UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety & Licensing Board

In the Matter of HOUSTON LIGHTING & POWER CO. (Allens Creek Unit 1)	)	Docket 50-466

TEXPIRG'S RESPONSE TO HL&P MOTION TO DISMISS

Intervenor Texas Public Interest Research Group (TexPIRG) is in receipt of Applicant's Motion for Dismissal of TexPIRG dated November 9, 1979. TexPIRG herein urges denial of that motion.

Applicant carefully orchestrates a series of events, many described in exagerrated and distorted words, in order to justify its motion. However, Applicant asks the Board to join in an exercise of sheer speculation as to TexPIRG's motive in this proceeding. TexPIRG emphatically denies the innuendos associated with Applicant's statements of TexPIRG's motives, and moreover points out that this Board should not countenance such pure speculation as the basis for denial of due process rights.

Throughout this proceeding, Applicant has attempted to put intervenors on trial. But this proceeding is for the purpose of putting a construction license application "on trial." The Board should not allow the Applicant to use such tactics as this motion to divert attention from the true task of examining the merits of its application.

II.

Applicant cites three Licensing Board cases in which intervenors were dismissed because of failure to comply with discovery orders. In fact, however, the circumstances of those cases are far removed from that of this proceeding. In Offshore Power Systems (2 NRC 813), the intervenor repeatedly failed to answer interrogatories, failed to respond to Orders granting motion to compel responses, and even submitted a document in which intervenor stated a "firm decision" had been made not to proceed with discovery. In Public Service Electric & Gas Co. (2 NRC 702), the same intervenor refused to respond to an Order Compelling Responses and likewise vowed not to participate in answering any questions. (The Board orders in those cases in fact leave the door open for recission of the orders if intervenors would agree to respond to questions). In Northern States Power Co. (5 NRC 1298), all the intervenors had failed to respond in any fashion to orders granting motions to compel responses, and further, when asked by the Board whether they wished to continue participation in the proceeding, failed to answer that question. The numerous documents filed by TexPIRG in this proceeding, its pages of responses to Applicant and Staff interrogatories, and its responsiveness to orders issued by the Board indicate no analogy whatsoever to these other intervenors cited by Applicant who simply refused to participate in the proceeding.

In the Northern States Power Co. (supra.) case, the Board found that the criteria for determining whether to grant

a motion to dismiss is whether the intervenors would make a useful contribution to the proceeding (at 1301). In that instance, the Board noted that intervenors had made no discovery requests themselves; had made no responses to other requests and apparently had no documents; and that each had failed provide any information on its positions relating to issues in the proceeding. In the instant case, TexPIRG has conducted extensive interrogatory efforts, has spent many hours examining documents at the Applicant's engineering offices, has produced and named a number of documents to support its own position, and has not only responded to three sets of interrogatories and an order requiring more responsive answers, but also has participated in three depositions instigated by Applicant. Moreover, TexPIRG believes it has already made many positive contributions to the proceeding and finds it hard to believe that Applicant seriously urges elimination of intervenors when the President's Commission on the Three Mile Incident has just concluded criticism of nuclear regulatory policy for its promotional bias and failure to include public participation. */

Perhaps Applicant attempts to avoid the fact that the cited authorities are not analogous by making the incredible statement that "what TexPIRG has done in far worse than a simple refusal to answer discovery requests." (at p. 14)

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*/ As an example of TexPIRG's contribution, TexPIRG believes that the staff might have overlooked a serious NEPA issue regarding transport of the reactor vessel without its contention on that point. HL&P counsel initially told the Board flatly that barge transport would not occur; but apparently TexPIRG's contention "jogged" HL&P memory, too, since HL&P's counsel confirmed several months later that barging plans had been prepared in 1974.

TexPIRG has responded to each interrogatory posed, and has identified and made available numerous documents over the course of this proceeding. Yet the Applicant inexplicably argues that an Intervenor who has made information available is somehow more deficient in its duties than an Intervenor who refuses to make any information available. This logic is perhaps interesting, but not persuasive.

Applicant states: "TexPIRG has never, over a period of seven months, complied in any meaningful way with reasonable discovery requests and Applicant has therefore been utterly unable to advance the preparation of its case." (p. 15) TexPIRG objects to this statement because it is flatly false. Also, TexPIRG finds the remark insulting since TexPIRG staff and volunteers have spent many hours preparing responses to Applicant's interrogatories--most of which HL&P already knew the answer to before they submitted the inquiries--and the order for more responsive answers.

The responses contained in Applicant's motion's appendix (e.g., pp. 10-17) show that TexPIRG did turn over much information to Applicant. TexPIRG urges the Board to examine the further responses resulting from the July 12 Memorandum and Order, because TexPIRG believes these responses indicate TexPIRG attempted to be very detailed in its answers there. If Applicant was unsatisfied with those responses, it has not stated so, nor has it provided specific responses it believed to be inadequate. Moreover, TexPIRG has made several documents* / available

* / e.g., Bonneville P.A. Conservation Study, and Gulf Coast Waste Disposal Authority documents as noted in Oct. 10 supplemental response of TexPIRG.

for inspection by HL&P, but Applicant has not availed itself of that opportunity. And further, TexPIRG has turned over to Applicant for perusal and examination three important conservation documents, which were the only copies of those documents in TexPIRG's possession, and TexPIRG believes that this level of co-operation contrasts with that of the Applicant, who refuses to make documents available except at an office outside of Houston. Indeed, if Applicant has been "utterly unable" to prepare its case, then the fault lies somewhere other than with TexPIRG.

Indeed, Licensing Boards have refused to dismiss intervenors who have been far less diligent than TexPIRG in meeting their responsibilities. In Gulf States Utilities Co. (River Bend Station) 1974 8 AEC 669, the Board was reluctant to hold intervenors to the letter of discovery orders, even though the intervenors repeatedly failed to show up for depositions after statements by their attorney that they would appear. The Board did not grant the motion to dismiss because "The Board values highly the contribution Intervenors make to licensing proceedings such as this." (supra, ftn. 671).

III.

Applicant alleges a violation of Commission rules because TexPIRG's responses to HL&P's Third Set of Interrogatories do not contain an affadavit by its expert witness Mr. Sansam. Applicant is not correct in calling this a violation of the rules.

Applicant's third set deals with the issue of conservation, and in particular follows up some questions in the deposition of Mr. Sansam. Since Mr. Sansam is one TexPIRG witness on that

matter, TexPIRG was obligated to obtain his assistance in responding to the interrogatories in order to provide all of the knowledge available to TexPIRG. However, Mr. Sansam's work was revised and supplemented by TexPIRG Executive Director Clarence Johnson in order to reflect the knowledge, views, and position of TexPIRG. As such, it would not have been proper for Mr. Sansam to submit the interrogatories. He is not an employee of TexPIRG (he, in fact, works for the state of Texas), and holds no position with TexPIRG. Mr. Johnson's affadavit accurately and properly avers that the responses had been prepared at Mr. Johnson's direction. The form of that affadavit closely tracks the sworn statement of HL&P's Letbetter in responding to TexPIRG interrogatories in Docket 2676 before the Texas Public Utility Commission. (see attachment A). In short, interrogatory responses reflect the position of the intervenor, not of any particular expert witness. HL&P has already deposed Mr. Sansam, and that is the appropriate means of obtaining his specific views.

Moreover, the Applicant is inconsistent in the position it takes on TexPIRG's duties. Earlier in this proceeding, HL&P expressed concern that TexPIRG interrogatories were not signed by an authorized representative. Now HL&P complains that the interrogatories are not signed by a specific individual, who turns out not to be an authorized representative of TexPIRG (as shown by Exh. A of the motion). TexPIRG is confident HL&P would have included that point among its "complaints" in the instant motion, if TexPIRG had in fact submitted an affadavit by Mr. Sansam.

TexPIRG believes that the proper interpretation of 10 CFR 2.740b(b) (responses shall be signed by "persons making them") is that "person" refers to the party to whom the interrogatories were addressed and who has the legal obligation of answering them. In Northern States Power Co. (5 NRC at 1300), the importance of the Applicant interrogating the intervenor so that the Applicant can inquire into positions of the Intervenor(to prevent surprise at the tact of cross-examinations)is pointed out. Having an expert witness--who may or may not agree with all of the positions of intervenor and who may or may not be associated with intervenor at all times in the future--respond to interrogatories,rather than the intervenor,actually reduces the value of those responses to the Applicant.

IV.

Applicant states that TexPIRG failed to comply with the Board's orders because responses to the first and second set of interrogatories were not re-submitted with sworn affadavits.

This is not true. TexPIRG did re-submit its earlier submitted responses with a sworn affadavit and in the required number of copies served on the required individuals.

TexPIRG believes the point of that order to be one of authenticating and verifying that previous responses were, in fact, the submissions of TexPIRG. */

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*/ Applicant implies that the "spirit" of the order required TexPIRG to write new answers in lieu of the previous submission. TexPIRG did not make that interpretation, because:(1) the Board had already chosen those responses it believed deserved to be re-written; and (2) the Order arrived two days before the deadline of the re-submission and TexPIRG believes the Board would have provided a deadline equivalent to that of making more complete responses if it had intended the re-submission to be a completely new set of responses.

The circumstances surrounding this matter--not TexPIRG--has created some confusion. The responsible officer who previously signed the interrogatories, John Doherty */, had been discharged by TexPIRG. Obviously he could not provide an affadavit anymore, since that would have violated the Board's order that the affadavit contain the signature of TexPIRG's authorized representative. Two persons at the time of the re-submission were authorized to act on behalf of TexPIRG--James Scott, the counsel, and Clarence Johnson, the Executive Director. Mr. Johnson was not in TexPIRG at the time those responses had been originally submitted, and therefore, technically, would have violated the Board's order that the affadavit contain the name of an individual with knowledge of the responses. Since Mr. Scott was attorney at the time of the original submission, and had in fact assisted Mr. Doherty in the preparation of responses, he could sign the re-submission. In somewhat of a "Catch-22" situation, TexPIRG acted in the only way that it could. Therefore, as TexPIRG's attorney, Mr. Scott accepted those earlier responses on behalf of TexPIRG.

The important point is that TexPIRG responded to both the spirit and the letter of the Board's order by re-submitting the interrogatories in such a manner as to clearly show that the responses <u>do</u> belong to TexPIRG.

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*/ A bit of history for the Board: In January, 1979, TexPIRG's Board granted a leave of absence for Exec. Director Clarence Johnson in order for him to accept employment with Texas Consumer Association as staff lobbyist during the six-month state legislative session. John Doherty was hired as an acting research director, with the understanding that his employment ended when Mr. Johnson returned. Mr. Johnson returned to employment with TexPIRG on July 14, 1979, shortly before the July 12 Memorandum and Order arrived.

Any implication by the Applicant that TexPIRG's responses to the first and second interrogatories of Applicant have been disavowed is false. TexPIRG accepts those responses as its statement of various facts and positions, and given every indication of that with its submission of sworn affadavits confirming that. If Applicant is still bothered on this point, TexPIRG is amenable to entering into a written stipulation stating such.

Furthermore, TexPIRG has not, and does not intend to disavow any responses of a substantive nature given by Mr. Doherty at his deposition. The only provisio stated by TexPIRG with regard to Mr. Doherty's deposition relates to alleged withdrawals of contentions by Mr. Doherty. In his capacity, he was not authorized to withdraw contentions, and had been specifically told so. He was authorized to supply information to Applicant regarding TexPIRG's positions and documents. As TexPIRG has stated before, discovery is intended to supply information to aid other parties in building their respective cases; but that withdrawal of contentions occurs in a different procedure--through the submission of documents via stipulation or motion by the withdrawing party. On this matter the Board has apparently agreed with TexPIRG (see, Board's Order in response to TexPIRG's motion to compel, re: underground siting contention). Regardless, TexPIRG believes that it assisted HL&P in learning more about TexPIRG contentions during Mr. Doherty's deposition.

V.

Applicant states that TexPIRG has violated the Board's orders by refusal to allow its counsel, Mr. Scott, to submit to wholesale deposition with regard to all points of its case.

First of all, TexPIRG did not understand its statement of authorized representatives to be a statement of "individual who may be deposed" as implied by the Applicant. As stated earlier, TexPIRG believed that the purpose of the Board's Order requiring that statement was a concern that parties did not know which documents that might be submitted under TexPIRG's name would be authentic. (This concern of the Applicant appeared to be prompted by a letter from Mr. Doherty that "no one appeared to be running TexPIRG now, " a misconception on his part). TexPIRG submitted the name of its Executive Director, the TexPIRG official designated by its Board of Directors as the supervisor of the intervention project, and that of its attorney, since TexPIRG's counsel is obviously called upon to submit documents in this proceeding.

Upon being deposed, TexPIRG's counsel, Mr. Scott, believed it fair to offer to provide information relating to contention 6, since TexPIRG had stated in interrogatory responses that it was plausible Mr. Scott might testify as an expert witness on this point. Applicant parenthetically notes that such a situation forces Mr. Scott to disqualify himself as an attorney. However, as Mr. Scott stated under deposition examination, TexPIRG is aware of this conflict and will not use Mr. Scott in that capacity unless no other alternative exists. TexPIRG is familiar with the cases cited by Applicant (ftn. 8 at p. 9) and believes they justify such a dual role in that event. Regardless, that particular point should be argued if and when it arises.

However, Applicant's counsel refused to make inquiries on that contention, but proceeded to insist on interrogating TexPIRG's counsel with regard to other contentions.*/

As allowed within the rules, TexPIRG objects to having its attorney interrogated on a wholesale basis. Such broad interrogation of the attorney will inevitably result in disclosure of the attorney's work product and the associated legal theories and strategies for TexPIRG in this proceeding. Moreover, HL&P has other TexPIRG representatives available to it for obtaining information with respect to every TexPIRG contention. Clarence Johnson, Executive Director of TexPIRG, supervises the intervention project for TexPIRG and is available for deposition. Yet HL&P does not depose Mr. Johnson, instead preferring the unprecedented step of seeking deposition of TexPIRG's counsel.

HL&P's argument that Mr. Scott has been made "the repository of information" is completely without merit. Obviously, Mr. Scott holds knowledge and expertise which will be helpful to TexPIRG in planning strategy and developing cross-examination; but certainly there is no attempt to "hide" information from HL&P. Certainly, Mr. Newman and Mr. Copeland utilize expertise on behalf of their clients, but TexPIRG is confident they would rightfully object to being deposed.

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*/ HL&P's assertion that they expected Mr. Scott to be the representative"with knowledge"based upon his affadavit is suspect. The only question asked of him was a re-phrasing of an interrogatory which was answered in its most complete and detailed form by Clarence Johnson in TexPIRG's Supplemental Response required by the Board's Order of July 12. If Applicant were truly interested in obtaining the most information, they should have sought Mr. Johnson's deposition.

Applicant cites no authorities applicable to this case which justify deposing TexPIRG's counsel. All of the cases cited on p. 10 of the motion involve attorneys who refused to turn over documents, rather than a refusal regarding depositions. In U.S. v. Bartone, 400 F. 2d 459, 461, the court stated that an attorney may testify as to clerical or administrative services, which appears to support TexPIRG's position in part IV of this response, but which is inapplicable to deposing him on the merits of the case. In Re Penn Central Commercial Paper Litigation, 61 FRD 453, the court ruled an attorney had waived privilege as to handing over certain documents, because the documents had been provided to other parties, but the attorney was not interrogated on those documents. In Balistrieri v. O'Farrell, 57 FRD 567, 569, a pro se litigant could not claim privilege as his own client; but unlike that case, TexPIRG has other officials who may be/ deposed to gain that information without interrogating counsel. Moreover, Balistrieri tends to support TexPIRG's assertion of attorney-client privilege, because even in the unusual instance of a pro se attorney, the court restricts interrogatories, especially those which are too broad and may tend to reveal attorney work products. This was a prime concern of TexPIRG in the type of questions which Applicant was entering into with TexPIRG's counsel.

In Re Penn Central (supra), the court stated that attorney-client privilege is applicable when the holder has sought or is a client, the communicator is a member of the bar or court, is acting as attorney for the client, and is providing assistance in a legal proceeding. TexPIRG is confident its assertion of that privilege meets that criteria.

Moreover, if Applicant disagrees with that objection by TexPIRG, it's proper remedy is to seek a motion to compel Mr. Scott's responses, not a motion for a dismissal. At that time, TexPIRG and HL&P can discuss whether or not assertion of the privilege is justified. However, TexPIRG would urge Applicant to exercise an alternative which is less stressful on all parties--simply requesting a deposition of Mr. Johnson, TexPIRG's Executive Director who will co-operate in providing information on the requested contentions.

VI.

Applicant's statement that dismissal is the only appropriate remedy under Rule 37 of the Federal Rules of Civil Procedure is misconceived. None of the cases cited on p. 14 of the motion are applicable nor analogous to TexPIRG. Plaintiffs in those cases were simply refusing to participate in the discovery process--unlike TexPIRG, which has diligently and in good faith attempted to respond to all requests by Applicant.

Emerick v. Fenick Industries 539 F 2d 1379, cited by HL&P, involves a plaintiff who refused to respond to three sets of interrogatories; and the court stated there: "When the disobedient party is a plaintiff, dismissal without prejudice is a sanction of last resort, applicable only in extreme circumstances." Applicant has shown no such extremities here. In Diaz v. Southern Drilling Co. 427 F 2d 1118, Diaz failed to show up for depositions three times. In Mangano v. American Radiator & Standard Sanitary Corp., 438 F. 2d 1187, not only had the plaintiff failed to attempt responses to interrogatories,

but the court held that other grounds for dismissal existed.

Furthermore, Applicant has not identified any violations of the Commission's rules or of the Board's orders, but instead relies upon veiled references to TexPIRG's motives. (In fact, HL&P admits on p. 14 of its motion that TexPIRG gives the "appearance" of attempting to comply with the regulations and this Board's orders). Such speculation cannot serve as a basis to dismiss. As the Supreme Court noted in Societe Internationale v. Rogers 357 US 197, 2 LEd 2d 1255 (1958):

> "The due process clause limits the power of courts to dismiss action without affording a party an opportunity for a hearing on the merits of his cause."

VII.

In conclusion, TexPIRG would point out that Applicant has not been harmed by any actions so far, even if HL&P's allegations were true. The N.R.C. has declared a lengthy "pause" in licensing activity. There appears to be plenty of time for TexPIRG and HL&P to work out whatever discovery problems may exist. And TexPIRG does not oppose lengthening discovery deadlines on "old" contentions if that will aid HL&P in resolving its problems, actual or imagined. TexPIRG urges the Board to utilize the "rule of reason" here. Wherefore, premises considered, TexPIRG urges the Board to deny Applicant's Motion to Dismiss TexPIRG.

Respectfully submitted,

James Scott, Jr.
Counsel for TexPIRG

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me, the undersigned authority, on this day personally appeared R. Steve Letbetter, who, having been duly sworn, upon oath says:

"My name is R. Steve Letbetter, I am of legal age and a resident of the State of Texas. The foregoing answers to the Requests for Information of James Scott were prepared under my supervision and are true and correct to the best of my knowledge and belief."

R. Steve Letbetter

R. Steve Letbetter

Subscribed and sworn to before me by the said R. Steve Letbetter this 6th day of August, 1979.

Ratona L. Switzer

Notary Public in and for Harris County, Texas

RATONA L. SWITZER
Notary Public in and for Harris County, Texas
My Commission Expires 3-14-80

ATTACHMENT #1: Affidavit, Steve Letbetter, Controller, Houston Lighting & Power Co.
HL&P Responses to James Scott's Requests for Information, Docket 2676, Texas PUC

DOCKET 50-466

I, Clarence Johnson, herein certify that the attached TexPIRG response to HL&P's Motion to Dismiss has been served upon the following by deposit in the U.S. Mail System on this the 14th day of November.

J. Gregory Copeland

Sheldon Wolfe

Dr. E.L. Cheatum

Gustave Linenberger

Richard Lowerre

ASLAB

Steve Sohinki

John Doherty

Carro Hinderstein

Brenda McCorkle

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