

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Michael M. Gibson
Dr. Sue H. Abreu

In the Matter of

THOMAS B. SAUNDERS

(Confirmatory Order)

Docket No. IA-19-027-EA

ASLBP No. 20-963-01-EA-BD01

January 8, 2020

MEMORANDUM AND ORDER
(Denying Motion to Consolidate)

Pending before this Licensing Board is a request by Leonard Sparks to intervene in this proceeding to challenge a Confirmatory Order (CO) issued by the NRC Staff to Thomas Saunders.¹ Mr. Sparks' request includes a motion to consolidate this proceeding with a challenge he is bringing to a CO issued by the NRC Staff to the Southern Nuclear Operating Company (SNC) in a different proceeding. See Sparks' Motion at 1.² For the reasons discussed below, we deny Mr. Sparks' motion to consolidate his intervention requests. We will address Mr. Sparks' request to intervene in this proceeding in a subsequent memorandum and order.³

¹ See Motion to Intervene [in the Saunders Proceeding] and Motion to Combine Opposition with Related Proceeding (Nov. 29, 2019) [hereinafter Sparks' Motion].

² When Mr. Sparks filed his November 29 request seeking intervention and consolidation, he had not yet filed a challenge to the SNC CO. He filed such a challenge on December 20, 2019. See Motion to Intervene [in the SNC Proceeding] and Motion to Combine Opposition with Related Proceeding (Dec. 20, 2019) [hereinafter Sparks' SNC Petition].

³ To be clear, our ruling is limited to denying Mr. Sparks' motion to consolidate his intervention requests. It does not preclude him from again seeking consolidation in the event he

I. BACKGROUND

For a consolidation request to be granted, a movant must demonstrate “good cause.” 10 C.F.R. § 2.317(b). As discussed more fully infra Part II, to satisfy the “good cause” standard, the movant must establish that the proceedings (here, Mr. Sparks’ two intervention requests) involve common questions of law or fact such that consolidation would promote adjudicatory efficiency and be conducive to the ends of justice. We summarize below the two challenged COs that Mr. Sparks seeks to consolidate as a prelude to our analysis of the commonality of questions of law or fact involved in Mr. Sparks’ intervention requests.

A. The CO Issued to Mr. Saunders

In 2017, Mr. Saunders held the position of Contracts and Procurement Director for Construction at SNC’s Vogtle Electric Generating Plant, Units 3 and 4 (Vogtle), in Georgia.⁴ In November 2018, the NRC Office of Investigations issued a report concluding that Mr. Saunders appeared to have willfully violated 10 C.F.R. § 52.5.⁵ According to the report, the offense occurred in July 2017 when Mr. Saunders directed that Mr. Sparks (who was a contract employee at Vogtle) be removed from the site and terminated. See Saunders CO at 2. When Mr. Saunders took that action, he was aware that Mr. Sparks previously had engaged in protected activity by raising numerous safety-related concerns. See id. at 1–2; Sparks’ Motion at 3–4.⁶

were to attain “party” status—i.e., in the event his intervention requests were granted and he wished to seek to consolidate the adjudication of any admitted contentions. See infra note 12.

⁴ See [CO to Thomas B. Saunders] Effective Upon Issuance (IA-19-027) at 1 (Oct. 21, 2019) (ADAMS Accession No. ML19269C005) [hereinafter Saunders CO], published at 84 Fed. Reg. 57,778 (Oct. 28, 2019).

⁵ Section 52.5(a) provides that “[d]iscrimination . . . against an employee for engaging in certain protected activities is prohibited.” 10 C.F.R. § 52.5(a). “Protected activities” include the raising of safety-related concerns. See id. § 52.5(a)(1)(i).

⁶ Although Mr. Sparks is not identified by name in the Saunders CO, he attests (and neither Mr. Saunders nor the NRC Staff disputes) that he is the adversely impacted employee described therein. See Sparks’ Motion at 3 n.1.

In June 2019, the NRC Staff notified Mr. Saunders of the results of the investigation and provided him with two options: (1) attend a predecisional enforcement conference; or (2) participate in an alternative dispute resolution (ADR) mediation session with the NRC.⁷ See Saunders CO at 2. Mr. Saunders chose the latter option, and on August 15, 2019, he and the NRC Staff participated in an ADR mediation session arranged through Cornell University's Institute on Conflict Resolution. See id.

The mediator assisted the parties in reaching the settlement agreement embodied in the Saunders CO. See Saunders CO at 2. In that October 21, 2019 CO, Mr. Saunders “acknowledge[d] that a violation of 10 [C.F.R. §] 52.5 (Employee Protection) occurred,” id., and he committed to taking specified corrective actions. In particular, Mr. Saunders committed to making presentations at SNC meetings and training sessions addressing “lessons learned regarding the importance of employee protection (to include contractors), why it is necessary to ensure proper follow-up in response, and proper follow-up when evaluating any potentially adverse personnel decisions.” Id. Those presentations will be “based on Mr. Saunders’ personal case study and [he] will honestly answer questions about what he failed to do ([specifically, he failed to] follow STAR [i.e., the SNC stop, think, act, review protocol governing employee protection matters], seek advice from management, consult with [the SNC Human Resources office], and engage with the consolidated concerns department).” Id. at 3. Mr. Saunders also committed to (1) making presentations at five nuclear industry forums within one year of the CO’s issuance; (2) submitting an article for publication to a nuclear industry forum; and (3) presenting at the NRC’s annual Regulatory Information Conference (RIC), if asked by the NRC Staff. See id. at 5–6.

⁷ An ADR mediation process is one in which a neutral mediator, with no decision-making authority, assists the parties in reaching an agreement on resolving any differences regarding a dispute. See Saunders CO at 2.

The NRC Office of Enforcement concluded that Mr. Saunders' commitments were "acceptable and necessary" and "that with these commitments the public health and safety are reasonably assured." Saunders CO at 4.

The CO stipulated that it "settle[d] the matter between the parties," Saunders CO at 4, and that Mr. Saunders waived his right to a hearing. See id. The CO provided, however, that any other person adversely affected by the CO may request a hearing. See id. at 7. Mr. Sparks filed an intervention request in which he seeks to challenge, inter alia, the accuracy of the facts in the CO and the sufficiency of the corrective actions. See Sparks' Motion at 7. Mr. Sparks moved to consolidate his challenge to the Saunders CO with his challenge to the SNC CO. See Sparks' Motion at 1.

Mr. Saunders opposes Mr. Sparks' intervention request and his motion to consolidate. See Answer of Thomas B. Saunders in Opposition to Leonard Sparks' Motion to Intervene and Request for Hearing at 1–2 (Dec. 26, 2019) [hereinafter Saunders' Answer]. The NRC Staff opposes Mr. Sparks' intervention request but does not take a position on consolidation. See NRC Staff's Answer to Request for Hearing by Leonard Sparks (Dec. 19, 2019) [hereinafter NRC Staff's Answer]. Mr. Sparks filed a reply to Mr. Saunders' answer, see Sparks' Reply to Saunders' Answer to Sparks Motion to Intervene (Jan. 3, 2020),⁸ but he did not reply to the NRC Staff's answer.

B. The CO Issued to SNC

The November 20, 2019 CO issued by the NRC Office of Enforcement to SNC⁹ embodies a settlement agreement between the two parties resulting from an ADR mediation

⁸ Mr. Sparks accompanied his reply with an unopposed motion to extend the January 2, 2020 deadline for filing his reply. See Consent Motion for Extension of Time (Jan. 3, 2020). We granted that motion. See Licensing Board Order (Granting Consent Motion for Extension of Time) (Jan. 7, 2020) (unpublished).

⁹ See [CO to SNC] Modifying License Effective Upon Issuance (EA-18-130; EA-18-171) (Nov. 20, 2019) (ADAMS Accession No. ML19249B612) [hereinafter SNC CO], published at 84 Fed. Reg. 65,426 (Nov 27, 2019).

session in August 2019 addressing two allegedly willful violations of 10 C.F.R. § 52.5.¹⁰ See SNC CO at 1–2. In one incident, the NRC Office of Investigations determined that “SNC directed a contract employee at the Vogtle Units 3 and 4 construction site be removed in December 2015, in part, for engaging in protected activity.” Id. at 2. The other incident involved Mr. Saunders’ 2017 misconduct toward Mr. Sparks that is described supra Part I.A; specifically, the NRC Office of Investigations determined that “a contract employee [i.e., Mr. Sparks] was removed from the site by an SNC official [i.e., Mr. Saunders] on July 13, 2017, in part, for engaging in protected activity.”¹¹ Id. Recognizing the “substantially similar broad corrective actions expected from the two cases, the NRC and SNC agreed to include both cases in [a single mediation session].” Id.

Although the “NRC and SNC agree[d] to disagree as to whether the violations occurred,” SNC CO at 1, 9, SNC nevertheless agreed to NRC modifications of its operating licenses for the Joseph M. Farley Nuclear Plant, the Edwin I. Hatch Nuclear Plant, and the Vogtle Electric Generating Plant to incorporate multiple corrective actions, including the following: (1) SNC will establish a fleetwide Employee Concerns Program that, inter alia, manages the intake of all construction concerns raised by employees and tracks corrective actions; (2) SNC will institute a review process covering termination or suspension of SNC employees that will consider, prior to termination or suspension, whether such adverse actions were the result of protected activity; (3) SNC will maintain a Discipline Review Process that must be followed by SNC, contractors, and subcontractors at the Vogtle project site when termination of a contract employee engaged

¹⁰ Like the ADR session between the NRC and Mr. Saunders, the ADR session between the NRC and SNC was arranged through Cornell University’s Institute on Conflict Resolution and performed by a professional mediator. See SNC CO at 2.

¹¹ The SNC CO does not identify Mr. Saunders or Mr. Sparks by name; however, Mr. Sparks attests (and neither Mr. Saunders nor the NRC Staff disputes) that they were the parties involved in the July 2017 incident. See Sparks’ Motion at 4. Mr. Saunders was not the SNC official involved in the December 2015 incident that is described in the SNC CO. See id.; Saunders’ Answer at 8–9; NRC Staff’s Answer at 2 n.5.

in nuclear safety-related work is under consideration; (4) for three years, SNC will require all SNC employees who are onboarding to complete Safety Conscious Work Environment (SCWE) training, including training on the relevant NRC regulations protecting employees from discrimination based on protected activity; (5) for three years, SNC will require all new SNC supervisors to receive SCWE training within six months of beginning work as a supervisor; (6) within twelve months, SNC will present SCWE insights derived from these events to an industry-sharing forum (e.g., the NRC's RIC or the National Association of Employee Concerns Professionals); (7) within three months, SNC will revise its SCWE policy to address lessons learned; (8) within three months, a senior SNC executive will issue a written communication to all SNC employees and contractors at the Vogtle project site reinforcing SNC's commitment to maintaining an SCWE and reaffirming SNC's insistence on the protection of employees' rights and obligations to raise safety issues without fear of retaliation; and (9) within six months, and again within thirty months, SNC will obtain a third-party, independent SCWE survey of the Vogtle project site, and the results of both surveys will be made available to the NRC. See SNC CO at 1, 3–14.

The NRC Office of Enforcement concluded that SNC's commitments were "acceptable and necessary" and "that with these commitments the public health and safety are reasonably assured." SNC CO at 10.

The CO stipulated that it "settle[d] the matter between the parties," SNC CO at 9, and that SNC waived its right to a hearing. See id. The CO provided, however, that any other person adversely affected by the CO may request a hearing. See id. at 14. On December 20, 2019, Mr. Sparks filed an intervention request in which he seeks to challenge, inter alia, the adequacy of the facts in the CO and the sufficiency of the corrective actions. See Sparks' SNC Petition at 7.

II. LEGAL STANDARD

The NRC regulation governing consolidation provides in relevant part:

On motion and for good cause shown or on its own initiative, the Commission or the presiding officers of each affected proceeding may consolidate for hearing or for other purposes two or more proceedings . . . if it is found that the action will be conducive to the proper dispatch of its business and to the ends of justice

10 C.F.R. § 2.317(b). Pursuant to Commission case law, only a “party” to a proceeding has a “right to a formal consolidation.” Edlow Int’l Co. (Agent for the Gov’t of India on Application to Export Special Nuclear Materials), CLI-77-16, 5 NRC 1327, 1328 (1977).¹² Section 2.317(b) nevertheless confers discretion on a licensing board to grant consolidation “on its own initiative . . . [if such] action will be conducive to the proper dispatch of its business and to the ends of justice.” 10 C.F.R. § 2.317(b); see Edlow Int’l Co., CLI-77-16, 5 NRC at 1328. Finally, the consolidation standard in section 2.317(b) “mirrors Rule 42(a) of the Federal Rules of Civil Procedure which . . . provides that, if actions involve common questions of law or fact, they may be consolidated if consolidation would ‘avoid unnecessary costs or delay.’” Edlow Int’l Co., CLI-77-16, 5 NRC at 1328 (quoting Fed. R. Civ. P. 42(a)(3) (1966)).

III. ANALYSIS

Mr. Sparks moves to consolidate his intervention request challenging the accuracy and sufficiency of the Saunders CO with his intervention request challenging the adequacy and sufficiency of the SNC CO. See Sparks’ Motion at 1, 8–9.¹³ At the outset, we observe that two

¹² In NRC administrative adjudications, a “party” to a proceeding is distinguished from a “participant.” The latter is defined as an individual who, like Mr. Sparks, “has petitioned to intervene in a proceeding or requested a hearing but that has not yet been granted party status.” 10 C.F.R. § 2.4 (defining “Participant”).

¹³ Mr. Sparks also requests in passing that we consolidate this proceeding with a “Notice of Violation [NOV] against yet another SNC manager . . . for ‘blacklisting’ employees engaged in protected activities.” Sparks’ Motion at 8. We summarily deny that request because the NOV is not an agency enforcement order and, thus, does not include a provision allowing third parties an opportunity to intervene or seek a hearing. See [NOV] to Mark Rauckhorst (Nov. 20, 2019) (ADAMS Accession No. ML19301C710). Moreover, Mr. Sparks’ request to consolidate this proceeding with the NOV suffers from the two threshold impediments described above in text.

independent threshold obstacles impede consolidation. First, insofar as Mr. Sparks currently is not a “party” to either proceeding, see supra note 12, he has “no right to a formal consolidation.” Edlow Int’l Co., CLI-77-16, 5 NRC at 1328. Second, Mr. Sparks failed to comply with the NRC regulatory requirement establishing that a motion must include “a certification by the attorney . . . of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issues(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.” 10 C.F.R. § 2.323(b). Because of this failure, Mr. Sparks’ “motion must be rejected.” Id.

We nevertheless have discretion to consider consolidation on our own initiative to determine whether there are common questions of law or fact in the intervention requests such that consolidation would promote adjudicatory efficiency and be conducive to the ends of justice. See 10 C.F.R. § 2.317(b). Exercising this discretion, we conclude that consolidation is not warranted.¹⁴

At first glance, one might conclude that Mr. Sparks’ challenges to the two COs would involve common questions of law or fact because both relate to unlawful employment discrimination by SNC management based on protected conduct. On closer examination, however, it is clear that the two COs are more notable for their differences than their similarities.

As discussed supra Part I.A, the Saunders CO was issued to an individual who—having acknowledged a violation of the NRC’s Employee Protection regulation, 10 C.F.R. § 52.5—agreed to make presentations at SNC meetings and training sessions at the Vogtle site “based on [his] personal case study,” including his failure to comply with company policies that are designed to protect employees. Saunders CO at 3. In addition, he agreed to make similar

¹⁴ Mr. Sparks’ pleadings fail to cite, much less discuss, the NRC regulation governing consolidation. Nor does he craft a cogent argument demonstrating that the challenges he raises in his intervention requests involve common questions of law or fact sufficient to conclude that consolidation would promote adjudicatory efficiency.

presentations at five nuclear industry forums and to submit an article for publication to an industry forum. See id. at 5–6.

In contrast, as discussed supra Part I.B, the SNC CO was issued to a company that—although it denied violating the agency’s Employee Protection regulation, 10 C.F.R. § 52.5—agreed to adopt broad corrective actions that were not limited to the Vogtle site, but that extended to its fleet of nuclear plants. See SNC CO at 1. Additionally, the curative actions SNC agreed to implement, which were institutional in nature and embodied in SNC’s licenses, included such programmatic changes as maintaining a fleetwide Employee Concerns Program; maintaining an adverse action review process for employees; maintaining a Discipline Review Process for contractors and subcontractors; and enhancing fleetwide awareness and effectiveness of the SCWE policy. See id. at 10–14.

In sum, Mr. Sparks is challenging different COs, issued to different respondents, arising from different (albeit partly overlapping) facts, and containing different corrective actions tailored to provide different (albeit complementary) cures. Moreover, in the Saunders CO, the respondent acknowledged a regulatory violation, whereas in the SNC CO, the respondent denied it. In light of these significant differences, we conclude that consolidation of the intervention requests would neither promote efficiency nor “be conducive to the proper dispatch of [adjudicatory] business.” 10 C.F.R. § 2.317(b). Consolidation is therefore not warranted. Cf. Molycorp. Inc. (Washington, Pennsylvania), LBP-00-10, 51 NRC 163, 172 (2000) (declining to consolidate two separately noticed materials license amendment proceedings, observing that each proceeding authorizes “its own discrete activities,” and the fact that “some factual or legal questions may overlap . . . is fortuitous, not legally controlling”).

IV. CONCLUSION

For the foregoing reasons, we deny Mr. Sparks' motion to consolidate.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

/RA/

Michael M. Gibson
ADMINISTRATIVE JUDGE

/RA/

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ADMINISTRATIVE JUDGE

Rockville, Maryland
January 8, 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

Mr. Thomas B. Saunders

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IA-19-027 EA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Motion to Consolidate) (LBP-20-01)** have been served upon the following persons by Electronic Information Exchange.

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Thomas Saunders IA-19-027 EA

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[Original signed by Clara Sola _____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of January 2020.