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March 8, 1985

Mr. Gary J. Edles, Esq.
Chairman, Administrative Judge
Dr. W. Reed Johnson
Administrative Judge
Mr. Thomas S. Moore, Esq.
Administrative Judge
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

RE: Houston Lighting and Power Co., et al.
(South Texas Project Units 1 and 2)
Docket Nos. STN 50-498 OL and STN 50-499 OL
ASLBP No. 79-421-07 OL

To The Honorable Judges Of The Atomic Safety And Licensing Appeal Board:

I am in receipt of a letter to the Appeal Board dated February 25, 1985, from Alvin H. Gutterman of Newman & Holtzinger, P.C. on behalf of applicants, Houston Lighting and Power Co., urging the Board to reconsider its grant of an extension of time to intervenor, Citizen's Concerned About Nuclear Power (CCANP), in which to file a motion for reconsideration of the Board's recent decision (ALAB-799). On behalf of Intervenor, I wish to make the following response.

The background is as follows. On the morning of Wednesday, February 20, 1985, I telephoned Jack Newman to inquire whether he was willing to release a copy of the letter from his office to the Selective Service System, which requested the personal draft status records of my co-counsel, Lanny Sinkin. I had hoped to attempt by negotiation to save Intervenor from the tedious, although undoubtedly ultimately successful, process involved in Freedom of Information Act proceedings with the Selective Service System.

At that time, I also inquired of Mr. Newman whether applicants would oppose a Motion For Extension Of Time In Which To File Motion For Reconsideration. It is correct that

Mr. Newman requested the time limit for the filing of petitions for reconsideration. I did respond that Intervenor calculated the date to be February 22.

At no time did Mr. Newman request to know the date of the Board's decision or the date of its service on either of Intervenor's counsel. At no time did Mr. Newman request to know the method used by Intervenor to calculate the time limit. Moreover, at no time did Mr. Newman indicate that he would rely solely on my representation in determining whether to oppose Intervenor's request for an extension of time.

Several hours later, Mr. Gutterman contacted me and indicated that applicant did not object to an extension of time. It must be embarrassing for the firm of Newman & Holtzinger, P.C. to admit that none of the several attorneys on this case bothered to recall or check the date of the Board's decision. Moreover, at no time did Mr. Newman or Mr. Gutterman request to know the N.R.C. Staff's position concerning Intervenor's Request.

My contemporaneous notes of my conversation with Mr. Newman frankly do not reflect whether I indicated a prospective request for a ten-day or a fourteen-day extension. Having just spoken with Mr. Sinkin at the time, it was my intention to request a fourteen-day extension.

Applicants petty niggling over four days without even so much as an offer of proof of prejudice is indicative of the extreme adversarial role played by counsel since the start of the licensing proceedings. See, e.g., the conclusion of the Appeal Board in ALAB-799 at 25-26. Indeed, a show of prejudice would be extremely difficult for applicants given the fact that "hearings on some aspects of the competence and character issue . . . are not complete" and "the Board expressly left open the possibility of modifying its tentative findings and conclusions regarding character and competence." Id. at 5-6 (footnotes omitted), citing LBP-84-13, 19 N.R.C. 659, 668, 691, 697-99, 782-87.

Shortly after talking with Mr. Newman, I contacted Oreste Russ Pirfo to inquire whether the Staff would oppose Intervenor's request for an extension of time. He indicated that although the staff did not oppose an extension of time per se, he did not want to go on record as not opposing the request

because he was unsure about Intervenor's interpretation of the rules governing the calculation of time limits. Mr. Pirfo indicated that the staff would not be prejudiced by the grant of an extension of time to Intervenor. He wished to avoid being on record as not opposing the motion if Intervenor was later found by the Appeal Board to be incorrect in its interpretation of the rules regarding the time limits for filing a motion for reconsideration.

Apparently, Mr. Sinkin misunderstood my representation of Mr. Pirfo's position. When the mistake was called to Mr. Sinkin's attention, he immediately corrected it, as indicated by his letter to the Appeal Board dated February 22. Applicants' discussion of this episode is undercut by their prior lack of interest in the Staff's position.

10 C.F.R. §2.710 provides that "whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him or her and the notice or paper is served upon by mail, five (5) days shall be added to the prescribed period." Applicants argue that this provision does not apply to 10 C.F.R. §2.771(a) because the time for filing a petition for reconsideration does not run from "the service of a notice or other paper." Applicants' interpretation is illogical, inconsistent with every other provision regarding administrative decisions by N.R.C. adjudicatory bodies, and is without support by the case law.

Applicants' argument, if true, would result in the loss of a few days for the preparation of a motion to reconsider for all counsel who reside outside of the District of Columbia, due to delays in receipt of mail. There is nothing procedurally unique about a motion for reconsideration which would support this "non-resident counsel tax." Such a result is particularly ironic in the case at hand given the fact that Intervenor is merely attempting to satisfy the Appeal Board's mandate that Intervenor document the prejudicial effect of the numerous due process violations in the Phase I hearings. ALAB-799 at 21.

Every provision involving the rendering of decisions by N.R.C. adjudicatory bodies allows for service of the decision on parties. See, 10 C.F.R. §2.762 (Appeals of initial decisions), 10 C.F.R. 2.786(b)(1) (Appeals of decisions of Appeal Boards), 10 C.F.R. 2.788 (Stays of decisions pending Appeals). There is

no rational basis for treating motions for reconsideration differently. Moreover, 10 C.F.R. Part 2, App. A., §IX(d)(3) expressly provides that Appeal Board briefing time limits are also subject to the provisions of 10 C.F.R. 2.710 relating to service by mail.

Applicants' reliance on federal cases construing Rule 6(e), Federal Rules of Civil Procedure, is misplaced. The cases cited by applicants involve the important threshold questions of the jurisdiction of the federal courts, as opposed to the timeliness of an administrative appellate procedure. See, Cleveland Electric Illuminating Co., et al., (Perry Nuclear Power Plant Units 1 & 2), LBP-82-110, 16 N.R.C. 1895, 1896 (1982); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3) ALAB-597, 11 N.R.C. 870, 874 n.9 (1980). Therefore, Intervenor's request for an extension of time was itself a timely request.

Alternatively, should the Appeal Board find Intervenor's request "to be filed out of time without any showing of good cause for lateness," Intervenors would request the Appeal Board to allow it to provide such good cause. Intervenor is ready to comply with any such ruling and would present a full discussion of inter alia the following factors: (1) concomitant duties to the Atomic Safety & Licensing Board to prepare comments to the staffs' affidavit and preparation for pre-hearing conference regarding Phase II hearings, (2) the recent splitting of the location of counsel and files of Intervenor, (3) the need to raise specific issues or be procedurally foreclosed from further administrative appeal. 10 C.F.R. §2.786(b)(2)(ii), (4)(ii), (4)(iii), and (4) the continuing ambiguity over the split jurisdiction of this case between the Atomic Safety & Licensing Board and the Atomic Safety & Licensing Appeal Board. Similarly, see Tennessee Valley Authority (Hartsville Nuclear Plants, Units 1A, 2A, 1B & 2B), ALAB 467, 7 N.R.C. 459 (1978).

In conclusion, the Appeal Board's grant of an extension of time to Intervenor in which to file a motion for reconsideration was both proper and appropriate under the statutes governing the U.S. Nuclear Regulatory Commission. See, e.g., 10 C.F.R. §2.711(a). Therefore, Applicants "request that the Appeal Board

reconsider its grant of CCANP's request and deny it" should be denied.

Respectfully submitted,

GRAY & BECKER

Ray Goldstein

Ray Goldstein

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cc: Service List

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of )
)
HOUSTON LIGHTING & POWER ) Docket Nos. 50-498OL
COMPANY, ET AL. ) 50-499OL
)
)
(South Texas Project, Units 1 )
and 2) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the March 8, 1985, letter to the Appeal Board from Ray Goldstein have been served on the following individuals and entities by deposit in the United States mail, first class, postage prepaid, this 8th day of March, 1985.

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