

3/16/82

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
SOUTH CAROLINA ELECTRIC & GAS )  
COMPANY )  
Virgil C. Summer Nuclear Station, )  
Unit 1 )

Docket No. 50-395



NRC STAFF RESPONSE TO INTERVENOR'S MOTION FOR  
ADMISSION OF NEW CONTENTION

I. INTRODUCTION

On February 24, 1982, the Intervenor filed a motion to reopen the record in the captioned proceeding for the late admission of a proposed new contention. The evidentiary record in this case was closed on January 20, 1982. The present motion seeks to reopen the record to admit a new contention regarding the adequacy of the Applicant's normal and emergency operating procedures.<sup>1/</sup>

1/ The proposed new contention states:

The Applicant and the NRC Staff cannot provide reasonable assurance that the Summer plant can be operated without endangering the health and safety of the public because the normal and emergency operating procedures are so badly done that they invite operator error, SCE&G's management has shown that it does not follow up well enough to ensure that procedures are correct and that they are followed, and SCE&G management has demonstrated through its operating procedures that it places economic concerns before safety. The emergency operating procedures do not meet the Commission's post-TMI requirements in NUREG-0737. Relying upon changes early in the plant's life, as the Staff would do, provides no reasonable assurance of the health and safety of the public in that the TMI accident clearly proved that bad operating procedures under normal and emergency operating conditions could cause a severe accident early in plant life.

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The grounds asserted for the proposed new contention is a Board Notification (BN-82-7), dated January 28, 1982, regarding a trip report by a former member of the NRC Staff, Mr. Manuel Madeires, (Medeiros trip report) critical of operating procedures at the Summer plant. For the reasons set forth below, and in the attached Staff affidavits,<sup>2/</sup> the Staff submits that the present motion should be denied.

## II. Discussion

Intervenor seeks, in his motion, to, in effect, have the record reopened and to have a new contention admitted for litigation. Separate legal standards govern the consideration of motions to reopen an NRC proceeding and the introduction of a late contention in any such proceeding. The Staff will discuss both standards in turn.

### A. Reopening

The standards for reopening a record in Commission proceedings are defined in Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). Therein, the Appeal Board makes it clear that the proponent of a motion to reopen bears a heavy burden. The movant must demonstrate that: (1) the motion is timely, (2) the motion is directed to a significant safety or environmental issue,<sup>3/</sup> and (3) a different result would have been reached

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<sup>2/</sup> See separate Affidavits of William G. Kennedy and Virgil L. Brownlee Regarding Motion for Admission of New Contention and attachments thereto.

<sup>3/</sup> See Georgia Power Co. (Alvin W. Vogtle Nuclear Power Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 409 (1975); Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

initially had the material submitted in support of the motion been considered.<sup>4/</sup> These standards were reiterated in Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 804 (1979), where, as here, the motion to reopen was filed after the record was closed but prior to issuance of a decision by the licensing board.<sup>5/</sup> Thus, the motion to reopen must be timely and not based on information that reasonably could have been raised prior to the close of the record, it must involve a matter which is of some significance, and it must be such that the outcome of the case will be affected by the alleged new information.

Even if these factors are resolved in the movant's favor, there is no justification to reopen the record for an additional evidentiary hearing unless a triable issue of fact (that which would defeat a summary disposition motion) exists. Vermont Yankee, supra, 6 AEC at 523. According to the Appeal Board, a hearing should not be reopened if the affidavits submitted in response to the motion "demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding." Id. As the accompanying Staff affidavits, and attached memoranda and inspection report attest, that is

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<sup>4/</sup> See Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974).

<sup>5/</sup> See also Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903 (1981).

precisely the situation which obtains in the present situation. The Staff will first discuss the factors relevant to reopening the record.

The first relevant factor is the timeliness of the motion. The Intervenor cites the January 29 Board notification and accompanying Medeiros trip report as the basis for his motion. The Medeiros trip report criticizes the composition of the Applicant's operating procedures and makes certain generalized observations about nuclear power plant operating procedures.

The subject Board Notification was initiated because comments in the Medeiros trip report appeared to contradict the favorable conclusion reached in the Staff Safety Evaluation Report (SER)<sup>6/</sup> regarding the adequacy of emergency operating procedures. The Staff reached the preliminary conclusion in the Board Notification that the Medeiros comments did not alter the pertinent SER conclusion. This was later verified following a re-evaluation at the plant.<sup>7/</sup>

An argument can be made that the Medeiros trip report provides an adequate justification for an effort to adjudicate specific identified deficiencies in operating procedures. However, the fact that shortcomings in operating procedures have been known and reported since 1980,<sup>8/</sup> renders the present attempt to litigate inadequacies in such procedures exceedingly untimely. The Intervenor's claim that he had no access to operating procedures and could not have known that uncorrected

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<sup>6/</sup> See, e.g., SER, § 22.2, para. I.C.1, § 22.3, para. I.C.8.

<sup>7/</sup> See Kennedy affidavit and attachment.

<sup>8/</sup> Id. at 2.

errors existed is unfounded. The Intervenor knew that operating procedures existed at the plant.<sup>9/</sup> At least certain procedures appear to have been served on the Intervenor by the Applicant in correspondence with the Staff.<sup>10/</sup> Yet the Intervenor did not seek to raise a contention regarding procedures or otherwise seek to examine the procedures to determine whether there was a basis to challenge them at hearing.

Normal (system and general) operating procedures have been under review and regarded by NRC Region II as an outstanding item since May 1980 although improvements in the procedures have been evident over time. This review has been documented in periodic inspection reports available in the public document room.<sup>11/</sup> The Region II review of emergency operating procedures began in January, 1982.<sup>12/</sup>

Since the implementation of the TMI Action Plan, emergency operating procedures are also reviewed by the Office of Nuclear Reactor Regulation (NRR) as part of its safety evaluation.<sup>13/</sup> That review was documented in the February, 1981 Summer Safety Evaluation Report.

Thus, the Intervenor had ample knowledge and opportunity to seek to litigate plant operating procedures in a timely manner had he so desired. Moreover, the Intervenor was given an explicit opportunity following the

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<sup>9/</sup> Motion at 2.

<sup>10/</sup> See Kennedy affidavit at 4.

<sup>11/</sup> See Brownlee affidavit at 2-3.

<sup>12/</sup> Id.

<sup>13/</sup> See Kennedy affidavit at 3-4.

third prehearing conference to seek to raise matters pertaining to the TMI-related requirements in NUREG-0737.<sup>14/</sup> He did not avail himself of this opportunity. Now, it is too late.

The second criterion for reopening the record involves the safety significance of the matter in question. Properly written and understandable operating procedures are clearly important from an operational safety standpoint. The significance of the comments contained in the Medeiros trip report, however, is doubtful.<sup>15/</sup>

In any event, the comments contained in the trip report have been thoroughly investigated by both the Office of NRR and NRC Region II in separate inspections conducted during the week of January 18, 1982. The Office of NRR found that, although there are minor deficiencies in the emergency operating procedures, those procedures are acceptable for full power operation and the SER evaluation remains valid.<sup>16/</sup>

Region II of the NRC found that the conclusions in the Medeiros trip report regarding emergency operating procedures were not substantiated. Its inspection did, however, reveal "minor discrepancies relative to technical adequacy" which must be corrected.<sup>17/</sup> Region II did find more significant deficiencies in the normal operating procedures which it

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<sup>14/</sup> Clarification of Action Plan Requirements (November 1980). See Memorandum and Order (Following Third Prehearing Conference), dated December 30, 1980, at 6.

<sup>15/</sup> See Kennedy and Brownlee affidavits and attachments.

<sup>16/</sup> See attachment to Kennedy affidavit.

<sup>17/</sup> See attachment 1 to Brownlee affidavit at 14.

found presently unsuitable for plant operation.<sup>18/</sup> The Applicant has committed to promptly correct these deficiencies. Region II will re-inspect all plant procedures on March 22, 1982 and issue a subsequent inspection report.<sup>19/</sup> No fuel load or full-power operating license will be issued until all operating procedures are corrected.<sup>20/</sup>

As a consequence of the comprehensive NRC review and evaluation of operating procedures, the outcome of the present proceeding would not have been affected had the question of adequacy of normal and emergency operating procedures been litigated. There is no practical necessity for formal adjudication of operating procedures nor could this Board fashion any relief beyond that already being provided by the NRC Staff (specifically, direction to the Applicant to modify those procedures found to be deficient). Therefore, this final criterion for reopening the record weighs heavily against the movant.

Even assuming the Intervenor could prevail on the criteria applicable to a motion to reopen, the matters fairly raised in the Medeiros trip report do not present triable issues necessitating an evidentiary hearing. As the accompanying Staff affidavits (and attachments) demonstrate, the Staff will require that the normal and emergency operating procedures be in satisfactory order before the issuance of a license. Equally important, the proposed new contention

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<sup>18/</sup> Id. at 12-13.

<sup>19/</sup> Brownlee affidavit at 3.

<sup>20/</sup> See attachment 2 to Brownlee affidavit.

itself is without merit.<sup>21/</sup> Therefore, there is no justification to reopen the record for an additional evidentiary hearing under the circumstances of this case. See Vermont Yankee, *supra*, 6 AEC at 523.

B. Late-Filed Contention

Assuming arguendo that the Intervenor has satisfied the conditions for reopening, the proposed new contention is not thereby admissible as a matter in controversy at this stage. The Commission's regulations provide that nontimely filings will not be entertained absent a favorable balancing of five specified factors. 10 CFR § 2.714(a)(1), (a)(3).<sup>22/</sup> The present motion attempts to address these factors.

The first factor is whether there is good cause for the filing delay. As discussed above, there is no good cause for filing a proposed new contention regarding operating procedures at this extremely late date. Region II inspection reports beginning in May 1980 identified operating procedures as an area requiring improvement. These procedures would have been corrected and verified without the Medeiros trip report in the normal course of the Region's preoperational inspection effort.

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<sup>21/</sup> See Kennedy affidavit at 7-11.

<sup>22/</sup> These factors are:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding. 10 CFR §2.714(a)(1).

Furthermore, the proposed new contention is more expansive in scope and discusses conclusions not substantiated in the Medeiros trip report.<sup>23/</sup> In view of the documented existence of prior concerns in the area of operating procedures, and the broad scope of the proposed contention, the recent availability of the Medeiros trip report does not provide good cause for the late filing of such a contention.

The second factor to be considered is whether other means are available to protect the Intervenor's interest. Contrary to the allegation in the present motion, discovery of the problems with the procedures was not "accidental" nor is the Staff analysis of the matter "faulty".<sup>24/</sup> Rather, as already observed, deficiencies in procedures were known to the NRC Staff well before the Medeiros trip report, that report did not illuminate the situation appreciably, and the NRC Staff is firmly dedicated to assure that necessary corrections are made in the operating procedures before the issuance of a license.<sup>25/</sup> The Staff may be relied on to assure that inadequacies in operating procedures are corrected.

The third factor, the extent to which the Intervenor can assist in developing a sound record, also weighs against the admission of a late contention. The present motion understandably does not address this factor. The Intervenor has not indicated any special expertise in the area of plant procedures nor does he offer to introduce any expert

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<sup>23/</sup> See Kennedy affidavit at 7-11.

<sup>24/</sup> See motion at 2.

<sup>25/</sup> See Brownlee affidavit at 4 and attachments.

testimony on the subject. The most the Intervenor can do is to seek the introduction of the Medeiros trip report into evidence and request a subpoena for Mr. Medeiros who has left the NRC. The contents of that trip report have been thoroughly and adequately evaluated by the NRC Staff as the attached Staff affidavits clearly attest. As a further matter, none of the specific allegations in the proposed new contention have merit to them.<sup>26/</sup>

The fourth factor, the extent to which the Intervenor's interest will be represented by existing parties, similarly disfavors admission of the proposed contention. The concerns espoused by Mr. Medeiros, and apparently adopted by the Intervenor, have received ample and proper attention by both the Applicant and NRC Staff. The Applicant has committed to correct any deficiencies in its operating procedures which the the NRC Staff will verify. There is no reason to adjudicate the issue to ensure that the Staff performs its duties in this regard. The Board understood this fact in denying that portion of the Intervenor's December 8, 1981 motion to reopen the record to litigate the testing of the siren alert system.<sup>27/</sup>

Finally, factor five, the extent to which admission of the late contention will broaden the issues or delay the proceeding, weighs heavily against the movant in this case. The adequacy of the plant's operating procedures was not a contention in the case nor, despite

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<sup>26/</sup> See Kennedy affidavit at 7-11.

<sup>27/</sup> See Memorandum and Order (Denying, in Part, and Granting, in Part, Intervenor's Motion to Reopen the Record), dated January 5, 1982, at 2.

earlier related NRC inspection reports, did the Intervenor seek to make it an issue. In the Staff's view, admission of the proposed contention would substantially broaden the issues in this proceeding.<sup>28/</sup>

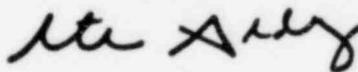
This proceeding commenced in 1977. Evidentiary hearings were held in 1981 and 1982. The record in the proceeding closed in January, 1982 and proposed findings have been filed. An initial decision is pending. According to NRC Region II, April 1982 is a realistic fuel load date.<sup>29/</sup> The admission of the proposed new contention on the eve of an initial decision will obviously delay the proceeding to an unnecessary and costly degree.

In short, all the factors for admission of a late filed contention weigh against admission of Intervenor's proposed contention. Intervenor's motion for admission of the contention should be denied.

CONCLUSION

In light of the foregoing, the Intervenor's present motion to reopen the record for the admission of a new contention should be denied.

Respectfully submitted,



Steven C. Goldberg  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 16th day of March, 1982.

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<sup>28/</sup> The Intervenor, at one point, suggests that the comments in the Medeiros trip report bear upon this Board's question to the Applicant regarding management competence. To the contrary, however, the Medeiros trip report did not conclude that the Applicant is unqualified to operate a nuclear power plant nor does the condition of the procedures at the time of Mr. Medeiros' visit permit such a conclusion to be drawn. See Brownlee affidavit at 3.

<sup>29/</sup> See attachment 2 to Brownlee affidavit.