UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

June 15, 1982

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

INTERVENOR DOHERTY'S MOTION TO REOPEN THE RECORD

John F. Doherty, of 4327 Alconbury Lane, Houston, Texas 77021, intervenor pro-se in the above proceeding now moves the Board reopen the closed record for the purpose of taking evidence on the enclosed Contention 59, which is filed separately in order to fully display that it is entitled to the right of reply as discussed in Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, Oct. 1, 1979, at page 8, as opposed to this Motion which is not granted an automatic right of response to replies absent leave from the Board, as set forth in the Memorandum and Order of the Board in this proceeding of June 2, 1982, at page 6, and in 10 CFR 2.730(c).

The Commission's Rules of Practice do permit a Board to reopen the record of a closed proceeding in 10 CFR 2.718(j), under the "Power(s) of the Presiding Officer". In Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Plant), ALAB-138, 6 AEC520,523, (1973), the Appeal Board set forth two requirements for a Motion to Reopen to carry. These were: "(1) the timeliness of the motion, i.e. whether the issues sought to be presented could have been raised at an earlier stage, such as prior to the close of the hearing, and (2) the significance or gravity of those issues."

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Below, this Intervenor sets out, using ALAB-138, (supra.) guidance, reasons for why the Board should reopen the ACNGS record.

(1) This Motion to Reopen is timely filed.

This Intervenor maintains that the instant Motion could not have been raised earlier than now, such as prior to the closing of the April 1982 hearings, or the December 9, 1981 provisional closing. (Tr. 21, 326). This is because of the sequence of events surrounding the closely related TexPIRG Contention 31. That Contention, for which additional evidence was taken in the April 12-14, 1982 hearings, was called because of a renewed Motion by this Intervenor, filed December 7, 1981, which followed the guidance of the Board Order of November 10, 1981, which denied without prejudice this Intervenor's original Motion for Additonal Evidence on TexPIRG Contention 31. In that Order of November 10, 1981, the Board ordered availability to this Intervenor of the Quadrex Report on the South Texas Nuclear Project.

That same Order, stated,(P. 2), "...[M]r. Doherty must specify those portions of the Quadrex report which indicate that organizational changes (which were either not previously adverted to or were inadequately addressed in testimony in this case) ought to be made insofar as the Allens Creek facility is concerned and/or indicate that modifications (which were either not previously adverted to or were inadequately addressed in testimony in this case) ought to be made in the supervision of the ACNGS construction." This portion of the Order precluded mention of Intervenor perceived Applicant problems with 10 CFR 50.55(e) reporting, since there was no dealing, "...[w]ith what was reportable under (10 CFR)50.55(e)..." in the Quadrex report. (Tr. 21562)

Contention 59(a) enclosed, deals exclusively with the question of Applicant being technically incompetent because it did not recognize that many of the findings of the Quadrex report were reportable under 10 CFR 50.55(e), the Commission's self-policing rule for licensees on construction performance.

An attempt to file a similar contention was struck in the Board's Memorandum and Order of June 2, 1982. The attempted filing was dated May 24, 1982. This Intervenor, prior to May 24, 1982, filed a contention less similar to 59(a), on April 22, 1982, with Applicant and Staff filing replies on May 7, 1982, and May 14, 1982, respectively. The Board in its Memorandum and Order of June 2, 1982, treated this Intervenor's April 22, 1982 filing as a Motion to Reopen, which as stated above it found deficient. The Board's action in striking this Intervenor's filing of May 24, 1982 (styled: Intervenor Doherty's Reply to Applicant's Motion to Strike Doherty Contention 58) was the result of an Applicant motion of May 19, 1982, received by this Intervenor on May 24, 1982. Thus, this Intervenor, in order to expedite matters replied to the Motion of the Applicant on May 19, 1982, on the same day as received. This Intervenor believes that if any party has the stamina to review the recent history of this proceeding as attempted here, it will show this Intervenor has made a totally acceptable record in filing timely. It should be pointed out the April 22, 1982 filing of Contention 58, was defective, but being but eight day after the close of the April 1982 hearings in Houston, was surely not an abuse of the timeliness requirements significant here. In addition, this Intervenor believes he has shown that Contention 59(a) could not have been filed sooner.

Contention 59(b) is based on a memorandum received from the Staff on March 24, 1982, in discovery. The item was denied admiss-

ility in the hearing in April, 1982 (Tr. 21,728), but, more importantly since the issues of Applicant's character was not before the Board, cross examination was not proper on that subject. */ Judge. Wolfe emphatically denied any cross examination on the memorandum. (Tr. 21,728) As with Contention 59(a), a similar contention was struck **/ in the Board's Memorandum and Order of June 2, 1982, and it was originally filed in a slightly different form on April 22, 1982, eight days after the last day of the April hearings. This Intervenor maintains that as with Contention 59(a), he has with Contention 59(b) pursued diligently his rights and hence this omission is timely with regard to Contention 59(b), because could not have been filed sooner, as required in Vermont Yankee (supra).

2) The significance or gravity of the issues in Contention 59 merits reopening the ACNGS record.

Intervenor would have the Board reopen the record for consideration of his Contention 59 which is enclosed. Contention 59 maintains that Applicant lacks technical competence in failing to report construction problems as they occured, later found in the Quadrex report, and that the Applicant lacks character to be a Commission licensee. These assertions are significant because if the Applicant is found to lack the competence to recognize construction problems, it follows many defects can be built into the subject nuclear plant. And if it is found Applicant lacks

*/ Nor can this Intervenor be at fault for not insisting on asking questions that would be improper.

**/ Since the Board treated the Contention as a Motion this somewhat awkward terminology is correct.

character through a willingness to conceal the Quadrex cited problems then it follows the plant may be constructed or operated unsafely. Such findings and their implications could well lead to a different outcome of the licensing Board in its decision to issue a construction permit for the ACNGS.

The Commission has made at least one decision with regard to how important an issue must be to merit re-opening of a record. In Public Service Company of New Hampshire (Seabrook Station, Unit 1 & 2) CLI-80-33, 12 NRC 295 (1980) it stated that as a matter of prudence subsequent publication of an expert's works and general increase in seismic knoledge meant a closed record should be opened. (At 297) And, in Pacific Gas & Electric Company (Diablo Canyon Nuclear Power Plant, Unit 1 & 2) ALAB-598, 11 NRC 876 (1980), the Appeal Board ordered a record reopened to examine new evidence on seismic ability although the issue was covered prior to the hearing close.*/ And, in Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Plant),ALAB-138, 6 AEC 520, 526, it affirmed a Licensing Board decision to reopen based only on the issue of fuel densification. Additional guidance from the Appeal Board would appear to indicate it is possible to submerge the first prong of the Vermont Yankee test (supra.), for in a prior Seabrook decision, Public Service Company of New Hampshire, (Seabrook Station Unit 1 & 2), ALAB-486, 8 NRC 9, 21 (1978), it stated that although the movant's burden be greater, that when the matter is of such gravity that the public interest demands its further exploration, a motion

*/ At 879 and 881.

to reopen may be granted although untimely without good cause.

This Intervenor urges therfore that the issue of not having the competence to recognize reportable issues under 10 CFR 50.55(e) and the willingness to not notify the NRC of the significance of findings in a contractor report when placed in a single contention are the equal in gravity to the issues in the above cited cases. The reason for this is that the NRC through its Inspection and Enforcement Branch is relying on its Licensees to see that both construction and operation of power plants under its jurisdiction is performed safely. Any lack of either willingness or competence to do these may permeate anywhere in the licensee's plant and present a public danger. Evidence an Applicant will jeoparadize the programs of the NRC for any reason demand further exploration in the public interest. If granted a construction permit, the NRC will rely on Applicant to report deficiencies promptly at the ACNGS. Where this Intervenor has shown, in his Contention 59, there is reason to believe the Applicant has not met this trust under a previously granted license at another site, the Board should reopen the record on that issue.

Respectfully submitted,

John F. Doherty

John F. Doherty
Intervenor pro se

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(Certificate of Service with "Intervenor Doherty's Contention 59)