April 26, 1982

SECY-82-174

ADJUDICATORY ISSUE

(Notation Vote)

For: The Commission

From: Sheldon L. Trubatch
Acting Assistant General Counsel

Subject: REVIEW OF ALAB-671 (MATTER OF HOUSTON LIGHTING & POWER CO.)

Purpose: To inform the Commission of an Appeal Board decision for which no petitions for review have been received and which, in our opinion,

Facility: Allens Creek Nuclear Generating Station Unit 1 50-466

Review Time Expires: May 10, 1982

Discussion: Mr. Robert Alexander filed an untimely petition for leave to intervene in this construction permit proceeding, raising matters related to financial qualifications. The Licensing Board rejected his petition in an unpublished order on January 12, 1982. In the Licensing Board's view, Mr. Alexander did not demonstrate sufficient justification for filing 28 months late, by which time 84 days of

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FOIA- 82-436

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hearings, including hearings on financial qualifications issues, had been held. 1/ In addition, the Licensing Board had heard testimony on the derating of the applicant's bonds, a main source of Mr. Alexander's concerns. The Board also regarded his contribution to the record as somewhat speculative in the absence of firm details about the nature of his proposed testimony. On balance, the Board concluded, Mr. Alexander did not satisfy the requirements of 10 CFR 2.714 for acceptance of an untimely intervention petition. 2/

On Mr. Alexander's appeal, the Appeal Board affirmed. ALAB-671, 15 NRC ____ (March 31, 1982). The Board used two independent bases -- that used by the Licensing Board and the recent NRC rule change eliminating financial qualifications from proceedings (47 Fed. Reg. 13750 (Mar. 31, 1982)) -- to uphold the denial. Since the rule change applied to ongoing proceedings, the Appeal

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1/ This was Mr. Alexander's second untimely petition for leave to intervene. His first attempt was rejected by the Licensing Board and upheld on appeal. ALAB-582, 11 NRC 239 (1980).

2/ 10 CFR 2.714(a)(1) specifies the factors to be balanced in ruling on late interventions. The list of factors appear at page 2, note 2, of the Appeal Board's decision.

Board found, granting Mr. Alexander's petition to intervene would have no practical significance. Id. at 13753. The Appeal Board nevertheless reviewed the Licensing Board's decision for evidence of abuse of discretion. Finding none, it affirmed for much the same reasons as the Licensing Board cited. Slip opinion at 5-12. (Attachment).

EX 5

Accordingly, we recommend

Recommendation:

Sheldon L. Trubatch
Acting Assistant General Counsel

Attachment:
ALAB-671

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Friday, May 7, 1982.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, April 30, 1982, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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NUCLEAR REGULATORY COMMISSION

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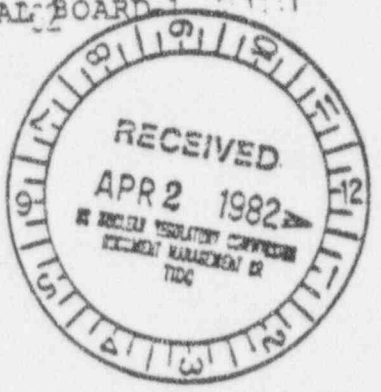

In the Matter of HOUSTON LIGHTING AND POWER COMPANY (Allens Creek Nuclear Generating Station, Unit 1)	Docket No. 50-466 CP

Mr. Robert Alexander, Houston, Texas, petitioner pro se.

Messrs. Jack R. Newman and David B. Raskin, Washington, D.C., and J. Gregory Copeland and Scott E. Rozzell, Houston, Texas, for the applicant, Houston Lighting and Power Company.

Mr. Richard L. Black for the Nuclear Regulatory Commission staff.

DECISION

March 31, 1982

(ALAB-671)

Two years ago, we upheld the Licensing Board's denial of an untimely petition for leave to intervene filed by Robert Alexander in this construction permit proceeding. ALAB-582, 11 NRC 239 (1980). Now before us is Mr. Alexander's appeal under 10 CFR 2.714a from the rejection below of a second, and perforce even

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more tardy, intervention petition filed by him last November 30.[1] This new petition focuses upon a single issue: the financial qualifications of the applicant to build the proposed Allens Creek facility. As in the instance of the earlier petition, its rejection was founded upon an appraisal of the petitioner's showing on the five specific factors which, by virtue of 10 CFR 2.714(a), are to be considered by a licensing board in deciding whether to accept a late petition.[2]

The briefing of this appeal was completed on March 5. Less than a week thereafter, on March 11, the Commission amended

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1/ January 12, 1982 memorandum and order (unpublished). Because of an inadvertent delay in its service upon Mr. Alexander, the appeal permissibly was filed on February 18.

2/ Those factors are:

(i) Good cause, if any, for failure to file on time.
(ii) The availability of other means whereby the petitioner's interest will be protected.
(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
(iv) The extent to which the petitioner's interest will be represented by existing parties.
(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 CFR 2.104(b)(1) to provide that, in a construction permit proceeding, the notice of hearing will state:

> That, if the proceeding is a contested proceeding, the presiding officer will consider the following issues:
>
> * * * * *
>
> (iii) Whether the applicant is financially qualified to design and construct the proposed facility, except that this subject shall not be an issue if the applicant is an electric utility seeking a license to construct a production or utilization facility of the type described in §50.21(b) or §50.22; * * *.

47 Fed. Reg. 13750, 13753 (March 31, 1982) (emphasis supplied).[3/] That amendment took immediate effect upon its publication in the Federal Register and, according to the accompanying Statement of Considerations, is to be "applied to ongoing licensing proceedings now pending and to issues or contentions therein * * *". Id. at 13750, 13753.

Allens Creek indisputably is a proposed utilization facility of the type described in 10 CFR 50.22. Thus, the amendment to 10 CFR 2.104(b)(1) would appear to foreclose consideration by the Board below of any issue which may have been or might be raised

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3/ A corresponding amendment was made to Section VI(c)(1)(iii) of Appendix A to 10 CFR Part 2. 47 Fed. Reg. at 13754.

with regard to the applicant's financial qualifications to build that facility.

This being so, the Licensing Board's determination that Mr. Alexander's petition should be turned aside on lateness grounds seemingly has now been stripped of all practical significance. Notwithstanding that consideration, we have elected to pass upon the merits of the ruling below, viewed (as it must be) in the light of the litigability of financial qualifications issues at the time it was made.[4/] Because the licensing boards are all too frequently called upon to decide whether to grant an untimely petition, some further guidance on the subject may be of assistance to them.

For the reasons which follow, we conclude that the Licensing Board did not abuse its discretion in determining that the tardiness of Mr. Alexander's petition dictated its disallowance. Hence, the outcome of the appeal is necessarily the same with or without regard to the Commission's recent total removal of the financial qualifications issue from this

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4/ "[T]he constitutional requirement for a 'case or controversy' under Article III does not apply to NRC licensing proceedings". Edlow International Co., CLI-76-6, 3 NRC 563, 569-70 (1976).

proceeding. Accordingly, on two independent bases, Mr. Alexander's challenge to the result below must fail.

1. It is not necessary to revisit here the long and tortuous path traversed by this proceeding since its inception several years ago. For present purposes, it suffices to note (as the Licensing Board stressed) that the present petition -- seeking to raise a question respecting the applicant's financial qualifications -- surfaced after 84 days of evidentiary hearings and on the virtual eve of the closing of the record (December 9).[5/] In that circumstance, the petitioner's burden on the Section 2.714(a) factors is a heavy one. When recently confronted in another proceeding with an intervention petition filed two weeks after the

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5/ On January 28, 1982, the Licensing Board entered an order which, on motion of one of the existing intervenors, reopened the record for the taking of further evidence on the issue of the applicant's technical qualifications. That evidence will be received at a hearing now scheduled to commence on April 12.

Both the applicant and the NRC staff maintain that, in addition to making a sufficient showing on the Section 2.714(a) factors, Mr. Alexander was obliged to satisfy the established criteria for reopening a record. See, e.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980); Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978). The Licensing Board explicitly declined to decide "whether this late-filed petition should be considered as a motion to reopen the record". January 12, 1982 memorandum and order, fn. 2, at p. 3. We likewise find it unnecessary to pass upon that question.

date for the commencement of the evidentiary hearing had been set, we had this to say:

> [Prior to the date of the filing of the untimely petition], the applicants and the staff had every right to assume that both the issues to be litigated and the participants had been established with finality. Simple fairness to them -- to say nothing of the public interest requirement that NRC licensing proceedings be conducted in an orderly fashion -- demanded that the [Licensing] Board be very chary in allowing one who had slept on its rights to inject itself and new claims into the case as last-minute trial preparations were underway.

South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 886 (1981), petition for review pending sub nom. Fairfield United Action v. NRC, No. 81-2042 (D.C. Cir.). That observation has yet greater force where not merely trial preparation but also the hearing itself has already taken place by the time the belated petition is received.

2. It is in this context that we examine Mr. Alexander's petition. It asserts (at p. 1) that the applicant "has not demonstrated pursuant to 10 CFR 50.33(f) that it possesses or has reasonable assurance of obtaining the funds necessary to cover the costs of constructing and then operating [the Allens Creek facility] in a safe manner * * *". In support of this contention, Mr. Alexander points out (id. at pp. 1-2) that the applicant's bond rating has been downgraded by Standard and

Poors from AA to A, and asserts that this will increase the cost of applicant's long-term financing for the project. As Mr. Alexander sees it (id. at p. 2), this development requires a reassessment of the applicant's "financing plans".

With respect to the five Section 2.714(a) factors (see fn. 2, supra), the petition maintains (at pp. 2-3) that: (1) Mr. Alexander first learned of Standard and Poors' action from an article appearing in the Houston Post on November 26, 1981; (2) he knows of no other means for the protection of his interest; (3) he "is an articulate school teacher fairly knowledgeable with the mechanics of corporate financing and with the dynamics of securities" and plans to offer the testimony of at least one "brokerage house expert" on the implications of the downgrading of the applicant's bond rating; and (4) no existing party to the proceeding has so far "anticipated or addressed" the downgrading. With respect to the final factor, Mr. Alexander concedes (id. at p. 3) that his participation might "slightly" broaden the issues and delay the proceeding. He insists, however, that any delay would be relatively small and justified in the interest of developing a sound record.[6/] We consider these arguments seriatim.

6/ In his brief on the appeal (at pp. 3-4), he urges that, given the supervening reopening of the record on the technical qualifications matter, the delay factor need not be considered by us at all.

a. The extent to which applicant's current Standard and Poors' bond rating might be taken as bearing materially upon its financial qualifications to build the Allens Creek facility is problematic. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 17-23 (1978).[7] Be that as it may, as the Licensing Board observed,[8] the reduction of that rating from AA to A cannot be regarded as having first brought the financial qualifications question to the fore. To the contrary, that question long ago had been raised by several of the present intervenors[9] and then explored in some depth during the evidentiary hearings already concluded.[10] Beyond that, both the applicant and the staff call attention to the fact that, in November 1980 (i.e., a full year before the Standard and Poors' action and the filing of Mr. Alexander's petition), the other principal rating service (Moody's) had

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7/ In addition to its discussion of the ingredients of the financial qualifications inquiry then contemplated by NRC regulations, the Seabrook decision provided part of the impetus for the Commission's determination to consider eliminating that inquiry from licensing proceedings. See 7 NRC at 17-18; 47 Fed. Reg. at 13750.

8/ January 12, 1982 memorandum and order, at p. 3.

9/ See Licensing Board March 10, 1980 memorandum and order (unpublished), at pp. 40, 47, 68-69.

10/ See Tr. 16713-16890.

likewise downgraded the applicant's bond rating from AA to A.[11/] Mr. Alexander provided no satisfactory explanation to the Board below why that event had not triggered his intervention endeavor.[12/]

In the totality of these circumstances, we must agree with the Licensing Board that the petition fell far short of establishing good cause for Mr. Alexander's failure to have asserted his financial qualifications contention at a much earlier date (as had other petitioners concerned with that matter). There was simply nothing put before that Board which might have lent credence to the insistence in the petition (at p. 2) that the applicant's revised Standard and Poors' bond rating was, of itself, a sufficiently pivotal development to entitle Mr. Alexander to enter the proceeding as its termination point drew nigh.

b. The papers before us do not illume whether (and, if so, what) other means might remain available to Mr. Alexander for the protection of his asserted interest in insuring that the

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11/ The significance of Moody's newly assigned A bond rating to the applicant's financial qualifications was addressed at the hearing. See, e.g., Dean, fol. Tr. 16723, at pp. 5-7; Tr. 16724-31; 16794-95.

12/ Two months after Moody's revised the applicant's bond rating, Mr. Alexander made a limited appearance statement before the Licensing Board (Tr. 2319-26). See 10 CFR 2.715. That statement contained no reference to financial qualifications.

applicant possesses the requisite financial qualifications. Because, all things considered, it does not appear to be a crucial factor here, we shall not speculate on the point but, rather, assume that no such alternative means exist.[13/]

c. The Licensing Board properly concluded that Mr. Alexander did not demonstrate a likely ability to make a significant contribution to the development of a sound evidentiary record on the financial qualifications issue. No inference of such ability is warranted, let alone compelled, by the unvarnished assertion that "he is an articulate school teacher fairly knowledgeable with the mechanics of corporate financing and with the dynamics of securities". See p. 7, supra. Cf. ALAB-582, supra, 11 NRC at 241, 244.[14/] Nor was his statement of a present purpose to adduce the testimony of an unidentified (and very possibly as yet unobtained) "brokerage house expert" enough to carry the day on that factor. Summer, ALAB-642, supra, 13 NRC at 893-94.

13/ In discussing this factor, the Licensing Board touched upon the matter of the representation of Mr. Alexander's interest by existing parties. January 12, 1982 memorandum and order, at p. 4. That matter is, however, relevant only with respect to the fourth factor. Insofar as the second factor is concerned, the sole inquiry is into the availability of other fora in which the petitioner himself can undertake the protection of his interests.

14/ Mr. Alexander informs us on appeal (Br. p. 3) that "he is also an articulate law student well-versed in evidentiary matters". But it is the ability to contribute sound evidence -- rather than asserted legal skills -- that is of significance in considering a late-filed petition to intervene.

d. As in the case of the second factor, it is both difficult and unnecessary to make a confident assessment on the fourth factor -- that of the representation of Mr. Alexander's interests by existing parties. Manifestly, however, that factor does not weigh heavily in his favor. It may be, as he maintains on the appeal (Br. pp. 2-3), that he had not affirmatively intended to rely upon one or more of the parties to represent his interests. But, given his chosen course of inaction over a protracted period, he can fairly be held to have assumed the risk that none of the participants would protect his interests "to the extent he desires" (Br. p. 3). As should have been readily apparent to him, only his own timely intervention could have insured Mr. Alexander that the financial qualifications issue would be litigated to his satisfaction. Cf. Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 644-45 (1977).

e. Finally, we cannot adopt Mr. Alexander's suggestion that the question of delay has been effectively mooted by the recent reopening of the record to take a limited amount of additional evidence next month on the technical qualifications issue (see fn. 6, supra). We have been provided no basis for judging how much time might be necessary for pre-trial preparation (including possible discovery) in connection with a relitigation of the financial qualifications issue.[15/] The potential

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15/ Once again, this analysis does not take account of the recent Commission removal of that issue from licensing proceedings but, rather, is based upon the situation obtaining when the Licensing Board ruled on the petition in January. See p. 4, supra.

for delay attendant upon a grant of the petition at hand thus cannot be discounted.

In sum, two weighty factors (the first and third enumerated in 10 CFR 2.714(a)) militate strongly against allowing this extremely late intervention attempt, and a third equally significant factor (that of delay) at the very least points in the same direction. And Mr. Alexander's lack of diligence in protecting his own interest precludes giving the other two factors controlling effect. This being so, the Licensing Board manifestly acted within the bounds of its discretion in denying the petition.

Accordingly, we affirm the result below on the independent grounds that (1) the Licensing Board's assessment of the untimeliness of Mr. Alexander's petition was free of material error; and (2) the sole issue raised by the petition is no longer cognizable in this proceeding.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
C. Jean Shoemaker
Secretary to the
Appeal Board