1/26/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANT'S RESPONSE TO TEXPIRG'S MOTION "FOR INTERLOCUTORY APPEAL PER 2.730(f) AND CERTIFICATION OF QUESTION PER 2.718(i)"

Applicant files this response to Intervenor TexPirg's motion for interlocutory appeal and certification to the Appeal Board of three questions which were the subject of the Licensing Board's ruling of September 15, 1980. For the reasons discussed below, neither referral nor certification is warranted in this case, and Applicant urges the Licensing Board to deny TexPirg's motion.

I. BACKGROUND

On July 21, 1980, TexPirg filed a motion requesting the Licensing Board to issue an order directing the NRC Staff to prepare a supplement to the Final Environmental Impact Statement (FES) to assess the environmental impacts of the "worst-case accidents, and other accidents referred to in the FES for ACNGS as 'Class 9.'" Motion, p. 1. TexPirg argued that under the Commission's Statement of Interim Policy (45 Fed. Reg. 40101, June 13, 1980), the NRC Staff was required to evaluate the impacts of a Class 9

D503
S
1/1

G

accident at ACNGS, and further, that NEPA would be violated unless such an evaluation were undertaken at this time. Motion, pp. 2-5.

In responses dated August 7, 1980, and August 13, 1980, the Applicant and Staff, respectively, opposed TexPirg's motion on grounds that no supplemental impact statement to consider Class 9 accident impacts was required under the Statement of Interim Policy; that the Commission had implicitly determined that the Policy Statement was consistent with NEPA requirements; and that the Staff had not identified any "special circumstances" with respect to ACNGS which would necessitate the consideration of Class 9 accidents at this time.

In a Memorandum and Order dated September 15, 1980, the Licensing Board denied TexPirg's motion on the basis that the Staff has no ongoing environmental review of accidents for ACNGS and accordingly, a Class 9 accident analysis is not required under the Statement of Interim Policy. Memorandum and Order, p. 3. The Board also ruled that under the OPS */ and Black Fox **/ decisions, as well as the Statement of Interim Policy, the Commission has determined that it is the Staff's responsibility

---

*/ Offshore Power Systems (Floating Nuclear Power Plants) CLI-79-9, 10 NRC 257 (1979).

**/ Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-8, 11 NRC 433 (1980).

to bring to the Commission's attention those cases which might warrant an evaluation of a Class 9 accident and that "the decision to proceed with this consideration rests with the Commission and not with its adjudicatory tribunals." Id. at 4. Finally, the Board rejected TexPirg's NEPA argument stating that the Board was bound by the Commission's orders. Id.

On January 15, 1981, four months after the Board's September 15, 1980, Memorandum and Order, TexPirg filed a motion requesting an interlocutory appeal under § 2.730(f) and certification under § 2.718(i) of three questions relating to its motion and the Board's September 15 ruling. */

II. REFERRAL OR CERTIFICATION TO THE APPEAL BOARD OF THE QUESTIONS RULED ON IN THE BOARD'S SEPTEMBER 15 MEMORANDUM AND ORDER IS NOT WARRANTED UNDER THE CIRCUMSTANCES IN THIS CASE

A. TexPirg's Motion is Untimely and Should be Denied by the Board

TexPirg waited four months after the Board's September 15 Memorandum and Order to file, on the eve of the commencement of evidentiary hearings on environmental issues, its motion for referral or certification. TexPirg offers the Board no explanation of why it waited so long, and, indeed, the prolonged delay itself, raises a question as to the good faith with which the motion is filed.

---

*/ TexPirg's motion is addressed to both this Board and the Appeal Board. In an Order issued on January 19, 1981, the Appeal Board stated that it intended to withhold any action on the motion for directed certification pending a determination by this Board of the relief sought by TexPirg.

While NRC regulations do not prescribe a specific time period for filing a motion for referral or certification of an issue to the Appeal Board, nevertheless, a four month delay in filing such a motion is unreasonable. In its motion TexPirg requests the Board to exercise its discretion to refer or certify the Class 9 accident issue on grounds that immediate appellate review is required; yet TexPirg's own action in unreasonably delaying the filing of its motion, with no apparent good reason, belies this argument. If TexPirg believed that immediate appellate review of this issue was necessary to protect its interests in this proceeding, it had the responsibility to take prompt action to seek such appellate review. TexPirg's failure to undertake such action by filing its motion in a timely manner is sufficient reason standing alone for the Board to deny the motion.

B. Criteria for Referral and Certification Under Sections 2.730(f) and 2.718(i)

The Commission's regulations set forth in 10 CFR § 2.730(f) proscribe interlocutory appeals to the Appeal Board except in cases where the Licensing Board in its discretion determines that a prompt review of its ruling "is necessary to prevent detriment to the public interest or unusual delay or expense. . . ."*/ If the Board makes such a determination,

---

*/ If the Board has issued a ruling on a particular issue, referral under § 2.730(f) is the proper procedure rather than certification under § 2.718(i). Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-152, 6 AEC 816, 818-19 (1973).

it may refer its ruling to the Appeal Board for decision. */ No specific criteria for certification are set forth in the provisions of § 2.718(i), but the standards under this section are no less than those for referral. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483 (1975).

The general policy of the Commission, however, does not favor certification of an issue during the pendency of a proceeding, Id. at 483, and certification is the exception and not the rule, Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station) and Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-300, 2 NRC 752, 759 (1975)).

Moreover, the Appeal Board has made it clear that it will undertake discretionary interlocutory review only sparingly, and only if the Licensing Board's ruling

> (a) threatens the party adversely affected with immediate and serious irreparable harm which could not be remedied by a later appeal or (b) affects the basic structure of the proceeding in a pervasive or unusual manner.

Pennsylvania Power & Light Co., (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-593, 11 NRC 761, 762 (1980); Accord, Public Service Co. of Indiana (Marble Hill Units 1 and 2), ALAB-405, 5 NRC 1190, 1191 (1977). See Houston Lighting & Power Company (South Texas Project, Units 1 and 2), ALAB-608 12 NRC 168 (1980).

---

*/ The Appeal Board may refuse to accept a referral from the Licensing Board where there has been no strong showing that § 2.730(f) criteria have been met. See, e.g., Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-438, 6 NRC

(footnote continued on page 6)

C. TexPirg Has Failed to Demonstrate that Referral or Certification of its Three Questions is Warranted Under the Criteria of §§ 2.730(f) or 2.718(i)

In an attempt to justify its request for referral or certification of its three questions to the Appeal Board, TexPirg states that referral is necessary because of "exceptional circumstances, public interest, and effects of delay," which TexPirg claims require that the Class 9 accident issue be considered at the construction permit stage. Motion, p. 2. TexPirg never articulates these "exceptional circumstances" or "public interest" or "effects of delay" except to state that certain costs will be incurred if the Class 9 accident analysis is not undertaken until the operating license stage. This hardly meets the criteria for referral under § 2.730(f). TexPirg does not explain to the Board why the circumstances of the ACNGS proceeding are so "unusual" with respect to this issue that interlocutory Appeal Board review is required at this time. Moreover, TexPirg's assertion that costs of 2 billion dollars will be incurred if the Class 9 accident analysis is not undertaken now does not take into account the appellate process provided by the Commission's regulations and federal law. Once an initial decision is issued in this proceeding by the Licensing Board, TexPirg may appeal that decision, including the Board's ruling of September 15, 1980, in accordance with the provisions of

---

(footnote continued from page 5)

638 (1977); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1191 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-293, 2 NRC 660 (1975).

§ 2.762. Thus, the Licensing Board's ruling can be reviewed prior to the time that any substantial sums are incurred toward the construction of the ACNGS facility. And, as the Appeal Board has stated, the potential risk of reversal of a Licensing Board decision on appeal does not override the policy reasons for precluding interlocutory appeals. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-393, 5 NRC 767, 768 (1977).

TexPirg has also failed to show that under the Appeal Board criteria, set forth on page 5, this issue is appropriate for certification. First, TexPirg has not shown, as indeed it cannot, that it will be threatened by "immediate and serious irreparable impact" which cannot be remedied by an appeal of the initial decision. As discussed above, pages 6-7, review of the Licensing Board's September 15 ruling can be sought by TexPirg after the initial decision is issued which will be long before any substantial construction of the facility can be undertaken.*/ Secondly, TexPirg has not shown that this issue, if not reviewed immediately, will affect the "basic structure of the proceeding in a pervasive or unusual manner." This issue is only one of numerous environmental and health and safety issues which are being heard in this proceeding and its rejection does not seriously

---

*/ Under current regulations, an initial decision does not become effective until at least 80 days after the decision has been issued during which time there is Appeal Board and Commission review. 10 CFR Part 2, Appendix B.

affect the course of this proceeding nor TexPirg's right to participate in it. Accordingly, TexPirg has made no case for certification under these two criteria.

D. TexPirg Seeks to Challenge the Commission's Statement of Interim Policy

It is evident from examining the three questions which TexPirg requests the Board to refer or certify to the Appeal Board that TexPirg's real complaint is directed to the Commission's Policy Statement itself. If TexPirg seeks to certify to the Appeal Board questions which directly challenge the provisions of the Policy Statement, interlocutory review is obviously not appropriate. A brief look at these three questions will demonstrate that this is precisely the relief which TexPirg seeks.

In question 1, TexPirg asks whether NEPA requires that an analysis of Class 9 accidents be undertaken for all construction permit applications. The Statement of Interim Policy makes it clear that the Commission has not authorized the NRC Staff, on the basis of a NEPA requirement, to perform a Class 9 accident analysis for all construction permit applications. Rather, the Policy Statement provides for a cut-off point for construction permit applications based upon whether the Staff has issued an FES for that application. 45 Fed. Reg. at 40103. In promulgating the Policy Statement, the Commission no doubt was aware of applicable NEPA requirements and, therefore, made a determination that the provisions of the Policy Statement comported with those requirements. An affirmative answer to TexPirg's question would completely

undermine this provision of the Policy Statement as it relates to construction permit applications. Since the Commission has spoken directly on this point, NRC adjudicatory boards are bound by the Commission's directives. See Board's September 15 Memorandum and Order, p. 4. Accordingly, this question is not appropriate for referral or certification to the Appeal Board.

In question 2, TexPirg asks whether the Statement of Interim Policy requires the Staff to consider and analyze a Class 9 accident for ACNGS "because its NEPE (sic) review is ongoing." Motion, p. 2. This question also seeks to challenge the Commission's Policy Statement. In the Policy Statement, the Commission has been very specific as to the circumstances under which the Staff is directed to analyze Class 9 accidents in its "ongoing NEPA reviews." The Commission has provided that "where a Final Environmental Impact Statement has not yet been issued," the Staff is to undertake an evaluation of the impacts of a Class 9 accident. 45 Fed. Reg. at 40103. The apparent purpose of this provision was to minimize the disruptive potential of the Commission's change in policy by establishing a time table to govern the transition in cases in which the Staff had previously issued an FES. The Commission stated:

> Thus, this change in policy is not to be construed as any lack of confidence in conclusions regarding the environmental risks of accidents expressed in any previously issued statements, nor, absent a showing of similar special circumstances, as a basis for opening, reopening, or expanding any previous or ongoing proceeding.

45 Fed. Reg. at 40103 (footnote omitted).

TexPirg questions whether the Staff is required to undertake a Class 9 accident analysis for ACNGS because the hearing on NEPA issues has not yet begun, a construction permit has not been issued and no construction has begun, and a supplement to the impact statement to consider alternative siting has just been completed. Again, the provisions of the Statement of Interim Policy are clear that the cut-off point for consideration of Class 9 accidents in an ongoing licensing proceeding is issuance of the Staff's FES which has been done in the ACNGS proceeding. If the Commission had intended that issuance of a supplemental FES */ or issuance of an initial decision by the ASLB would constitute the cut-off point, it would have simply and explicitly so provided. **/ Since TexPirg's question 2 raises an issue which challenges the

---

*/ An FES is that document issued in response to comments received on the draft environmental statement. A supplement to an FES is termed a "supplemental FES" and is a different document than the FES. See 40 CFR § 1502.9.

**/ As Applicant pointed out in its Response to TexPirg's Class 9 motion, p. 10, the Statement of Interim Policy itself contradicts the argument that the issuance of an initial decision or a supplemental FES is the appropriate cut-off point. Often a supplemental FES is not issued until late in a proceeding, and an initial decision cannot be rendered until hearings are completed. The designation of either of these events as the cut-off point would not provide for the orderly transition, desired by the Commission, since the preparation of a Class 9 accident analysis at either of these times would pose the potential for a severe disruption of a proceeding.

clear language of the Policy Statement, it is not an appropriate question for referral or certification.

Finally, in question 3, TexPirg questions whether the Staff should identify ACNGS for "early consideration of either additional features or other actions which would prevent or mitigate the consequences of serious accidents." Motion, p. 2. The short answer to this question is, as the Licensing Board pointed out in its September 15 Memorandum and Order, "that the Staff alone is to bring to the Commission's attention those cases that might warrant consideration of environmental impact of the more severe kinds of very low probability accidents that are physically possible, and that the decision to proceed with this consideration rests with the Commission and not with the adjudicatory tribunals." Memorandum and Order, p. 4; See Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 537 (1980). The Staff has determined that ACNGS is not one of those cases. Staff's August 13, 1980 Response to TexPirg's Motion, pp. 3, 6. TexPirg seeks certification of a question which challenges Commission policy and accordingly, it is not appropriate for interlocutory appeal.

III. CONCLUSION

For the reasons discussed above, TexPirg has failed to demonstrate that either referral or certification is warranted

in this case and Applicant urges the Licensing Board to deny TexPirg's motion.

Respectfully submitted,

Robert H Culp

Jack R. Newman
Robert H. Culp
David B. Raskin
1025 Connecticut Avenue, NW
Washington, DC 20036

J. Gregory Copeland
C. Thomas Biddle
Darrell Hancock
3000 One Shell Plaza
Houston, Texas 77002

ATTORNEYS FOR APPLICANT
HOUSTON LIGHTING & POWER COMPANY

OF COUNSEL:

LOWENSTEIN, NEWMAN, REIS
& AXELRAD
1025 Connecticut Avenue, NW
Washington, DC 20036

BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Response to TexPirg's Motion "For Interlocutory Appeal Per 2.730(f) and Certification of Question Per 2.718(i)" were served on the following by deposit in the United States mail, postage prepaid, this 26th day of January, 1981:

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

Dr. E. Leonard Cheatum
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

Chase R. Stephens
Docketing and Service Section
Office of the Secretary of
the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

Susan Plettman, Esq.
David Preister, Esq.
Texas Attorney General's Office
P. O. Box 12548
Capitol Station
Austin, Texas 78711

Hon. Charles J. Dusek
Mayor, City of Wallis
P. O. Box 312
Wallis, Texas 77485

Hon. Leroy H. Grebe
County Judge, Austin County
P. O. Box 99
Bellville, Texas 77418

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

Richard Black, Esq.
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

John F. Doherty
4327 Alconbury Street
Houston, Texas 77021

TexPirg
Att: Clarence Johnson
Executive Director
Box 237 U.S.
University of Houston
Houston, Texas 7704

Carro Hinderstein
609 Fannin Street
Suite 521
Houston, Texas 77002

D. Marrack
420 Mulberry Lane
Bellaire, Texas 77401

Brenda McCorkle
6140 Darnell
Houston, Texas 77074

F. H. Potthoff, III
1814 Pine Village
Houston, Texas 77080

Wayne E. Rentfro
P. O. Box 1335
Rosenberg, TExas 77471

James M. Scott, Jr.
13935 Ivy Mount
Sugar Land, Texas 77478

William Schuessler
5810 Darnell
Houston, Texas 77074

Stephen A. Doggett, Esq.
P. O. Box 592
Rosenberg, Texas 77471

Bryan L. Baker
1923 Hawthorne
Houston, Texas 77098

J. Morgan Bishop
Margaret Bishop
11418 Oak Spring
Houston, Texas 77043

W. Matthew Perrenod
4070 Merrick
Houston, Texas 77024

Robert H. Culp