

2/17/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE
ATOMIC SAFETY AND LICENSING BOARD and the
ATOMIC SAFETY AND LICENSING APPEAL BOARD



In the Matter of

X

Houston Lighting and Power Co.

X

Docket No. 50-466

(Allens Creek, Unit 1)

X

TEX PIRG'S MOTIONS TO:

A. LICENSING BOARD FOR:

1. Reconsideration of certain actions taken during week of Jan. 18 to 24 which restricted right of intervenors to cross-examine.
2. Interlocutory appeal per 2.730(f), and
3. Certification of Questions per 2.718(i)
and

B. APPEAL BOARD FOR:

1. Directed Certification of Questions related to restrictions on Cross-examination
2. Appointment of a new Licensing Board.

I. BACKGROUND

Ever since Mr. Samuel W. Jensch was replaced as chairman of the Licensing Board, this board has attempted to restrict intervenors in this proceeding. In ALAB-535 the Appeal Board held that the Licensing Board had unduly restricted intervenors' contentions. In ALAB-539, this decision was upheld. Still the Board refused to republish the Notice of Intervention Procedures until the Appeal Board in ALAB-544 pointed out to the Board and Applicant that they might be making a mistake. Still the Board refused to publish a unrestricted notice , but required citizens to state in public that the only reason that they had not asked to intervene earlier was that they had been stopped by the prior restrictions. One intervenor actually cried when asked why she had not asked to intervene earlier. Of the over 100 people who asked to intervene less than 10% were allowed to take part.

Now, after the past week , it is clear that even the parties are not going to be given a fair chance to fully participate in the hearings.

1. First the Board has required that all parties be present at all times in the hearings or lose their rights,^{1B 2738, 2/01/3229/3232-3137, 2/20/81, 2/22-3/1/81, 5/14-5/14} but the Board has not required that the NRC and Applicant witnesses be present at all times or even until a party has finished cross-examination. It is totally impossible
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for most intervenors to miss several months of work to sit in the hearings on a full time basis. The Board specifically refused to hold ^{TA 246} some night and week-end sessions to allow those intervenors more input.

2. The Board refuses to let intervenors arrange between themselves so that one intervenor can do their cross-examination by another intervenor stopping their cross-examination then starting up again at a later time. Most of the intervenors will not be able to sit for hours or even days awaiting their chance to ask a few questions. TR 3101; 3238-3337; 3938; 3747,40

3. The Board does not allow complete cross-examination by restricting questions to the ^{TA 2781-2739} ^{TR 274-2737} literal direct testimony, instead of the scope of the contention. They also restrict the scope of the contention to the literal basis mentioned in the contention. For example in the Tex PIRG cooling lake contentions, 2 and 4, Tex PIRG was not allowed to ask about pesticides in the lake just because that was not one of the bases used in the original contention to show that the lake would not be good for recreation.

4. The Board refused to allow complete and thorough cross-examination even though for most intervenors that is their only way to participate since they could not afford expensive "expert" witnesses. This refusal took several forms.

(a) The Board demanded that the Cross-examiner tell the witness what his goal was. ^{TR 3144, 4102, 4954;} This totally prevents effective cross because the witness can answer in such a way as to prevent the desired result. Tex PIRG offered to tell the Board what the goal of a line of questions was so long as it was not told to the witness. The Board refused this offer.

(b) The Board often ruled that if someone had cross-examined any witness on a general subject that noone else could cross on that subject even though they would have asked different or more detailed questions.

(c) The Board ~~twice~~ refused to let Tex PIRG continue cross-examination (Dr Schlicht and Dr Armstrong) even though its attorney ^{371 M/S} ^{TR 3091, TA 3730-40} ^{ANDERS, TA 4958, 5051, 5053} told the board that it had over 50 written questions that were not "argumentative, repetitious, or cumulative". It is clear that the Board was unhappy with the numerous admissions and impeachment of so called experts that Tex PIRG's attorney had managed. The Board and witnesses did not expect to be cross-examined by an attorney with a MS in nuclear

physics, and BS in Physics, Chemistry, and Math who had read the complete ER and FES. Numerous court decisions have held that cross-examination may be full and exhaustive and must not be unduly limited or restricted. 360 F₂ 569,577; 350 F₂ 231; 130 F₂ 330; 128 F₂ 604; 164 F₂ 841; 55 F₂ 139; 55 F₂ 844; 24 F₂ 153; 232 F 662; Also see 2.743(a). (d) The Board often "pressured" intervenors to complete their cross in a short time, like thirty minutes or force intervenors to detail what their questions would be.

5. In several cases the Board totally prevented cross-examination.

(a) On Friday, Jan. 23, 1981, the Board refused to let Mr. Rentfro conduct even limited cross-examination. They claimed that the Prairie Island case, 8 NRC 458; 8 NRC 857; 8 NRC 1175 prevented anyone from cross examination except on their own contentions. In fact the case says exactly the opposite, ie that any party can cross-examine all other party witnesses. The only reason that the pro se intervenor in that case did not get to cross examine is that when asked by the appeal Board what he wished to cross on, he said his contentions that had not been admitted into the proceeding. Therefore the Licensing board error was harmless. Still the appeal Board allowed him to cross examine on the remand of the case. There can be no valid claim that Mr Rentfro had no interest in the contentions that he asked to cross on. He lives close to the plant, owns land very close to the plant, was one of only two intervenors who took part in the hearings of 1975, has transmission lines planned to pass over his land that would not do so if the plant is either not built or moved to another location, and by helping with the cooling lake contentions would be helping to get the plant moved to another location.

(b) By applying the Rentfro ruling to other intervenors, on a case by case basis, they will be able to prevent most if not all intervenors from cross-examination except on their own contentions. For example Mr. Baker's only contention is related to financial qualifications.

(c) By wrongly refusing Rentfro's cross until the lunch break, TA 374/1378 by working through the lunch break, and dismissing the witnesses, TA 3850 Schlicht and Tischler, by dismissing early to catch a plane, the three intervenors who appeared for the afternoon session (Tex PIRG, McCorkle, TA 4111 and Bishop) were wrongly denied their right to cross examine the dismissed witnesses. This is another example of Board action where

(d) Also on Friday, Jan. 23, 1981, the Board allowed both the Applicant and NRC Staff to introduce into evidence their ER Supplement and Final Supplenent to FES even though the record showed that Tex PIRG had said that it objected to their introduction unless a showing was made as to what parts of each were done by who and those persons were made available for cross examination as to those parts that related to any of the accepted contentions. Rather than introduce the documents when Tex PIRG's attorney was present they waited until no intervenor attorneys were present then introduced them without objection then promptly dismissed the witnesses so they could not be cross-examined. The Board was fully aware of what they were doing and how it would hurt the intervenors case yet they allowed it to happen.

6. On several occasions the Board, especially Dr. Linenberger, would stop Tex PIRG's cross-examination at critical times when a witness had just made statements that helped intervenors case or was just about to do so. The Board would then ask its own question in such a way that the witness could see that he had damaged Applicants case. The witness then would either change or "clarify" its answer to reduce the damage caused.

In summary, for the reasons mentioned above, and many others that can be seen if the transcript for the hearing to date is read, Tex PIRG believes that reverseable error that is harmful to it and other intervenors has already occured in this case such that any final decision by this Board to grant the construction permit will be overturned. Rather than waste about one year of time in hearings before a final decision is made which will almost certainly be overturned based on errors already made Licensing Board should promptly either correct its errors (let Tex PIRG continue its cross of the three witnesses dismissed, let Rentfro, McCorkle, Bishop etc cross, make those who prepared the ER Supp and FSFES available for cross, etc) or refer its ruling to the Appeal Board so they can promptly set the standards to be used in this proceeding. Even if the Board corrects its errors, Tex PIRG is very doubtful that it can get a fair, impartial decision from this Board because of the obvious friction and tension between the Board and Tex PIRG's attorney (no matter who's fault it is). It is therefore with great reluctance that Tex PIRG asks that a new Board hear this case.

II. ACTIONS REQUESTED

With the foregoing background as basis , Tex PIRG MOVES that:

1. The Licensing Board:

(a) Tex PIRG be allowed to continue to cross Dr Schlicht and DR. Marrack Dr. Armstrong until it has finished or that a valid limit based on 2.756 can be made.

(b) Tex PIRG be allowed to cross-examine Dr. Tischler who was dismissed early by improperly preventing Mr. Rentfro from cross and working through the lunch break without notice to the parties. Three parties were there to cross him before 1:30 pm which is the earliest that the Board had ever returned from lunch.

(c) Allow Tex PIRG to do its cross of the above three witnesses and all other NRC Staff and Applicant witnesses before it presents its witness Dr. Marrack for cross. Witnesses means those who presented direct testimony on the contentions that Dr Marrack supplied direct testimony for. It includes those that prepared the NRC FSFES and applicants ER Supplement.

(d) Allow all other parties to cross examine all witnesses if they can so do without causing the panel or witness if not part of a panel to be delayed for over 4 hours without anyone to cross them.

(e) Allow Rentfro to cross-examine all witnesses that any other party is allowed to cross-examine.

(f) Allow Bishop to finish cross-examination of Dr. Armstrong.

(g) Allow Bishop and McCorkle to cross all three applicant witnesses which were dismissed early by working through lunch and improperly preventing the cross by Rentfro.

(h) Allow all parties to cross-examine all witnesses on all issues relevant to the contention and their general subject matter of direct testimony as opposed to limiting it to the exact bases listed to supply the one basis needed for a valid contention. For example Tex PIRG should be allowed to cross on pesticides because they can cause health hazards directly and through their heavy metal contributions.

(i) All intervenors to schedule among themselves so that any party can stop its cross of a witness to allow another party to do their cross of even another witness present, then allow the original party to continue their cross-examination.

(j) To schedule at least one evening and one weekend session for each week, and to allow at least one full weekday to be free of hearings. This is to allow participation by those that have full time jobs, and to allow others to get some other work done while the courts and businesses are open.

(k) Strike the introduction into evidence the Applicants ER and ER Supplement as well as the NRC Staff FES and Supplements until a witness has been identified that prepared each part of each document and that person is made available for cross examination by all parties. Otherwise most of the record is gross hearsay and the due process right of cross-examination is denied.

2. The Appeal Board:

(a) Promptly read the complete record of the hearing to date (one week) to see for itself the unfairness to intervenors.

(b) Direct Certification of the following questions:

- (i) Can the Licensing Board stop cross-examination even though 2.757 has not been violated?
- (ii) Did the Licensing Board improperly stop Tex PIRG from cross-examination?
- (iii) Was it proper to prevent Mr. Rentfro from cross-examination except as to his own contentions?
- (iv) Was it proper to prevent cross-examination by preventing Mr. Rentfro's cross, changing the hearing schedule without notice, and dismissing the witnesses before the parties got to the hearing before the normal afternoon session was scheduled to start?
- (v) Is it proper to allow the introduction into evidence documents without making available those that prepared it for cross-examination?
- (vi) Does the record already show reversible error such that detriment to the public interest and unusual delay and expense could be saved by promptly changing Boards and/or having the appeal board provide firm direction to the licensing board so that the past errors are promptly corrected and others of the same kind do not occur?
- (vii) Should the present hearings be delayed until the above questions are answered by the Appeal Board?

Respectfully submitted,

James Morgan Scott, Jr.
James Morgan Scott, Jr.

Attorney for Tex PIRG

CERTIFICATE OF SERVICE

The attached Motion was mailed to all parties (or hand delivered) and others required on Jan. 29, 1984.

FEB. 17, 1984. James Morgan Scott, Jr.