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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

'93 MAR 22 P4:21

In the Matter of)

GEORGIA POWER COMPANY)
et al.,)

(Vogtle Electric Generating)
Plant, Unit 1 and Unit 2))

Docket Nos. 50-424-OLA-3
50-425-OLA-3

Re: License Amendment
(transfer to Southern Nuclear)

ALLEN MOSBAUGH'S BRIEF IN OPPOSITION
TO GEORGIA POWER COMPANY'S APPEAL OF THE
LICENSING BOARD'S FEBRUARY 18, 1993 MEMORANDUM AND ORDER

Pursuant to the Order of the Commission, dated March 18, 1993, Petitioner Allen L. Mosbaugh files his brief in opposition to Georgia Power Company's ("GPC") appeal of the Atomic Safety and Licensing Board's ("ASLB") Memorandum and Order of February 18, 1993.

- 1. GPC'S ARGUMENT THAT PETITIONER CANNOT ESTABLISH STANDING IN FACT IS ERRONEOUS.

Injury in fact, as it applies to proceedings brought under section 189(a) of the Atomic Energy Act ("AEA"), does not require Petitioner to prove that a harm will occur. Petitioner need only establish that there is an increased possibility of an accident stemming from the action contemplated in the amendment to the operating license. TRUMP-S Project, LBP-90-18, 31 NRC 559, 566 (June 15, 1990). At issue here is whether the change of operational authority gives rise to a potential increased risk of

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an accident. Plainly it does,¹ and GPC's refusal to realize this is troubling.

The harm stemming from the total transfer of operational control, which GPC seeks in its amendment, is perhaps best illustrated by way of analogy. Assume that a licensee sought to amend an operating license for a nuclear power station and sought to transfer control to an organization managed by members of a terrorist organization. Whether or not the organization had the requisite technical and financial resources to operate this nuclear facility, no one could reasonably question the assertion that this transfer of control did not pose a potential increased risk to the public. Indeed, the potential for intentional conduct on the part of the proposed organization's management could result in the release of radiation. Generally speaking, an individual with real property within a fifty mile radius of this plant would have standing to challenge the transfer. The same analogy holds true here. Mr. Mosbaugh alleges, with an adequate basis, that the organization GPC has chosen to become the licensed operator of Plant Vogtle is capable of, and in fact has, engaged in intentional criminal wrongdoing and that the propensity for such intentional wrongdoing constitutes a distinct

¹ The safety significance of the change in operational management was addressed in Public Service Company of New Hampshire, et al, (Seabrook Station, Units 1 & 2), CLI-90-02, 31 NRC 197 (1990), where the Commission observed that the "applicant's organizational structure and personnel qualifications requirements" has "safety significance" and it is "[p]lainly" "essential" to the safe operation of a power station.

and palpable harm to Petitioner.²

GPC further asserts that Mr. Mosbaugh cannot establish "injury in fact" because the proposed amendment to the license constitutes "little more than a name change." GPC's Appeal Brief at p. 15. This assertion totally ignores the fact that Mr. Mosbaugh, with adequate basis, alleged that in 1988 GPC illegally transferred control of its nuclear operations to an entity known as the SONOPCO project and that Mr. Mosbaugh's "injury in fact" began back in 1988 with the illegal transfer of operational authority to the SONOPCO project.³

In addition to NRC staff's persuasive argument on this issue

² Petitioner further contends that the transfer of operational authority is such a fundamental change of the license that, under Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 & 2), CLI-89-21, 30 NRC 325 (1989), that his mere proximity to plant Vogtle constitutes sufficient grounds for standing whether or not the petitioner specifically alleges an "injury in fact." Specifically the Commission in Florida Power notes that proximity alone is sufficient where the challenged action "involved the construction or operation of the reactor itself, with the clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences." Id., 30 NRC at 329. Only where the amendment to a license is minor in nature, must the petitioner "allege some specific 'injury in fact' that will result from the action taken." Id., at 329-330. Indeed, where the amendment is more than minor in nature, a petitioner, as a matter of law, has standing and need allege nothing more than proximity:

[C]lose proximity has always been deemed to be enough, standing alone, to establish the requisite interest.

Virginia Electric and Power Co. (North Anna, Units 1 & 2), ALAB-522, 9 NRC 54, 56 (citations omitted). See also Northeast Nuclear Energy Co. (Millstone Nuclear Power Station Unit 2), LBP-92-28, 35 NRC ___, slip op. at 20 (September 30, 1992).

³ Petitioner's original challenged to the illegal transfer of control was initially addressed by way of a 2.206 petition filed with the Commission in September of 1990.

(See NRC Staff Brief pp. 5-7), common sense dictates that if the management of SONOPCO does not have the requisite character and competence to operate Plant Vogtle, a serious and recognizable issue would be presented.

GPC's assertion that the amendment merely seeks a name change ignores the underlying allegation that GPC seeks to ratify the illegal creation of the SONOPCO project and the fact that GPC transferred control of its nuclear operations to a Southern Company executive, Mr. Farley, without first obtaining the consent of the NRC.⁴ The ASLB concluded that Petitioner adequately alleged that by allowing its nuclear operations to be transferred to the SONOPCO project, GPC had run amuck of the "nonalienation requirement" set out in 10 C.F.R. §50.54(c).⁵

⁴ As the ASLB found, Mr. Mosbaugh alleged with an adequate basis that GPC improperly transferred control of its nuclear operations to the SONOPCO project in 1988, and that Mr. Farley -- who is not an employee of GPC -- served as the chief executive. Perhaps Farley was able to take over control of GPC's nuclear operations because the GPC executive formerly responsible for nuclear operations, H. Grady Baker, believed Farley to be a GPC officer, which he was not. See ASLB Memorandum and Order at pp. 11-12.

⁵ 10 C.F.R. §50.54(c) states:

Neither the licensee, nor any right thereunder . . . shall be transferred, assigned, or disposed of in any manner, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions and the act and gives its consent in writing.

No where does GPC allege that it received, in writing, permission from the Commission to transfer responsibility for the operation of Plant Vogtle to Mr. Farley.

Clearly, Petitioner challenges much more than a name change. He alleged, with adequate basis, that in 1988 GPC illegally transferred control of its nuclear operations to the SONOPCO project. As such, Mr. Mosbaugh began to suffer "injury in fact" once GPC allowed the licensed operation of Plant Vogtle to be transferred to the SONOPCO project.

The Board's analogy to Northeast Nuclear Energy Co. (Millstone Power Station, Unit 2), 35 NRC ____, LBP-92-28 slip op. (September 30, 1992) was wholly appropriate because in the Northeast the petitioner (1) did not claim that the calculation error leading to the unsafe condition stemmed from intentional misconduct on the part of the licensee, and (2) that the licensee's reason to amend the license was to increase the safety of the plant.

First, GPC licensee that its amendment will not increase the safe operation of the plant. According to GPC it will have no effect. Second, Mr. Mosbaugh alleges that the harm resulting from the transfer stems from intentional misconduct on the part of SONOPCO's management which demonstrates that SONOPCO does not have the requisite character and competence to obtain a nuclear license to operate Plant Vogtle. Third, just as in the NNEC case, if the amendment were denied, the safety problem would not immediately be abated (i.e., in NNEC, the calculation error would continue to exist and with respect to Plant Vogtle, the much of the same management would continue to operate the plant).

GPC's assertion that "[t]he important distinction between

NNEC and the instant case is that, in NNEC, the licensee amendment was predicated upon (indeed its sole purpose was to correct) a calculation error discovered by the licensee which caused the actual margin of safety to be less than that of the original design" and that this could have resulted in "a margin of safety below the original, licensed design." GPC Appeal Brief at p. 18 (emphasis added). This distinction must fail because Petitioner has sufficiently alleged that the margin of safety at Plant Vogtle is less because the original management over plant operation did not engage in "risk taking" where the post-SONOPCO management not only engaged in risk taking, they intentionally supplied the NRC with false information. See ASLB Memorandum and Order at p. 5.

GPC also asserts that "the Vogtle license amendments are not intended to correct a deficient condition or a margin of safety" and that the amendment is not necessary in order to correct "a condition prohibited by NRC requirements." Id., at p. 19. GPC is dead wrong. Petitioner has alleged, with sufficient basis, that GPC violated 10 C.F.R. §50.54(c) by transferring operational authority to SONOPCO without first obtaining written permission from the Commission, and 10 C.F.R. §50.34(b)(6)(i) by failing to inform the NRC about the licensee's organizational structure, allocation of responsibilities and authorities, and personnel qualification requirement. As far as Petitioner can tell, the amendment to the operating license offers the only method available for GPC to cure the present violation of 10 C.F.R.

§50.54(c) and 50.34(b)(6)(i) because Petitioner has adequately alleged that SONOPCO rather than GPC currently controls the operation of Plant Vogtle. Indeed, it may also offer Mr. Mosbaugh an opportunity to cure the injury in fact stemming from the alleged illegal transfer of control of Plant Vogtle's operation to SONOPCO.⁶

Because Mr. Mosbaugh's injury flows from the creation of the SONOPCO project the ASLB correctly notes that:

Mr. Mosbaugh has adequately alleged, with basis, that the formation of Southern Nuclear's relationship to Vogtle violated NRC regulations, evidencing a lack of trustworthy character in Southern Nuclear. If this contention were sustained, we might direct that the licensee amendment be denied or conditioned on changes in the structure and personnel of Southern Nuclear.

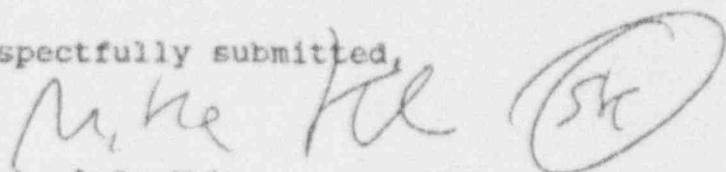
Georgia Power Co., et al. (Plant Vogtle, Units 1 & 2), LBP-93-5, slip op. at p.12.

CONCLUSION

For reasons stated in this brief, the February 18, 1993 ASLB M&O and the Brief submitted by the NRC staff, GPC's appeal must be dismissed.

⁶ The injury in fact associated with the amendment is essentially identical to the injury in fact stemming from the illegal transfer of control to SONOPCO. Thus, if the Board fashions conditions on the transfer that remedy the harm stemming from the proposed amendment, the injury in fact stemming from the illegal transfer would be abated at the same time.

Respectfully submitted,



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Dated: March 22, 1993

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CERTIFICATE OF SERVICE

I hereby certify that commencing at or before 4:15 p.m., on March 22, 1993 copies of: ALLEN MOSBAUGH'S BRIEF IN OPPOSITION TO GEORGIA POWER COMPANY'S APPEAL OF THE LICENSING BOARD'S FEBRUARY 18, 1993 MEMORANDUM AND ORDER was served in the above-captioned proceeding, by facsimile upon the following:

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