April 7, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY & LICENSING BOARD

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

Docket No. 50-466 CP

JOHN F. DOHERTY'S REPLY TO APPLICANT'S MOTION OF MARCH 30, 1981 TO DISQUALIFY TEXPIRG'S COUNSEL SCOTT*, AND STAFF'S BRIEF IN RESPONSE TO BOARD REQUEST (tr. 8835)

John F. Doherty, Intervenor pro se in the above proceeding now files the above styled response. As a party who intends to use TexPIRG attorney James M. Scott, this filing is in response to two filings by Applicant and Staff with regard to Mr. Scott's status in these proceedings. The intent of this filing is to show that where the public interest is paramount following the suggestion of either Staff or Applicant is unwise. This Intervenor believes his right to reply to a motion is clear, and that where the Board did not specifically limit Briefs to Staff (Applicant has really not filed a "Brief") and Applicant, and where he intends to use Mr. Scott as an expert witness for his Contention #3, the filing of a "Reply" is in order, (as far as to Staff's submittal is concerned) due to this latter interest.

Background

Applicant in its March 30, 1981 filing (hereafter: Brief-Motion) at p. 9, insinuates that Mr. Scott deliberately withheld notifying it of his plan to appear as an expert witness for five TexPIRG contentions, the earliest of which will be heard in June. This necessarily brings up the history of these proceedings, because DR 5-102 (A) and (B) place a burden on an attorney to withdraw (although as shown below there are exceptions) when this person knows they will be a witness (the code here says nothing however about expert witnesses). In April, 1979, Applicant was severely defeated by TexPIRG Counsel Scott on the issue of proper Federal

*/ Although styled a "Brief", this filing is in fact a Motion. See the enclosed Motion by this Intervenor with regard to this flaw.

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Register notice in an Appeal Board decision, (ALAB-535, April 4, 1979). In May of 1979, TexPIRG was defunded by the University of Houston. By use of the summer school "check-off"($2.00 from each University of Houston student who who checked a box marked TexPIRG on their registration form, and a few fundraising activities) the group was able to continue its solitary payed employee until mid-1980. Fundraising through several persons kept alive the hope of obtaining expert witnesses, but with the passage of time it became clear no local witness were willing to testify. Through the course of these proceedings, Applicant has sought the dismissal of Intervenor Hinderstein, Intervenor McCorkle, the Board (in order to speed up the licensing), and TexPIRG. Moving to dismiss through various avenues is a frequent Applicant tactic. But the history shows only a financially strong organization being weakened through a long proceeding. As late as January 1981, this Intervenor attempted to find an expert witness for some of his safety issues and Mr. Scott asked me to inquire if there might be any for any of the safety issues. Although sympathetic, there were none in these specialized areas. This having failed, in this Intervenor's case, I debated for several weeks the wisdom of using Mr. Scott, for my Contention #3, and reached the decision to go ahead on that single issue at the end of February. The same is probably true of TexPIRG. Applicant's witnesses Michaelson, Peel and Hamilton indicated they received $100 per hour for their services. TexPIRG had hoped to provide some money for witnesses, but as their financial situation grew worse, only then could it have been possible for Mr. Scott to have learned or for it to become "obvious"(DR 5-102 (A) that he might become an expert witness.

Applicability of civil and criminal cases to administrative hearings.

In support of their notions as stated in Applicant's Brief-Motion and Staff's Brief of March 30, 1981 (Hereafter: Staff's Brief) both have used cases drawn exclusively from civil and criminal litigation. The Atomic Safety and Licensing Board is not a court, but a hearing Board. Administrative law has considerable variance from judge and judge and jury activities. One illus-

tration of this was in these hearings, where the Board told Applicant its case was weak with regard to the Barge Slip and told it to supply two additional witnesses. On explaining why the Board could not uphold an objection to this practice, Judge Wolfe stated (Tr. 9295) that "...[t]he public interest is paramount." If this be so, these hearings differ from the litigation involving attorneys as witnesses (but not expert witnesses) cited by both Staff and Applicant in the subject filings.

In fact the total failure of Staff and Applicant to present any administrative law on this topic indicates there is none. It is therefore doubtful that any attorney has ever been prevented from testifying as an expert witness in an administrative hearing or licensing hearing held in the public interest. The same goes for restraining an expert witness from resuming his role as counsel to a party who is litigating in the public interest.

But, the disqualification of an attorney because he seeks to be a witness is not an ironclad requirement. In Greenbaum Mountain Mortgage Co. v Pioneer National Title Insurance Co., 421 F. Supp 1348 (D. Colo. 1976, a non-administrative proceeding, exception to DR 5-102 (A) was allowed. In the cases cited by Applicant or Staff below, counsel were not allowed to testify because they, or their firms had access to information or personal knowledge about the dispute. Hull v. Cellanese Corp., 513 F.2d 568 (2nd Cir. 1975), a sex discrimination case, Dragenescu v First National Bank of Hollywood (Fla.) 502 F. 2d 550 (5th Cir. 1974), a negligence suit, Connel v Clairol Inc. 440 F. Supp 17 ND. Ge. 1977), a patent infringment case, U. S. ex rel Sheldon Electric v Blackhawk Heating & Plumbing, 423 F. Supp. 486 (S. D. (NY. 1976) dispute between contractor and subcontractor, Phillips v. Myrick 553 F.2d 489 (8th Cir. 1977) a criminal proceeding, and International Electronics Corp. v Flanzer, 527 F.2d 1288 (2nd Cir. 1975) a suit on stockholder misrepresentation. In addition, both Greenbaum Mountain Mortgage (supra.) and U. S. v Springer 460 F.2d 1344 (5th Cir. 1972) were non-administrative matters.

However, Applicant has supplied one case, Universal Athletic Sales Co. v American Gym Recreational & Athletic Equiptment Corp. 546 F.2d 530, (3rd Cir. 1976) (Applicant's Brief-Motion, p.8) where the Court of Appeals over-turned the district court because it placed controlling weight on an attorney-electrical engineer's testimony when the evidence required a mechanical engineer's expertise in determining patent rights. This is Applicant's only case where an expert witness-attorney dual role was disallowed.

Rule DR 5-102(A) is not immutable of interpretation

In a concuring opinion to a per curiam decision, Judge Gurfein in J. P. Foley & Co. v Vanderbilt, 523 F.2d 1357 spoke for flexibility in the use of DR 5-102 (A):

> I think a court need not treat the Canons of Professional Responsibility as it would a statute that we have no right to amend. We should not abdicate our Constitutional function of regulating the Bar to that extent. When we find an area of uncertainty (however) we must use our judicial process to make our own decision in the interests of justice to all concerned. (at 1359,60)

Protecting the Legal Profession

Both Applicant (Brief-Motion, p. 4) and Staff (Brief, p.14) state the integrity of the legal profession is one of the goals of the prohibition against attorney's as witnesses (and presumably expert witnesses). But neither of these set forth exactly what it is that Mr. Scott might say as an expert witness which would injure the legal profession. In an article, "The Rationale of the Rule that Forbids a Lawyer to be Advocate and Witness in the Same Case," 1977 Am. Bar Foundation Journal 455, Enker states:

> Protection of the profession's image seems at best a makeweight. Its force is a function of the degree to which the forbidden practice is regarded as intrinsically wrongful. Absent an explanation of the impropriety of the practice itself, the argument from professional image hardly seems sufficiently potent to explain the intensity with which the practice has been denounced.

In the Brief-Motion, p.4, Applicant states the rule is based in part on the concern that an attorney may distort the truth for the sake of his client. But, modern rules of evidence no longer require automatic disqualification of interested

witnesses. (2 J. Wigmore, Evidence, § 576, at 693). By use of cross examination these parties may be best able to show the competency of the testimony they seek to keep from taking force in the record which Mr. Scott would give.

TexPIRG's counsel should not be denied further participation as an attorney in this proceeding because he has chosen to appear as a witness.

In its request, the Board asked to be advised so it could "... [d]ecide whether or not Mr. Scott should withdraw as counsel if he intends to proceed as an expert witness on TexPIRG's behalf." (Tr. 8834) Should the Board decide "Mr. Scott should withdraw as counsel" (ibid.) is quite different from moving to disqualify as Applicant has done, because it usurp's the Board's attempt to find out what it should do (if anything) if Mr. Scott becomes a witness (Tr. 8870-72). This is because it requires the Board to decide if it should disqualify Mr. Scott on Applicant's motion on facts known to this time. One would think, out of courtesy to the Board, the motion to disqualify would have waited for the Board's decision. One notes (Tr. 8834) that Applicant had from March 6, 1981 to March 16, 1981, to file such a motion before Judge Wolfe's request.

Obviously a party with an expert witness has an advantage because that party can place scientific research which backs its position far more easily into the record than it can if it must get it into the record through another party's witness. Staff's brief urges that a high price be exacted from TexPIRG if it succeeds in having Mr. Scott testify in its behalf.

TexPIRG's counsel is of distinctive value to it.

To TexPIRG, Mr. Scott is of distinctive value as an attorney because he and no one else has worked for them on this proceeding for the last three years. No attorney could familiarize himself with the issues remaining, both environmental and health and safety, nor be as familiar with the record as he. There are few attorney's available at nominal fees with his combination of scientific and legal education.

Applicant Has Other Ways To Protect Its Interests.

Applicant lauds DR 5-102 (Motion-Brief, p.4) without noticing the primary purpose of the hearings is the public interest. Mr. Scott represents one of several Public Interest Research Groups. It is worth noting that in International Electronics Corp. v Flanzer (supra) cited prominently by Applicant (Motion-Brief, p.4-5) there were very few persons who knew the facts with regard to the charge of corporate misrepresentation central to that case. Here we will be dealing with facts treated by many public documents and reports. Applicant makes no mention of any one thing Mr. Scott could testify to that would "...[d]istort the truth for the sake of his client" (Motion-Brief, p.4) that Applicant would not have access to. Applicant has re-direct rights to its witnesses and re-cross rights on Board questions available to it. In addition, it may obtain leave of the Board to recross witnesses for good cause.

To Disqualify TexPIRG's Counsel From Appearing As An Expert Witness Or Appearing As Counsel Would Be A Hardship to TexPIRG.

In attacking the TexPIRG affidavit, (Motion-Brief, p.6) Applicant has cited cases where private businesses were involved in civil litigation. For such cases, if they have merit, it is fairly easy for a would-be plaintiff to pay an attorney on a contingency fee, and hence the cases went against such attorneys being witnesses. Here, of course, TexPIRG as an Intervenor cannot offer even that. To apply these cases to a non-profit corporation attempting to intervene in the public's behalf in a nuclear power plant licensing is to broaden these rulings greatly. Supreme Beef Processors, Inc. v American Consumers Industries, Inc., 441 F. Supp. 1064 (cited by Applicant in its Motion-Brief, p.6) was a case an attorney would take on a contingency basis, even if the client had no money. Since TexPIRG will get no money to provide an attorney's fees if it wins in this multi-issue hearing, TexPIRG is in much greater financial hardship than any of the parties in the cases cited by Applicant. When closely examined, this Intervenor believes it is difficult to imagine a situation where hardship could be greater, and the same hardship would make unfair Staff's position that Mr. Scott should be permitted only to be an expert witness, but not allowed to resume as counsel on remaining issues.

In DR 5-101 and 102, A "Witness" Is Not An Expert Witness.

It is interesting to note that 10 CFR 2.713 (a) permits a party pro-se to advocate or witness without restriction. An attorney appearing pro se would have the same right. So, it is the fact of representing others that makes the appearance of an attorney as a witness unethical according to Applicant and Staff. This Intervenor believes that this aspect of the Disciplinary Rules comes as baggage to Commission hearings, and that when the subject DR was formulated, cases were contemplated but not administrative hearings such as these. Nor do the Disciplinary Rules mention expert witnesses as incompatible roles for attorneys. Expert witnesses are more expert than witness. Indeed, in these proceedings we have had environmental witnesses, with only a casual acquaintance with the environment of the ACNGS. These appear far removed from the witnesses in the mind of the framers of the Disciplinary Rules. Hence, in the case of TexPIRG's counsel the application of the rule, where he is to be an expert witness and not a "witness" in the usual sense of the term, would be unjust.

Conclusion

For the foregoing reasons, TexPIRG's counsel, James M. Scott, of Sugarland, Texas, should be unrestricted by the Disciplinary Rules in appearing as an expert witness for TexPIRG contentions. Nor should he be disqualified as urged by Applicant or prohibited from resuming his position as counsel on completing any or all testimony in behalf of his client or this Intervenor, as urged by Staff.

Respectfully,

John F. Doherty

John F. Doherty, J. D.

CERTIFICATE OF SERVICE

Copies of this Reply of April 7, 1981 were served via First Class Mail this 7th April, 1981 from Houston, Texas on the parties: Sheldon J. Wolfe, Esq., Gustave A. Linenberger, Dr. E. Leonard Cheatum, Administrative Judges, ASLB; Richard Black, Esq., NRC Staff; Jack R. Newman, Esq. and J. Gregory Copeland, Esq., Counsel for Applicant; the State of Texas; the Several Intervening Parties; NRC Docketing & Service; and the Atomic Safety Licensing and Appeal Board.