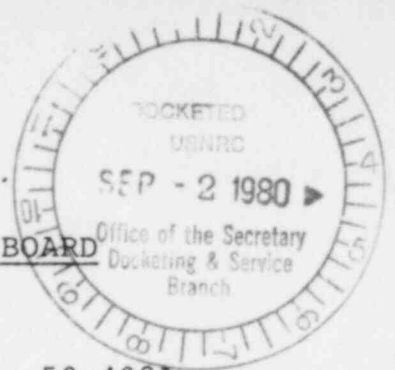


UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of:

HOUSTON LIGHTING & POWER COMPANY : Docket Nos. 50-498A  
et al. : 50-499A  
: :  
(South Texas Project, :  
Units 1 and 2) :  
: :  
TEXAS UTILITIES GENERATING COMPANY : Docket Nos. 50-445A  
et al. : 50-446A  
: :  
(Comanche Peak Steam Electric :  
Station, Units 1 and 2) :

REPLY OF THE  
TEXAS BORDER COOPERATIVES TO ANSWERS OF  
HOUSTON LIGHTING & POWER COMPANY, ET AL,  
TEXAS UTILITIES GENERATING COMPANY, ET AL.,  
CENTRAL AND SOUTHWEST CORPORATION, ET AL.  
AND CITY OF AUSTIN OBJECTING TO PETITION OF THE  
TEXAS BORDER COOPERATIVES FOR LEAVE TO INTERVENE

On July 31, 1980, the Texas Border Cooperatives ("Border Cooperatives") filed a Petition for Leave to Intervene Out of Time in the above-captioned proceeding pursuant to Section 2.714 of the Rules of Practice of the Nuclear Regulatory Commission. 1/ In response, the Nuclear Regulatory Commission Staff ("NRC Staff"), the Department of Justice, and the City of Brownsville, Texas, submitted Answers in Support of the Border Cooperatives' request to intervene. Houston Lighting & Power Company ("HL&P"), Texas Utilities Generating Company ("TUGCO"), Central and Southwest Corporation ("C&SW"), and the City of Austin, Texas ("Austin"), filed Answers opposing the Petition.

1/ 10 C.F.R. §2.714.

The Border Cooperatives respectfully submit that they have satisfied all of the requirements for a petition seeking to intervene out of time in an antitrust proceeding, and should be granted leave to intervene. The NRC Staff and the Department of Justice, after careful analysis, agree on the basis of:

- the Border Cooperatives' important interest in the proceedings and the harmful manner in which their interest may be affected;
- the significant anticompetitive effects which the Border Cooperatives alleged will result from the Applicants' proposed settlement of these proceedings, particularly as a result of the proposed DC interconnection;
- the existence of good cause for late intervention due to dramatically changed circumstances;
- the unavailability of adequate alternative means for the Border Cooperatives to protect their interests;
- the inability of the existing parties to adequately represent the Border Cooperatives' interest;
- the important contribution which the Border Cooperatives can make in developing a sound record; and
- the fact that the Border Cooperatives' participation will not unduly broaden the issues or delay the proceedings.

Despite the importance of intervention to protection of the Border Cooperatives' interests under the dramatically new circumstances of these proceedings and the significance of the Border Cooperatives' allegations concerning a proper resolution of the antitrust questions at issue in these proceedings, HL&P, TUGCO, C&SW, and Austin seek to block the Border Cooperatives' participation. HL&P and TUGCO developed the more elaborate objections to the Border Cooperatives' petition. As a result, this Reply focuses on the Answers of those two parties.

The objections of HL&P and TUGCO to the Border Cooperatives' Petition center on the following contentions: (1) that the Border Cooperatives have not satisfactorily pleaded their interests; (2) that they have not established good cause for late filing; (3) that they have other means to protect their interests; (4) that they have failed to demonstrate that their participation would assist in the development of a sound record; (5) that their interests will be represented by existing parties; and (6) that their participation will broaden the issues and delay the proceedings.

#### I. Specificity of Interests

HL&P and TUGCO claim that the Border Cooperatives' Petition does not satisfy the specificity requirements of Section 2.714(a)(2) and should be denied on that basis alone. The Applicants thus argue that the Border Cooperatives would not be

justified in intervening even if timeliness were not an issue.

But HL&P's shallow treatment of the "Interest" issue 1/ suggests that it considers the argument a makeweight. HL&P perfunctorily cites the Appeal Board's well-known Wolf Creek decision, 2/ which interpreted the standards under 10 C.F.R. §2.714 for petitions to intervene in Commission antitrust proceedings. But HL&P merely makes the bald, conclusory assertion that the Border Cooperatives have failed to meet the Wolf Creek requirements without the barest pretense of an attempt to show why or how the Petition is deficient under the articulated standards. 3/

The Appeal Board has made it clear that the Wolf Creek requirements do not mandate a technical form of pleading or any magic words. As the Board stated on review of Wolf Creek 4/ the factual specificity and nexus requirements for petitions to intervene in antitrust proceedings are a safeguard designed to

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1/ Answer of HL&P at 13-14.

2/ Kansas Gas & Electric Company, (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 N.R.C. 559 (1975) [hereinafter Wolf Creek], held that antitrust petitioners, in addition to meeting the general requirements of 10 C.F.R. §§2.714(a)(2) and 2.714(d), must state: (1) facts describing a situation inconsistent with the antitrust laws; (2) facts describing a nexus between the activities under the license and the situation alleged; and (3) the relief sought.

3/ HL&P Answer at 13-14.

4/ Kansas Gas & Electric Company, Wolf Creek Generating Station, Unit No. 1), ALAB-299, 2 Nuclear Regulatory Commission Issuances 740 (1975).

enable the applicant to understand the nature of the claim the petitioner is making and the relief being asked for so that the applicant has "a fair chance to defend." 1/

The Border Cooperatives have clearly done that. They allege, inter alia, that the establishment of DC ties may preclude AC ties, resulting, in practice, in foreclosing potential competition by denying the Border Cooperatives opportunities to buy power from suppliers outside the State of Texas. 2/ Their statement clearly alleges an existing situation of monopoly power in Texas which would be exacerbated by the DC tie arrangement. 3/ And their request for relief could not be more clearly stated. 4/

It is by no means necessary that a petitioner for leave to intervene in a Commission antitrust proceeding allege an anticompetitive intent on the part of the applicants, as TUGCO's confused and largely irrelevant discussion of "Interest" at pages 3-4 of its Answer seems, at bottom, to imply. That argument misses the point, which is that the Border Cooperatives fear the proposed settlement will have significant anticompetitive effects, inconsistent with the antitrust laws and detrimental to the Border Cooperatives and the public's, interests.

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1/ Id. at 745.

2/ Petition at 7.

3/ Id. at 8.

4/ Id. at 9.

Finally, it should be noted that C&SW makes no attempt to challenge the Border Cooperatives on the Interest criteria.

II. Good Cause.

The Border Cooperatives are the victims of changed circumstances. They stand to be seriously injured by a settlement offer which for the first time in the proceedings proposes the use of DC rather than AC interconnections. The drastic change in the posture of the proceedings occasioned by the parties' shift of position regarding DC ties threatens to impact on the Border Cooperatives in terms of cost, accessibility, flexibility, and competitive opportunities. C&SW's representations and public posture of commitment to AC ties throughout the proceedings, along with the posture of other interested parties, made it appear all along, as the NRC staff notes, 1/ that the only possible outcome of the proceedings would be AC interconnections or no interconnections.

TUGCO asserts that the Commission has rejected the Border Cooperatives' argument that they had no compelling reason to seek intervenor status because other parties were adequately protecting their interests. As authority for that assertion, TUGCO cites Davis-Besse. 2/ But Davis-Besse

1/ Response of the NRC Staff at 13 n. 27.

2/ Toledo Edison Company, (Davis-Besse Nuclear Power Station). LBP-74-13, 7 AEC 282 (1974), aff'd sub. nom. Duguesne Light Company (Beaver Valley Power Station, Unit 2). ALAB-208, 7 AEC 959 (1974), aff'd CLI-74-24, 7 AEC 953 (1974).

is readily distinguished on its facts. In Davis-Besse the City of Cleveland relied on another Group (AMP-O) to intervene and represent its interests in an antitrust proceeding before the Commission. AMP-O failed to intervene at all. Cleveland had totally failed to follow the progress of the proceedings, or communicate with AMP-O, or evidence any other degree of interest in the case and as a result did not learn that AMP-O had decided not to intervene until after the deadline for timely intervention had passed. On those facts, the Board found tht Cleveland had failed to show good cause. The Appeal Board's decision on review of Davis-Besse 2/ indicated that if the City of Cleveland had made even some effort to follow the AMP-O situation, the outcome might have been different. 2/ The Board also took pains to point out that Cleveland had been allowed to intervene in related proceedings where it could litigate the same antitrust claims it sought to advance. 3/ Further distinguishing the Davis-Besse situation from that of the Border Cooperatives' is that there the NRC Staff opposed the petition for lack of good cause, whereas here the Staff has found good cause and supports the Border Cooperatives' petition. In addition, the Department of Justice in Davis-Besse found that no anticompetitive effects were indicated by the license application and recommended against

1/ Duquesne Lighting Company (Beaver Valley Power Station), Unit 2). ALAB-208, 7 AEC 959 (1974), aff'd CLI-74-24, 7 AEC 953 (1974).

2/ Id. at 965-66.

3/ Id. at 969.



an antitrust hearing. Here, the Department of Justice, as its Answer in support of the Border Cooperatives' Petition makes manifest, 1/ finds the antitrust issues highly significant and the Border Cooperatives' interests concerning them highly important.

In short, TUGCO misstates the law of Davis-Besse, 2/ and its reliance on the case is misplaced. Despite what TUGCO says, the case merely stands for the proposition that a would-be intervenor may not blandly assume that someone else will intervene on his behalf, fail to note, as the deadline for filing comes and passes, that the other person in fact does not intervene, and then two months later come knocking on the Commission's door claiming good cause.

HL&P, for its part, relies on "the plain language" of Puget Sound Power and Light Company 3/ for the proposition that the Border Cooperatives do not have good cause. HL&P reproduces a lengthy excerpt from the Appeal Board's decision in that proceeding which, at bottom, merely states a rule that is not at all in contention in this proceeding -- namely, that absent good cause, most petitions for leave to intervene out of time will be denied. 4/ In Puget Sound, the

1/ See Answer of the Department of Justice at 5, 11, 13-16.

2/ See Answer of TUGCO at 7-8.

3/ Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-559, 10 NRC 162 (1979).

4/ Answer of HL&P at 6.



would-be intervenors were Indian tribes who filed three years late. The tribes were not prompted to file their petition by any change occurring in the project itself or in the theme of the proceedings during that time. Rather, they just had not been aware that the project might hurt their interests, and they had been busy with other matters. In short, they simply had no excuse for missing the filing deadline. As such, they did not have good cause. However, the Appeal Board noted that, on a sufficient showing of the other balancing test factors of Section 2.714(a), even a petitioner lacking good cause for lateness may be allowed to intervene. And in fact one of the three Appeal Board members did find that the tribes petition should be granted.

III. Other Means to Protect Interests.

Both TUGCO and HL&P argue that since the Border Cooperatives are parties in a somewhat related FERC proceeding, they have other means available whereby they may protect their interests. <sup>1/</sup> This argument misses the key point here, which is that the NRC and the FERC are charged with applying different legal standards in the pursuit of their statutory duties. Section 105c of the Atomic Energy Act charges the NRC with a unique mandate to insure that licenses it issues will not create or maintain situations inconsistent with the antitrust laws. The FERC standard is simply a "public interest" one. The NRC's responsibility to fully consider

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<sup>1/</sup> Answer of HL&P at 7-9; Answer of TUGCO at 10-11.

all potential antitrust ramifications requires that it should hear the Border Cooperatives in this proceeding.

IV. Development of a Sound Record.

Both HL&P and TUGCO claim that the Border Cooperatives make no showing that their participation would assist in the development of a sound record. The HL&P and TUGCO discussions of this factor appear to suggest that the determination of whether petitioners participation may reasonably be expected to assist in the development of a sound record should turn on the petition's specificity. But that is not the law. 10 C.F.R. §2.714(a)(1)(iii) is not concerned with any formalistic pleading requirements on a petitioner. Rather, it is a guideline for the Licensing Board itself, a factor which it must weigh in reaching its decision on whether to grant leave to intervene out of time. The Border Cooperatives will present both factual and expert testimony on the effects of the DC ties. This testimony will certainly aid the Board in its determination of the effect of DC interconnections on the antitrust situation.

V. Representation by Existing Parties.

HL&P and TUGCO argue that the Border Cooperatives' interests will be adequately represented by both the NRC Staff and the Department of Justice. The Border Cooperatives' are likely to be affected by the DC interconnection in a unique manner. Their stake in the outcome is

very great. While the public interest, represented by the NRC Staff and the Department of Justice, and the Border Cooperatives' particular private interests overlap in a number of instances, neither public agency can possibly be expected to protect the Border Cooperatives' interests in all particulars, or in any particular as effectively as the Border Cooperatives could themselves.

The fact that both the NRC Staff and the Department of Justice support the intervention of the Border Cooperatives at this time underscores the practical reality that neither of them can adequately represent the Border Cooperatives' interests. Both recognize this.

VI. Extent to Which the Petitioners' Participation Will Broaden the Issues or Delay the Proceeding.

TUGCO and HL&P make much of supposed delays and broadening of issues which they allege the Border Cooperatives' participation will cause. But it is patently absurd to argue, as TUGCO does, 1/ that the Border Cooperatives will enlarge the scope of the proceeding by being heard on the subject of the DC interconnection. As the NRC Staff points out, "[t]he Applicants themselves have already broadened the issues in these proceedings through the introduction of a DC interconnection proposal." 2/ The Staff notes that the Border Cooperatives' Petition "does not appear to introduce new areas of consideration, other than those already contemplated by the parties." 3/

1/ Answer at 12-13.

2/ Response at 17.

3/ Id. n. 31.

Obviously, any intervention may delay a proceeding to some extent. The question for the Licensing Board to consider is not whether intervention will occasion any delay, but whether it will cause undue or unnecessary or unjustified delay. In fact, any delay resulting from the intervention of the Border Cooperatives will be minor. The Border Cooperatives will accept the record established to date as they find it, and will accept the evidence and discovery acquired to date.

The key point to be kept in mind is that the policy of avoiding unnecessary delay in antitrust reviews is bottomed on the unchallenged concept that late hearings should not be allowed on issues which could have been raised previously. But the issue which the Border Cooperatives seek to raise -- namely, the anticompetitive ramifications of the DC interconnection proposal -- could not have been raised at any earlier time because it did not arise until very recently, when the settlement offer was made public. Furthermore, while it is true that the deposition of the Border Cooperatives' transmission expert may be necessary, the fact remains that no depositions have been taken of any experts on the issue of the DC interconnections. Quite simply, unless the DC proposal is accepted without hearing, some further discovery will be required regardless of whether the Border Cooperatives are allowed to intervene.

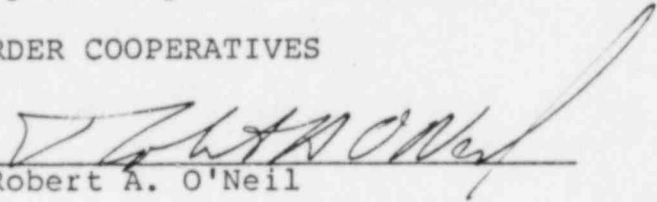
CONCLUSION

The Texas Border Cooperatives respectfully submit that they have met the requirements of Section 2.714 that are necessary to obtain intervention in these proceedings, and should be granted leave to intervene as full parties.

Respectfully submitted,

BORDER COOPERATIVES

By

  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
HOUSTON LIGHTING & POWER	)	
COMPANY, et al. (Gouth	)	Docket Nos. 50-498A
Texas Project, Units 1	)	50-499A
and 2)	)	
	)	
TEXAS UTILITIES GENERATING	)	
COMPANY, et al. (Comanche	)	Docket Nos. 50-445A
Peak Steam Electric	)	50-446A
Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing PETITION OF THE TEXAS BORDER COOPERATIVES FOR LEAVE TO INTERVENE OUT OF TIME has been made on the following parties listed hereto this 31st day of July, 1980, by depositing copies thereof in the United States mail, first class, postage prepaid.

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