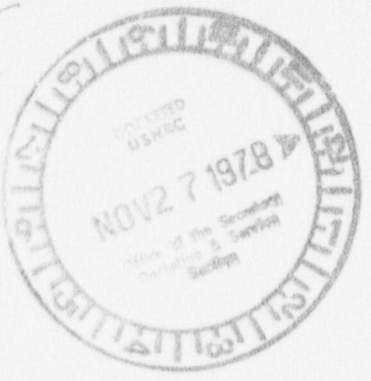
LOCAL PDR



UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	I	
	I	Dock. # 50-466
HOUSTON LIGHTING AND POWER COMPANY (Allens Creek Nuclear Generating Station)	I	

MOTION FOR

MEMORANDUM IN SUPPORT OF TEX PIRG'S MODIFICATION OF THE LICENSING BOARD'S AUG. 14, 1978 AND SEPT. 1, 1978 ORDERS RE: LIMITATIONS ON CONTENTIONS

On October 30, 1978, Petitioner TexPIRG filed a motion requesting that the Board eliminate the "new evidence" restrictions upon the admissibility of contentions set forth by petitioners who were not parties to the hearings of March 11, 1975. TexPIRG is in receipt of responses by the Applicant and N.R.C. staff to that motion. TexPIRG herein requests leave of the Board in the above-referenced matter to submit this memoranda in support of its earlier motion.

In TexPIRG's motion, petitioner argued that the doctrines of res judicata and collateral estoppel do not apply to the prospective petitioners in this proceeding. The Applicant and Staff apparently agree that these doctrines are not applicable in this case, but further assert that the Board must rely upon the doctrine of laches to restrict petitioner's contentions.*/ The Applicant and Staff's arguments notwithstanding, TexPIRG would argue, for the reasons outlined below, that laches is not applicable to this situation and, therefore, the motion should be granted.

---

*/ Both the Applicant and Staff allege that TexPIRG has "sat on its rights" in not responding to the original notice.

Neither the Applicant nor Staff has shown any inexcusable delay and prejudice that would result from raising a full scope of issues. Laches is an affirmative defense in which the asserting party must show inexcusable delay or resulting prejudice. Fed. R. Civ. P. 8(c) [affirmative defense] Shouse v. Pierce County, 559 F. 2d 1142 (9th Circ. 1977). National Asn. of Broadcasters v. F.C.C. 554 F. 2d 1118, 1128 (D.C. Circ. 1976). Ecology Center of Louisiana v. Coleman, 515 F. 2d 860, 867 (5th Circ. 1975). Czaplicki v. S.S. Hoegh Silvercloud 351 U.S. 525, 533 (1956). Clausen v. Nene Grande Oil Co. 275 F. 2d 108, 111 (3rd Circ. 1960).

Merely because TexPIRG's petition may have slightly lengthened the hearing process is not adequate to show "inexcusable delay and prejudice."*/ Shouse v. Pierce County supra at 1147.

Furthermore, TexPIRG might note that laches normally applies to plaintiffs initiating a lawsuit: an analogy of laches to an intervenor entering an action initiated by an application is questionable. Laches can only apply to the party attempting to disturb the status quo. Walter Bledsoe & Co. v. Elkhorn Land Co. 219 F. 2d 556 (6th Circ. 1955) United States v. Rusche, 56 F. Supp. 201 (S.D. Cal. 1944).

TexPIRG noted in its motion of October 30, 1978 that "public interest factors" must be considered in order to further the interests of "careful and informed decision-making." Similarly, courts have been reluctant to apply laches to lawsuits involving environmental questions.

---

*/ TexPIRG would respectfully point out that the three-year delay by the applicant has already caused more delay than any delay that will be caused by Petitioner's attempt to seek a full and complete hearing.

As the 8th Circuit explained in Minnesota Public Interest Research Group v. Butz , laches while an available doctrine, is not favored in suits involving environmental questions, because individuals other than the plaintiff will suffer the adverse environmental effects, and the defendant "will escape compliance with NEPA, a result not to be encouraged," M-PIRG v. Butz 498 F. 2d 1314 (8th Circ. 1974) at 1324.

Even in the case of a six-year delay involving the environmental effects of a canal, a court has held the special importance of "ecology laws and declined to invoke laches" when statutory provisions seek to preserve the environment. James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority, 359 F. Supp. 611 (E.D. Va. 1973), aff'd 481 F. 2d 1280 At 627. See also, Arlington Coalition on Transportation v. Volpe, 458 F. 2d 1323 (4th Circ., 1972).

Applicant argues "it is neither a legal requirement under the Atomic Energy Act or the Commission's regulations, nor sound administrative practice to provide more than one opportunity to litigate any given issue." Yet, as noted above, courts have held that it is important to develop a sound record in compliance with environmental laws.

In commenting on draft congressional legislation which would attempt to require the N.R.C. to prevent intervenors from raising issues if they could have raised them earlier, N.R.C. Commissioner Peter Bradford stated, "Furthermore, far from encouraging the early resolution of issues, this provision as drafted encourages their concealment, for if they escaped unnoticed at the first hearing, they cannot come up again in the absence of significant information not in existence at the time of the first hearing." Congressional Record, May 24, 1978, E2817.

TexPIRG submits, therefore, that it would be sound administrative practice to grant the instant motion.

Respectfully submitted,

James Scott, Jr.
Counsel for TexPIRG