

14422

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

93 OCT 28 AM 10:32

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of) Docket No. 50-458-*OLA*
)
GULF STATES UTILITIES COMPANY) (Transfer of Ownership
) and Control)
(River Bend Station, Unit 1))

REPLY OF
CAJUN ELECTRIC POWER COOPERATIVE, INC.,
TO RESPONSES TO THE
LIST OF CONTENTIONS

James D. Pembroke
Thomas L. Rudebusch

DUNCAN, WEINBERG, MILLER &
PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 467-6370

Attorneys for Cajun Electric Power
Cooperative, Inc.

Dated: October 27, 1993

9311040016 931027
PDR ADOCK 05000458
G PDR

2803

TABLE OF CONTENTS

	<u>Page</u>
I. BACKGROUND.....	1
II. REPLY.....	6
A. The Legal Standard.....	6
1. The Criteria for Contentions.....	6
2. The Scope of the Hearing.....	8
3. The Financial Qualifications Rule.....	10
B. Cajun's Contentions Are Admissible.....	12
1. Contention No. 1.....	12
2. Contention No. 2.....	16
3. Contention No. 3.....	20
4. Contention No. 4.....	22
5. Contention No. 5.....	26
6. Contention No. 6.....	27
7. Contention No. 7.....	29
III. CONCLUSION.....	30

TABLE OF AUTHORITIES

CASES

<u>Arizona Public Service Company</u> , (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, <u>appeal aff'd in part and denied in part</u> , CLI-91-12, 34 NRC 149 (1991)	7, 8
<u>Duke Power Company</u> (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 N.R.C. 785 (1985)	9
<u>Georgia Power Company</u> (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-03, 35 NRC 63 (1992)	10

STATUTES/REGULATIONS

42 U.S.C. § 2232(a) (1988)	9
42 U.S.C. § 2241(a) (1988)	9
10 C.F.R. § 2.206 (1993)	29
10 C.F.R. § 2.714 (1993)	1, 4, 7, 10
10 C.F.R. § 50.2	11
10 C.F.R. § 50.33(f) (1993)	10
10 C.F.R. §§ 50.40(b) and 50.57(a)(4) (1993)	10
10 C.F.R. § 50.71(b) (1993).	19
10 C.F.R. § 50.90 (1993)	2
10 C.F.R. § 50.92(c) (1993).	18

MISCELLANEOUS

49 Fed. Reg. 35,749 (1984)	19
52 Fed. Reg. 1292 (1987)	19
54 Fed. Reg. 33,168 (1989)	7
58 Fed. Reg. 36,423, 36,435, 36,436 (1993)	3

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket No. 50-458
)	
Gulf States Utilities Company)	(Transfer of Ownership
)	and Control)
(River Bend Station, Unit 1))	

REPLY OF
CAJUN ELECTRIC POWER COOPERATIVE, INC.,
TO RESPONSES TO THE LIST OF CONTENTIONS

Cajun Electric Power Cooperative, Inc. ("Cajun"), pursuant to Section 2.714(b) of the Nuclear Regulatory Commission's ("Commission" or "NRC") Regulations, 10 C.F.R. § 2.714 (1993), and the Order of the Presiding Judge issued at the prehearing conference on September 15, 1993 (Tr. 86), submits this Reply to the Opposition of Gulf States Utilities Company ("GSU") and the Response of Commission Staff to Cajun's List of Contentions and states as follows:

I. BACKGROUND

This proceeding involves two license amendments related to the proposed merger between GSU and Entergy Corporation ("Entergy"), pursuant to the June 5, 1992 Agreement and Plan of Reorganization between GSU and Entergy.

On January 13, 1993, GSU filed an application seeking approval of an effective change of control over GSU, and for a license amendment to the River Bend Station Unit 1 Facility Operating License NPF-47 to reflect such approval, in NRC Docket

No. 50-458 ("Ownership Application").^{1/} GSU asserted in its Ownership Application that the merger does not require any changes in the design or operation of the River Bend Plant, but it does affect the ownership of GSU. See GSU's Ownership Application, at 1-2. The Ownership Application asserts that this amendment involves no change to the organizations or personnel responsible for the operation of the facility. See id. at 11. Despite Applicant's assertions, Cajun contends that significant management changes have occurred since GSU filed its Ownership Application.^{2/} Applicants have also asserted that significant A&G and O&M cost savings can be achieved at River Bend after the merger.

Secondly, GSU filed another application requesting an amendment to reflect approval for an Entergy affiliated company, Entergy Operations, Inc. ("EOI"), to be included as a licensee of River Bend under 10 C.F.R. § 50.90 ("Operations Application"). The Operations Application asserts that EOI would have authority, purportedly, to operate the facility on behalf of its owners, GSU and Cajun.

-
- 1/ Under the Cajun-GSU Joint Ownership Participation and Operating Agreement ("JOPOA"), Cajun owns a 30 percent undivided interest (282 MW) in the River Bend nuclear plant, with a current total investment in River Bend of approximately \$1.6 billion. GSU is project manager with the authority and obligation to operate and maintain River Bend, subject to duties, among others, to act in good faith and in Cajun's best interests.
 - 2/ In particular, based on information and belief, Cajun states that the following Entergy officials have assumed positions in GSU River Bend nuclear operations: Harold Keiser, GSU Senior Vice President; John McGaha, River Bend Nuclear Group Vice President; and Mike Sellman, River Bend Plant Manager.

On March 25, 1993, the Commission issued a notice of filing of the Ownership Application of GSU. The Notice also provided that the Operations Application would be the subject of a separate Federal Register notice.

On April 26, 1993, Cajun filed Comments, Petition for Leave to Intervene, and Request for Hearing and Conditions, on Application for Approval of Transfer of Ownership ("Cajun April 26 Petition").^{2/} Cajun's April 26 Petition specifically noted that Cajun would file separate comments, a petition for leave to intervene and a request for hearing when the Commission issued a Notice of Filing of GSU's proposed Operations Application.

On July 7, 1993, the NRC issued its "Notice of Consideration of Issuance of Amendments to Facility Operating License, Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing." 58 Fed. Reg. 36,423, 36,435, 36,436 (1993). On August 6, 1993, as amended on August 17, 1993, Cajun filed its "Comments, Petition for Leave to Intervene, and Request for Hearing and Conditions" in response to the Commission's Notice of filing of the Operations Application (respectively, "Cajun April 6 Petition" and "Cajun August 17 Petition").

On August 19, 1993, this Atomic Safety and Licensing Board ("Board") was established to rule on petitions for leave to

^{2/} Cajun's April 26 Petition presents Cajun's concerns regarding the Ownership Application, which concerns are much broader than competition or antitrust concerns, as Staff contends (Tr. 38). See April 26 Petition at pages 44-49 and 65-85.

intervene and requests for hearing related to the Commission's Notice of July 7, 1993.

On August 23, 1993, as supplemented on August 27, 1993, GSU filed an Opposition to Cajun's Petition to Intervene and Request for a Hearing. On August 26, 1993, the Commission Staff filed with the Board its Response to Cajun's Petition. While Staff states that Cajun has standing to intervene in this proceeding, Staff suggested that Cajun amend its Petition to Intervene to clarify Cajun's position regarding the license amendments in which Cajun seeks leave to intervene. See Staff August 26 Response at 2, fn.3.

On August 31, 1993, Cajun amended its Petition to Intervene to clarify, if necessary, that it seeks to intervene in appropriate proceedings related to both the Ownership and Operation Applications ("Cajun August 31 Amendment"). Cajun attached as appendices and incorporated by reference its April 26 Petition, August 6 Petition and August 17 Petition, pursuant to Section 2.714(a)(3) of the Commission's Regulations. 10 C.F.R. § 2.714(a)(3).

On August 27, 1993, counsel for Cajun was notified by telephone that the first prehearing conference was scheduled for September 15, 1993. Therefore, in light of the requirements of Section 2.714(b), specifying that a list of contentions be submitted no less than fifteen days before the first prehearing conference, Cajun supplemented its Petition to Intervene by including a List of its Contentions in its August 31 Amendment. See 10 C.F.R. § 2.714(b). Along with each contention, Cajun

provided (i) a brief explanation of the bases of the contention; (ii) a concise statement of the facts and expert opinion which support the contention; and (iii) information to show that there is a dispute with GSU on a material issue of fact or law with regard to each contention.

On September 15, 1993, a prehearing conference was conducted to hear oral argument on GSU's claim that Cajun, a thirty percent co-owner and co-licensee of River Bend, with at least a \$1.6 billion stake in the facility and an interstate commerce interest in the operation of the plant, somehow lacks standing to intervene in GSU's Ownership and Operation Applications to amend the license for the facility. Cajun's arguments on standing are as stated at the prehearing conference, and Cajun will not repeat its position on standing here. Tr. 19-35, 40.

At the September 15 prehearing conference, GSU and Staff were allowed to present preliminary comments on Cajun's List of Contentions. The Presiding Judge also established a procedural schedule for GSU and Staff to file written responses, and for Cajun to reply to the responses. Tr. 86.

By letter dated October 25, 1993, GSU submitted a copy of a letter dated October 18, 1993, from GSU to the Commission ("October 18 Letter"). The October 18 Letter contains GSU's version of proposed language for license conditions related to "significant transfers of facilities from GSU to Entergy or any other entity and the outcome of certain ongoing litigation." See October 18 Letter at 1, attached hereto.

II. REPLY

A. The Legal Standard

1. The Criteria for Contentions.

On August 31, 1993, Cajun identified as its contentions:

- (1) The proposed license amendments failed to reflect the public interest and interests of co-owners and other parties that may be affected by the outcome of the Cajun and Texas litigation;
- (2) The proposed license amendments may result in a significant reduction in the margin of safety at River Bend;
- (3) The proposed license amendments cannot be approved without Cajun's consent;
- (4) The proposed license amendments will adversely affect Cajun's rights regarding the operation of River Bend;
- (5) The proposed license amendments cannot be approved without certain license conditions;
- (6) The proposed license amendments should only be approved with conditions to remedy their adverse impacts on the Cajun/GSU Interconnection Agreement; and
- (7) The River Bend license conditions must be enforced.

GSU and NRC staff filed responses opposing Cajun's contentions. For contentions one, and three through seven, GSU and NRC primarily argued that Cajun's contentions are beyond the Board's authority. For contention two they argued that Cajun has failed to satisfy the pleading standards for a contention.

In reply, Cajun states that contention two meets the NRC pleading standards and demonstrates a sufficient connection with health and safety, clearly issues within the authority of the Board. Second, for the remaining contentions, Cajun states that the Board has the authority to address issues beyond health and safety which relate to the manner in which GSU and EOI intend

to operate the plant, and that these contentions also meet the Commission's standards.

The standards for contentions are set out in 10 C.F.R. § 2.714(b)(2), which states, in pertinent part, that each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, a petitioner shall provide the following information with respect to each contention: (i) A brief explanation of the bases of the contention; (ii) A concise statement of the alleged facts or expert opinion which support the contention; and (iii) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2). Further, the contention, if proven, should entitle a petitioner to relief. 10 C.F.R. § 2.714(d)(2); see 54 Fed. Reg. 33,168 (August 11, 1989).

Subsequent case law indicates that contentions are reviewed under a standard akin to an answer to a summary judgment motion, and should be construed accordingly. In Arizona Public Service Company, (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, appeal aff'd in part and denied in part, CLI-91-12, 34 NRC 149 (1991), the Board reasoned that the contention pleading is analogous to an answer to a motion for summary judgment:

the contention pleader is entitled to at least the same benefit of construction as a party opposing a summary disposition motion. Thus, as in the case under Rule 56 of the Federal Rules of Civil Procedure, a pleading opposing summary judgment must be indulgently treated with inferences of fact drawn in the pleader's favor. Therefore, the . . .

pleading must be viewed in the light most favorable to accepting it.

Arizona Public Service Company, slip op. at 6. The Board went on to note that the petitioners were entitled to a "liberal construction of their contention, and their allegation should be construed most favorably to them" and that "[a] pleading should be so construed as to do substantial justice." Id. The Board concluded that the contention pleading rule required a brief and concise statement of the allegation and that it should not "penalize Petitioners for being briefer and more concise than others might have been." Arizona Public Service Company, slip op. at 7. On appeal, the Commission concluded that the "Board may appropriately view Petitioners' support for its contention in a light that is favorable to the Petitioner." Arizona Public Service Company (Palo Verde Nuclear Generating Station, Units 1 and 2), CLI-91-12, 34 NRC 149 (1991).

The rules of pleading construction dictate that Cajun's contentions should be construed in the light most favorable to it. Furthermore, the NRC's rules only require Cajun to identify those issues of which it has knowledge and Cajun has done so. The rule also requires that Cajun be "brief" and "concise." Cajun has done so.

2. The Scope of the Hearing.

GSU and the Staff primarily allege that Cajun's contentions one, and three through seven, do not relate to health and safety and therefore are not properly before the Board. However, the scope of the Board's authority is indicated by its title, the Atomic Safety and Licensing Board. Clearly the Board

has authority over more than "safety" issues. By virtue of having authority over "licensing," the Board also has authority to hear certain financial, management and control issues.

The scope of the Board's authority, in the first instance, is a function of the authority of the Commission. The Atomic Energy Act clearly gives the Commission the authority to review financial issues in commercial licensing proceedings:

Each application for a license hereunder shall be in writing and shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the applicant, the character of the applicant, the citizenship of the applicant, or any other qualifications of the applicant as the Commission may deem appropriate of the license.

42 U.S.C. § 2232(a) (1988) (emphasis added).

The Board's authority, in turn, is dependent on what is delegated to it by the Commission:

[T]he Commission is authorized to establish one or more atomic safety and licensing boards . . . to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license authorization under the provisions of this chapter, or any other provision of law, or any regulation of the Commission issued thereunder. The Commission may delegate to a board such other regulatory functions as the Commission deems appropriate.

42 U.S.C. § 2241(a) (1988). See also Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785 (1985).

The authority of each Board therefore turns on the Hearing Notice

by which means the Commission delegates its authority to the Board.

In those proceedings where the Commission issues a general hearing notice, e.g., the notice only references the license that is the subject of the hearing, the NRC has reasoned that the Board has authority over all portions of the license application. Id. Because the hearing notice in this case only references the general license and license amendment, the hearing notice functions as a general notice to discuss all permit issues. This Board was, therefore, established to address all issues that were not the subject of the antitrust review and the No Significant Hazards Determination.

The NRC's rules only require that petitioners submit one contention that satisfies the Commission's standards. 10 C.F.R. § 2.714(b)(1). A petitioner that submits one admissible contention must be granted party status. Id. See also Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-03, 35 NRC 63 (1992). Therefore, in order to grant Cajun's request for a hearing, the Board need only find that one of Cajun's seven contentions meets the Commission's pleading standards.

3. The Financial Qualifications Rule.

Additionally, GSU makes the argument that the "Financial Qualifications Rule" prohibits several of Cajun's contentions and prohibits the discussion of any financial issues in this proceeding. The Financial Qualifications Rule states, in

pertinent part, that applicants for an operating license must provide, among other things:

[e]xcept for an electric utility applicant for a license to operate a utilization facility of the type described in § 50.21(b)[research and medical facilities] and § 50.22[utilization and production facilities for production of materials or energy for commercial purposes in interstate commerce], information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out . . . the activities for which the permit or license is sought.

10 C.F.R. § 50.33(f). See also 10 C.F.R. §§ 50.40(b) and 50.57(a)(4).

GSU argues that EOI is only a "conduit" through which operating funds flow from the electric utilities, GSU and Cajun. GSU Opposition at 7. GSU's argument fails because the Operations Application seeks to add EOI to the license as the plant operator. It is EOI's qualifications that are at issue. EOI's financial qualifications are not at issue only if EOI is not an "electric utility." An "electric utility" is an entity which generates or distributes electricity and recovers its costs, directly or indirectly through rates established by the entity or by a regulatory authority. See 10 C.F.R. § 50.2. EOI is clearly not an electric utility. See Tr. 47-48. The contractual arrangements between GSU, EOI and Entergy indicate that Entergy and GSU will not assume all responsibility for costs associated with River Bend. Therefore, EOI bears residual financial responsibility for the operation of River Bend. Since EOI is not an electric utility, the Commission's Regulations dictate that a financial qualifications review is required.

B. Cajun's Contentions Are Admissible.

Cajun's contentions are admissible because they provide a foundation for further inquiry into the subjects addressed and because they provide sufficient notice to GSU and Staff of the issues to be litigated. Cajun's List of Contentions briefly describes the factual and legal bases for each contention, provides a concise statement of the facts which support each contention and provide sufficient information to show that a genuine dispute with the Applicant exists.

Cajun's contentions entitle Cajun to the relief specified in the List of Contentions. Cajun's contentions summarize the statements and facts presented in Cajun's April 26, August 6 and August 17 Petitions, and the affidavits and testimonies attached thereto, as presented in Cajun's August 31 Amendment. Finally, according to Commission precedent, Cajun's List of Contentions must be viewed in the light most favorable to it.

1. Contention No. 1.

Cajun's first contention is that:

The Proposed License Amendments Fail to
Protect the Public Interest and Interests of
Co-Owners, Wholesale Customers and Customers
That May Be Affected By the Outcome of the
Cajun and Texas Litigation.

See April 26 Petition at 39-40, 70-71; August 31 Amendment at 7-11.

Cajun requests in this contention that this Board examine fully the effects of the outcome of certain litigation on GSU, Entergy and EOI in the event a merger is consummated, and to

consider the regulatory options available to the Commission to ameliorate that adverse financial impact. Cajun explained the basis of the impact of a substantial judgment or settlement by Cajun in the Cajun litigation and the reasons why this Board must analyze the adverse financial impact which GSU, Entergy and EOI would experience from such judgment/settlement for Cajun. See Cajun August 31 Amendment at 7-11; Cajun April 26 Petition at 39-44.

In their respective responses, GSU and Staff argue that Cajun's contention one is not linked to the proposed license amendments and is outside the scope of this proceeding. GSU Opposition at 13; Staff Response at 8. To the contrary, GSU's October 18 Letter to the Commission (attached) containing language for a proposed condition related to the Cajun litigation demonstrates that the financial risks to GSU, EOI and Entergy of the Cajun litigation are vital to the license applications and are within the scope of this proceeding. The October 18 Letter states that "proposed license conditions have been discussed by representatives of the NRC Staff and the licensee." See October 18 Letter at 1. Further, the letter states "the purpose of such license conditions would be to assure that the NRC is kept informed of the outcome of certain ongoing litigation [i.e., the Cajun litigation]." Id. The fact that GSU and Commission Staff have been negotiating proposed license conditions between themselves, without counsel for Cajun's previous knowledge,^{4/}

4/ Counsel for Cajun received a copy of the October 18 Letter on October 27, 1993.

demonstrates beyond a doubt that Cajun's contention one is essential to this proceeding.

Moreover, the fact that GSU and Staff have been negotiating additional license conditions related to the Ownership Application must establish that Cajun's proposed relief be considered by the Board. Cajun's proposed relief is an additional or alternative license condition which would require EOI/Entergy to stand behind the financial obligations of GSU.

With regard to condition one, Cajun supplied a concise statement of the facts regarding the two Cajun lawsuits -- the Rescission Case^{5/} and the Nullity Case,^{6/} as well as the Texas Litigation.^{7/}

Moreover, Cajun concisely summarized the testimony of its expert, a partner in the Public Utilities Industry Services

5/ In the Rescission Case, Cajun has requested that the JOPOA be rescinded and that damages of at least \$1.6 billion be awarded to Cajun, inter alia, because of GSU's misrepresentations of material facts intended to fraudulently induce Cajun to enter into the JOPOA and to finance the construction, ownership and operation of River Bend.

6/ The Nullity Case rests on the fact that the JOPOA was never submitted to the Louisiana Public Service Commission ("LPSC") for its consideration as is required by a General Order of the LPSC issued on October 28, 1968. Failure to have submitted the JOPOA to the LPSC for its consideration results in the JOPOA being a nullity. GSU would become the sole owner of River Bend and Cajun will receive at least \$1.6 billion in damages from GSU.

7/ The order of the Public Utility Commission of Texas ("PUCT") which disallowed approximately \$63.5 million of GSU River Bend plant costs and ordered the abeyance of approximately \$1.4 billion of GSU River Bend investment and \$157 million of deferred River Bend costs ("Texas Litigation").

Group of Price Waterhouse, which amply demonstrates that a judgment/settlement in Cajun's favor, anywhere in the range from \$700 million to \$1.6 billion, would drop GSU below investment grade parameters, and further, that a judgment/settlement in Cajun's favor in any substantial amount would probably render GSU bankrupt with attendant adverse impacts on GSU and Entergy. In the event of a \$1.6 billion Rescission Case judgment/settlement, even on a consolidated GSU/Entergy basis, the combined entity would fail to meet three of the four Standard and Poor's investment grade bench marks. Affirmance of the PUCT in the Texas Litigation would only exacerbate GSU's and Entergy's financial deterioration.

Given these risks, Cajun recommended that the Board consider as a remedy:

- (a) The potential effects that the adverse litigation scenarios may have on the combined financial integrity of Entergy and GSU;
- (b) An acceptable financial arrangement whereby available resources of a combined Entergy/GSU could meet the requirements of the adverse litigation scenarios; and
- (c) Regulatory options to ameliorate the financial impact of the adverse litigation scenarios prior to granting approval for the merger in order to ensure that the public interest and Entergy's and Cajun's best interests are served.

In its Ownership Application, GSU asserted that it will continue to operate as a utility after the merger, but will be a subsidiary of the new Entergy Corporation. See Ownership Application, at 1-2. However, Entergy has included in the

Reorganization Pl. specific conditions that allow it to withdraw from the merger if an adverse decision in the Cajun Litigation is rendered before the merger is consummated or if information comes to light which is materially adverse to GSU's position in the litigation. The further concern is that if the merger is consummated, and Cajun subsequently prevails against GSU, there would be a substantial adverse financial impact on Entergy and EOI, as well as GSU. Cajun clearly presented sufficient information to show there is a dispute with the Applicant, related to the Ownership Application.

This contention raises issues not only with regard to the financial integrity of GSU and EOI, but also of EOI's ability to operate River Bend in a safe fashion in the event of the bankruptcy of GSU. Prior decisions regarding the impact of the bankruptcy of a licensee are not determinative here. After the consummation of the merger and the approval of the proposed license amendments, the corporate interrelationship of these three utilities will result in GSU's bankruptcy having an effect on GSU, Entergy and EOI. Given the funding relationship between GSU and EOI discussed in Cajun's second contention, the impact of a decision adverse to GSU in the Cajun and Texas Litigation on River Bend operation by EOI is a matter properly before this Board.

2. Contention No. 2.

Cajun second contention is that:

The Proposed License Amendments May Result in a Significant Reduction In The Margin of Safety at River Bend.

See August 6 Petition at 16-20; August 31 Amendment at 11-13.

Cajun here contends that the contractual framework for maintaining safe and reliable River Bend operation by EOI is tenuous, as proposed, and does not require Entergy to guarantee EOI funding for River Bend operation, which in turn may affect the margin of safety at River Bend. Tr. 77.

Cajun explained that GSU and EOI propose to enter into an Operating Agreement for the provision of those services by EOI and for payment by GSU. The proposed Operating Agreement provides that EOI shall take all actions necessary to manage, control, possess, use, monitor, repair and re-commission, and to take all actions necessary to make capital improvements at River Bend. See Operating Agreement, §§ 1.13, 2.1. However, because the Operating Agreement runs only between GSU and EOI, GSU has the full obligation under the Operating Agreement to compensate EOI for River Bend operation. See id., § 3.1. Under the Operating Agreement, EOI cannot look to either Entergy or Cajun for payment.

Related to the Operating Agreement is the proposed River Bend Guarantee Agreement among EOI, GSU and Entergy. Under the Guarantee Agreement, Entergy "guarantees" to be responsible for funding EOI's activities under the Operating Agreement. However, that guarantee is in effect only so long as GSU meets its payment obligations to EOI under the Operating Agreement.

Cajun presented a concise statement that this specific exclusion makes Entergy's "guarantee" totally illusory. This loophole is critical. EOI is very thinly capitalized, as

Applicants admit. Tr. 48. It has no authority to seek external financing and its sole revenue stream related to its operation of River Bend is GSU's payments under the Operating Agreement. If GSU ceases to make its Operating Agreement payments, Entergy is not obligated to financially support EOI, and EOI has no other sources of funds to maintain safe and reliable operation of River Bend. GSU faces severe exposure from the Cajun and Texas Litigation which could render GSU bankrupt and unable to make adequate payments to EOI to maintain safe and reliable River Bend operation.

Cajun also presented information to demonstrate that there is a dispute with the Applicant on this matter. In GSU's Ownership Application, GSU included a one and two-thirds page "discussion" which merely recited that no changes to the physical design or operation of the plant will be made and then reaches the bald conclusion that the proposed change meets the requirements of 10 C.F.R. § 50.92(c). See Ownership Application, Attachment 2. As discussed at the hearing, the Ownership Application did not even mention the potential shutdown scenario which the chief executive officers of both Entergy and EOI admitted was possible Tr. 83-85.

Cajun has provided a sufficient basis for its contention that the financial arrangements among GSU, EOI and Entergy may affect the safety of River Bend. In contention two, Cajun has alleged that the contractual framework for maintaining River Bend operations is tenuous and may make it impossible for EOI to maintain safe and reliable operation of River Bend. Cajun

provides details of the basis for its allegations that GSU is subject to certain litigation risks. Furthermore, it notes that Entergy is required by the Guarantee Agreement to guarantee the activities of EOI only in certain limited circumstances. Finally, Cajun notes that EOI is thinly capitalized. Cajun then concludes that the financial problems associated with this arrangement may make it impossible for EOI to maintain safe and reliable operation of River Bend.

While GSU and Staff claim that there is no necessary connection between poor financial resources and safety concerns, the Commission's own statements and common sense dictate that this conclusion is incorrect. This Commission has repeatedly noted the relationship between financial circumstances and safety. See 49 Fed. Reg. 35,749 (1984) ("a licensee in financially straitened circumstances would be under more pressure to commit safety violations or take safety 'shortcuts' than one in good financial shape"); 52 Fed. Reg. 1292 (1987) (because of the nexus between health and safety, the Commission adopted a rule requiring all licensees (including electric utilities) to notify the agency upon the filing of bankruptcy petitions; 10 C.F.R. § 50.71(b) (requiring annual financial reports and certified financial statements from commercial reactor licensees). The relationship requires no further explanation.

Furthermore, Cajun cannot and is not required to supply additional data in response to GSU's claim that additional information regarding the precise nature of the alleged safety violations is required. Cajun cannot know at this time the

precise nature of any future safety violations by GSU. Consequently, Cajun cannot project how EOI will operate the plant or in what manner safety problems will arise in the event of a GSU bankruptcy. Cajun has established, however, that the financial problems raised by the merger may affect safety at the plant. GSU has the burden of establishing that River Bend will be run safely by EOI in the event the operating license is transferred. The meager information supplied by GSU in the application (and unsupplemented in subsequent pleadings) is inadequate to carry that burden and is clearly inadequate to establish that Cajun's second contention is inadmissible or not adequately pleaded.

Cajun's second contention pleads a genuine issue of material fact regarding EOI's ability to operate River Bend. This contention is admissible and should be set for hearing.

3. Contention No. 3.

Cajun's third contention is that:

The Proposed License Amendments Cannot Be
Approved Without Cajun's Consent.

See August 17 Amendment at 5-8; August 31 Amendment at 13-14.

Cajun explained its contention that, under the Cajun-GSU JOPOA, GSU can act as Cajun's agent, and take actions on behalf of Cajun, only where GSU's judgment and discretion have not been exercised unreasonably. See JOPOA, § 4.1. Cajun asserts that GSU's judgment and discretion have not been exercised reasonably in GSU's application to amend the operating license and transfer operational responsibility for River Bend to EOI as proposed.

Cajun concisely explained that the primary flaws in the proposed plan for operation of River Bend after the license amendment are that GSU will be a barrier between Cajun and the proposed plant operator, EOI. Also, since, after the merger, River Bend will be operated as part of a five company, multiple nuclear unit holding company, the plant may no longer be run in the best interests of GSU, much less in the best interests of Cajun. Instead, it will be run in the best interests of the Entergy System. Cajun has therefore notified GSU that this attempted exercise of its agency authority is improper and ineffectual. Indeed, under Louisiana law, GSU's authority to act as Cajun's agent in this regard no longer exists.

As can be seen from GSU's Operations Application, GSU has submitted its license transfer application on its own behalf and, purportedly, on behalf of Cajun. The Operations Application has not properly been made on Cajun's behalf, since Cajun's consent to the license amendment has not been obtained and Cajun opposes the Operations Application as proposed by GSU. The issue of GSU's legal and contractual ability to submit the license amendments on Cajun's behalf goes to the core of this proceeding. If GSU is not authorized to file the license amendment applications on Cajun's behalf, and since Cajun opposes the license amendments in their current form, a substantial issue arises whether the proposed license amendments are properly before the NRC for action.

Both GSU and Staff assert that a determination by the Board of this contention will require a review and analysis of

Louisiana law and thus conclude that Cajun should seek relief in the state courts. See GSU Opposition at 19; GSU Response at 10. Cajun concurs that an analysis of state law must be undertaken by the Board and the NRC prior to approval of the proposed license amendments but strenuously objects to the proposal that Cajun seek relief only from the state courts.

In the face of a challenge that a contractual barrier exists to the filing of the amendment on Cajun's behalf, the Commission, and the Board, must undertake an analysis of Louisiana law adequate to assure themselves that the license amendments are properly before this Commission for action. Cajun does not argue that the Commission must render a contract interpretation binding on GSU and Cajun regarding the agency aspects of the JOPOA. Rather, as a predicate to the exercise of its jurisdiction, the NRC and the Board must conclude that its jurisdiction has been properly invoked. A suggestion that this Commission proceed to act on the license amendment applications while Cajun seeks judicial resolution of the agency question in state courts is an abdication of the Commission's responsibility to assure that its jurisdiction has been properly invoked and that license amendment applications are properly before it.

4. Contention No. 4.

The Proposed License Amendments Will
Adversely Affect Cajun's Rights Regarding The
Operation Of River Bend.

See April 26 Petition at 65-70; August 17 Amendment at 8-13;
August 31 Amendment at 14-17.

Cajun explained that GSU's proposal for the transfer of ownership and operation of River Bend is in derogation of Cajun's rights under the Cajun/GSU JOPOA. These arrangements are proposed to be implemented by agreements which include the GSU-EOI Operating Agreement, the GSU-EOI Support Agreement, the GSU-EOI Switchyard and Transmission Interface Agreement, the GSU/EOI/Entergy Corporation Guarantee Agreement and the GSU/Entergy Services, Inc. Service Agreement.

Cajun concisely stated that the Applicants propose to effect the transfer of River Bend operational responsibility to EOI which will change fundamentally the relationship between the co-owners and co-licensees, GSU and Cajun. Whereas the current JOPOA provides for a considerable and significant direct relationship between the co-owner of the facility, Cajun, and the project manager and operator of the facility, GSU; the agreements proposed by the Applicant to enable EOI to operate River Bend insert GSU as a non-operating owner between the operator, EOI, and Cajun. Indeed, Cajun has no direct contractual privity with EOI.^{8/}

8/ Cajun further explained, in sufficient detail, that the proposed agreements change the rights for which Cajun bargained. They would change GSU from an operator-owner to simply an owner. GSU will no longer be making decisions on an independent basis, serving the interests of GSU and, purportedly, Cajun, as joint owners of River Bend. Rather, the Entergy Operating Committee will make critical decisions regarding loading criteria for River Bend, additions or changes in facilities related to production requirements, refueling outages, and system dispatching and switching.

Cajun explained that the proposed River Bend arrangement would have following the additional detrimental impacts on Cajun:

1. It would undermine Cajun's current rights with the plant operator since Cajun will have no direct contractual privity with EOI;
2. It would impair Cajun's rights of access to auditors, INPO audits, and key reporting data on the plant since such rights run only to Gulf States. See Operating Agreement, §§ 5.1, 5.4, and 5.9;
3. Co-owner approvals of budgets, capital projects, and major undertakings are not addressed; rather the proposed arrangement appears to structure a "blank check" approach for EOI and GSU to access Cajun's money. See Operating Agreement §§ 3.1, 5.1, and 5.2;
4. Relationships with and among Entergy affiliates are ill-defined and could be costly to Cajun. One example of this is in the scheduling of outages. Another is in the area of allocation of costs. See Operating Agreement, §§ 2.1, 2.5, and 5.1; Entergy System Agreement, § 4.08;
5. Administrative, general, and other costs to Cajun would be expected to increase with the imposition of GSU between the operator and Cajun; and
6. The proposed arrangement substantially limits EOI's liability to actions which constitute "Gross Negligence or Willful Misconduct." See Operating Agreement, Article VI.

Both Staff and GSU argue that Cajun's concerns regarding the post-license transfer operation of River Bend are merely economic and contractual matters. While economic and contractual matters are implicated in Cajun's contention, the

contention also calls for Commission and Board review of the nature of the operational relationship among Cajun, GSU and EOI in a post-license amendment scenario. Whereas Staff and GSU would have the Board require Cajun to identify specific changes in operation which would affect health and safety, Cajun urges a broader and more realistic view of the transaction which recognizes that the nature of the owners' governance mechanism over the operator will affect operation at River Bend.

Currently, Cajun had direct contact with the plant operator, GSU. If the license amendments are approved, Cajun no longer has a direct relationship with the plant operator. Cajun's input to the plant operator regarding the safe and reliable operation of River Bend now will be filtered through GSU. Cajun's direct input on plant operations will have a salutary benefit to the operator through receiving additional guidance and input regarding plant operations.

The Board, in considering this contention, should conclude that Cajun has sufficiently pleaded that a question exists whether approval of the license amendment, without the conditions sought by Cajun, would unduly limit input to the plant operator thus inhibiting the operator's ability to safely and reliably operate River Bend. Concomitantly, if such input is appropriate, as Staff apparently concedes (Tr. 70), Cajun's contention that it needs data adequate to enable it to properly and effectively communicate with the plant operator, also is well pleaded and admissible.

5. Contention No. 5.

The Proposed License Amendments Cannot Be
Approved Without Certain License Conditions

See April 26 Petition at 85-87; August 6 Petition at 26-29;
August 31 Amendment at 17-18.

In this contention, Cajun described the specific
license conditions it requests as a remedy for the substantial
problems with the mechanisms proposed by GSU resulting from the
transfer of operating responsibilities from GSU to EOI. These
license conditions would include:

1. The agreement pursuant to which EOI will operate River Bend must be a tripartite agreement among GSU, EOI and Cajun;
2. EOI must be the direct agent of Cajun, equally and without preference or prejudice in favor of GSU;
3. EOI must be directly liable to Cajun under a reasonable liability standard;
4. Cajun must have meaningful input into decisions related to maintenance and fuel outages, budgets, capital improvements and major maintenance items;
5. Cajun must have access to EOI records, meetings and decisions affecting operations, maintenance or scheduling of River Bend;
6. EOI should submit regular reports to Cajun and provide copies of all communications and documents submitted by EOI to the NRC, SEC, or other governmental agencies regarding River Bend or affiliate transactions involving EOI's nuclear management or cost allocations;
7. Cajun should have access to INPO documents and be able to participate in INPO meetings; and
8. Other conditions appropriate to protect Cajun as a thirty percent minority owner of River Bend.

Contention five is a well-pleaded and admissible
contention in that it asserts that the proposed license

amendments cannot be approved unless properly conditioned. Eight conditions are proposed and the appropriateness of each of those conditions has been denied by Staff and GSU. The matter is thus joined and the contention is admissible.

While the eight conditions are posed in a single contention, each of them relates to, and is proposed as relief for one or more of the other contentions made by Cajun. Contention five, standing alone, or read in conjunction with related contentions is well pleaded and admissible.

6. Contention No. 6.

The Proposed License Amendments Should Be Approved Only With Conditions Adequate to Remedy the Adverse Impacts on the Cajun/GSU Interconnection Agreement.

See April 26 Petition at 74-85; August 17 Amendment at 8-13; August 31 Amendment at 18-20.

Cajun's contention here is that the proposed ownership amendment will have detrimental effects on an agreement that is critical to the continued effective operations of Cajun, and thus to the overall interests of its consumers. This is what the Staff called, at the pre-hearing conference, "interstate damage to the sale and transmission of electricity." Tr. 40.

As reflected in the FERC Testimony of Victor J. Elmer^{2/}, Cajun and GSU have a power interconnection agreement, or PIA which provides, along with its Service Schedules, for the transmission of Cajun-generated or purchased power over the Cajun/GSU jointly-owned high voltage transmission system, the

^{2/} Attached as Exhibit CJN-4, Schedule 1, to the Elmer FERC Testimony, which is appended to Cajun's April 26 Petition.

ITS, for ultimate delivery to Cajun's Member distribution cooperatives located on the GSU and Entergy systems, and for transmission of Cajun-generated power for delivery of third party sales.

In general, if the merger is approved as proposed, the planning functions of the PIA, its service schedules, and the construction obligations, access rights and the cost sharing mechanisms of Service Schedule CTOC will be severely impacted. The Applicants have admitted that they have not even analyzed the impacts of the expected changes regarding the ITS. Frank F. Gallaher, Entergy Senior Vice President, testified in a deposition taken in the LPSC merger proceeding that Entergy has undertaken no studies to determine what changes are necessary to the Entergy or Gulf States' transmission systems to accommodate this increased usage.^{10/} Cajun has demonstrated a dispute with the Applicants over a material issue with the result that contention six is well pleaded and admissible.

Furthermore, as relief, since Entergy's stated position is in contradiction and violation of Cajun's existing contractual rights, and is detrimental to Cajun's ultimate consumers, no approval of this proposed merger should be granted until this situation has been clarified and corrected.

^{10/} See Gallaher LPSC Deposition, Attachment C to April 26 Petition.

7. Contention No. 7.

The River Bend License Conditions Must Be Enforced.

See April 26 Petition at 71-74; August 17 Amendment at 13-15; August 31 Amendment at 20-22.

As noted above, the Rescission and Nullity lawsuits may dramatically affect Cajun's ownership in River Bend. In the River Bend litigation, Gulf States is seeking to have the Cajun/GSU PIA and related service schedules declared void by the court. The PIA is the contract pursuant to which, among other things, GSU provides Cajun with transmission services. This action, seeking to have the PIA declared void, is in direct conflict with NRC license condition 10. That license condition requires GSU to transmit power over its system on behalf of utilities engaging in bulk power supply in GSU's service area. The Commission should evaluate this condition of the River Bend license in its consideration of the public interest aspects of the merger and amendment, and should inquire of the Applicants whether, if the merger is consummated, GSU will cease its attempts to have the Cajun/GSU PIA and related service schedules declared void.

Under license condition 12, GSU is obligated to sell power for resale to any entity engaged in retail distribution of electric power where such power is not available from alternative resources at competitive costs. In derogation of license condition 12, GSU has refused to provide certain delivery points which are necessary for one of Cajun's distribution cooperative Members to supply power to two large industrial customers.

Staff and GSU argue that if Cajun is of the opinion that GSU is currently not satisfying its license conditions, Cajun's remedy is the filing of a petition under 10 C.F.R. § 2.206. While the petition route may be available to Cajun to remedy the license condition violations, such availability does not make this proceeding one in which these violations cannot be raised. Indeed, this license amendment proceeding, in which the relative responsibilities of GSU as owner, and EOI as operator will be delineated, is an appropriate forum to determine whether those license conditions currently are being satisfied and how GSU and EOI intend for those conditions to be satisfied if the license amendments are approved.

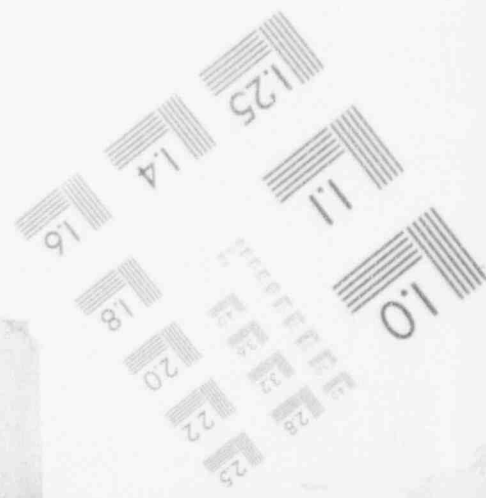
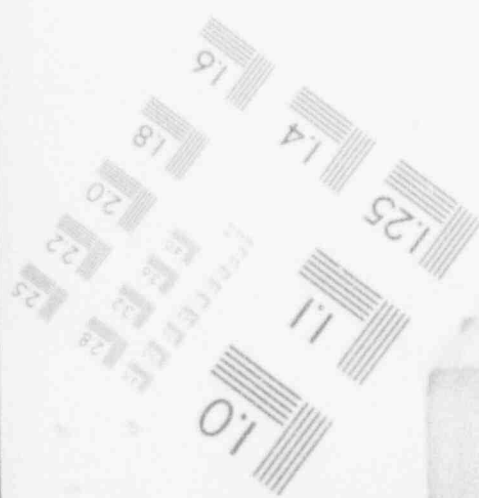
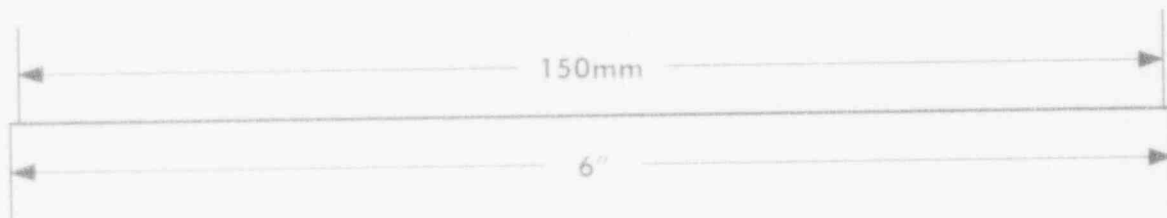
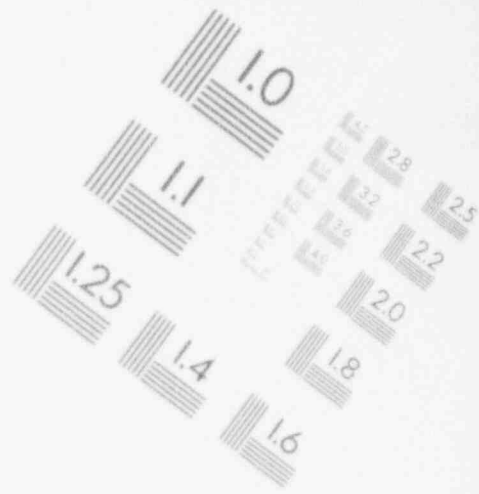
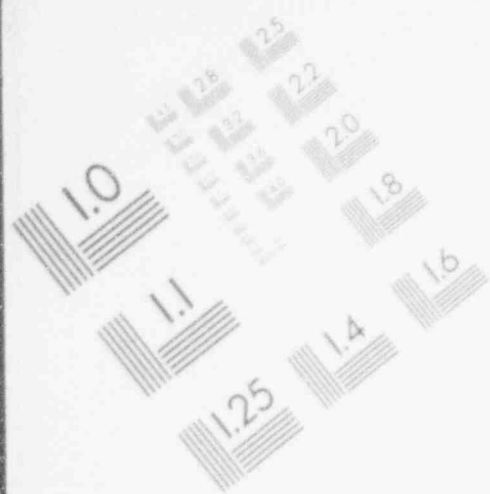
III. CONCLUSION

Wherefore, for the foregoing reasons, Cajun Electric Power Cooperative, Inc., respectfully requests that the Board:

1. Grant Cajun's requested intervention in this proceeding for all purposes;
2. Order that each of Cajun's contentions to be litigated in this proceeding;
3. Order a full evidentiary hearing to determine whether the requested license amendment to reflect the change in ownership of GSU should be granted and whether the requested license amendment to effect EOI operation of River Bend should be granted;
4. Impose on any approval of the proposed license amendments conditions as described herein; and

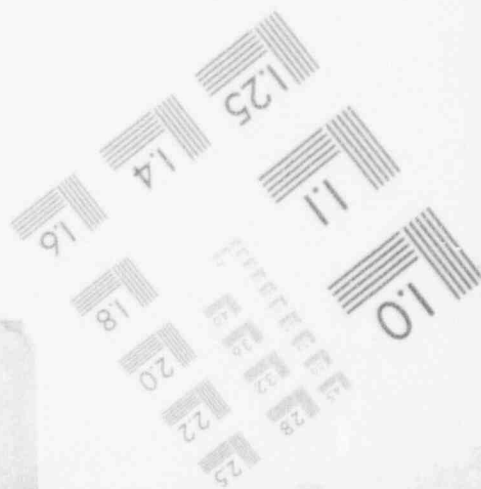
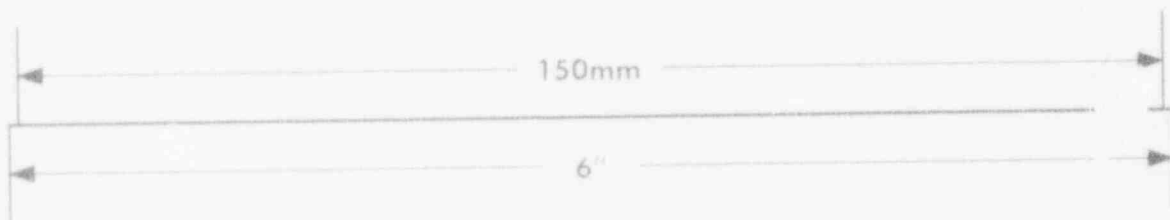
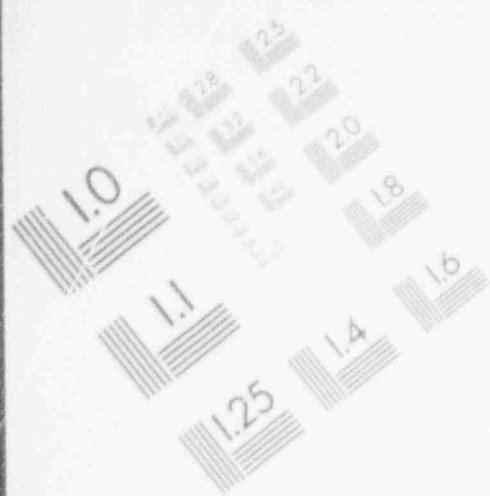
1

IMAGE EVALUATION TEST TARGET (MT-3)



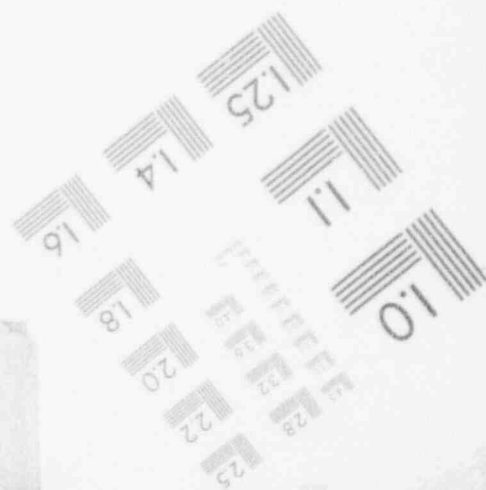
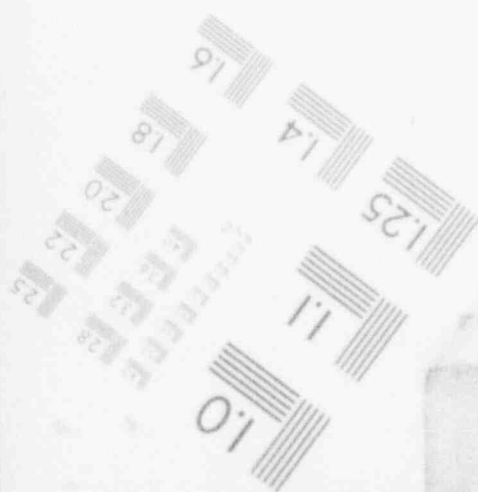
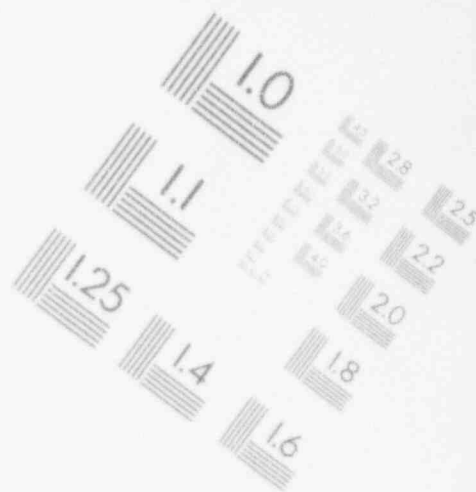
1

IMAGE EVALUATION TEST TARGET (MT-3)



1

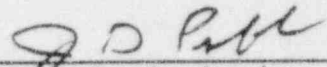
IMAGE EVALUATION TEST TARGET (MT-3)



5. Grant such other relief as the Board deems appropriate.

Dated: October 27, 1993

Respectfully submitted,



James D. Pembroke
Thomas L. Rudebusch

DUNCAN, WEINBERG, MILLER &
PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 467-6370

Attorneys for Cajun Electric Power
Cooperative, Inc.

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

RECEIVED
GENERAL

In the Matter of)

'93 OCT 28 AIO:33

GULF STATES UTILITIES COMPANY)

Docket No. 50-458

(River Bend Station, Unit 1)

(Transfer of Ownership
and Control)

CERTIFICATE OF SERVICE

I, James D. Pembroke, hereby certify that on this 27th day of October, 1993, I served on the following, by federal express or first class mail, postage pre-paid, copies of the Reply of Cajun Electric Power Cooperative, Inc., to Responses to the List of Contentions.

Samuel J. Chilk, Secretary
Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike, Rm. 16 H1
Rockville, MD 20852

Office of Commission Appellate
Adjudication
Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Richard F. Cole
Atomic Safety & Licensing Board
Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
B. Paul Cotter, Jr., Chairman
Atomic Safety & Licensing Board
Nuclear Regulatory Commission
Washington, DC 20555

Docketing & Services Branch
Office of the Secretary
Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

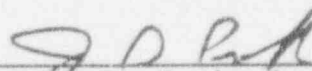
Administrative Judge
Peter S. Lam
Atomic Safety & Licensing
Board
Nuclear Regulatory Commission
Washington, DC 20555

Edwin J. Reis, Esq.
Ann P. Hodgeson, Esq.
Office of the General Counsel
Nuclear Regulatory Commission
Washington, DC 20555

Joseph B. Knotts, Esq.
Mark J. Wetterhahn, Esq.
Winston & Strawn
1400 L Street, N.W.
Washington, DC 20005

Philip P. Graham
Vice President
Gulf States Utilities Co.
5485 U.S. Hwy. 61
Post Office Box 220
St. Francesville, LA 70775

Cecil L. Johnson, Esq.
Vice President-Legal Services
Gulf States Utilities Co.
350 Pine Street
Beaumont, TX 77701


James D. Pembroke