

October 24, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

HOUSTON LIGHTING & POWER COMPANY
(Allens Creek Nuclear Generating
Station, Unit 1)

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Docket No. 50-466

HOUSTON LIGHTING & POWER COMPANY'S
ANSWER TO DOHERTY MOTION TO PRESENT
DIRECT TESTIMONY ON TEXPIRG CONTENTIONS



I.

On October 13, 1980, Intervenor Doherty filed a motion requesting that he be permitted to present direct testimony on thirteen contentions which have been admitted at the request of other parties to this proceeding.

Twelve out of the thirteen contentions were TexPirg contentions.^{1/} The other was a contention admitted on behalf of the various clients of Mr. Dogett.^{2/}

^{1/} It is not clear why TexPirg Additional Contention 41 is on this list. On May 23, 1980, the Board issued an order designating Mr. Doherty as the lead party on this contention.

^{2/} Mr. Doherty has filed a separate motion to include his own contention on the health effects of low level radiation releases. Applicant will address that motion in a separate response. Mr. Doherty's effort to take over as the lead party on that contention is therefore premature. Applicant's response will thus focus only on the TexPirg contentions.

Under the Commission's rules of practice an intervening party is not permitted to file direct affirmative testimony in support of another party's contentions. Northern States Power Company (Prairie Island, Units 1 and 2), ALAB-244, 8 AEC 857, 869, n.17(1974), reconsideration denied, ALAB-252, 8 AEC 1175, aff'd, 1 NRC 1 (1975); Project Management Corporation (Clinch River Breeder Reactor), ALAB-354, 4 NRC 383, 392 (1976). In order to obtain this right a party must amend his or her petition to intervene and address the factors which govern the admissibility of late-filed contentions. 10 CFR §2.714(a). The Licensing Board so notified the parties at the Prehearing Conference held on August 13, 1980 (Tr. 1725). Mr. Doherty has not satisfied the requirements of 10 CFR §2.714(a) and his request should therefore be denied.*/

II.

Good Cause:

Mr. Doherty asserts that the reason he did not file his request earlier is that he was unsure whether it would be necessary to do so. Mr. Doherty now believes, based upon his

*/ Initially, it is important to note that Mr. Doherty does not represent that the other intervening parties are agreeable to his assuming the role of lead party on these contentions. The Board has made it clear that parties consolidated on a contention are not to submit duplicative direct testimony. Apparently, Mr. Doherty is not challenging this ruling. Instead he is arguing that he is more capable than TexPirg to present evidence. However, the Board has been provided no grounds for permitting Mr. Doherty to take over another party's contentions at this late date, without that party's approval.

review of the fruits of discovery, that "relevant items" are likely to be missed in TexPirg's direct testimony. This non-specific assertion provides the Board with absolutely no information upon which to base a determination as to good cause. Mr. Doherty does not set forth any particulars as to the "relevant items" that TexPirg's direct testimony will not cover. Furthermore, in light of the fact that TexPirg has not yet stated whom it intends to call as an expert witness on many of these contentions Applicant finds it difficult to understand the basis for Mr. Doherty's assertion that TexPirg's testimony will not cover relevant areas.

It should be remembered that Mr. Doherty is here requesting the Board to admit late-filed contentions in his behalf so that he may file direct testimony. To the extent that he is citing the insufficiency of TexPirg's interpretation of their contentions as the basis for an assertion of good cause, Mr. Doherty should be required to set forth "with particularity" the precise concerns that he believes will not be addressed by the admitted parties, so that there is some substance upon which the Board may base a ruling under §2.714(a).

Mr. Doherty's assertion of good cause as to the contentions numbered 6-13 in his motion, should be rejected by the Board for an additional reason. As Mr. Doherty admits, he authored these contentions several months ago, in his capacity as an employee of TexPrig. If Mr. Doherty believed that he had the knowledge and expertise necessary to support his own contentions he should have timely so informed the Board. Instead he waited until all discovery had ended.

The Board will recall that during his employment at TexPirg Mr. Doherty represented that he was authorized to speak for that organization, and allowed himself to be deposed in order to provide information alleged to support these contentions. Subsequently, TexPirg disavowed Mr. Doherty's authority even though Doherty had written the contentions. Applicant argued that TexPirg's disavowal constituted an attempt to thwart Applicant's rights to full discovery, and later renewed its complaint as responsibility for and knowledge about these contentions appeared again to shift from TexPirg's Mr. Scott to Mr. Johnson.

As a result of that controversy, the Board directed TexPirg's counsel to designate the persons at TexPirg who had substantive knowledge as to each of TexPirg's contentions so that the Applicant and Staff could engage in meaningful discovery.^{3/} TexPirg complied with that order and with respect to the contentions at issue here, designated Mr. Clarence Johnson as the TexPirg employee with substantive knowledge as to TexPirg's contentions. In reliance upon that representation Applicant took several depositions of Mr. Johnson and examined the basis for each of TexPirg's contentions solely through Mr. Johnson. Applicant has relied upon those depositions, and the knowledge gained therein, in both preparing its direct case and in responding to motions for summary disposition.

Now after having remained silent for these many months, Mr. Doherty has come forward to assert that TexPirg, through

3/ Order of December 4, 1970 at p. 5.

Mr. Johnson, has not adequately supported these contentions.^{4/} After proceeding full circle (Doherty to Scott to Johnson to Doherty), Mr. Doherty asks the Board to substantially negate all of Applicant's discovery and allow him to pursue these contentions on his own behalf. The Board should deny this outrageous attempt to undermine its earlier resolution of the dispute as to whether Mr. Doherty was the individual with full knowledge of TexPirg's contentions.

Other Means To Protect Interests:

Mr. Doherty has also failed to show that there are no other means available whereby his interests will be protected.^{5/} He claims that TexPirg will not be able to adequately support these contentions because it lacks the financial resources to do so and because of the "lack of knowledge on the part of its Interrogator."

On the question of financial resources, Applicant finds it difficult to perceive how Mr. Doherty could use another party's scarcity of resources to support an attempt to broaden his participation since Mr. Doherty himself has pleaded financial difficulty throughout the course of this proceeding.

As to the second point, Applicant assumes that TexPirg's

4/ What this apparently means is that Mr. Doherty is displeased with the answers provided by Mr. Johnson on deposition - i.e. that his answers are favorable to the Applicant.

5/ Applicant believes that through his long silence Mr. Doherty has waived any legitimate interest he may have on these contentions over and above that which he earlier passed on to TexPirg's acknowledged representative, Mr. Johnson.

"interrogator" is Mr. Scott. It is not clear how Mr. Scott's capabilities as an interrogator are relevant to Mr. Doherty's need to present direct written testimony on these questions, nor is it clear whether Mr. Doherty understands the distinction between presenting direct testimony and engaging in cross-examination of another party's expert witness.^{6/} Mr. Scott has not been designated as a witness in this proceeding, and thus will not be presenting any direct testimony. Moreover, Mr. Doherty has stated that he has not retained any expert witnesses to testify on his own contentions (August 13, Prehearing Conference, Tr.1726-27) and does not now state that he has any such witnesses for the 13 contentions which are the subject of the instant motion. Mr. Doherty has also admitted in deposition that he is not an expert on the subject of his own admitted contentions and nothing in his background provides a basis for supposing that he has special expertise on any of these 13 contentions.

Developing a Sound Record:

The simple fact that Mr. Doherty wrote the contentions while employed by TexPirg does not demonstrate that his participation would be reasonably expected to assist in developing a sound record. Mr. Doherty does not make any representation as to the type of evidence he would be able to present which could

6/ Mr. Doherty may believe that he will be a more competent cross-examiner than Mr. Scott, however, that question is irrelevant to his motion. Mr. Doherty's right to engage in cross-examination on these issues is not disputed.

not be presented by TexPirg. As stated earlier, it must be presumed that Mr. Doherty has no expert witnesses to call on these contentions. If he did, he should have so informed the Board.

Representation by Existing Parties:

Mr. Doherty's argument that other parties are too heavily burdened is truly extraordinary. No other intervenor has as many contentions as Mr. Doherty and he is still attempting to admit new ones.^{7/} If Mr. Doherty were to prevail upon his motion, the result would be to significantly increase his burden of presenting evidence on his numerous contentions that will be dealt with in the health and safety phase of the proceeding. Mr. Doherty has complained to the Board on several occasions about the burden he is under in handling the numerous contentions for which he is responsible, and he has already requested extensions of time within which to carry out his responsibilities during the prehearing process. He has also appealed to the Board for a prolonged schedule due to his other commitments. These many complaints can only be expected to increase if his motion is granted.

Delay:

The Appeal Board has noted on several occasions that the delay factor is very significant in striking a balance on the admissibility of a late petition. Long Island Lighting Company

^{7/} On October 13, Mr. Doherty filed a motion to add Contention 50 dealing with cracking in jet pumps.

(Jamesport Station), ALAB-292, 2 NRC 631, 650-51 (1975); Project Management Corporation (Clinch River Breeder Reactor), ALAB-354, 4 NRC 383, 394-95 (1976). The later in the proceeding the request is made, the greater the potential for delay. Detroit Edison Corporation (Greenwood Energy Center), ALAB-476, 7 NRC 759, 762 (1978).

If Mr. Doherty is successful in having these contentions admitted on his own behalf, Applicant has no choice but to attempt to undertake its full rights of discovery against Mr. Doherty. This would inject substantial delay into these proceedings at this time, and must be considered as an important factor weighing against the granting of Mr. Doherty's motion. Virginia Electric and Power Co. (North Anna Station), ALAB-289, 2 NRC 395, 400 (1975). Mr. Doherty's attempt to distinguish between delay and "useless" delay is entirely without support in NRC jurisprudence. Furthermore, his argument assumes that he has the intention of presenting direct testimony through expert witnesses which, as stated above, is contrary to his prior representations to this Board.

III.

For the foregoing reasons, Mr. Doherty has failed to establish good cause for his untimely attempt to raise the contentions in question on his own behalf. Mr. Doherty has known about these contentions for many months and he can have absolutely no good cause for attempting to raise them in his own behalf at this

time. None of the relevant factors weigh in favor of permitting Mr. Doherty to file direct testimony. Mr. Doherty has totally failed to satisfy the standards of Section 2.714 and his motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of Houston Lighting & Power Company's Answer to Doherty Motion to Present Direct Testimony on TexPirg Contentions, were served on the following by deposit in the United States mail, postage prepaid, or by hand delivery, this 24th day of October, 1980:

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