August 1, 2005

# UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

### BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

DAVID H. HAWES

Docket No. 55-22685-SP

(Denial of Reactor Operator License)

ASLBP No. 05-840-01-SP

## NUCLEAR REGULATORY COMMISSION STAFF'S RESPONSE TO REQUEST FOR HEARING

#### <u>INTRODUCTION</u>

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the Nuclear Regulatory Commission (Staff) hereby responds to the Request for Hearing (Request), filed by David H. Hawes on June 28, 2005. The Staff herein addresses the adequacy of Mr. Hawes' request. For the reasons set forth below, the Staff opposes Mr. Hawes' Request for failure to submit a valid contention as required by 10 C.F.R. § 2.309.

#### BACKGROUND

On June 28, 2005, David H. Hawes, an applicant for a reactor operator license at Vogtle Electric Generating Plant, filed a request for hearing to contest the Staff's June 20, 2005 proposed denial of his reactor operator (RO) license application due to failure to pass the written examination portion of the May 27, 2005 RO examination. Mr. Hawes had previously taken the RO examination in 2002. The examination consists of a written examination and an operating test. In 2002, Mr. Hawes failed the operating test, and states that he was unable to re-take it in 2003 due to his deployment to Iraq. He returned to his job in 2004 and applied to retake the RO examination in 2005. According to his application, attached hereto as Exhibit 1, he did not request a waiver of the written examination. *See* Personal Qualification Statement -

Licensee, NRC Form 398, May 2, 2005, Exhibit 1. In May of 2005 Mr. Hawes took the RO examination for the second time and failed the written examination, but passed the operating test. By letter dated June 20, 2005, the Staff informed him of the proposed denial of the RO license application. On June 28, 2005, Mr. Hawes filed a Request for Hearing, objecting to being required to take the written examination. The Staff files this response in opposition to the Request, on the basis of failure to submit at least one admissible contention.

#### DISCUSSION

#### I. Legal Standards

## A. Legal Standards Governing Standing

Any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that he or she has standing to do so. Section 189a. of the Atomic Energy Act of 1954, as amended ("AEA"), 42 U.S.C. § 2239(a), instructs the Commission to grant a hearing upon the request of "any person whose interest may be affected by the proceeding." Commission regulations require that a petitioner demonstrate standing under the provisions of 10 C.F.R. § 2.309(d) and proffer at least one admissible contention. 10 C.F.R. § 2.309(a). Section 2.309(d) requires that a petition or request to intervene state the following:

- (i) the name, address and telephone number of the requestor or petitioner;
- (ii) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) the nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
- (iv) the possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

## B. Legal Standards Governing the Admission of Contentions

To gain admission to a proceeding as a party, a requestor must submit at least one

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admissible contention that meets the requirements of 10 C.F.R. § 2.309(f).

10 C.F.R. § 2.309(a). This regulation requires a requestor to:

- (i) provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) provide a brief explanation of the basis for the contention;
- (iii) demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) provide a concise statement of the alleged facts or expert opinions which support the requestor's . . . position on the issue and on which the [requestor] intends to rely at hearing, together with references to the specific sources and documents on which the requestor . . . intends to rely to support its position on the issue; and
- (vi) provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.

10 C.F.R. § 2.309(f)(1).1

II. Mr. Hawes' Request for Hearing

On June 28, 2005, Mr. Hawes filed a one paragraph Request which stated:

I request a hearing due to a denial of a NRC reactor operator license at Plant Vogtle. My request for hearing is based upon having to retake the written examination given at Plant Vogtle in December 2002 and receiving a waiver to re-take only that portion. Due to my mobilization to support Operation Iraqi Freedom in March 2003, I was unable to re-take the simulator dynamic exam in May 2003, and returned to work in July 2004, and was required to re-take the entire NRC examination, to include the portion previously passed.

<sup>&</sup>lt;sup>1</sup> Although the Commission recently revised its Rules of Practice at 10 C.F.R. Part 2, the provisions of § 2.309 "incorporate the longstanding contention support requirements of former § 2.714 – no contention will be admitted for litigation in any NRC adjudicatory proceeding unless these requirements are met." 69 Fed. Reg. at 2221.

A. Standing

As the applicant for the reactor operator license in issue here, Mr. Hawes has standing to contest the denial of the license.

B. Timeliness

By letter dated June 20, 2005, the Staff informed Mr. Hawes that he had failed the written examination and that the Staff was proposing to deny his application for a reactor operator license. The letter also advised him that if he chose to contest the denial by filing a request for hearing, pursuant to 10 C.F.R. § 2.103(b)(2), the request must be filed within 20 days of the notification. Mr. Hawes filed his Request for hearing on June 28, 2005. Therefore, his Request is timely.

C. Contention

Although, the Request is not written as a contention, for purposes of this response the Staff will treat it as such. Nonetheless, as discussed below, Mr. Hawes has failed to submit a contention that meets the requirements of 10 C.F.R. § 2.309(f).

In the Request, Mr. Hawes states that he should not have been required to retake the entire RO examination when he had previously passed a portion of the examination. Although it is not clear from the Request, Mr. Hawes' complaint relates to the written examination. As a basis, he states that he was unable to take the operating test in 2003 because of his mobilization to Iraq and, when he returned, he should not have been required to take the entire RO examination. The proffered basis is insufficient to demonstrate the admissibility of this proposed contention.

First, in order to begin the process of obtaining a waiver from a portion of the RO examination, an applicant must explicitly request a waiver. 10 C.F.R. § 55.35(b) states that "[a]n applicant who has passed either the written examination or operating test and failed the other *may request*... to be excused from re-examination on the portions ... which the

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applicant has passed." (Emphasis supplied). See also 10 C.F.R. § 55.47(a) ("On application, the Commission may waive any or all of the requirements for a written examination and operating test . . .") (emphasis supplied). The request is thus a prerequisite for a waiver. Nowhere does Mr. Hawes suggest that he requested a waiver. In fact, his application for the RO license does not include a request for waiver of the written examination.<sup>2</sup> See Exhibit 1. See also, International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-02-10, 55 NRC 251, 258 (2002) (Affirming denial of stay due to failure request within time and thus failing to meet the "prerequisite to obtaining stay relief."). Because there is no indication that Mr. Hawes has met the regulatory prerequisite for a waiver, he has not submitted a valid basis for the contention.

Second, the granting of a waiver is discretionary on the part of the Commission. 10 C.F.R. § 55.35(b) provides that "[t]he Commission may in its discretion grant the request, if it determines that sufficient justification is presented." *See also* 10 C.F.R. § 55.47(a) (" On application, the Commission may waive any or all of the requirements for a written examination and operating test . . ."). Thus, there is no entitlement to a waiver from any portion of the examination. Since granting a waiver is discretionary, in order for any claim to lie, there must have been an abuse of discretion. Therefore, in order to frame the question of law, Mr. Hawes must allege that there was an abuse of discretion and provide the facts in support of the claim. Mr. Hawes has alleged neither.

In sum, Mr. Hawes has failed to: provide a specific statement of the issue of law or fact to be raised or controverted; provide a brief explanation of the basis for the contention; provide a concise statement of the alleged facts or expert opinion which support his position on the

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<sup>&</sup>lt;sup>2</sup> It is interesting to note that Mr. Hawes' Form 398 does request a waiver of the Generic Fundamentals Examination, but does not also include a similar waiver request regarding the written examination. See Ex. 1 at 1.

issue and on which he intends to rely at hearing, together with references to the specific sources and documents on which he intends to rely to support his position on the issue; and provide sufficient information to show that a genuine dispute exists on a material issue of law or fact. Therefore, the Request for hearing should be denied.<sup>3</sup>

## **CONCLUSION**

Based on the foregoing, the Staff respectfully requests that the Request for Hearing be denied.

Respectfully submitted,

Susan L. Uttal Counsel for NRC staff

Dated at Rockville, Maryland this 1<sup>st</sup> day of August, 2005

<sup>&</sup>lt;sup>3</sup> If the Board determines that the Request should be granted, the Staff believes that this case would be appropriate candidate for use of the Subpart N procedures - Expedited Proceedings with Oral Hearing. 10 C.F.R. § 2.1400, *et seq.* 

# UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

#### **BEFORE THE COMMISSION**

In the Matter of

DAVID H. HAWES

Docket No.

(Denial of Reactor Operator License)

### CERTIFICATE OF SERVICE

I hereby certify that copies of the "NUCLEAR REGULATORY COMMISSION STAFF'S RESPONSE TO REQUEST FOR HEARING" in the above-captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by an asterisk, with copies by electronic mail this 1<sup>ST</sup> day of August, 2005:

Ann M. Young, Chair Administrative Judge Atomic Safety and Licensing Board Panel Mail Stop: T-3F23 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001

Michael C. Farrar Administrative Judge Atomic Safety and Licensing Board Panel Mail Stop: T-3F23 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001

David H. Hawes\* 1522 Magnolia Church Road Perkins, GA 30822

Atomic Safety and Licensing Board Panel Mail Stop: T-3F23 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 Peter S. Lam Administrative Judge Atomic Safety and Licensing Board Panel Mail Stop: T-3F23 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001

Office of Commission Appellate Adjudication Mail Stop 0-16C1 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001

Office of the Secretary ATTN: Docketing and Service Mail Stop: 0-16C1 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001

Susan Uttal Counsel for NRC Staff

# UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

## BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

In the Matter of

DAVID H. HAWES

Docket No. 55-22685

(Denial of Reactor Operator License)

ASLBP No. 05-840-01-SP

#### NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

Name:

Address:

Susan L. Uttal

Office

Telephone Number:

Fax Number:

E-mail Address:

Admissions:

Office of the General Counsel, 0-15D21 U.S. Nuclear Regulatory Commission Washington, DC 20555

(301) 415-1582

(301) 415-3725

slu@nrc.gov

State of New Jersey Commonwealth of Pennsylvania Supreme Court of the United States

Respectfully submitted,

Susan L. Uttal Counsel for NRC Staff

Dated at Rockville, Maryland this 1st day of August, 2005

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