

February 8, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



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

APPLICANT'S RESPONSE TO PETITION
FOR REVIEW OF DECISION OF ATOMIC
SAFETY AND LICENSING APPEAL BOARD
(ALAB-574)

On January 24, 1980, petitioners for leave to intervene Donald D. Weaver, Patricia L. Streilein and Kathryn Otto (petitioners), filed a petition for review of the Atomic Safety and Licensing Appeal Board's decision in ALAB-574. */ Pursuant to 10 CFR §2.786(b)(3), Applicant files this opposition to the petition for review.

I. A. Summary of the Decision Below

On January 10, 1980, the Appeal Board affirmed the Licensing Board's ruling which dismissed the petitions for leave to intervene of Donald D. Weaver, Patricia L. Streilein and Kathryn Otto. The Appeal Board rejected petitioners' argument that a "Supplementary Notice of Intervention Procedures" issued by the Licensing Board on June 18, 1979, was invalid because of the provision in that notice requiring

*/ Houston Lighting & Power Company (Allens Creek Nuclear Generating Station), ALAB-574, _____ NRC _____ (Slip op.) (January 10, 1980).

petitioners to state that they failed to file petitions under the Board's prior notices (May and September, 1978) because of certain restrictions contained in those notices. In addition, the Appeal Board found it unnecessary to reach petitioners' argument that publication of the Supplementary Notice in the Federal Register was not sufficient, ruling instead that petitioners had failed in their responsibility to ascertain the requisites for intervention as set forth in said Notice.

B. Background

On December 28, 1973, a notice of hearing on the application to construct and operate the Allens Creek Nuclear Generating Station (ACNGS) which provided the opportunity for filing of intervention petitions was published in the Federal Register (38 Fed. Reg. 35521). In 1975, after an evidentiary hearing was held on certain issues, Applicant deferred the ACNGS application. Subsequently, the Licensing Board issued a partial initial decision on these issues */ which was affirmed by the Appeal Board. **/

In 1977, the Applicant informed the Licensing Board that it intended to resume licensing of the ACNGS application (reduced from two units to one), and as a result, the

*/ Houston Lighting & Power Company (Allens Creek Nuclear Generating Station, Units 1 and 2), 2 NRC 776 (1975).

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

Licensing Board issued on May 31, 1978, a notice of intervention procedures and on September 11, 1978, a corrected notice of intervention procedures. These two notices allowed the filing of intervention petitions but required that contentions be related to changes in the design of the facility as a result of the reduction from two units to one or to new information or evidence unavailable prior to December, 1975. The Appeal Board subsequently held in ALAB-535 that the restrictions on contentions set forth in the May and September notices were unwarranted and therefore, must be stricken from those notices. */ The Appeal Board, however, did not hold that the prior notices were void, thereby requiring a new notice be published; rather, the Appeal Board left it to the discretion of the Licensing Board whether to issue a new notice -- "out of an abundance of caution" -- which would allow intervention petitions to be filed by persons who had been discouraged from filing petitions under the prior notices because of the unwarranted restrictions contained in those notices. **/ On June 18, 1979, the Licensing Board exercised its discretion and, pursuant to the Appeal Board's guidance in ALAB-544, issued the Supplementary Notice. This notice provided that petitions for leave to intervene could be filed by any person "who did not file a petition pursuant to [the earlier] notices because

*/ ALAB-535, 9 NRC 377 (1979); See also ALAB-539, 9 NRC 422 (1979).

**/ ALAB-544, 9 NRC 630, 632 (1979).

of restrictions on permissible contentions contained therein" and the petitioner should so state in his petition. 44 Fed. Reg. at 35062.

Pursuant to the Supplementary Notice, petitioners Weaver, Streilein and Otto filed petitions for leave to intervene. Neither petitioner Weaver nor Streilein stated in their petition that he or she was deterred from filing a petition pursuant to the Board's prior notices because of the restrictions in those notices. At the special pre-hearing conference held on October 15-19, 1979, neither petitioner was able to state, either in person or through counsel, to the satisfaction of the Board, whether they were discouraged from filing petitions earlier and if so, why they had failed to so state in their petitions for leave to intervene. Petitioner Otto admitted in her pleadings and at the special prehearing conference that her failure to file a petition for leave to intervene earlier was not due to restrictions in the Board's prior notices, but because she was unaware of the prior notices and believed the proposed ACNGS facility to be a coal-fired or hydro-electric plant. Since none of the three petitioners satisfied the condition in the Supplementary Notice, the Licensing Board dismissed their petitions and treated them as requests for limited appearances. */

*/ ALSB Order dated November 19, 1979.

On appeal, petitioners challenged the decision of the Licensing Board on grounds that (1) the restriction in the Supplementary Notice was invalid and (2) publication of the Supplementary Notice in the Federal Register was insufficient to provide actual notice.

The Appeal Board rejected the first argument stating that the challenged restriction in the Supplementary Notice was imposed in "full conformity" with the Appeal Board's three opinions rendered in this proceeding (ALABs 535, 539 and 544). The Appeal Board held that, once the Licensing Board decided to exercise its discretion and provide a "fresh chance to intervene," it was appropriate for the Board to include a provision in the Supplementary Notice requiring those persons filing petitions to "aver explicitly that they were within the limited class to whom the supplementary notice was addressed." (Slip op., p. 7).

As to the second argument, the Appeal Board found it unnecessary to decide the question raised by petitioners as to the adequacy of publication of the Supplementary Notice in the Federal Register because petitioners had a duty "to make inquiry into the possible existence of preconditions" for intervention. (Slip op., p. 7). The Appeal Board found that none of the petitioners did so in a satisfactory manner.

II. The Appeal Board's Decision in ALAB-574 Was Correct

Petitioners' attack on the Appeal Board's decision is founded on the premise that the Licensing Board's May and September 1978 notices were void because of the improper restrictions contained therein. In the circumstances, petitioners argue, by implication, that the Licensing Board was obligated to issue a de novo notice without any restrictions of the type incorporated in the Supplementary Notice. Petitioners cite no cases or agency regulations to support this bare assertion that the notices were void (and cited none to the Appeal Board). The Appeal Board never concluded that the May and September notices were void, but only struck down as unwarranted the restrictions on contentions set forth in these notices. The Licensing Board subsequently issued the Supplementary Notice in light of the Appeal Board's concern that persons might have been discouraged from filing intervention petitions because of those restrictions. The Appeal Board correctly held that once the Licensing Board had decided to close the gap and afford those persons who were discouraged from filing petitions under the prior notices an opportunity to file new petitions, it was appropriate to include in the new notice a provision requiring those persons to show that they were within the class of persons to whom the notice was addressed. (Slip op., pp. 6-7).

The Appeal Board held further, in considering the adequacy of the Supplementary Notice, that petitioners had an obligation "to make inquiry" into the conditions for intervention imposed by the Supplementary Notice. */ None of the petitioners made any attempt to meet this obligation, although a copy of the Supplementary Notice was easily obtainable from the local public document room. Petitioners argue that they had no "duty to ascertain and comply with requirements in a notice which notice petitioners are claiming is improper and constitutionally insufficient." (p.4). This argument is based on the same faulty premise underlying petitioners' first attack on the Appeal Board's decision and fails for the same reason.

The facts are that simple steps could have been taken at least by petitioners Streilein and Weaver, to meet the requirements of the Supplementary Notice. Petitioner

*/ Petitioners' argument that publication of the Supplementary Notice in the Federal Register is insufficient to provide "fair notice and is a denial of due process", although not reached by the Appeal Board, is without merit. The statute clearly provides, and Court and NRC decisions have held, that publication of notice of hearing or opportunity of hearing in the Federal Register is deemed legal notification to all persons. 44 U.S.C. §1508; Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947); Buckner Trucking, Inc. v. United States, 354 F. Supp. 1210, 1219 (S. D. Texas, 1973); Aris Gloves, Inc. v. United States 281 F.2d 954 (1958) cert. denied, 368 U.S. 954; Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 646-47 (1975); Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 389 (1976); Florida Power and Light Company (Turkey Point Nuclear Generating Station, Units 3 and 4), ALSB's Order Ruling on the Petition of Mark P. Oncavage, Slip op. pp. 16-17 (August 3, 1979).

Streilein failed to provide the Board with additional information with respect to her intervention as requested by the Board. (See Tr. 1227-30). Likewise, petitioner Weaver's representations to the Board (made through a third party) were insufficient to satisfy the Board that indeed Mr. Weaver was discouraged from filing an intervention petition by the Board's prior notices. (See Tr. 1233-35). As to Ms. Otto, little could be expected for she was clearly not within the class of persons covered by the Supplementary Notice.

Accordingly, the Appeal Board held correctly that the requirements of the Supplementary Notice were reasonable and that the petitioners "did little, if anything" to make themselves aware of these requirements and discharge their related obligations. (Slip op., p. 9)

III. The Commission Should Decline Review of ALAB-574

The provisions of 10 CFR §2.786(b)(4)(i) state that the Commission will not ordinarily grant a petition for review unless, inter alia, the petition raises "an important procedural issue, or otherwise raises important questions of public policy." Neither of these considerations is present in this case and, accordingly, the Commission should decline to review the Appeal Board's decision in ALAB-574. */

*/ The other factors set forth in §2.786(b)(4)(ii)-(iv) which might warrant Commission review are neither discussed by petitioners nor are applicable to the petition for review.

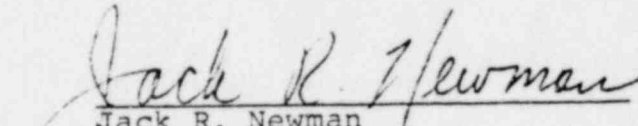
The argument raised by petitioners and rejected by the Appeal Board with respect to the requirements for intervention contained in the Supplementary Notice is a narrow procedural question relating solely to the factual circumstances of the ACNGS proceeding. The issuance of the Supplementary Notice arises out of a unique set of circumstances peculiar to this reactivated proceeding and is unlikely to be repeated in other licensing proceedings. The Appeal Board has carefully examined the procedural aspects of this case in four separate decisions and in each, has made sure that the procedural rights of the petitioners were fully protected.

Nor does the petition involve an important question of public policy. Petitioners complain that they are in effect being kept out of the ACNGS proceeding because of a "legal technicality". The "legal technicality" of which they complain, however, is nothing more than the minimal set of requirements for intervention contained in the Commission's regulations. Petitioners would have the Commission step in and reverse the Appeal Board on grounds that they should be allowed to intervene in this proceeding without meeting those requirements. Petitioners have not advanced a consideration of public policy sufficient to warrant such Commission action.

IV. Conclusion

For the reasons discussed above, the Commission should deny the petition for review.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Response to Petition for Review of Decision of Atomic Safety and Licensing Appeal Board (ALAB-574) in the above-captioned proceeding were served on the following by deposit in the United States mail, postage pre-paid or by hand delivery, this 8th day of February 1980:

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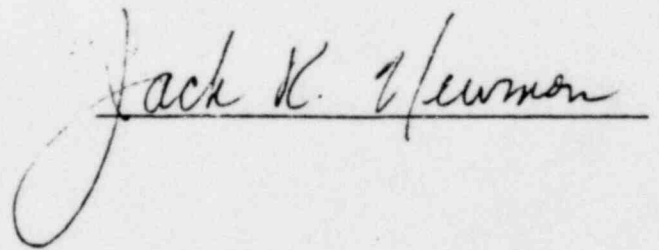
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A handwritten signature in cursive script, reading "Jack K. Hewmon", is written over a horizontal line.