

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD NOV 4 AM 8 52

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

US NRC
DISTRIBUTION SERVICES
Docket No. 50-466

NRC STAFF RESPONSES TO INTERVENOR DOHERTY'S (1) MOTION FOR THE
RIGHT TO PRESENT DIRECT TESTIMONY ON CERTAIN ADMITTED CONTENTIONS
OF OTHER INTERVENORS AND (2) MOTION TO HAVE HIS CONTENTION 1 JOINED
TO THE BOARD REWORDED CONTENTION ON ROUTINE RADIATION EMISSIONS AND HEALTH EFFECTS

I. INTRODUCTION

On October 13, 1980, Intervenor Doherty filed two motions with the Board. One motion requested the right to file direct testimony on certain admitted contentions of other parties.^{1/} In his other motion, Intervenor Doherty requested the Board to consolidate his rejected Contention 1 with the recently admitted contention on the health effects of low level radiation which was reworded and admitted by Board Order dated September 26, 1980, in order that he could present evidence on this issue. Since both of these motions pertain to the general subject of the right of an intervenor to present affirmative evidence on an issue placed into controversy by another intervenor, the NRC Staff will respond to both of them collectively below and urge that the Licensing Board deny the motions.

^{1/}Specifically, Intervenor Doherty requested the right to file direct testimony on TexPIRG's amended contentions 8, 10, 12, 31, 36, 38, 39, 40, 41, 52, 53 and 55 and on the consolidated contention pertaining to the health effects of low level radiation admitted by Board Order dated September 26, 1980.

II. DISCUSSION

A. Request to File Direct Testimony on Other Parties' Contentions

It is well established in NRC practice that an intervenor cannot present direct testimony on an issue placed into controversy by another intervenor unless he is granted leave to amend his intervention petition to assert the issue on his own behalf. The Appeal Board addressed this question in Prairie Island and stated:

To avoid possible misunderstanding, it should be stressed that we do not hold here that an intervenor may adduce affirmative evidence (or do anything else during the course of the hearing other than conduct cross-examination) with regard to an issue placed in contest by another party. On such an issue, in order to do more than engage in cross-examination of the witnesses called by other parties, the intervenor must seek and obtain leave of the Licensing Board to amend his intervention petition to assert the issue on his own behalf. Leave to amend should be freely given if the Board is satisfied that (1) the intervenor has shown good cause for his failure to have raised the issue at an earlier point; and (2) allowance of the amendment may assist the board in the proper resolution of the issue without occasioning unwarranted delay. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 3 AEC 857 at 869, n. 17 (1974).

Thus, in order for Intervenor Doherty to file direct testimony on other parties admitted contentions, he must amend his intervention petition to include these contentions. In accordance with the Commission's Rules of Practice, a petition may be amended after the special prehearing conference has been held only with approval of the presiding officer, based on a balancing of the five factors specified in 10 C.F.R. §2.714(a)(1). See 10 C.F.R. §2.714(a)(3). Those five factors are:

1. Good cause, if any, for failure to file on time.
2. The availability or other means whereby the petitioner's interest will be protected.
3. The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
4. The extent to which the petitioner's interest will be represented by existing parties.
5. The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The Intervenor has recognized these procedural burdens and has attempted to address these factors in his Motion. We will address the merits of these arguments seriatim below.

1. Good Cause

Intervenor asserts that this Motion was not filed earlier because it was uncertain that it would be necessary. In the case of the TexPIRG contentions, Intervenor's claims that "it appears now from discovery that TexPIRG's direct testimony is likely to miss relevant items that this Intervenor will wish part of the record." Motion, p. 2, para. A.

NRC Staff submits that these assertions of "good cause" are totally inadequate. In essence, Mr. Doherty's assertion of "good cause" is simply a statement that he initially relied on TexPIRG to represent his interests with respect to these contentions and that, after a review of discovery on these issues, he

now believes that TexPIRG does not have the resources or knowledge to adequately go forward with them.^{2/}

Such an assertion of "good cause" must fail. Although a concrete definition as to what constitutes "good cause" has not been established, it has been held in River Bend that a petitioner's claim that it was lulled into inaction because it relied on the State, which later withdrew, to represent its interests does not constitute good cause for an untimely petition. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 796 (1977). We think the River Bend decision is applicable to this situation. Intervenor Doherty cannot claim that he was lulled into inaction with respect to these contentions because he relied on TexPIRG to represent his interests and then spring into action when the discovery period has lapsed, summary disposition motions have been filed and a hearing schedule has been established. Such a scheme of action must especially fail when the Intervenor has set forth no facts to establish that TexPIRG cannot adequately present or examine on these issues, that TexPIRG's interest on these issues is different than Doherty's, or that Doherty can adequately present or examine on these issues himself.^{3/} In addition, any claim that "TexPIRG's direct testimony is likely to miss relevant items" is

^{2/} Although Mr. Doherty alleges that he authored several of the TexPIRG contentions, it now appears that the interventions of Doherty and TexPIRG are separate and distinct from one another and, accordingly, Mr. Doherty wishes to adopt some of the TexPIRG contentions as his own.

^{3/} Mr. Doherty has represented that at this time he has not obtained the services of any expert witnesses. Tr. 1727.

rank speculation since TexPIRG has not even filed its testimony.

In summation, the Staff submits that the Intervenor has not established the requisite "good cause" for failure to timely file this motion to amend his contentions for the reasons set forth above. Accordingly, "where no good excuse is tendered for the tardiness, the petitioner's demonstration on the other factors must be particularly strong." Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-431, 6 NRC 460, 462 (1977) and cases there cited. We now turn to a consideration of those other factors to determine if the lack of "good cause" can be outweighed to allow the Intervenor to amend his contentions.

2. Availability of other means to protect interests

Intervenor Doherty asserts that "it appears TexPIRG's capacity to deal with these [contentions] may be limited by lack of financial resources and lack of knowledge on the part of its Interrogator" and that he can "cover" these issues better. Motion, p. 2, para. B.

The NRC Staff submits that these intuitive, speculative statements cannot be substituted for objective facts in order for the Board to weigh this factor. The Intervenor has set forth no facts to establish that TexPIRG lacks knowledge and resources on these subjects or that, conversely, he has the necessary resources and knowledge to effectively "cover" these issues. Lacking these facts, this factor must be weighed against the Intervenor in this attempt to amend his contentions. Indeed, Mr. Doherty may be able to protect his

interests with respect to these issues by cross-examining Applicant, Staff and other witnesses and, thus, establish a sound record for decision-making. Further, Mr. Doherty does not show why he cannot supply his purported knowledge to assist TexPIRG. Accordingly, in the absence of facts demonstrating that existing parties will not be able to protect his interests and because a reasonable alternative exists of the right to cross-examine witnesses or to assist TexPIRG in any manner on these issues, the NRC Staff submits that this factor must be weighed against Intervenor.

3. Development of a sound record

Intervenor Doherty asserts that since he has authored eight of the twelve TexPIRG contentions which he wishes to adopt as his own and file direct testimony, and since he has researched these contentions through FOIA requests, his knowledge can "reasonably assist in progress of the record." Motion, p. 2, para. C.

Again, the Staff believes that these intuitive, speculative statements cannot substitute for objective facts in order for the Board to weigh this factor of Mr. Doherty's ability to assist in developing a sound record. Mr. Doherty also seems to be implying that since he has done considerable research on these issues by literature searches, he qualifies as an expert capable of giving direct testimony on these issues. Whether Mr. Doherty can qualify as an expert witness by knowledge, skill, experience, training, or education is speculative at this point.^{4/} See Fed. R. Evid. 702. Accordingly, Mr. Doherty's ability to

^{4/} We would note that Mr. Doherty has a bachelor's degree in psychology, a master's degree in education and is currently in law school. Insofar as work experience, it appears that he has been a science teacher, a guidance counselor, a research assistant in biochemistry and psychiatry, a mental health worker, and a research assistant for TexPIRG. Deposition of John F. Doherty, dated March 26, 1979, pp. 3-7.

assist in developing a sound record by presenting direct testimony on these issues is questionable.^{5/} Of course, Mr. Doherty can assist in developing a sound record by counseling and assisting TexPIRG and by cross-examining Staff and Applicant witnesses without adopting these contentions as his own. Prairie Island, supra. Therefore, for the reasons discussed above, this factor must be weighed against Intervenor.

4. Extent to which interest represented by existing parties

Intervenor asserts that other parties are "heavily burdened with other contentions and hence will not be able to represent his interest as fully as he can himself." Motion, p. 2, para. D. While this statement may be true, we are still not convinced that Mr. Doherty can qualify himself as an expert witness and, thus, present testimony on these issues. Accordingly, since he has full rights of cross-examination and can protect his interests in that manner, we submit that this factor does not weigh to his benefit. In addition, Intervenor has not alleged how his interest on these issues differ from TexPIRG's nor why TexPIRG will not be able to adequately represent his interests other than the fact that it is "heavily burdened with other contentions." Since Mr. Doherty is also burdened with other contentions and is also a full-time law student, this is hardly a convincing argument.

5. Participation will broaden the issues or delay the proceeding

Intervenor asserts that his submission of direct testimony will neither broaden the issues or delay the proceeding because the issues for this proceeding have been established. The NRC Staff is of the opinion that Intervenor's participation in these issues by the submission of direct testimony will broaden the issues and delay the proceeding. First, as we will discuss in detail later in this response, Intervenor's request to join his Contention 1 with the Board admitted contention on the NEPA balancing of the health effects of low level radiation will considerably broaden the scope of the contention. Second, his request to submit direct testimony on certain TexPIRG contentions will, in our

^{5/}As noted earlier, Mr. Doherty at this point has not retained any expert witnesses nor has he identified any expert witnesses in this motion.

opinion, delay this proceeding. If the Board grants this request, other parties should have a reasonable opportunity to discover what Mr. Doherty's case is on these issues. Accordingly, this additional discovery period will unduly delay this proceeding which has already been scheduled for hearing. For these reasons, we submit that this factor must be weighed heavily against the Intervenor.

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For the reasons set forth above, Intervenor Doherty's request to file direct testimony on certain admitted contentions on other parties must be denied. To do so, he must seek and obtain leave of the Licensing Board to amend his intervention petition to include those contentions by establishing that the five factors specified in 10 C.F.R. §2.714(a)(1) weigh in his favor. We submit that those factors clearly do not weigh in Intervenor's favor and, therefore, his request must be denied.

B. Request To Join Doherty Contention 1 With Board Admitted Contention

By Order dated September 26, 1980, the Board reworded and admitted the following contention:

The health effects* of low level radiation emitted during normal operation of the plant, even though meeting the "low as reasonably achievable" standards of Appendix I, if included in the NEPA balancing of costs and benefits, would alter this benefit to the extent that costs would outweigh benefits.

*Health effects include impacts upon humans, animals, and plants.

This contention was derived and consolidated from various intervenors' contentions (Cummings 9, Griffith, Johnston 1 and Lemmer 5) as a result of the recent Commission decision in Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC ____ (September 22, 1980).

Intervenor Doherty has requested the Board to join the following contention, previously labeled as Doherty Contention 1 and rejected by the Board, with the above contention:

Liquid and gaseous effluent limits proposed for ACNGS represent a dangerous trend toward tolerance [sic] of radio-active (releases) when recent genetic, and medical literature point to the possibility that radio-active doses (are) more hazardous to the health of persons such as petitioners than was thought at the time the applicable parts of the Code of Federal Regulations were written.

Intervenor Doherty asserts that this contention is sufficiently similar to Lemmer Contention 5 and Cummings Contention 9 that it should be admitted in this proceeding as a matter of right or, in the alternative, he should be admitted as a party to the consolidated contention set forth in the Board Order of September 26, 1980, supra.

The NRC Staff opposes both of these requests. First, with respect to the admission of Doherty Contention 1, we submit that, as worded, the contention is an impermissible challenge to the Commission's regulations pertaining to effluent limitations set forth in 10 C.F.R. Part 50, Appendix I. Accordingly,

the contention must be rejected pursuant to the provisions of 10 C.F.R. §2.758. This contention is a challenge to Appendix I standards because it basically asserts that Appendix I standards may be wrong because radioactive effluents that comply with these standards constitute an unacceptable health hazard based on more recent medical literature and, therefore, the Appendix I standards should be more stringent. On the other hand, the Board admitted contention does not challenge nor seek to change the Appendix I standards, but merely contends that the health effects of the radiation effluents that comply with Appendix I standards should be factored into the NEPA cost/benefit analysis.

With regard to the question of whether Intervenor Doherty should be allowed to join as a party to the consolidated contention, we submit that this request should also be denied. First, it is clear, as indicated above, that Doherty Contention 1 is significantly different from the consolidated contention and, in fact, cannot be admitted as a matter of law. Second, it is abundantly apparent to the Staff that the contentions of Lemmer and Cummings, which Doherty claims are sufficiently similar to his Contention 1, seek to litigate an entirely different issue than that advanced by Doherty. Although the originally worded contentions of Lemmer and Cummings might have been similar to Doherty's Contention 1, they were substantially modified by their legal representative at the Special Prehearing Conference held on October 17, 1979. For instance, Mr. Doggett, the legal representative for Lemmer and Cummings, stated:

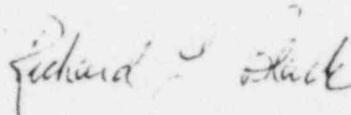
Again, I would recognize that objection [challenge to the regulations]; except that I believe the potential health dangers from low level radiation, however small, even within the regs, should be a factor that is calculated into the cost-benefit analysis. Tr. 1202. See also Tr. 1220.

Because of this modification of the contentions, the Board was justified in including Lemmer and Cummings as parties to the consolidated contention as reworded by the Board. The issue sought to be litigated by Mr. Doherty is entirely different than the consolidated contention and, therefore, Mr. Doherty should not be joined as a party to it.

III. CONCLUSION

For the reasons set forth in Section A of this response, Mr. Doherty's motion for the right to present direct testimony on certain admitted contentions of other intervenors should be denied. For the reasons set forth in Section B of this response, Mr. Doherty's motion to have his Contention 1 joined to the Board worded contention on routine radiation emissions and health effects or, in the alternative, to be joined as a party to that consolidated contention should also be denied.

Respectfully submitted,



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

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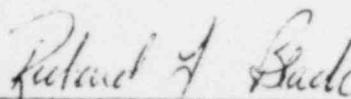
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