

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

INTRODUCTION

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

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.

¹ 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

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.² 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

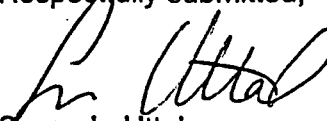
² It is interesting to note that Mr. Hawes’ Form 398 does request a waiver of the Generic Fundamentals Examination, but does not also include a similar waiver request regarding the written examination. See Ex. 1 at 1.

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.³

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 1st day of August, 2005

³ 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 1ST 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

Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
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Washington, DC 20555-0001


Michael C. Farrar
Administrative Judge
Atomic Safety and Licensing Board Panel
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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

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

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

Atomic Safety and Licensing Board Panel
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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

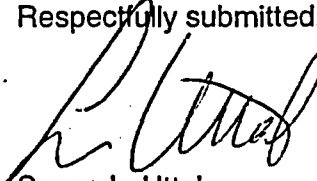
In the Matter of)
)
DAVID H. HAWES) Docket No. 55-22685
)
) ASLBP No. 05-840-01-SP
(Denial of Reactor Operator License))

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: Susan L. Uttal
Address: Office of the General Counsel, 0-15D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555
Telephone Number: (301) 415-1582
Fax Number: (301) 415-3725
E-mail Address: slu@nrc.gov
Admissions: 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

NRC FORM 398
(4-2004)
10 CFR 55.31, 55.33,
55.47, and 55.87

U.S. NUCLEAR REGULATORY COMMISSION

PERSONAL QUALIFICATION STATEMENT—LICENSEE

TO REMAIN VALID, THIS FORM MUST NOT BE ALTERED

APPROVED BY OMB: NO. 3150-0090

EXPIRES: 10/31/2006

DATE RECEIVED
(To be completed by NRC)

MAY 2 2005

Estimated burden per response to comply with this mandatory collection request, 1.8 hours. NRC requires this information to ensure that applicants/licenses meet all the requirements for taking reactor operator examinations. Send comments regarding burden estimate to the Records and FOIA/Privacy Services Branch (1-S FS2) U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001 or by Internet e-mail to license@nrc.gov, and to the Desk Officer, Office of Information and Regulatory Affairs, NEOR-10202, (3150-0090), Office of Management and Budget, Washington, DC 20503. If a means used to impose an information collection does not display a currently valid OMB control number, the NRC may not conduct or sponsor, and a person is not required to respond to, the information collection.

1. APPLICANT'S FULL NAME (Last, First, Middle) AND ADDRESS (Includes ZIP Code)

Hawes, David, Hayes
1522 Magnolia Church Road
Perkins, Georgia 30822

4. TYPE OF APPLICATION (Check applicable boxes)

- a. NEW
- b. RENEWAL
- c. UPGRADE
- d. MULTI-UNIT (Amend to Include Additional Unit)
- e. REAPPLICATION
 - 1 - FIRST DENIAL
 - 2 - SECOND DENIAL
 - 3 - THIRD DENIAL
 - 4 - WITHDRAWAL
- f. WAIVER REQUESTED (Justify in Item 17)
 - 1 - WRITTEN (Category _____)
 - 2 - OPERATING (Category _____)
 - 3 - ELIGIBILITY
 - 4 - MEDICAL
 - 5 - OTHER
- g. DATE PASSED GFE

MM	YY
10	01

2. CITIZENSHIP

- a. UNITED STATES
- b. OTHER (Specify) _____

3. BIRTH DATE

MONTH	DAY	YEAR
03	15	65

5. TYPE OF LICENSE APPLIED FOR

- a. OPERATOR (RO)
- b. SENIOR OPERATOR (SRO)
- c. LIMITED SRO (LSRO)

6. CURRENT OR PREVIOUS LICENSE(S) HELD

a. DOCKET NO.	RO	SRO	LSRO	b. LICENSE NUMBER	c. EXPIRATION DATE			d. FACILITY DOCKET NUMBER
55-22685	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		MONTH	DAY	YEAR	50-

7. NAME AND ADDRESS OF APPLICANT'S EMPLOYER (Include ZIP Code)

Southern Nuclear Operating Company - Plant Vogtle
7821 River Road
Waynesboro, Georgia 30830

10. CURRENT POSITION AT FACILITY

- a. PLANT SUPERINTENDENT/MANAGER
- b. ASSISTANT PLANT SUPERINTENDENT/MGR.
- c. SHIFT SUPERVISOR
- d. STAFF ENGINEER
- e. SHIFT TECHNICAL ADVISOR/SHIFT ENGINEER
- f. INSTRUCTOR
- g. SENIOR CONTROL ROOM OPERATOR
- h. CONTROL ROOM OPERATOR
- i. AUXILIARY UNIT OPERATOR/TRAINEE/TURBINE BUILDING/EQUIPMENT OPERATOR (NON-LICENSED OPERATOR)
- j. OTHER (Specify)
System Operator

8. NAME OF APPLICANT'S FACILITY

Vogtle Electric Generating Plant

FACILITY DOCKET NUMBER

50-424

9. ADDITIONAL FACILITY DOCKETS (Multi-unit Licenses)

50-425

11. EDUCATION

a. HIGH SCHOOL	b. COLLEGE			DEGREE CODES (To be used for "HIGHEST DEGREE" obtained) 0 - NONE 1 - CERTIFICATE 2 - ASSOCIATE 3 - BACHELOR 4 - MASTER 5 - DOCTORAL	c. VOCATIONAL/TECHNICAL	NUMBER OF MONTHS	CERTIFICATE RECEIVED	
<input type="checkbox"/> GRADUATE <input type="checkbox"/> GED EQUIVALENCY <input type="checkbox"/> NO	MAJOR AREA(S) OF STUDY	NUMBER OF YEARS	HIGHEST DEGREE (Also Code)		TYPE OF TRAINING		YES	NO
	ENGINEERING (Physics)						<input type="checkbox"/>	<input type="checkbox"/>
	OTHER						<input type="checkbox"/>	<input type="checkbox"/>

12. POWER REACTOR OPERATOR TRAINING PROGRAM

- a. HAS THE APPLICANT COMPLETED THE OPERATOR TRAINING PROGRAM ACCREDITED BY THE NATIONAL NUCLEAR ACCREDITING BOARD? YES NO
- b. IS A "PLANT-REFERENCED SIMULATOR" (AS DEFINED IN 10 CFR 55.4) USED IN THE OPERATOR TRAINING PROGRAM? YES NO

13. TRAINING (Since Last Application - See Instructions)

a. CLASSROOM	MONTH AND YEAR		NUMBER OF WEEKS
	FROM	TO	
1 - NUCLEAR POWER PLANT FUNDAMENTALS			a.
2 - PLANT SYSTEMS			b.
3 - PLANT PROCEDURES			c.
b. SIMULATOR			d.
c. SRO INSTRUCTION			e.
d. EXTRA PERSON ON SHIFT IN CONTROL ROOM (12-Hour Minimum) TIME ON SHIFT ABOVE 20% POWER (8-Hour Minimum)			f.
e. REQUALIFICATION			h.
f. OTHER (Specify)			i.
Refer to block 17			j.

14. SIGNIFICANT CONTROL MANIPULATIONS

DESCRIPTION	PLANT	SIMULATOR
	<input type="checkbox"/>	<input type="checkbox"/>
	<input type="checkbox"/>	<input type="checkbox"/>
	<input type="checkbox"/>	<input type="checkbox"/>
	<input type="checkbox"/>	<input type="checkbox"/>
	<input type="checkbox"/>	<input type="checkbox"/>
	<input type="checkbox"/>	<input type="checkbox"/>
	<input type="checkbox"/>	<input type="checkbox"/>
	<input type="checkbox"/>	<input type="checkbox"/>
	<input type="checkbox"/>	<input type="checkbox"/>

15. EXPERIENCE DETAILS

POSITION TITLE	FROM	TO	MONTHS	FACILITY	DUTIES

16. FOR RENEWALS ONLY

a. HOURS OPERATED FACILITY: <input type="checkbox"/> < 100 (LESS THAN) <input type="checkbox"/> 100 - 1000 <input type="checkbox"/> > 1000 (MORE THAN)	b. DATE AND RESULT OF LAST WRITTEN COMPREHENSIVE REQUALIFICATION EXAM AND ANNUAL OPERATING TEST.	DATE	RESULT
		W	<input type="checkbox"/> PASS <input type="checkbox"/> FAIL
		O	<input type="checkbox"/> PASS <input type="checkbox"/> FAIL

17. COMMENTS

Item 4.1.5:
Request waiver of GFE within 2 years of application due to applicant successfully completed instruction and passed a prior GFE that was randomly selected from among those contained on the NRC GFE web page and administered under controlled conditions on 8-27-04.

Item 13:
Applicant has successfully completed the following remedial training program beginning August 2004 and is ready for re-examination:
 4 week review of generic fundamentals and passed a randomly selected NRC GFE.
 5 week review of plant systems with the SRO upgrade candidates and passed comprehensive written exams
 12 weeks of classroom and simulator training on integrated plant operations including abnormal and emergency procedures. He was required to take and pass all examinations for the course.
 In-plant refresher training and a JPM exam of randomly selected tasks.
 6 weeks of comprehensive review training in the classroom and simulator.
 Passed a comprehensive site audit examination including dynamic scenarios, control room, in-plant, and administrative JPMs, and a 75 question RO written examination.

18. NRC FORM 396, CERTIFICATION OF MEDICAL EXAMINATION BY FACILITY LICENSEE, IS ATTACHED

19. SIGNATURES

ANY FALSE STATEMENT OR OMISSION IN THIS DOCUMENT, INCLUDING ATTACHMENTS, MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS.

19a. I certify under penalty of perjury that the information in this document and attachments is true and correct in accordance with the instructions. I further certify that I have notified my current employer of: (1) all previous employers; (2) any instance where I have been tested by a Health and Human Services (HHS) Certified Drug Testing Laboratory or a Licensee's testing facility for alcohol or a controlled substance, and the test results exceeded the cutoff levels established pursuant to 10 CFR Part 26; (3) any instance where I have been arrested for the sale, use, or possession of a controlled substance described in 10 CFR Part 26; and (4) any reasons for removal or revocation of unescorted access at a nuclear facility. I also authorize the NRC to submit the results of examinations to my employers for use in preparing retraining programs, as necessary.

SIGNATURE - APPLICANT *[Signature]* DATE 26 APR 05

CHECK APPLICABLE BOX

b. I certify that the above named individual has successfully completed the facility licensee's requirements to be licensed as an Operator/Senior Operator pursuant to Title 10, Code of Federal Regulations, Part 55; and that the individual has a need for an Operator/Senior Operator license to perform his/her assigned duties and that the facility will be made available for the examination. I also certify under penalty of perjury that the information in this document and attachments is true and correct in accordance with the instructions.

c. I certify that the above named individual completed the approved requalification program (with the exceptions noted in Item 17) as required by section 5054(f) of 10 CFR 50, and that he/she has discharged his/her licensed responsibilities competently and safely. I also certify under penalty of perjury that the information in this document and attachments is true and correct.

TRAINING COORDINATOR PRINTED OR TYPED NAME AND TITLE R. J. Brown, Manager, Training & Emergency Preparedness SIGNATURE <i>[Signature]</i> DATE 4/27/05	SENIOR MANAGEMENT REPRESENTATIVE ON SITE PRINTED OR TYPED NAME AND TITLE W. F. Kitchens, General Manager Nuclear Plant SIGNATURE <i>[Signature]</i> DATE 4-27-05
---	---

FOR NRC USE

WAIVER (Check or Complete Items, as applicable)

CATEGORY	GRANTED BY		DENIED BY	
	HEADQUARTERS	REGION	HEADQUARTERS	REGION
WRITTEN				
OPERATING				
ELIGIBILITY				
MEDICAL				
OTHER		X		

MEETS REQUIREMENTS DOES NOT MEET REQUIREMENTS (Explain below)
 GFE WAIVER.

SIGNATURE *[Signature]* DATE 05/10/05