay," however, appears addressed to the risk that on appeal the Appeal Board or other reviewing authority may reverse and remand for further proceedings on issues excluded by the terms of the Board's Corrected Notice. The Appeal Board has already dealt with that type of argument, holding that it does not override the policy reasons for precluding interlocutory appeals:

> In the last analysis, the potential for an appellate reversal is always present whenever a licensing board (or any other trial body) decides significant procedural questions adversely to the claims of one of the parties. The Commission must be presumed to have been aware of that fact when it chose to proscribe interlocutory appeals (10 CFR §2.730(f)). That proscription thus may be taken as an at least implicit Commission judgment that, all factors considered, there is warrant to assume the risks which attend a deferral to the time of initial decision of the appellate review of procedural rulings made during the course of trial. Since a like practice obtains in the Federal judicial system, that judgment can scarcely be deemed irrational. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2) ALAB-393. 5 NRC 767, 768 (1977).

Finally, petitioner argues that its questions "are important insofar as they relate to the basic rights of individuals and groups to participate as intervenors here and raise legitimate issues here." This argument is excessively vague but may be aimed at meeting the "detriment to the public interest" criterion in §2.730(f). If so, it fails. The Board's Corrected Notice, which permitted the opportunity to participate in this proceeding in certain issues without having to justify an untimely petition for leave to intervene, goes beyond any legal duty which the Board had to follow in renoticing this project. As pointed out by both the Applicant and Staff (see fn. p. 3, supra) the Board could have legally decided to provide absolutely no renotice. Having exercised its discretion to issue the Notice complained of, the Board can hardly be criticized for treading on the basic rights of TexPirg and other petitioners. */

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*/ The Staff spoke cogently to this point in its "Response to TexPirg's Motion for Modification of the Licensing Board's August 14, 1978 and September 1, 1978 Orders re. Limitations on Contentions" (p. 2) filed November 16, 1978:

> In issuing the "Corrected Notice of Intervention Procedures," this Board was exercising its discretion and recognizing in a formal way that the changes which had occurred in station design, and information which could not reasonably have been presented prior to the hiatus in the proceeding would establish good cause for the filing of petitions that would otherwise have been rejected as untimely.

Petitioner has never addressed the question of why it failed to file either a timely or an untimely petition for leave to intervene pursuant to the original Notice of Hearing and, therefore, provides no basis for the claim that its "basic rights" to participate in this proceeding are infringed here.

III. CONCLUSION

Petitioner's request for referral does not meet the criteria set forth in §2.730(f) and fails to establish any "extraordinary circumstances" */ warranting review of these questions by the Appeal Board.

Finally, it bears repeating that the Board's Order of August 14, 1978 and its Corrected Notice subject no party to harm or injury and further, by their terms and purpose, are aimed at preventing any detriment to the public interest. Therefore, the Board should deny Petitioner's motion.

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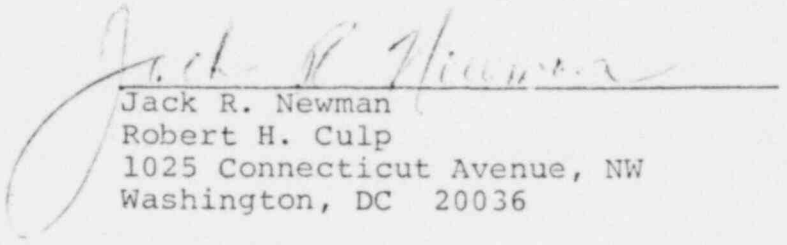
*/ Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2) ALAB-271, 1 NRC 478, 483 (1975) (citation omitted; emphasis added).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Applicant's Response to Texpirg's Motion for Certification of Questions to the Appeal Board in the above-captioned proceeding were served on the following by deposit in the United States mail, postage prepaid, or by hand-delivery this 5th day of January, 1979.

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