

January 2, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
SOUTH CAROLINA ELECTRIC AND GAS)
COMPANY)
) Docket Nos. 52-057 and 52-028
(Virgil C. Summer Nuclear Station)
Units 2 and 3))

NRC STAFF ANSWER TO "PETITION TO INTERVENE" FROM JOSEPH WOJCICKI

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff (Staff) of the Nuclear Regulatory Commission (NRC or Commission) hereby answers Joseph Wojcicki's "Petition to Intervene" filed in the South Carolina Electric & Gas (SCE&G or Applicant)) V.C. Summer Nuclear Station Units 2 and 3 combined license (COL) proceeding. For the reasons set forth below, the NRC staff opposes admitting Joseph Wojcicki as a party to this proceeding because he has not demonstrated standing and has not submitted an admissible contention.

BACKGROUND

By letter dated March 27, 2008, SCE&G submitted a COL application (Summer COL application) for two AP1000 advanced passive pressurized water reactors (PWRs) to be located in Fairfield County, South Carolina. The Federal Register notice of receipt and availability of the Summer COL application was published on July 9, 2008 (73 Fed. Reg. 39,339) and the Summer COL application was accepted for docketing on July 31, 2008. The Federal Register notice of docketing was published on August 6, 2008 (73 Fed. Reg. 45,792) and the Federal Register notice of hearing (Hearing Notice) was published on October 10, 2008 (73 Fed. Reg. 60,362). The Hearing Notice included an "Order Imposing Procedures for Access to

Sensitive Unclassified Non-Safeguards Information [SUNSI] and Safeguards Information [SGI] for Contention Preparation” (SUNSI/SGI Access Order).

DISCUSSION

In his Petition, Joseph Wojcicki states that he believes that he has the right to be an Intervenor “in the next stage of reviewing the SCE&G Application.” (Petition at 1). Mr. Wojcicki’s Petition, which is very brief, does not directly address the standing and contention admissibility requirements of 10 C.F.R. § 2.309. In fact, it does not appear that Mr. Wojcicki even attempted to meet these requirements. Instead, Mr. Wojcicki states that he is “prepared to fulfill all [NRC] requirements” and states where he can be reached by email or telephone. *Id.* at 1. Although Mr. Wojcicki may have little knowledge of, or experience with, NRC proceedings, the Hearing Notice clearly notifies potential petitioners that those “desir[ing] to participate as a party to this proceeding must file a written petition for leave to intervene in accordance with 10 CFR 2.309.” Hearing Notice, 73 Fed. Reg. at 60,363. As the Commission has stated:

We recognize, nonetheless, that our contention rules require petitioners to work within a limited time frame to review the license application and any available related licensing documents, and that this can pose a significant burden, especially for *pro se* petitioners who are likely to have less available time and resources. But those participating in our proceeding must be prepared to expend the necessary effort. We are unwilling to convene costly and time-consuming hearings unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.

USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 456-57 (2006) (internal footnote and quotation marks omitted).

As explained below, Joseph Wojcicki has not established standing and has not submitted any admissible contentions.

I. The Petitioner Has Not Demonstrated That He Has Standing to Intervene

A. Legal Background

In accordance with the Commission's Rules of Practice:

[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing or petition for leave to intervene and a specification of the contentions that the person seeks to have litigated in the hearing. 10 C.F.R. § 2.309(a).

The regulations further provide that the Licensing Board:

will grant the [petition] if it determines that the [petitioner] has standing under the provisions of [10 C.F.R. § 2.309(d)] and has proposed at least one admissible contention that meets the requirements of [10 C.F.R. § 2.309(f)].

Id.

Under the general standing requirements set forth in 10 C.F.R. § 2.309(d)(1), a request for hearing or petition for leave to intervene must state:

(i) The name, address and telephone number of the requestor or petitioner;

(ii) The nature of the requestor's/petitioner's right under the [Atomic Energy Act of 1954, as amended (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.

10 C.F.R. § 2.309(d)(1).

As the Commission has observed:

[a]t the heart of the standing inquiry is whether the petitioner has 'alleged such a personal stake in the outcome of the controversy' as to demonstrate that a concrete adverseness exists which will sharpen the presentation of issues.

Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994), citing Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72

(1978) and quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962). The Commission went on to state:

To demonstrate such a 'personal stake,' the Commission applies contemporaneous judicial concepts of standing. Accordingly, petitioner must (1) allege an 'injury in fact' that is (2) 'fairly traceable to the challenged action' and (3) is 'likely' to be 'redressed by a favorable decision.

Sequoyah Fuels, CLI-94-12, 40 NRC at 71-72, citing *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992), and *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). See also *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).

In reactor license proceedings, licensing boards have typically applied a "proximity" presumption to persons "who reside in or frequent the area within a 50-mile radius" of the plant in question. See, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 148 (2001).¹ The Commission noted this practice with approval, stating that:

We have held that living within a specific distance from the plant is enough to confer standing on an individual or group in proceedings for construction permits, operating licenses, or significant amendments thereto[.] See, e.g. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54 (1979). . . . [T]hose cases involved the construction or operation of the reactor itself, with clear implications for the offsite environment[.] See, e.g., *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 8 [sic, 7] AEC 222, 226 (1974).

Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). The proximity presumption establishes standing without the need to establish the elements of injury, causation, or redressability. *Turkey Point*, LBP-01-6, 53 NRC at 150.

The Staff submits that since a COL application is an application for a construction permit combined with an operating license, see 10 C.F.R. § 52.1(a), the proximity presumption would

¹ The *Turkey Point* decision summarizes the development of this doctrine. See *Turkey Point*, LBP-01-6, 53 NRC at 147-48.

appear, in general, to apply to such applications.

B. Standing Discussion

On page 1 of the Petition, Mr. Wojcicki summarizes his position as follows:

I believe I have the right to be an intervenor also in the next stage of reviewing the SCE&G Application. The SCE&G application is in the hearing stage right now with the Public Service Commission in Columbia, SC, where I am an intervenor. I want to be sure that the motion to change the location of the two AP1000 nuclear reactors from the currently proposed Jenkinsville, SC site, to a new location near the Atlantic Ocean, providing significantly better economic, environmental, and social solutions, is accepted by the NRC.

Mr. Wojcicki may believe that he has standing in this proceeding because he has standing to intervene in the South Carolina Public Service Commission hearing on the SCE&G COLA.

Petition at 1. However, standing in a prior proceeding is insufficient to establish that a petitioner has standing in the immediate proceeding. *See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2) LBP-90-29, 32 NRC 89, 91 (1990)*. As the Board held:

ANE attempts to incorporate by reference statements of standing filed in other proceedings in which it has participated, both NRC and otherwise. Standing in a non-NRC proceeding is not relevant to standing before us, at least in the absence of a showing (not here made) of the equivalence of applicable standards and an overlap of relevant issues.

Id. at 91.

Mr. Wojcicki's Petition does not state the nature of his right to intervene under the Atomic Energy Act (AEA). *See 10 C.F.R. § 2.309(d)(1)*. Nor does the Petition demonstrate that Mr. Wojcicki has a personal stake in the action so as to justify standing. *See Sequoyah Fuels, CLI-94-12, 40 NRC at 71-72*. Further, Mr. Wojcicki has not shown he suffered an "injury in fact," a traceable injury to the SCE&G COLA, nor that his injury can be redressed by a favorable Board decision. *See id.* In expressing his interest in the proceeding, Mr. Wojcicki states that he

want[s] to gain access to these major projects as a veteran technical consultant (being part of BYPAS Consulting in Columbia, SC), who is already involved with other investments along the Atlantic shoreline. These projects, including the potential for a future oil refinery, will require GigaWatts of electrical power. Governors Stanford of South Carolina and Perdue of Georgia have already given

the “go-ahead” decision for a new port, the Jasper Ocean Terminal. I hold all the required knowledge and experience in working with big investments such as these, requiring mass efforts in design, engineering, and construction.

(Petition at 1-2). Reading Mr. Wojcicki’s stated interest in light of his desire to site the reactors near the ocean, it appears that Mr. Wojcicki is seeking work. To the extent that Mr. Wojcicki would suffer any injury, it would appear to be economic. However, standing under the AEA has been denied to interveners who have claimed only economic injury. See *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 77-8 (D.C. Cir. 1999). Thus, Mr. Wojcicki has not established standing.

As for standing based on proximity, Mr. Wojcicki does not mention whether he is asserting that he has standing to intervene in this proceeding based on proximity to the site. The Petition states that Mr. Wojcicki is “part of BYPAS Consulting in Columbia, SC.” (Petition at 1). Also, Mr. Wojcicki’s signature block provides the following address: “820 East Steele Rd., West Columbia, SC 29170.” (Petition at 2). Both Columbia and West Columbia are within a 50-mile radius of the location of the Summer plant. In order to assert the applicability of the proximity presumption, a petitioner is required to affirm where he or she resides and the nature of any work activities which are located within close proximity to the plant. See *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-91-2, 33 NRC 42, 47 (1991), appeal dismissed on other grounds, CLI-91-05, 33 NRC 238. However, it is unclear whether Mr. Wojcicki resides at the West Columbia address or just receives mail there. The extent of Mr. Wojcicki’s activities with BYPAS Consulting is likewise unclear. Also, Mr. Wojcicki does not state whether he maintains a regular presence in Columbia. If Mr. Wojcicki were to

clarify in his reply that either one of these were so, the NRC Staff would not object to Mr. Wojcicki's standing based on his proximity to the proposed plant.²

II. The Petitioner Has Not Submitted An Admissible Contention

A. Legal Standards for Contention Admissibility

The legal requirements governing the admissibility of contentions are well established and currently are set forth in 10 C.F.R. § 2.309(f) of the Commission's Rules of Practice (formerly § 2.714(b)).³

The standards in 10 C.F.R. § 2.309(f)(1) may be summarized as follows: An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon

² The Staff does note, however, that at least one licensing board has found that the fifty mile proximity presumption is rebuttable. See *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6,19 NRC 393 (1984). In *Beaver Valley*, the licensing board in an operating license proceeding accepted that Petitioner Walker "could have relied upon proximity of the facility to establish interest but chose to particularize the matter, none of which concerns is within the protection of the NRC and for which no relief can be granted." *Id.* at 429. If the reasoning in this decision were applied to Mr. Wojcicki's petition, the Staff believes that the nature of Mr. Wojcicki's stated interests would effectively rebut the proximity presumption.

³ The Commission recodified the requirements of former § 2.714, together with rules regarding contentions set forth in Commission cases, in § 2.309 in 2004. See "Changes to Adjudicatory Process" (Final Rule), 69 Fed. Reg. 2182 (Jan. 14, 2004), as corrected, 69 Fed. Reg. 25,997 (May 11, 2004). In the Statements of Consideration for the final rule, the Commission cited several Commission and Atomic Safety and Licensing Appeal Board decisions applying former § 2.714 in support of the recodified provisions of § 2.309. See 69 Fed. Reg. at 2202. Accordingly, Commission and Appeal Board decisions on former § 2.714 retain their vitality, except to the extent the Commission changed the provisions of § 2.309 as compared to former § 2.714.

which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.⁴ See 10 C.F.R. § 2.309(f) (2008). In order for a contention to be admissible, it must satisfy all six factors listed in 10 C.F.R. 2.309(f)(1).

⁴ Section 2.309(f) states the following requirements for contentions:

(f) Contentions.

- (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:
 - (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/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner 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. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.
- (2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report[.]

10 C.F.R. § 2.309(f)(1)-(2).

It is well established that the purpose for these requirements is: (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose. *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974); *Ariz. Pub. Serv. Co., et al.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 400 (1991). The *Peach Bottom* decision requires that a contention be rejected if:

- (1) it constitutes an attack on applicable statutory requirements;
- (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
- (3) it is nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;
- (4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (5) it seeks to raise an issue which is not concrete or litigable.

Peach Bottom, supra, 8 AEC at 20-21.

B. Discussion of Contention Admissibility

In the instant Petition, it is unclear whether Mr. Wojcicki purports to submit a contention. The language reads as a narrative of his desire to change the location of the proposed Summer nuclear reactors and of his educational and professional background. Petition at 1. Mr. Wojcicki does not present a specific statement of issues of law or fact that are being raised. See 10 C.F.R. § 2.309(f)(1)(i).

Nevertheless, even if Mr. Wojcicki's Petition can be construed as containing a proposed contention, it is inadmissible pursuant to 10 C.F.R. 2.309(f)(1). The Petition merely lists Mr. Wojcicki's professional qualifications and desire to become involved with "these major projects

as a veteran technical consultant.” Petition at 1. Further, the only statement in the Petition that hints at Mr. Wojcicki’s concerns is the statement that he wishes “to change the location of the two AP1000 nuclear reactors from the currently proposed Jenkinsville, SC site, to a new location near the Atlantic Ocean, providing significantly better economic, environmental, and social solutions.” (Petition at 1). Mr. Wojcicki, however, does not state the bases for this desire, as required by 10 C.F.R. § 2.309(f)(1)(ii). Nor does Mr. Wojcicki identify a dispute with any aspect of the SCE&G COLA as required by § 2.309(f)(1)(vi). Although Chapter 9 of the Environmental Report discusses alternative sites for the proposed reactors, and siting issues related to “economic, environmental, and social solutions” might come under the rubric of the NRC’s NEPA analysis, Mr. Wojcicki has failed to specify these issues with enough particularity to demonstrate that the issues he raises are material to the findings the NRC must make to issue the license. § 2.309(f)(1)(iv).

The Petition also does not present a concise statement of alleged facts and does not reference expert opinions which support Mr. Wojcicki’s siting issues. See 10 C.F.R. § 2.309(f)(1)(v). Mr. Wojcicki’s general recitation of his professional background does not establish expertise relevant to the issues he raises. Section 2.309(f)(1)(v) refers to supporting “expert opinion,” not mere “opinion,” and petitioners explicitly bear the burden of meeting the requirements of § 2.309(f)(1)(v). Merely claiming expertise does not suffice. Licensing boards have rejected at the contention admissibility stage statements of purported expert opinion where expertise was not established. See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC. 81, 90 (2004), *aff’d*, CLI-04-36, 60 NRC. 631; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, 367-68 (1998), reconsideration granted on another issue, LBP-98-17, 48 NRC 69. Even if Mr. Wojcicki is considered an expert with respect to the issues he raises, his bare conclusions are not enough to support contention admissibility. *Southern Nuclear*

Operating Co. (Early Site Permit for Vogtle ESP site), LBP-07-03, 65 NRC 237, 253 (2007) (stating, “[N]either mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention”).

As described above, the Petition does not possess sufficient information to show that there is a genuine dispute on a material issue of law or fact with SCE&G. See 10 C.F.R. §2.309(f)(1)(vi). Therefore, Mr. Wojcicki has not submitted an admissible contention.

CONCLUSION

In view of the foregoing, Joseph Wojcicki’s Petition should be denied. Mr. Wojcicki has not established standing and he has not submitted any admissible contentions.

Respectfully submitted,

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Dated at Rockville, Maryland
this 2nd day of January 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of)	
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SOUTH CAROLINA ELECTRIC AND GAS)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO 'PETITION TO INTERVENE' FROM JOSEPH WOJCICKI" has been served upon the following persons by Electronic Information Exchange this 2nd day of January, 2009:

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