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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

Docket No. 50-466



NRC STAFF'S RESPONSE TO TEXPIRG'S MOTION FOR RECONSIDERATION  
OF VARIOUS RULINGS DURING EVIDENTIARY HEARINGS, AND  
FOR CERTIFICATION OF VARIOUS ISSUES TO THE APPEAL BOARD

I. INTRODUCTION

On January 29, 1981, Intervenor TEXPIRG filed, under one cover, a series of motions with both the Licensing Board and the Appeal Board seeking the following relief: (1) reconsideration of various Licensing Board rulings with respect to procedural matters; (2) referral of an interlocutory appeal pursuant to 10 C.F.R. §2.730(f); certification of various issues pursuant to 10 C.F.R. §2.718(i); and (3) the removal of the Licensing Board. On February 3, 1981, the Appeal Board denied TEXPIRG's motion with respect to the issues directed to the Appeal Board and noted its disapproval of "the practice of simultaneously seeking Licensing Board reconsideration of interlocutory rulings and appellate review of the same rulings." Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC \_\_\_\_ (February 3, 1981).

~~At an evidentiary hearing held on February 5, 1981, the Licensing~~  
~~Board ruled that TEXPIRG's motion to disqualify the Board was denied because~~

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it was procedurally defective. Tr. 4808. With respect to the reconsideration motion, the Board ruled that TEXPIRG would be required to resubmit its motion with specific record citations to the Board's actions and rulings which TEXPIRG asserts are in error. Tr. 4812.

TEXPIRG resubmitted its original January 29, 1981 pleading on February 17, 1981, with record citations written in by hand at various places. Since the resubmission also requested the same interlocutory review by the Appeal Board, the Appeal Board again was forced to respond. On February 23, the Appeal Board issued a "Memorandum and Order" again dismissing the endeavor to obtain appellate relief as premature because the Licensing Board had not yet acted upon the reconsideration request.<sup>1/</sup>

For the reasons set forth below, the NRC Staff submits that (1) the motion for reconsideration of various procedural rulings should be denied, and (2) the motion for referral or certification must be denied.

## II. BACKGROUND

The thrust of TEXPIRG's motion is to challenge various Board rulings and actions which have attempted (1) to set forth the duty and responsibility of all parties to attend hearing sessions, and (2) to take appropriate

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<sup>1/</sup> In both decisions, the Appeal Board has noted that the request for appellate review must be a new and different pleading than that filed with the Licensing Board seeking reconsideration. A new pleading must take into account the Licensing Board's action on reconsideration as well as the decision in *Toledo Edison Co. (Davis Besse Nuclear Power Station, Unit 1)*, ALAB-314, 3 NRC 98, 99 (1976).

measures to prevent argumentative, repetitive, cumulative, or irrelevant cross-examination. The majority of TEXPIRG's allegations of error fall into two categories: (1) the Board erroneously prohibited the right of cross-examination by certain parties (See, e.g., Motion paras. 1, 2 and 5), or (2) the Board erroneously restricted the right of cross-examination (See, e.g., Motion paras. 3, 4 and 6).

As our subsequent discussion and a perusal of the record will show, these evidentiary hearings have been lengthy and controversial. Although the Staff would concede that a good deal of the length can be attributed to the number of issues in controversy, it is also our perception that much of the time has been spent in argumentative, repetitive, cumulative or irrelevant cross-examination. A good indication of this type of cross-examination can be gleaned in the general sense by comparing the time needed to respond to and rule on objections to certain questions or lines of cross-examination as opposed to the hearing time engaged in "meaningful" cross-examination.<sup>2/</sup> Without trying to impugn the conduct of any party during these difficult and time-consuming proceedings, it is also Staff's view that counsel for TEXPIRG has repeatedly engaged in procedural and cross-examination tactics that have resulted in numerous objections by other parties to the proceeding. See e.g. Applicant's

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because much objectionable cross-examination was allowed to continue in the interest of moving the hearing along.

characterization of this conduct set forth in "Applicant's Response to TEXPIRG's Motion For Reconsideration of Various Rulings During Evidentiary Hearings, and for Certification of Various Issues to the Appeal Board," dated March 4, 1981, p. 4, which Staff is in general agreement with. TEXPIRG's cross-examination and procedural tactics have directly resulted in numerous reprimands by the Board (E.g., Tr. 6184-6189, 6233-6240) and ultimately have caused the Board to impose procedural limitations on all parties' right to cross-examine witnesses. Tr. 5974, 6171, 6181-6189, 6233-6240, 6304, 6657-6659. Although the Board's procedural limitations may have limited certain intervenors' opportunities for cross-examination,<sup>3/</sup> it will be shown below that these limitations were necessary and reasonable measures to impose to preserve order, to move the hearing along in a timely manner, to aid in the development of a sound and complete record, and to assure the protection of the public interest. In addition, these limitations were within the discretionary authority of the Licensing Board to "[r]egulate the course of the hearing and the conduct of the participants." 10 C.F.R. §2.718(e). TEXPIRG has not shown how the Board has abused its discretion and, accordingly, this motion for reconsideration must be denied for the reasons set forth below.

### III. DISCUSSION

#### A. Legal and Regulatory Authority to Impose Procedural Restrictions

The authority of a licensing board to impose procedural restrictions to avoid delay and to maintain order cannot be questioned. See 10 C.F.R.

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<sup>3/</sup> See e.g. Tr. 6658 where Mr. Schuessler was denied cross-examination based on his absence from the proceeding.

§2.718. A presiding officer has all powers necessary to accomplish these ends, including the power to "[r]egulate the course of the hearing and the conduct of the participants." 10 C.F.R. §2.718(e). These powers are further delineated in 10 C.F.R. §2.757 wherein it states that the presiding officer may:

- (b) Strike argumentative, repetitious, cumulative, or irrelevant evidence;
- (c) Take necessary and proper measures to prevent argumentative, repetitious, or cumulative cross-examination; and
- (d) Impose such time limitations on arguments as he determines appropriate, having regard for the volume of the evidence and the importance and complexity of the issues involved.

The above regulations reflect the Commission's intent to conduct proceedings expeditiously and to assure that procedures maintain sufficient flexibility to accommodate that objective. This intent is "founded upon the recognition that fairness to all the parties in such cases and the obligation of administrative agencies to conduct their functions with efficiency and economy, require that Commission adjudications be conducted without unnecessary delays." 10 C.F.R. Part 2, App. A.

The discretion of a licensing board to impose procedural limitations on parties to avoid unnecessary delays is also well founded in NRC case law. It is recognized that such matters as the scope of cross-examination and the parties that may engage in it are committed to the discretion of the Licensing Board because these matters often depend on the posture of a particular case. Public Service Company of Indiana (Marble Hill, Units 1 and 2),

ALAB-461, 7 NRC 313, 316 (1978). In its discretion, the Board may "halt immediately cross-examination which manifestly is making no contribution to the ventilation of the issues in contest but, rather, is productive simply of delay and an unduly encumbered record." Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 868 (1974). The Board is also empowered to require an advance indication respecting what the intervenor will attempt to demonstrate or ascertain through cross-examination and to preclude or limit such cross-examination it determines will be of no value to the development of a full record on the issue involved. Id. at 869; Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-288, 2 NRC 390, 393 (1975).

In summation, there is ample authority which indicates that a licensing board is empowered to take appropriate action to avoid delay, to regulate the course of the hearing and the conduct of the participants. These actions can include the restriction of cross-examination as well as the outright denial of cross-examination rights under certain circumstances. We now turn to the question of whether this Board abused its discretion by imposing such restrictions and prohibitions in this proceeding.

B. Restrictions on Cross-examination

TEXPIRG has asserted error with respect to the Board's restriction of

~~cross-examination in the following instances:~~



1. TEXPIRG argues that the Board has improperly limited the scope of intervenor cross-examination by restricting examination to "the literal direct testimony, instead of the scope of the contention." Motion, para. 3. It also complains that the scope of the contention (presumably addressed in the direct testimony) is restricted to the literal basis set forth in the contention. Id.

Staff must necessarily respond to this assertion of error in two parts. First, it is clear that under the Federal Rules of Evidence (Fed. R. Evid. 611(b)) and the Commission's rules of practice (Prairie Island, supra, ALAB-244, 8 AEC at 867, petition for reconsideration denied, 8 AEC 1175, aff'd, 1 NRC 1 (1975)), cross-examination is to be strictly confined to the direct examination of that witness. Thus, TEXPIRG has no legal basis to assert error in this regard.

Second, the thrust of TEXPIRG's other argument is that the literal interpretation of the scope of the contention has been too restricted and, accordingly, it has been precluded from examining areas that it has felt relevant to the contention. See e.g. Tr. 2781-89; 2933-37. However, after a review of the record, it is apparent that TEXPIRG has a misunderstanding of the proper scope of cross-examination in these proceedings. TEXPIRG's counsel has admitted that he seeks to examine witnesses on any matter relevant to the "overall decision as to whether or not this project meets

~~REDACTED (IN 2006) BY THE BOARD. THE BOARD HAS THE RIGHT TO CROSS-EXAMINE ON EVERY ISSUE THAT THIS BOARD HAS TO DECIDE. NOT~~

just those that the intervenors may have specifically listed as bases for Contentions." Tr. 2937. It is clear that TEXPIRG has tried to expand the permissible scope of cross-examination allowed by the Commission's Rules of Practice. Although the Board has generally given all intervenors wide latitude in the scope of cross-examination, it certainly has not abused its discretion in the instances cited by TEXPIRG by restricting examination to the scope of the direct testimony or the contention being addressed. Accordingly, this allegation has no merit.

2. TEXPIRG claims error in that the Board prevented effective cross-examination by demanding that a "cross-examiner tell the witness what his goal was." Motion, para. 4(a). TEXPIRG's own citations to the record demonstrate, however, that the Board attempted to elicit from Mr. Scott the purpose of his line of questions not to alert the witness (as TEXPIRG claims), but to prevent repetitious, cumulative or irrelevant cross-examination. See Tr. 4102-06, 4944-54. The Appeal Board has held that a licensing board is empowered to require an advance indication respecting what the intervenor will attempt to demonstrate or ascertain through cross-examination and to preclude or limit such cross-examination it determines will be of no value to the development of a full record on the issue involved. ALAB-244, supra, 8 AEC 857 at 869. Accordingly, the action complained of by TEXPIRG has been sanctioned by the Appeal Board and, thus,

exercise of its powers.<sup>4</sup>

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<sup>4</sup>/ In addition, we would note that TEXPIRG has not cited any instance whereby it was precluded from pursuing a legitimate line of inquiry. Therefore, it has shown no prejudice as a result of the Board's actions in this regard.



3. TEXPIRG finally asserts error because the Board unduly restricted cross-examination by either refusing cross-examination to continue or by placing time limitations on the completion of examination. Motion, paras. 4(c) and 4(d). Again, TEXPIRG's citations to the record on these assertions demonstrate that these restrictions on cross-examination were reasonable under the circumstances to prevent argumentative, repetitious, cumulative or irrelevant cross-examination. See Tr. 3075-81, 4958-59, 5042-51, 5083-5088. Since TEXPIRG has not asserted nor shown any prejudice as a result of these restrictions, it has not met its burden of demonstrating an abuse of discretion. Accordingly, the Board's actions were within the scope of its discretion.

In summation, TEXPIRG has complained of numerous instances where the Board has restricted its cross-examination. TEXPIRG has not asserted nor shown that it has been prejudiced by these actions. Since the Board can take necessary and proper measures to prevent argumentative, repetitious or cumulative cross-examination and can impose such time limitations on arguments as it deems appropriate, these actions were clearly within its scope of authority. Absent any prejudice shown, there clearly is no abuse of discretion by the Board in imposing these reasonable and proper restrictions on cross-examination.

C. Prohibitions on Cross-examination

1. TEXPIRG asserts error in that the "Board has required that all

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~~Motion, para. 1. - This assertion of error is factually incorrect--the Board~~  
has imposed no such requirement. What the Board has required, in an attempt

to regulate the course of the hearing and the conduct of the participants, is that all parties who wish to cross-examine a particular witness, must be present throughout the duration of that examination until it is that parties' turn to cross-examine. If any party is absent during cross-examination, the Board has determined the party waives its right to any further cross-examination of that particular witness. Tr. 5973-77, 6171, 6181-89, 6233-40, 6304, 6657-59. It further ruled that intervenors would proceed with cross-examination in alphabetical sequence; however, if another sequence of examination was agreed to by the parties prior to the beginning of cross-examination, that would be permissible and accommodated by the Board. Tr. 6233-34. The Staff submits that these procedural devices to regulate the course of the proceeding and the conduct of the participants are reasonable when viewed in the context of this proceeding. To have no such limitations would result in (a) repetitious and cumulative cross-examination, and (b) the inability to establish schedules which would facilitate witness travel and participants' preparation on given issues.

3. TEXPIRG claims that the Board improperly applied the Appeal Board's decision in Prairie Island (ALAB-244), supra, to prevent intervenor Rentfro from cross-examining on contentions other than his one admitted contention regarding the health effects of high voltage transmission lines. However, TEXPIRG has misconstrued both the Licensing Board's ruling in

~~is case and the ruling in ALAB-244. As the transcript in this case~~  
~~(Tr. 3843-46), the Board did not hold that Prairie Island prevents an~~

intervenor from cross-examining on another party's contentions, but rather the Board applied a portion of the Prairie Island rule which prevents such cross-examination unless an intervenor has a "discernible interest" in the contention on which he wishes to cross-examine. (8 AEC at 868 and n. 15).<sup>5/</sup> Since the statement of interest in Mr. Rentfro's petition to intervene only discusses the proximity of high voltage transmission lines to his residence, the Board properly refused to permit him to cross-examine Applicant's witness on the effects of heavy metals in the Allens Creek cooling lake. The Board explained on the record that this holding was directed only to Mr. Rentfro and that it was based on the narrowness of his petition to intervene. (Tr. 3846). TEXPIRG's argument is legally and factually flawed and should be rejected by the Board.

D. Other Allegations of Board Error

TEXPIRG's Motion also contains assertions of Board error with regard to actions or rulings other than those limiting cross-examination. These allegations of error are set forth in the Applicant's Response, pp. 14-16.

These allegations of error pertain to Board actions or rulings which are factually documented on the record and concern generally (1) the dismissal of witnesses in the absence of TEXPIRG, (2) the holding of extra hearing sessions, and (3) the admission of Staff and Applicant environmental documents. Since Staff is in substantial agreement with Applicant's response to these assertions of error, we will not attempt to duplicate Applicant's efforts in this response. As a general statement, the Staff submits that these allegations of error do not demonstrate abuse of discretion on behalf of the Board and the actions taken by the Board are clearly within its power and authority as set forth in 10 C.F.R. §2.718.

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<sup>5/</sup> This "discernible interest" standard was affirmed by the Commission in Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-75-1, 1 NRC 1 (1975).

E. Conclusion Regarding Reconsideration of Board's Procedural Restrictions

As is evidenced by the foregoing discussion and a review of the record, TEXPIRG has asserted error with regard to the Board's actions or rulings which have imposed procedural restrictions on the intervenors. Most of the procedural restrictions alleged to be in error have been enacted in order for the Board to properly regulate the course of the proceeding and the conduct of the parties. Specifically, the Board has imposed certain procedural rules to ensure that parties who wish to cross-examine on a given issue are in attendance throughout the duration of that witness' examination in order to prevent repetitious and cumulative questions. As has been shown, this attendance rule is certainly within the Board's discretionary power to impose and TEXPIRG has neither asserted nor shown prejudice as a result of this requirement.<sup>6/</sup> Accordingly, any allegation of error with respect to this attendance requirement must be denied because no abuse of discretion has been shown.

In addition, to prevent argumentative, repetitious, cumulative or irrelevant cross-examination, the Board has restricted cross-examination in some instances by prohibiting any further questions in a given area or by setting time limitations. As the record indicates, these restrictions

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<sup>6/</sup> Since this ruling was imposed, it appears intervenors, including TEXPIRG, have adapted quite well to this requirement by giving cross-examination questions to other intervenors if they find they cannot be in attendance. See e.g., Tr. 7965, 7998-8011.

have been justified in light of the character and relevancy of the cross-examination when the restriction was imposed. Again, TEXPIRG has neither asserted nor shown how it has suffered prejudice as a result of these restrictions. Since these restrictions are clearly within the Board's exercise of powers, and no prejudice has been shown, there is no abuse of discretion. Accordingly, any allegations of error with respect to these restrictions on cross-examination must be denied.

Finally, since the TEXPIRG Motion does not demonstrate an abuse of discretion, TEXPIRG's request for certain remedial actions to permit intervenors further cross-examination privileges (Motion, Part II) must also be denied. Therefore, the Staff submits the motion for reconsideration must be dismissed.

F. Referral and Certification Under Sections 2.730(f) and 2.718(i)

The Commission's regulations set forth in 10 C.F.R. §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 . . . ." <sup>7/</sup> If the Board makes such a determination, it may refer its ruling to the Appeal Board for decision. <sup>8/</sup> No specific criteria for

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<sup>7/</sup> 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 Co. (Midland Plant, Units 1 and 2), ALAB-152, 6 NRC 811, 610, 2 NRC 633.

<sup>8/</sup> 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 638 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-293, 2 NRC 660 (1975).

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), 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 late 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, 1192 (1977). See, Houston Lighting & Power Company (South Texas Project, Units 1 and 2), ALAB-608, 12 NRC 168, 169 (1980).

TEXPIRG has failed to demonstrate that referral or certification of its seven questions is warranted under the criteria of §§2.730(f) or 2.718(i). On page 6 of its motion, TEXPIRG lists seven questions which it seeks to have reviewed by the Appeal Board. However, it never addresses the criteria for referral or certification of its seven questions to the Appeal



Board. The only justification provided by TEXPIRG to support its request for interlocutory review is TEXPIRG's belief that the Licensing Board has committed "reversible error." TEXPIRG states that the Licensing Board should correct its errors "or refer its ruling to the Appeal Board so they can promptly set the standards to be used in this proceeding." (Motion, p. 4). This conclusory statement hardly provides an adequate basis to justify an exception to the rule prohibiting interlocutory appeals.

The Appeal Board has made it clear that its role is not to monitor a Licensing Board's ruling on what evidence is admissible and in what "procedural framework it may be adduced." Toledo Edison Company (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98, 99 (1976). In that case, the Appeal Board specifically noted that during the course of a proceeding

a licensing board almost inevitably will be called upon to make numerous determinations respecting what evidence is permissible and in what procedural framework it may be adduced. Were we to allow ourselves to be cast in the role of a day-to-day monitor of those determinations, we would have little time for anything else.

All of the questions sought to be certified by TEXPIRG fall within the categories of "permissible evidence" or "procedural framework."<sup>9/</sup>

<sup>9/</sup> These questions can be briefly summarized as follows:

2. Did the Board improperly stop TEXPIRG from cross-examination?
3. Did the Board improperly prohibit Mr. Rentfro from cross-examination on issues that he had no discernible interest?

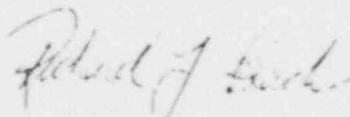
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As we have discussed at length above, the Licensing Board was totally justified in exercising its discretion to regulate the course of the hearing and the conduct of the parties by imposing reasonable restrictions on the cross-examination of either documentary evidence or written testimony. Nothing in TEXPIRG's motion demonstrates that the Board abused its discretion with respect to TEXPIRG's right of cross-examination, nor does it show how it suffered any prejudice as a result of the Board's restrictions. Accordingly, Appeal Board review is not warranted on any of these questions.

#### IV. CONCLUSION

Based on the foregoing, TEXPIRG's motions seeking (1) reconsideration of various Licensing Board rulings with respect to procedural matters; (2) referral of an interlocutory appeal; and (3) certification of various issues should be denied.

Respectfully submitted,



Richard L. Black  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 13th day of March, 1981

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9/ FOOTNOTE CONTINUED FROM PRECEDING PAGE

4. Did the Board improperly dismiss witnesses in the absence of TEXPIRG?

~~Should the Board properly consider the ER Supplement to be placed into evidence?~~

6. Should a new Board be appointed or the Appeal Board provide some "firm direction" to the existing Board?

7. Should the present hearings be delayed until the above questions are answered by the Appeal Board?