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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of)
HOUSTON LIGHTING & POWER COMPANY)
(Allens Creek Nuclear Generating)
Station, Unit 1))

Docket No. 50-466

NRC STAFF RESPONSE IN OPPOSITION TO TEXPIRG'S MOTIONS
FOR SUMMARY DISPOSITION DATED OCTOBER 8, 1980

On October 8, 1980,^{1/} TEXPIRG filed a motion seeking summary disposition of its contentions AC1 (barge slip); 2 and 4 (cooling lake); 5, 7, 8 and AC12 (alternative sources); and AC31 (technical qualifications).^{2/} For the reasons set forth below, the Staff submits that the motion for summary disposition should be denied as a matter of law.

In previous Staff responses in opposition to other TEXPIRG motions for summary disposition, we have set forth the legal standards for summary disposition. See e.g., "NRC Staff Response In Opposition To TEXPIRG Motion For Summary Disposition of Contention AC8," dated October 2, 1980. Our previous recitation of legal authorities makes it abundantly clear that the party seeking summary

^{1/} Although the certificate of service indicates that this motion was mailed on October 8, 1980, it is Staff's understanding that a copy was not delivered to Applicant until October 9, 1980 (see "Applicant's Response to TEXPIRG's Motions for Summary Disposition Served on October 9, 1980," dated October 22, 1980) and Staff did not receive its copy from Applicant until October 14, 1980, because of an intervening weekend and holiday. Staff was never served by mail. Because this motion was due on October 8, 1980, pursuant to the Board's Order of October 1, 1980, it could be dismissed as untimely. Be that as it may, the Staff urges the dismissal of the motion on other grounds set forth in this response, *infra*.

^{2/} These contentions are reproduced and set forth in Attachment A for the convenience of the Board. Although TEXPIRG has indicated that its Contention 8 should be included in the "alternative sources" grouping, that contention has been consolidated with Doherty Contention 8 and deals with Anticipated Transients Without Scram (ATWS). Thus, it appears that it has been added to this motion by mistake and we do not include it in Attachment A.

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judgment, not the party opposing it, must demonstrate the absence of any genuine issues of material fact and the party opposing summary judgment need only show that there are genuine issues to be tried. See e.g., Cleveland Electric Illuminating Company (Perry, Units 1 and 2), ALAB-433, 6 NRC 741, 752-754 (1977). Thus, in our previous responses in opposition to TEXPIRG motions for summary disposition, we attached affidavits from expert witnesses and presented statements of material facts which indicated that, in the Staff's opinion, genuine issues of fact remained to be litigated on each contention.

With respect to the instant motion, the Staff submits that the summary disposition motion is so legally insufficient that it fails to comply with the requirements of 10 C.F.R. §2.749. TEXPIRG has failed to meet its primary burden of placing sufficient admissible evidence into the record to show the total absence of a genuine controversy as to the determinative facts. In fact, the motion has set forth no admissible evidentiary material by way of affidavits, depositions, or interrogatory responses, to meet this primary burden. The motion consists entirely of unsupported assertions and legal conclusions by TEXPIRG's counsel. These assertions and conclusions by counsel are not "relevant, material, and reliable evidence" and, therefore, not admissible in NRC proceedings. 10 C.F.R. §2.743(c). Accordingly, it is clear that these assertions are no more than unadorned argument and, like briefs or legal memoranda not in affidavit form, cannot be used as evidentiary support for summary disposition. Tunnell v. Wiley, 514 F.2d 971 (3d Cir. 1975); Smith v. Mack Trucks, 505 F.2d 1248 (9th Cir. 1974).

Based on this patent deficiency, the Staff is of the opinion that the summary disposition motion need not be answered. It is well established that:

Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-754 (1977) quoting Adickes v. Kress & Co., 398 U.S. 144, 159 (1970) (emphasis in original, no defense to an insufficient showing is required. 6 Moore's Fed. Prac. §56.22[2] (2d Ed. 1980). Thus, by merely filing its motion for summary disposition, TEXPIRG does not become entitled to answers giving it notice of the manner in which the Staff and Applicant will meet at trial the issues covered by the motion.

For the reasons set forth above, the Staff submits that TEXPIRG's motion for summary disposition is entirely devoid of admissible evidentiary matter to support the motion and, therefore, should be denied as a matter of law because it does not meet the requirements of 10 C.F.R. §2.749. Accordingly, the Staff need not disclose or defend its position or to reply to the argument which, in effect, is an impermissible substitute for discovery. To do otherwise would be a needless burden on Staff resources and would jeopardize established legal procedures recognized by the Commission and set forth in its Rules of Practice.

As stated above, Staff does not need to reply to the substance of TEXPIRG's motion because it should be denied as a matter of law. However, we will set forth a few comments with respect to the contentions which are the subject of the summary disposition motion to indicate that the motion is totally lacking in merit and that there are issues remaining for trial on each contention.

TEXPIRG AC 1. The soon-to-be-published Second Supplement to the Allens Creek Final Environmental Statement (November 1980) will contain the Staff's assessment of the environmental impacts of the transportation of the reactor pressure vessel by barge. It will also contain an assessment of the alternatives to that transportation proposal. Contrary to TEXPIRG's unsupported assertion, ultimate NEPA judgments on any facility are to be made on the basis of the entire record, including supplemental testimony (and supplements to the FES), before the adjudicatory tribunal. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163 (1975). In addition, the Commission's regulations recognize that evidence presented at a hearing may cause a Licensing Board to arrive at conclusions different from those in the FES, in which event the FES is simply deemed amended pro tanto. 10 C.F.R. §51.52(b)(3); Allied General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671 (1975). Thus, the FES, FES Supplements, and supplemental testimony can provide the basis and support for ultimate NEPA judgments.

TEXPIRG Contentions 2 and 4. The Staff agrees with Applicant that paragraphs 1, 2 and 4 are mere restatements of TEXPIRG's contention and that paragraphs 3^{3/} and 5 appear to be outside the scope of the admitted contention. See Applicant's Response, supra, p. 5. In any event, the Staff has analyzed the proposed cooling lake and has concluded that it should provide a valuable recreational fishery

^{3/} Applicant's reference to this paragraph as "4" appears to be a typographical mistake.

(Final Supplement to FES, Summary and Conclusions - Item 3(i), p. S.iv). Thus, a genuine issue with respect to this contention remains for litigation.

TEXPIRG Contentions 5, 7 and AC 12. The assertions in support of summary disposition with respect to these contentions have no evidentiary basis. In addition, Paragraph 1, which addresses "need for power" is beyond the scope of the admitted contentions. Section 9.1 of the FES and Final Supplement to the FES evaluated alternative energy sources. Based on this evaluation, the Staff believes that a genuine issue remains with respect to these contentions.

TEXPIRG Contention AC 31. Again, the assertions in support of summary disposition with respect to this contention have no evidentiary basis and, in fact, are not relevant and material to the disposition of the issue.

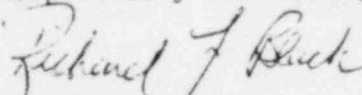
In Supplement No. 2 to the Safety Evaluation Report related to construction of Allens Creek Nuclear Generating Station, Unit 1, NUREG-0515, March, 1979, the Staff affirmed its conclusion that the Applicant is technically qualified to design and construct the Allens Creek Nuclear Generating Station, Unit 1 (Section 13.1). As stated we had noted that the Applicant's (1) updated corporate and technical organization, (2) technical resources as embodied in the numbers and technical experience of personnel assigned and available to the project, and (3) the quality assurance program as described in

Section 17.0 of the report were acceptable. Thus, the current Staff position is not in agreement with TEXPIRG's contention that HL&P is not technically qualified to design and construct the Allens Creek Nuclear Generating Station.

With regard to the four bases that TEXPIRG listed in its motion for summary disposition we note that: (1) the Commission's regulations do not specify that an applicant must have more than six Ph.D.'s, (2) no deficiencies in the quality control and construction program at the South Texas plant have been identified by the NRC Staff as a sufficient basis for requiring changes in HL&P's organization for design and construction of ACNGS as described in its Preliminary Safety Analysis Report (PSAR), (3) the Commission's regulations do not require a specific accuracy in estimating amounts of materials to be purchased, and (4) the Commission's regulations do not require that rejection of the applicant lowest on a list ranked by performance (even if that were the situation) if the applicant meets the Commission's regulations.

In conclusion, this motion must be denied because it (1) does not meet the requirements of 10 C.F.R. §2.749, and (2) the assertions in support of summary disposition on each of the contentions have no evidentiary basis and, in some instances, are outside the scope of the admitted contention.

Respectfully submitted,


Richard L. Black
Counsel for NRC Staff

Dated at Bethesda, Maryland,
this 3rd day of November, 1980.

Attachment A

Barge slip - TexPirg AC 1

Applicant has disclosed that it will transport the reactor vessel to the Allens Creek site by barge. It will be necessary to dredge the San Bernard River to allow such barging. This dredging will disrupt marine life, cloud the water, destroy river bottom life, require spoil disposal, and promote increased industrial use of the river, resulting in secondary environmental impacts.

S.4.5.1 (3) on P9 S. 4-14 of the Final Supplement to the Final Environmental Impact Statement (FSFEIS) does not adequately disclose and analyze the alternatives chosen for the transport of construction related components to the site. In particular, the Applicant has not clearly determined whether waterway barge transit will be used for transportation of large reactor components to the site.

Such a transportation scheme would require dredging and channelizing of sections of the San Bernard River or Brazos River. Such activity would disrupt marine life in that river, create excessive turbidity, and clouding of the water, destroy river bottom life, require environmental destruction during spoil disposal and initiate secondary impact in the form of increased industrial uses of the rivers. Petitioner contends that Applicant's commitment to transportation of the reactor vessel should be expressed more specifically and that the Board should either deny the license wholly or require the alternative site action sought by TexPirg in Contention 1 of the "Stipulation between TexPirg and the NRC Staff", if the dredging and channelizing is necessary.

The final EIS does not specify how the reactor vessel will be transported to the construction site and what means have to be taken to effect this transportation. The probability that this transportation will have an environmental impact necessitates its coverage in a final EIS for construction. For example, dredging, widening or otherwise altering the Brazos River to bring the vessel to the site by barge would have an environmental effect.

It is requested that the construction permit not be issued until the reactor vessel transportation is sufficiently addressed.

Cooling lake/recreational benefits TexPirg 2 and 4
[Griffith 4; McCorkle 2]

Due to its size and location, the cooling lake for the nuclear power plant at Allens Creek will be useless as a recreational fishery. In particular:

(1) The location fails to include the nearby bluff area as a recreational and fish spawning area. (The dam should be extended north to a point just east of its present northeast corner. This extension will channel more runoff into the lake and will submerge the bluff area.)

(2) Chlorine releases into the lake will kill significant numbers of fish.

(3) Sewage discharges from Wallis, Sealy, and the nuclear power plant will cause excessive algae growth in the lake.

(4) Heavy metals will concentrate in the lake and in the fish, making them inedible.

(5) Thermal shock will kill large numbers of fish when the plant shuts down during the winter.

[TexPirg 2] The smaller cooling lake size and changed location of the lake vis a vis the original proposal will render the lake useless as a viable recreational fishery because:

- a. the changed location eliminates the Bluff area as a recreational and fish spawning area;
- b. the amount of chlorine which will be released to the lake has more than doubled, which will result in significant fish kills;
- c. sewer discharges from Wallis, Sealy and the nuclear plant will cause an excessive algae growth in the lake;
- d. the heavy metal concentrations in the lake will result in heavy metals concentrating in the fish and will make them inedible; and

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- e. thermal shock will kill large numbers of fish during the winter when plant shutdowns occur.

[TexPirg 4] Even if a cooling lake is approved by the Board, the Board should require that it be redesigned to be more of an environmental benefit and less of an environmental burden. Specifically, the dam (levee) should be extended northward to a point just east of its present northeast corner so that the runoff can go into the lake and so that the north bluff area can be a viable fish spawning area.

Solid waste combustion -TexPirg 5-[Cumings 6(b)]

Residents of Houston produce 6,000 tons of solid waste daily. By building a 3,000-ton-a-day electrical generating plant fueled by this solid waste, Applicant can obviate the need for the ACNGS.

Neither the Applicant nor the Staff have given adequate consideration to the combustion of solid waste as an alternative energy source, because:

- a. The Staff concludes on § 9-9 of the DS-FES that "the lack of demonstrated technology on a commercial basis eliminates the potential future energy sources from consideration as alternatives for central station power by the late 1980's, apparently including refuse combustion among the "future alternatives". However, the evidence will indicate that the Staff has been inaccurate with regard to solid waste combustion. Twenty-one operational plants exist in the United States, with more than one dozen under construction, over forty in the advance planning stage, and over sixty in the feasibility study stage. Further, such facilities have operated successfully in Europe for over 40 years.
- b. The Staff states on § 9-6 of DS-FES that solid waste generation plants should be used to "regain lost energy", but expresses doubt that such plants will be contributing electricity in the near future. The heat content of solid mixed municipal waste is approximately 5,000 BTU/lb. or 40 percent the value of coal. In waste processing systems, the removal of light combustibles and separation of non-combustibles like glass and metals yield a paper-rich fraction in excess of 10,000 BTU/lb. or 90 percent the heat value of coal. Among the 80 operating "waste-to-electricity" plants in Europe are plants in Amsterdam and Frankfurt which supply six and seven percent of their city's electricity needs, respectively. The assumptions of the Staff regarding the use of this option are therefore incorrect.

- c. The six thousand tons per day of solid waste in Houston are more than adequate to support a three-thousand ton per day conversion plant that would obviate the need for the proposed ACNGS; and this alternative is technologically, environmentally, and economically desirable relative to nuclear generation stations. (This option should be an issue at this hearing. Petitioner believes the solid waste of Houston can sustain 800-1,000 MWe of production; though this level of supply could not have substituted for the two-unit ACNGS proposal in 1975, it does become viable in comparison to only one unit. In addition, since July, 1975, 28 communities have begun feasibility studies for solid waste power generation, 14 new plants went into the planning stage, and two more plants became operational - thus suggesting an increased viability of this option during that time).

Energy conservation TexPirg 7a-c [Doggett 1(a)]

There has not been a dispositive assessment of the energy demand reduction potential that might derive from conservation measures available to Applicant because:

- a. direct capital investment by the Applicant for conservation retrofitting in the service area has not been considered;
- b. inadequate attention has been given to the likelihood that major industrial users in the Houston area will be producing their own energy in the near future; and,
- c. the rate structure of the Applicant does not provide an incentive for energy conservation.*/

*/ As consolidated by the Board's Order of May 23, 1980.

Solar power (TexPirg 7J-[Cumings 6(c)]).

*:
There has not been a dispositive assessment of the energy demand reduction potential that might derive from conservation measures available to Applicant, because neither Applicant nor Staff has considered the increased use of passive solar techniques.*/_

*/_ As consolidated by the Board's Order of May 23, 1980.

Energy conservation has not been adequately considered as an alternative to the proposed facility because:

- a. direct capital investment by the Applicant for conservation retrofitting in the service area has not been considered. Examples of reasonable retrofits are more effective insulation, sealing, more efficient lighting units, improved air conditioning maintenance, use of more efficient glass, and use of more efficient industrial processes such as waste heat recovery. Expenditure of funds by the Applicant in the range of 50 percent that proposed for ACNGS would mean that the remaining demand for electrical power could be met with solid waste combustion as detailed in a separate contention;
- b. inadequate attention has been given to the likelihood that major industrial users in the Houston area will be producing their own energy in the near future. Texas City industrial complex, Dow Chemical complex and Bayport complex are presently considering such an option;
- c. the rate structure of the Applicant does not provide an incentive for energy conservation. Recent testimony before the Texas Public Utility Commission by Dr. Frederick Wells demonstrates the viability of altering the rate structure to significantly reduce power usage; and
- d. neither the Applicant nor the Staff has considered the increased use of "passive solar" techniques, such as architectural modifications and landscaping techniques that optimize the use of solar energy for residential and commercial structures.

Expanded conservation measures as set forth above would mitigate the need for a large central power station such as ACNGS. This is especially true because:

1. applicant's projections of power demand have decreased 22 percent in the period in which the proposed facility was deferred, and
2. reduced power production of a one-unit ACNGS vis a vis that of the original two-unit proposal can more readily be obviated by the measures outlined above.

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Solar power TexPirg 7d [Cumings 6(c)].

: There has not been a dispositive assessment of the energy demand reduction potential that might derive from conservation measures available to Applicant, because neither Applicant nor Staff has considered the increased use of passive solar techniques./
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*/ As consolidated by the Board's Order of May 23, 1980.

23. Energy conservation [Cummings 6(c); Doggett 1(a); TexPirg 7]

A. [TP] Energy conservation has not been adequately considered as an alternative to the proposed facility because:

- a. direct capital investment by the Applicant for conservation retrofitting in the service area has not been considered. Examples of reasonable retrofits are more effective insulation, sealing, more efficient lighting units, improved air conditioning maintenance, use of more efficient glass, and use of more efficient industrial processes such as waste heat recovery. Expenditure of funds by the Applicant in the range of 50 percent that proposed for ACNGS would mean that the remaining demand for electrical power could be met with solid waste combustion as detailed in a separate contention;
- b. inadequate attention has been given to the likelihood that major industrial users in the Houston area will be producing their own energy in the near future. Texas City industrial complex, Dow Chemical complex and Bayport complex are presently considering such an option;
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Expanded conservation measures as set forth above would mitigate the need for a large central power station such as ACNGS. This is especially true because:

1. applicant's projections of power demand have decreased 22 percent in the period in which the proposed facility was deferred, and
2. reduced power production of a one-unit ACNGS vis a vis that of the original two-unit proposal can more readily be obviated by the measures outlined above.

B. [D] Has a dispositive assessment been made of the energy demand reduction potential that might derive from conservation measures available to applicant?

Interconnection/purchase of power (TexPirg AC 12)

Applicant can eliminate the need for ACNGS by interconnecting with other electrical systems across the country, because they have excess capacity which can be purchased by HL&P in lieu of constructing ACNGS.

Studies such as that conducted by Taylor in Energy: The Easy Path and by the Subcommittee on Energy of the Joint Commission of Congress indicate that national, systemwide conservation decreases the need for new generating facilities nationwide; and this can provide the applicant here the alternative of interconnecting the HL&P system to other electrical systems across the nation which presently have excess capacity and will have even greater excess capacity in the future due to conservation. By interconnection of grids, the required reserved margin can be reduced for HL&P, and the need for additional generating capacity will be obviated because of the lowered need for reserves and the reduced industrial electrical demand (relative to that projected by Applicant) resulting from the Houston area's designation as an air quality non-attainment area. The state and local governments, and business groups, have stated that the EPA's "offset policy" of enforcing the non-attainment designation will curtail Houston industrial growth. The PID failed to consider the question of interconnection as an alternative, and the FS-FES is deficient in that respect because it examines interconnection only in the sense of a discrete purchase of power transaction.

Technical qualifications \TexPirg AC 31. [Doggett 3]

The PID did not thoroughly review, nor has the Applicant adequately shown, that HL&P is technically qualified to construct ACNGS. The following forms a basis for concluding that the Applicant is not technically qualified to design and construct the proposed facility:

- a. The Applicant has never designed an operating nuclear power plant with a record of safe operation;
- b. In 1978, an internal study by the Applicant stated that HL&P had underestimated the amount of steel required for HL&P's South Texas Project by 122%, concrete by 63%, rebar by 125%, piping by 88%, wire and cables by 100%, terminations by 71%, cable trays by 116%, and conduit by 49%, at the time of application to build the South Texas Project in 1973. The report concluded that this underestimation was partially due to "development from the conceptual stage" which had occurred since the construction license proceedings there. This may indicate technical deficiencies in the Applicant's power plant construction planning;
- c. NRC inspections indicate that the Applicant deviated in at least three instances from the PSAR submitted for its South Texas Project, all of which related to quality assurance, and this raises questions regarding the Applicant's ability to meet commitments in its ACNGS PSAR;
- d. HL&P has reported to the NRC that it failed to meet a commitment that a gantry crane at the South Texas Project meet tornado stress levels due to providing inadequate bid specifications to contractors, and this directly relates to the technical performance of the Applicant in this docket;
- e. In a 1977 NRC inspection report at HL&P's South Texas Project (Rpt. #50-498-08), HL&P was informed six of the ten quality control inspectors stated that they had experienced harassment (including an individual report of a death threat), and despite this notice, at least four other instances of quality control inspector-reported harassment were noted in later NRC inspections; and an August 22, 1978 NRC report states that QC inspectors at South Texas Project agreed "in majority" that they were not receiving adequate technical assistance from Project Quality Assurance Licensee personnel;

f. On Sept. 15, 1978, the NRC reported an investigation of an incident in which a quality control inspector alleged that HL&P's contractor at the South Texas Project fired him for strict inspection behavior, while the contractor's employee alleged a conversation with the quality control inspector in which the inspector allegedly solicited a bribe and supposedly stated that HL&P would "stay out" of any quality control let-downs; and though intervenor does not know what in fact occurred in this incident, the matter is sufficiently serious to form the basis for the consideration of this contention in this docket;

g. HL&P is the Project Manager of South Texas Project and is ultimately responsible to the NRC for the 24 items of non-compliance reported in inspections there so far, and for the numerous construction problems such as building the mechanical auxillary building one foot too narrow and installing understrength bolts, and that such performance as project manager there raises questions as to the technical qualifications of Applicant.

Because of the factors stated above, Intervenor contends that Applicant should be required to show that technical capabilities have been upgraded such that the problems encountered at its other nuclear project will not occur at ACNGS, with a finding that Applicant is not technically qualified if that is not shown.*/

*/ No rewording proposed.

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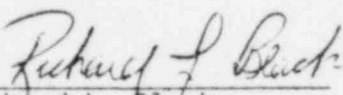
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