UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Michael C. Farrar

SERVED MAY 4 1979

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

Mr. James Morgan Scott, Jr., Houston, Texas,
for the Texas Public Interest Research Group

MEMORANDUM AND ORDER

May 3, 1979

(ALAB - 544)

In ALAB-539, 9 NRC ___ (April 23, 1979), we denied motions filed by the applicant and the NRC staff which sought, respectively, reconsideration and clarification of portions of ALAB-535, 9 NRC ___ (April 4, 1979). In acting on those motions without waiting for possible responses by other parties to the proceeding, we followed the practice first announced in Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-166, 6 AEC 1148, 1150 fn. 7 (1973):

> For the future guidance of the Bar, we note that it will never be necessary for a party

> to respond to a petition for reconsideration filed with an Appeal Board unless that Board has specifically requested it to do so. Absent the most extraordinary circumstances, such a petition will not be granted without a request for responses having first been made. This procedure basically conforms to that followed in the federal courts of appeals. See Rule 40(a) of the Federal Rules of Appellate Procedure.

Although the staff's motion ostensibly sought only clarification, as noted in ALAB-539 (9 NRC at ___) in reality its principal objective was to have us reconsider certain holdings in ALAB-535. In any event, no good reason exists why the Maine Yankee practice should be thought any less applicable to requests for clarification of a prior decision than it is to motions for reconsideration of that decision.

One of the matters addressed in ALAB-539 was whether ALAB-535 contained an implicit direction that there be a republication of the "Notice of Intervention Procedures" first issued in May 1978 and then reissued in amended form the following September. Although not urging that we should direct that this step be taken, the staff suggested that it might be required by reason of our holding in ALAB-535 that the September 1978 amended notice (as its May predecessor) was too restrictive in scope. Our response was:

> Had our thought been that [republication] was necessary or desirable, we would have said so. We thus obviously came to a contrary conclusion.

> That conclusion was founded on these considerations: First, the limitation contained in the May 1978 notice and September 1978 amended notice was ignored by a substantial number of the petitioners who sought intervention in response to the invitation contained in those notices. It is thus 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 the contentions which were set forth in the petitions filed). Second, the publication of a new notice at this juncture could occasion very serious prejudice to the successful appellants because, depending upon the terms of the new notice, they might well be deprived of the benefits to which we have determined they were entitled under the amended notice. Given the time and resources which were expended by them in establishing their rights under that amended notice, such a result would be inequitable.

ALAB-539, 9 NRC at ___ (slip opinion, pp. 10-11) (footnote omitted).

Five days after ALAB-539 was rendered, but apparently before its receipt of the copy served upon it, the Texas Public Interest Research Group (TEX-PIRG) filed a document with us. Labelled as both (1) a motion for reconsideration and clarification of ALAB-535 and (2) a response to the motions previously filed by the applicant and the staff seeking that relief, the TEX-PIRG submission flatly insists that a new "Notice of Intervention Procedures" must now be published by the Licensing Board. In this connection, TEX-PIRG opines that there are individuals or organizations who had been discouraged from seeking intervention by the restriction contained in the September 1978 amended notice.

Apart from the belatedness of the request for reconsideration and clarification, it is at best doubtful that TEX-PIRG may be heard to complain. As is seen from ALAB-535, it both sought and was granted leave to intervene in this proceeding. And, although the Licensing Board initially put unwarranted limitations upon the scope of the intervention, that error was apparently cured in its April 11, 1979 order entered in the wake of ALAB-535. Thus, without the issuance of a new notice, TEX-PIRG's interests (and those of its members) have been fully protected. It does not profess to have been clothed with the authority to represent the interests of others.

For this reason, we are constrained to deny, without reaching its merits, TEX-PIRG's application for relief on the notice republication question. In doing so, however, it bears emphasis that all that was previously before us was whether we were directing republication. Because of the considerations outlined in ALAB-539 (see p. 3, supra), we have not done so. But the factual underpinning of one of those considerations -- that it seemed unlikely that the improper limitation in the 1978 notices discouraged potential intervention petitions -- has now been put in dispute by TEX-PIRG. We do not know where the truth lies on that matter;

nor are we prepared now to speculate on how, should there be a challenge at a later date to the failure to have issued a new notice, the Commission or a court might look at the issue.

All this being so, it would not be appropriate for us to forbid republication. Rather, it is best left to the Board below and to the applicant and staff to determine for themselves whether, in the totality of circumstances, it is worthwhile for them to assume any risks which may inhere in continuing to proceed under the September 1978 notice (with the erroneous limitation removed). Although offering no opinion on that question, we must emphasize that, should a new notice be issued voluntarily out of an abundance of caution, it may not be used to constrict those rights which in ALAB-535 we held the successful appellants to possess under the September 1978 notice; i.e., it may not serve to defeat the second consideration which prompted us not to compel republication (see p. 3, supra).

The motion of TEX-PIRG for reconsideration or clarification of ALAB-535 is denied.

It is so ORDERED.

FOR THE APPEAL BOARD

Margaret E. Du Flo

Margaret E. Du Flo
Secretary to the
Appeal Board