

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
SOUTH CAROLINA ELECTRIC & GAS)	Docket Nos. 52-027 and 52-028
COMPANY AND SOUTH CAROLINA)	
PUBLIC SERVICE AUTHORITY (ALSO)	March 11, 2009
REFERRED TO AS SANTEE COOPER))	
)	
(Virgil C. Summer Nuclear Station Units 2)	
and 3))	

**SOUTH CAROLINA ELECTRIC & GAS COMPANY ANSWER TO JOSEPH
WOJCICKI'S MOTION FOR RECONSIDERATION**

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), South Carolina Electric & Gas Company (“SCE&G”) submits this Answer in opposition to the Motion for Reconsideration (“Motion”) filed by Mr. Joseph Wojcicki in the Virgil C. Summer Nuclear Station (“VCSNS”) Units 2 and 3 combined license (“COL”) proceeding on March 6, 2009.¹ Mr. Wojcicki’s Motion asks the Atomic Safety and Licensing Board (“Board”), previously designated to preside in this matter,² to reconsider its Order (Ruling on Standing and Contention Admissibility), dated February 18, 2009, LBP-09-2, as well as its Order dated March 3, 2009, reiterating that the Board, having

¹ Motion for The [sic] Reconsideration (Mar. 6, 2009).

² By Order dated March 3, 2009, the Board clarified that the Board’s February 18 Order terminated the proceeding before it, and, therefore, it no longer has jurisdiction over matters related to the proceeding. *See* Order (Regarding Mr. Wojcicki’s February 27, 2009 Filing; Notice of Termination of Proceeding) at 1 (Mar. 3, 2008) (unpublished). The Board noted that, as a consequence, the proper venue for any appeal of the February 18 Order is before the Commission itself, pursuant to 10 C.F.R. § 2.311.

terminated the proceeding before it in its earlier Order, no longer has jurisdiction. Mr. Wojcicki asks also that the Licensing Board “support” his Petition to Intervene (“Petition”).³

As discussed more fully below, Mr. Wojcicki failed to address the Commission’s substantive standards applicable to motions for reconsideration. Furthermore, with respect to reconsideration of the Board’s February 18 Order, the Motion is untimely. SCE&G also notes that, contrary to the requirements of 10 C.F.R. § 2.323(b), Mr. Wojcicki did not contact the applicant in an effort to resolve the underlying matter. For these reasons, Mr. Wojcicki’s Motion should be summarily denied.

II. DISCUSSION

The Board, in its February 18 Order, among other matters, denied Mr. Wojcicki’s Petition.⁴ It found that he could not be granted standing to participate in this proceeding because he failed to address the Commission’s standing requirements in his original Petition.⁵ Further, the Board found that, even if Mr. Wojcicki had established standing to participate in this proceeding, it would still deny his Petition because his initial statement calling for a change in the location of the proposed reactors failed to meet the contention admissibility requirements.⁶

On February 27, 2009, Mr. Wojcicki appealed LBP-09-2.⁷ Although making reference to 10 C.F.R. § 2.311, which provides that Board decisions wholly denying a petition to intervene may be appealed to the Commission, Mr. Wojcicki filed his Appeal before the Board. On

³ Motion at 1.

⁴ LBP-09-2, slip op. at 2, 28.

⁵ *Id.* at 5 and n.20.

⁶ *Id.* at 5 and n.21.

⁷ On March 9, 2009, SCE&G and the NRC Staff filed their respective briefs in opposition to Mr. Wojcicki’s Appeal. The Appeal is pending before the Commission. Although the Commission may delay consideration of Mr. Wojcicki’s Appeal while the instant Motion is pending before the Board, *see Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-01-1, 53 NRC 1, 3 (2001), inasmuch as the Motion is untimely, at least with respect to the February 18 Order, and, fails to satisfy the substantive requirements of 10 C.F.R. § 2.323(e), it should have no effect on the Appeal pending before the Commission.

March 3, 2009, the Board issued an Order properly clarifying that the Board's February 18 Order, by denying the two pending petitions to intervene, had the effect of terminating the proceeding before it, and that the proper venue for any further hearing-related matters was the Commission itself, pursuant to 10 C.F.R. § 2.311.⁸

Notwithstanding the Board's Order of March 3, 2009, clarifying the posture of this proceeding, and the very clear language of 10 C.F.R. § 2.311, Mr. Wojcicki filed the instant Motion with the Board. Once Mr. Wojcicki filed his Appeal, jurisdiction over the denial of his Petition was transferred to the Commission.⁹ Accordingly, SCE&G respectfully submits that this proceeding is now on appeal before the Commission, and therefore, the Board no longer has jurisdiction to entertain Mr. Wojcicki's Motion.¹⁰

Mr. Wojcicki's Motion not only flies in the face of the Board's March 3 Order, but utterly fails to satisfy the requirements of 10 C.F.R. § 2.323(e), which governs motions for reconsideration. Under this provision, a motion for reconsideration "must be filed within ten (10) days of the action for which reconsideration is requested" and "may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably

⁸ In addition to Mr. Wojcicki's petition, the Board denied the petition filed jointly by the Sierra Club and Friends of the Earth on December 9, 2008. See LBP-09-2, slip op. at 2.

⁹ See *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 & 2), ALAB-859, 25 NRC 23, 27 (1987) (holding that once a Licensing Board issues its decision disposing of an issue and appeals are filed, the reviewing tribunal has jurisdiction over new matters raised in connection with such issue). See also *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-726, 17 NRC 755, 757 n.4 (1983) (holding that a Licensing Board retains jurisdiction over a motion to reopen "until exceptions to an initial decision have been filed"); *Curators of the Univ. of Mo.*, CLI-95-1, 41 NRC 71, 94 (1995) (discussing the Appeal Board's reasoning in *Limerick* approvingly and applying it to a motion for reconsideration).

¹⁰ SCE&G files this Answer with Board in recognition that every tribunal has the inherent authority to determine, in the first instance, its own jurisdiction. See *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-591, 11 NRC 741, 742 (1980).

been anticipated, that renders the decision invalid.”¹¹ First, while timely with respect to the Board’s March 3 Order, insofar as the Motion asks for reconsideration of the Board’s February 18 Order, it is clearly untimely, having been filed well after the ten-day period permitted for seeking reconsideration.¹² The Motion makes no attempt to address this fatal shortcoming.

And second, the Motion wholly fails, in regard to both Orders, to address the significant substantive obligation imposed by 10 C.F.R. § 2.323(e), that is, to seek leave of the Board to file a motion for reconsideration, based upon a showing of “compelling circumstances, such as the existence of clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.”¹³ Mr. Wojcicki’s Motion is devoid of any identification of errors or deficiencies in the Board’s earlier decisions demonstrating that those rulings failed to consider or understand governing law or precedent that should have controlling effect, or some key factual information.¹⁴

¹¹ 10 C.F.R. § 2.323(e).

¹² *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 409 (2005) (“Lateness alone is sufficient to reject [an untimely] reconsideration request.”) (citation omitted).

¹³ 10 C.F.R. § 2.323(e).

¹⁴ *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-38, 54 NRC 490, 493 (2001) (citation omitted) (noting that, in seeking reconsideration, a movant must identify errors or deficiencies in the Board’s determination demonstrating that the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information).

III. CONCLUSION

Mr. Wojcicki's Motion thus fails to comply with 10 C.F.R. §§ 2.311 and 2.323(e), as well as the Board's March 3 Order, and, consequently, must be denied.

Respectfully submitted,

Signed (electronically) by Kathryn M. Sutton

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Dated in Washington, D.C.
this 11th day of March 2009

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CERTIFICATE OF SERVICE

I hereby certify that, on March 11, 2009, a copy of “South Carolina Electric & Gas Company’s Answer to Joseph Wojcicki’s Motion for Reconsideration” was served electronically with the Electronic Information Exchange on the following recipients:

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