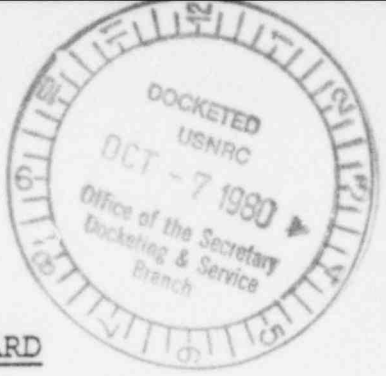

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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 MEMORANDUM OF LAW IN SUPPORT OF RESPONSES TO INTERVENORS' MOTIONS FOR SUMMARY DISPOSITION

On August 6, 1980, Intervenor TexPirg filed with this Board a motion for summary disposition in its favor on TexPirg Additional Contention 50. On September 16, 1980, Houston Lighting & Power Company (Applicant) received two additional, undated motions for summary disposition authored by TexPirg with respect to TexPirg Contention 1 and Additional Contention 8. On September 11, 1980, Intervenor D. Marrack filed a motion for summary disposition on Marrack Contention 2(c). Applicant now responds to these motions. Applicant will show that Intervenors' motions are legally insufficient to support summary disposition and that, therefore, all should be denied in their entirety.

ARGUMENT

Intervenors' motions in each instance fail to present and support sufficient material facts to negate the existence of triable issues. The single question presented on a motion for summary disposition is whether the "relevant, material, and reliable evidence"[1/] in the filings and/or affidavits produced in the proceeding "show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law."[2/] Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A and 2B), ALAB-554, 10 NRC 15 (1979). Intervenors' motions are factually unsupported by admissible evidence of any nature. Moreover, even assuming that the unsupported lay opinions and hearsay citations raise some factual issues, the motions plainly fail to carry the burden of establishing that there is no genuine issue remaining for trial when the record is viewed in the light most favorable to the opposing party. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit No. 1), LBP-77-45, 6 NRC 159 (1977).

1/ 10 CFR § 2.743(c)

2/ 10 CFR § 2.749(d)

A. Lack of Evidence

Intervenors fail entirely to meet the burden of submitting evidentiary support for their motions. The burden of establishing the facts necessary to justify summary disposition rests squarely on the movant, and the opponent of the motion has no obligation to respond until the facts relied upon are convincingly proved. Adickes v. Kress & Co., 398 U.S. 144 (1970). Thus, the Advisory Committee for the Federal Rules of Civil Procedure noted that "[w]here the evidentiary material 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."3/

Movant's primary burden, consequently, is placing sufficient admissible evidence into the record to show the total absence of a genuine controversy as to the determinative facts. E. P. Hinkel & Co., Inc. v. Manhattan Co., 506 F.2d 201 (D.C. Cir. 1974). In this case it is apparent that Intervenors have presented no admissible evidence as to any relevant facts and summary disposition should be denied

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3/ Fed. R. Civ. Proc. 56, Notes of Advisory Committee on 1963 Amendment. Section 2.749 is patterned after Rule 56 of the Federal Rules of Civil Procedure. 37 Fed. Reg. 15127 (July 28, 1972).

without further inquiry. Intervenors have either omitted affidavits in support of their conclusory arguments (TexPirg Contention 50 and Marrack Contention 2(c)) or have attached incompetent and unqualified opinions in affidavits executed by persons without education, experience or training to testify about the matters in issue.

1. The Affidavit.

Summary disposition motions are usually supported by affidavit, but affidavits are not required if other evidentiary materials are substituted. Thus, the federal rules[4/] and the NRC rules[5/] both recognize other evidentiary devices--depositions, interrogatory answers, etc.--as permissible methods of submitting the necessary proofs into the record. But these alternatives to an affidavit do not excuse the fundamental requirement of presenting conclusive admissible evidence.

4/ See 6 Moore's Federal Practice § 56.11[2](2d ed. 1976).

5/ 10 C.F.R. § 2.749(d) provides that

> The presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

As a practical necessity the affidavit of an expert is almost always required in NRC proceedings in order to evaluate and explain data and support opinions addressing a complex mixture of technical and subjective issues. It follows that fragments of admissible evidence substituted for expert affidavits must be adroitly arranged to conclusively negate every material issue of controversy. Intervenors offer, instead, the inadmissible work product of laymen and, in the case of TexPirg Additional Contention 50, of counsel.

The bulk of Intervenors' "evidence" is expurgated, out-of-context quotations and citations to scattered "scientific" and "technical" papers and books. Intervenors, presumably, believe that these citations and quotations amount to evidence; these are, in fact, not admissible evidence at all.

Rule 802 of the Federal Rules specifically excludes barren references of this type as hearsay. Rule 803(18) creates a narrow exception for a "learned treatise" used by expert witnesses.[6/] Intervenors, lacking such expert

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6/ "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits."

witnesses to support their references, fail to qualify for the narrow exception.

The unsupported assertions by Intervenors and Tex Pirg's counsel in the "motions" and "statements of material facts" are also plainly inadmissible. These assertions are no more than unadorned argument and, like briefs or legal memoranda not in affida it 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).

2. Expert credentials.

As noted above, the most credible form of admissible evidence in technical litigation is the testimony of an expert witness. See Public Service Commission of New Hampshire et al. (Seabrook Station, Units 1 and 2), LBP-76-4, 3 NRC 123 (1976). This preference exists because the credibility of conclusions drawn about technical and environmental issues relates primarily to theory and analysis of data. Id. Consequently, the reliability of "evidence" adduced in an affidavit depends critically on the experience and training of the affiant to explain and support the conclusions. Because the opportunity for a voir dire examination is lost, an affiant supporting motions for summary disposition must

submit a clear statement of qualifications and experience or training which establishes the reliability of each and every interpretation and opinion presented. 10 CFR §2.749(b). If the interpretations and opinions are unreliable, they are inadmissible. 10 CFR §2.743(c).

As discussed more thoroughly in the individual responses to Intervenors' motions, the offer of "expert" testimony in these motions is for the most part totally unqualified and, hence, unreliable and inadmissible. The proffered "statements of qualifications" fail to detail or refine the vague and generalized assertions of "expertise" in relation to the very specialized and rigorous qualifications required. These special qualifications are required to raise even a glimmer of reliability in testimony espousing sweeping conclusions about issues requiring both the careful consideration of myriad technical variables and subjective evaluation of conflicting evidence. Additionally, in many cases it is evident that the testimony strays beyond the outer-most boundary of the "expertise" claimed even if the assertions of qualifications are most liberally construed. In these circumstances, the great majority of the testimony offered in these affidavits must be considered unqualified lay testimony which cannot be used to support the motions before the Board.

B. Insufficient Evidence

Even if it is assumed, contrary to fact, that every assertion in Intervenors' arguments were supported by reliable evidence, these assertions in combination still do not deny the existence of all genuine issues in controversy. In each and every case, as outlined in the individual responses, the Intervenors have failed to address material facts which cannot be ignored if the ultimate issues are to be pre-emptively decided. Intervenors' failure to recognize and address all material facts defeats their motions at the outset. Applicant has no burden to even present evidence on the omitted material facts. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 752-54 (1977). Moore's Fed. Prac. § 56.15[3].

C. The NEPA Issues

There is a category of cases where the nature of the ultimate controversy essentially precludes a decision by summary judgment. This category includes cases where the relevant evidence is such that "conflicting inferences may be drawn therefrom, or if reasonably one might reach different conclusions." Pacific Gas and Electric Company, supra at 165 (citation omitted). Conflicting inferences and reasonable disagreements are nowhere more prevalent than in deciding the

cost-benefit balances required by the National Environmental Policy Act (NEPA).[7/]

NEPA requires an examination of reasonable alternatives to the construction and operation of a proposed nuclear facility if those alternatives hold the possibility of environmental superiority. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155 (1973). At the outset, however, there must be some basis for believing that the consideration of the proposed action and an alternative presents a realistic and cognizable choice involving "a significant environmental effect or . . . a controversy over the allocation of resources." Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451 (1980) (hereinafter "VEPCO"). Thus, it is unnecessary to engage in a NEPA examination if the alternative is unrealistic (e.g., Metropolitan Edison Company, et al. (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978)) or if the proposal poses no significant environmental impact (e.g. VEPCO, supra). In either of the latter two situations summary judgment may indeed be appropriate because there is no material issue to be litigated at trial.

7/ 42 U.S.C. § 4321-4361

Summary disposition is categorically inappropriate, however, if it is necessary to reach a decision on a cost-benefit balance. It is unsuited because

> in order to reject the applicant's proposal, it would have to be determined both that (1) at least one of the alternatives was environmentally superior; and (2) that environmental superiority was not outweighed by other considerations such as comparative costs:

VEPCO, supra at 458 (emphasis in original). It is virtually impossible to determine whether a claim of environmental superiority is outweighed by other considerations on summary disposition. First, the proponent of such a course would have to conclusively establish the weight attached to all other considerations which is a very difficult task that was not even attempted by the Intervenors.[8/] Secondly, the proponent would have to prove that there is only one possible balance that can be struck in light of all the material facts. The likelihood that a few pages in a qualified affidavit could preclude any other outcome in a complex decision fundamentally relegated to the agency's reasoned discretion[9/] is obviously infinitesimal. Summary disposition will not lie in these circumstances.

8/ Significantly, the Intervenors do not even address these other considerations. See Applicant's individual responses.

9/ Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1115 (D.C. Vic. 1971), cert. denied, 404 U.S. 942 (1972).

CONCLUSION

To succeed on motions for summary disposition, Intervenors must present reliable evidence. This reliable evidence must convincingly establish that all material facts lead to only one conclusion. This conclusion itself cannot be susceptible to reasonable disagreements nor rest on conflicting inferences. Intervenors have failed in each and every one of the tasks. Accordingly, their motions for summary disposition must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Applicant's Memorandum of Law in Support of Responses to Intervenors' Motions for Summary Disposition in the above-captioned proceeding were served on the following by deposit in the United States mail, postage prepaid, or by hand-delivery this 2nd day of October, 1980.

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