

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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 BRIEF IN OPPOSITION TO THE APPEAL OF F. H. POTTHOFF III

POOR ORIGINAL

Stephen M. Sohinki  
Counsel for NRC Staff

April 7, 1980

8004170 307

April 7, 1980

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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 BRIEF IN OPPOSITION TO THE APPEAL OF F. H. POTTHOFF III

In an undated pleading received by the Staff on March 26, 1980, F. H. Potthoff III appealed from the Licensing Board's March 10, 1980 Order denying his petition for leave to intervene in the captioned proceeding. More specifically, Mr. Potthoff requests only that this Board overturn the Licensing Board's rejection of his Contention 6, dealing with the alternative of a large scale marine biomass farm. For the reasons stated below, the Staff submits that the Licensing Board's ruling denying Mr. Potthoff's petition should be affirmed.

STATEMENT OF THE CASE

In its "Order Ruling Upon Intervention Petitions" dated February 9, 1979, the Licensing Board, while finding that Mr. Potthoff had established standing to intervene in the captioned proceeding, concluded that none of the four contentions he had submitted previously complied with the requirements of 10 C.F.R. Section 2.714 and/or the requirements of the Licensing Board's "Corrected Notice of Intervention Procedures," pursuant to which Mr. Potthoff had originally sought to intervene in the proceeding.<sup>1/</sup>

<sup>1/</sup> 43 Fed. Reg. 40328 (September 11, 1978).

For reasons not directly pertinent to this appeal, this Board overturned the Licensing Board's initial decision on Mr. Potthoff's petition for leave to intervene in ALAB-535<sup>2/</sup> and Mr. Potthoff was subsequently afforded the opportunity by the Licensing Board to amend his petition for leave to intervene. In a June 1, 1979 amendment to his petition, Mr. Potthoff submitted his Contention No. 6, which reads as follows:

In the FES, the Staff states that biomass production is "not now a reasonable alternative" to ACNGS. However, Project Independence estimates fuels from biomass production (urban waste, agricultural waste, terrestrial crops, marine crops) would amount to  $3 \times 10^{16}$  gross BTUs per year, and that large quantities of marine crops can be grown and harvested without subsidies when oil hits \$11 per barrel. Project Independence estimates a 100,000 acre marine biomass farm, producing  $27 \times 10^{12}$  BTUs per year, would cost \$578,000,000. I contend building and operating a marine biomass farm, or other biomass production systems, would be environmentally preferable to ACNGS, and ask the Board to deny the permit under the NEPA.

In rejecting the above contention and denying Mr. Potthoff's petition for leave to intervene, the Licensing Board found that Mr. Potthoff had failed to provide any basis in the contention for his bald allegation that a marine biomass farm would be an environmentally superior alternative to the Allens Creek facility.<sup>3/</sup>

#### ARGUMENT

The contention in question is essentially economic in nature, alleging that a large scale marine biomass farm would be preferable from that standpoint

<sup>2/</sup> Houston Lighting & Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979).

<sup>3/</sup> March 10, 1980 "Order" at p. 12.

to the proposed facility. As the Licensing Board correctly emphasized, the Appeal Board has previously ruled, in Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155 (1978), that licensing boards need not consider the economic cost of particular alternatives which are not environmentally preferable to the proposed nuclear station.<sup>4/</sup> Of course, 10 C.F.R. §2.714(b) requires that each contention (in this case, that biomass conversion is environmentally superior to the proposed action) must contain a supporting statement of the basis for the assertions made therein "set forth with reasonable specificity." The clear import of the Midland decision is that, pursuant to NEPA, economic comparisons between two alternatives are irrelevant in the absence of some basis for believing that one of those alternatives is environmentally preferable. Here, that basis has not been provided, either in the contention itself, or in Mr. Potthoff's oral presentation at the October 15-19, 1979 prehearing conference. Therefore, pursuant to ALAB-458 and requirements of 10 C.F.R. §2.714, the Licensing Board was clearly correct in ruling that the mere assertion of environmental preferability of a certain alternative, without any supporting bases for that assertion, does not create a cognizable contention.<sup>5/</sup> Manifestly, if a petitioner could create a litigable economic cost contention merely by asserting the environmental preferability of the alternative involved in that contention, the Appeal Board's Midland decision would be rendered meaningless.

Further, as the Staff argued in its response to this contention,<sup>6/</sup> Mr. Potthoff has failed to address the really critical questions with regard to marine biomass farms in his contention. In particular, he does not allege that the fuels from

<sup>4/</sup> 7 NRC at 162. See also Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, \_\_\_\_\_ NRC \_\_\_\_\_, Docket Nos. 50-338SP, 50-339SP (March 24, 1980), Slip op. at 11-12, 13-14.

<sup>5/</sup> See also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

<sup>6/</sup> See "NRC Staff's Response to More Contentions Submitted By F. H. Potthoff III" dated June 18, 1979.

biomass production would be available to the Applicant in sufficient quantities to provide the electrical output which the Allens Creek facility would provide, or that such fuels and facilities to convert them to electrical energy could be available and operable in the same time frame as Allens Creek. In addition, although Mr. Potthoff asserts that biomass production could result in an energy output of  $3 \times 10^{16}$  "gross BTUs per year," he offers no basis to believe that the necessary portion of this output required to substitute for Allens Creek would be available to the Applicant. In this regard, the Staff notes that the biomass alternative was discussed and rejected in the FES Supplement (p. 5.9-7) largely on the basis that the area required to grow the fuel needed for this source of power (600-1200 sq. miles) is much greater than that required for the proposed facility. Mr. Potthoff has never taken issue with that assessment in his contention or his oral and written arguments in support thereof.<sup>7/</sup>

In short, Mr. Potthoff's contention focuses entirely on the economics of production, and provides no basis for his implication that biomass conversion constitutes a viable energy option to Allens Creek. Therefore, the contention, of necessity, must involve a great deal of speculation with regard to the availability of the suggested alternative in terms of amount available and time frame of interest in this proceeding. NEPA does not require this agency to engage in such speculation. As the Appeal Board has recently stated, in the Hope Creek proceeding:

The Supreme Court has embraced the doctrine, first enunciated in Natural Resources Defense Council v. Morton, 458 F.2d 827, 837-38 (D.C. Cir. 1972), that environmental impact statements need not discuss the environmental effects of alternatives which are "deemed only remote and speculative possibilities." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978).<sup>8/</sup>

<sup>7/</sup> Even the 100,000 acre (156 sq. mile) area suggested by Mr. Potthoff for a marine biomass farm would not, according to the analysis in the FES Supplement, be nearly sufficient to obviate the need for the Allens Creek facility.

<sup>8/</sup> Public Service Electric and Gas Company, et al. (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 38 (1979).

On this appeal, with regard to the Licensing Board's finding that he had failed to provide a basis for his assertion that a biomass farm would be environmentally preferable to the Allens Creek facility, Mr. Potthoff states that ". . . I thought I had included statements in the text of the contention showing how it would be preferable."<sup>9/</sup> However, a reading of Potthoff Contention 6 (quoted above), clearly demonstrates that no such statements supporting the alleged environmental preferability of biomass conversion over nuclear power were included. Mr. Potthoff's assertion that a marine biomass farm is environmentally superior to nuclear power for the Applicant's service area is preceded solely by allegations regarding the economic advantages of such an alternative over the proposed facility. The contention is devoid of any supporting basis whatever for a claim that biomass conversion offers significant environmental advantages over the Allens Creek Nuclear Station. Mr. Potthoff, apparently recognizing that the contention is deficient in this regard, attempts for the first time to provide two separate bases for his assertion of environmental superiority of biomass conversion vis a vis the proposed plant. He states that (1) it would release less radionuclides to the environment and (2) it would irrevocably alter less land than ACNGS (this includes the uranium fuel cycle, specifically strip mining uranium.) However, these assertions were never presented to the Licensing Board either at the time of the original submittal of this contention, or during the time afforded by the Licensing Board for Mr. Potthoff to respond to the Applicant's and Staff's objections to the contention at the prehearing conference held during the week of October 15, 1979. As this Board has recently emphasized, in affirming the Licensing Board's denial of another petition for leave to intervene in this proceeding:

---

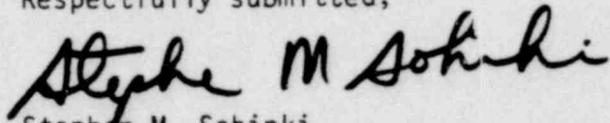
<sup>9/</sup> Brief on Appeal, p. 1.

The Licensing Board's ruling on [the] intervention petition was necessarily based on the record before it. Consequently, we would scarcely be justified in overturning the ruling on the strength of new assertions of fact which could have been, but were not, either included in the petition or otherwise presented to the Board below.<sup>10/</sup>

CONCLUSION

For all of the reasons discussed above, the Staff urges this Board to affirm the March 10, 1980 Order of the Licensing Board denying Mr. Potthoff's petition for leave to intervene.

Respectfully submitted,



Stephen M. Sohinki  
Counsel for NRC Staff

Dated at Bethesda, Maryland,  
this 7th day of April, 1980.

---

<sup>10/</sup> Houston Lighting & Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, Docket No. 50-466, (February 22, 1980), slip op. at 4-5.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of )  
HOUSTON LIGHTING & POWER COMPANY ) Docket No. 50-456  
(Allens Creek Nuclear Generating )  
Station, Unit 1) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN OPPOSITION TO THE APPEAL OF F. H. PUTTHOFF III" 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 7th day of April, 1980:

Alan S. Rosenthal, Esq., Chairman \*  
Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Dr. John H. Buck \*  
Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Michael C. Farnham, Esq. \*  
Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Sheldon J. Wolfe, Esq., Chairman \*  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Mr. E. Leonard Houston  
Route 3, Box 350A  
Watkinsville, Georgia 30677

Mr. Gustave A. Linenberger \*  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Richard Lowerre, Esq.  
Asst. Attorney General for the  
State of Texas  
P.O. Box 12549  
Capitol Station  
Austin, Texas 78711

Hon. Jerry Sliva, Mayor  
City of Wallis, Texas 77485

Hon. John R. Mikaska  
Austin County Judge  
P.O. Box 310  
Bellville, Texas 77418

Mr. John F. Eckhart  
4327 Alcedary Street  
Houston, Texas 77021

Mr. and Mrs. Robert S. Framson  
4322 Waynesboro Drive  
Houston, Texas 77035

Mr. F. H. Posthoff, III  
1814 Pine Village  
Houston, Texas 77090

D. Marrack  
420 Mulberry Lane  
Bellaire, Texas 77401

POOR ORIGINAL

Texas Public Interest  
Research Group, Inc.  
c/o James Scott, Jr., Esq.  
8302 Albarero  
Houston, Texas 77074

Brenda A. McCorkle  
6140 Darnell  
Houston, Texas 77074

Mr. Wayne Rentfro  
P.O. Box 1335  
Rosenberg, Texas 77471

Rosemary N. Lemmer  
11423 Oak Spring  
Houston, Texas 77043

Charles Andrew Perez  
1014 Montrose Blvd.  
Houston, Texas 77019

Leotis Johnston  
1407 Scenic Ridge  
Houston, Texas 77043

Atomic Safety and Licensing \*  
Appeal Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Atomic Safety and Licensing \*  
Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Docketing and Service Section \*  
Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Mr. William J. Scoussion  
5810 Darnell  
Houston, Texas 77074

Margaret Bishop  
11418 Oak Spring  
Houston, Texas 77043

Glen Van Slyke  
1739 Marshall  
Houston, Texas 77098

J. Morgan Bishop  
11418 Oak Spring  
Houston, Texas 77043

Stephen A. Dodgett, Esq.  
Pollan, Nicholson & Dodgett  
P.O. Box 592  
Rosenberg, Texas 77471

Bryan L. Baker  
1923 Hawthorne  
Houston, Texas 77098

Robin Griffith  
1034 Sally Ann  
Rosenberg, Texas 77471

Elinore P. Cummings  
926 Horace Mann  
Rosenberg, Texas 77471

Mrs. Connie Wilson  
11427 Oak Spring  
Houston, Texas 77043

Mr. William Penrenod  
4070 Marshall  
Houston, TX 77025

Carolina Conn  
1414 Scenic Ridge  
Houston, Texas 77043

Mr. James R. Piechovan  
618 W. Drew  
Houston, TX 77006

POOR ORIGINAL

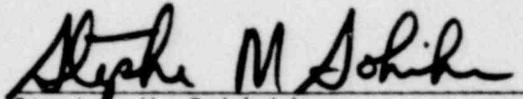
R. Gordon Gooch, Esq.  
Baker & Botts  
1701 Pennsylvania Avenue, N.W.  
Washington, DC 20006

J. Gregory Copeland, Esq.  
Baker & Botts  
One Shell Plaza  
Houston, Texas 77002

Jack Newman, Esq.  
Lowenstein, Reis, Newman & Axelrad  
1025 Connecticut Avenue, N.W.  
Washington, DC 20037

Carro Hinderstein  
8739 Link Terrace  
Houston, Texas 77025

The Honorable Ron Waters  
State Representative  
District 79  
3620 Washington Avenue, No. 362  
Houston, TX 77007



Stephen M. Sohinki  
Counsel for NRC Staff