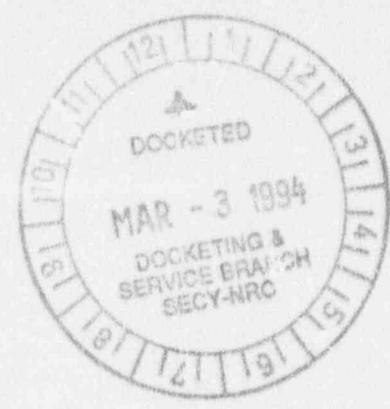


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UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
GULF STATES UTILITIES)
COMPANY, et al.) Docket No. 50-458-0LA
)
(River Bend Station, Unit 1))

CAJUN ELECTRIC POWER COOPERATIVE, INC.'S
BRIEF IN OPPOSITION TO
GULF STATES UTILITIES COMPANY'S APPEAL OF
ORDER GRANTING PETITION TO INTERVENE ISSUED BY
THE ATOMIC SAFETY AND LICENSING BOARD

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UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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GULF STATES UTILITIES) Docket No. 50-458-OLA
COMPANY, et al.)
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River Bend Station, Unit 1)

CAJUN ELECTRIC POWER COOPERATIVE, INC.'S
BRIEF IN OPPOSITION TO
GULF STATES UTILITIES COMPANY'S APPEAL OF
ORDER GRANTING PETITION TO INTERVENE ISSUED BY
THE ATOMIC SAFETY AND LICENSING BOARD

Cajun Electric Power Cooperative, Inc. ("Cajun"), pursuant to 10 C.F.R. § 2.714a (1993), hereby files this Brief in Opposition to Gulf States Utilities Company's ("GSU") Notice of Appeal and supporting Brief ("GSU Appeal") of the "Memorandum and Order (On Petition to Intervene)" LBP-94-3 ("Order"), dated January 27, 1994, issued by the Atomic Safety and Licensing Board ("Licensing Board") in the above-captioned proceeding, and states as follows:

I. INTRODUCTION

This proceeding involves two license amendments sought by GSU: (1) to authorize GSU to become a wholly-owned subsidiary of the Entergy Corporation ("Entergy"), and (2) to permit Entergy Operations, Inc. ("EOI"), another wholly-owned subsidiary of Entergy, to be included on the license as the operator of River Bend Unit 1 ("River Bend"). See 58 Fed. Reg. 36,343, 36,435-36 (1993).

In the Order, the Licensing Board, supported by Commission Staff, ruled that Cajun's property interest in protecting its \$1.6 billion investment in the licensed facility -- its 30 percent undivided ownership share in River Bend -- from radiological hazards and unsafe operation was within the "zone of interests" protected by the Atomic Energy Act (the "Act"). The Licensing Board also accepted Cajun's contention that the two proposed license amendments, when coupled with GSU's financial problems and EOI's thin capitalization, may result in increased safety risks at River Bend. As a result, the Licensing Board granted Cajun's petition for leave to intervene and request for hearing. GSU has appealed two issues related to the Order.

First, the Commission must determine whether the Licensing Board correctly concluded that Cajun's property interest in its \$1.6 billion investment in River Bend is a protected interest under the Act, which therefore confers standing on Cajun. On this issue, the Act clearly states that property damage from radiation is a protected interest. See 42 U.S.C.A. §§ 2133(b), 2201(b) (West Supp. 1993). GSU's attempts to confuse the issue by alleging that Cajun is only raising "economic interests" must be rejected.

Second, the Commission must determine whether the Licensing Board correctly admitted Cajun's contention that the license amendments proposed by GSU will decrease safety at River Bend. On this issue, GSU acknowledges that EOI, the new operator of River Bend, lacks the financial qualifications required by the Commission's Regulations. 10 C.F.R. § 50.33(f) (1993). This

acknowledgement, and GSU's failure to appeal this finding of the Licensing Board, means that the Commission must affirm the Board's Order.

Furthermore, the merger of GSU and Entergy creates an opportunity for underfunding of GSU and EOI, and for the parent Entergy to insulate itself from safety and decommissioning obligations through the proposed post-merger corporate structure. As a result, the Licensing Board correctly concluded that safety at River Bend could be jeopardized and it instituted a hearing. The Commission must affirm that decision.

II. BACKGROUND

A. Relationship Between Cajun and GSU Prior to the License Amendments

Under the Cajun-GSU Joint Ownership Participation and Operating Agreement ("JOPOA"), Cajun owns a 30 percent undivided interest in River Bend, with a current total investment in River Bend of approximately \$1.6 billion. Cajun purchased its interest in River Bend with the understanding that the co-owner, GSU, was an independent utility and that Cajun would be dealing directly with GSU in all matters pertaining to River Bend.

Under the JOPOA, GSU was the operator of River Bend. GSU was the project manager of the facility 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. Under the JOPOA, Cajun reserved to itself a variety of important rights, including direct contractual privity with GSU to ensure safe, reliable and efficient operation of River Bend, access to important documents related to health and safety

and reporting data on plant operation. Cajun reserved to itself these important rights so that it could ensure, among other things, that River Bend continued to be operated in a safe manner.

B. The Cajun Litigation

There are currently two federal court cases pending against GSU.^{1/}

In brief, 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 construction, ownership and operation of River Bend. The first phase of the Rescission case is scheduled to go to trial on April 11, 1994.

The Nullity Case rests on the fact that the JOPOA was never submitted to the Louisiana Public Service Commission ("LPSC") for its consideration as required by the LPSC. Failure to have submitted the JOPOA to the LPSC for its consideration results in the JOPOA being a nullity as a matter of law. If Cajun prevails in this proceeding, GSU may become the sole owner of River Bend and Cajun would receive at least \$1.6 billion in damages from GSU.

1/ The first case is captioned Cajun Electric Power Cooperative, Inc. v. Gulf States Utilities Company, Civil Action No. 89-474-B, United States District Court for the Middle District of Louisiana (the "Rescission Case"). The second case is captioned Southwest Louisiana Electric Membership Corporation and Dixie Electric Membership Corporation v. Gulf States Utilities Company, Civil Action No. 92-2129, United States District Court for the Western District of Louisiana (the "Nullity Case").

As the Licensing Board found, "potential under-funding stems from multiple legal actions against Gulf States that could cause considerable financial difficulty, including bankruptcy." Order at 12.

C. GSU's Two Proposed License Amendments

This proceeding involves two proposed license amendments related to the merger between GSU and Entergy, pursuant to the June 5, 1992 Agreement and Plan of Reorganization between GSU and Entergy. These license amendments would make several significant changes in the ownership and operation of River Bend, including those discussed below which relate directly to safety and health.

Under the first license amendment, GSU requested that the license be changed to allow an Entergy affiliated company, EOI, to be included as a licensee of River Bend under 10 C.F.R. § 50.90 ("Operations Application"). This application would interject GSU between Cajun and EOI, the new operator of the plant. Whereas under the JOPOA, Cajun had direct access to the operator of River Bend, this amendment would relegate GSU to only an ownership role, replace GSU with EOI as the operator of the facility and eliminate Cajun's direct access to the operator of the plant. As a result, this amendment places a non-operating owner between EOI and Cajun, and Cajun no longer has direct access to the operator for its safety concerns.

Under the second license amendment, GSU sought approval of Entergy's ownership of and control over GSU and for a license amendment to the River Bend Facility Operating License to reflect

such approval ("Ownership Application"). The amendment reflected that GSU is now merged into the Entergy system and has become a party to the Entergy System Agreement. Approval of the Ownership Application entails that Entergy and its shareholders are insulated from EOI and GSU. The result could be a continued decline in the viability of GSU and increased risks to health and safety at River Bend, because of the thin capitalization of EOI.

D. The Proceedings Below

On January 13, 1993, GSU filed its Ownership Application seeking approval of an effective change of control over GSU, and for a license amendment to the River Bend Operating License NPF-47 to reflect such approval, in NRC Docket No. 50-458. On the same day, GSU also filed its Operations Application requesting an amendment to reflect approval for EOI to be included as a licensee of River Bend under 10 C.F.R. § 50.90.

On March 25, 1993, the Commission issued a notice of filing of the Ownership Application of GSU. 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 ("April 26 Petition").

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" related to the Ownership and Operation Applications. 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 August 6 Petition" and "Cajun August 17 Petition").

On August 19, 1993, the Licensing Board was established to rule on petitions for leave to intervene and requests for hearing related to the Commission's Notices of July 7, 1993. On August 23, 1993, as supplemented on August 27, 1993, GSU filed an Opposition to Cajun's August 6 and 17 Petitions. GSU's Opposition implied that Cajun was concerned only with the Operations Application, despite the fact that Cajun had already filed its April 26 Petition related to the Ownership Application.

On August 31, 1993, Cajun amended its Petition to Intervene to clarify, if necessary, that it sought to intervene in appropriate proceedings related to both the Ownership and the Operations Applications ("Cajun August 31 Amendment").^{2/} 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) (1993).

Cajun also 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) (1993). Cajun raised seven contentions:

^{2/} GSU makes the inappropriate suggestion that Cajun took an interest in the Ownership Application "[u]pon prompting by the Licensing Board" at the September 15, 1993 prehearing conference. GSU Appeal at 6. That this is false can be seen from Cajun's April 26 Petition and August 31 Petition, both of which predate the prehearing conference.

1. The proposed License Amendments fail to reflect 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.
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 ownership amendment should be approved only with conditions adequate to remedy its adverse impacts on the Cajun/Gulf States Interconnection Agreement.
7. The River Bend license conditions must be enforced.

On September 15, 1993, a prehearing conference was conducted in this matter. Following the prehearing conference, briefs were filed regarding the issues raised at the conference, including Cajun's October 27, 1993 Reply to GSU's opposition to Cajun's contentions. ("Cajun October 27 Reply").

E. The Licensing Board's Order

On January 27, 1994, the Licensing Board granted Cajun's motion to intervene and request for a hearing in the above matters.

The Licensing Board first concluded that radiological harm to Cajun's property, River Bend, was a protected interest under the Atomic Energy Act. The Licensing Board reasoned that:

Cajun's asserted interest in avoiding damage to property from nuclear-related accidents

coincides with the Atomic Energy Act's stated purpose of affording protection from radiological hazards. . . . [R]adiological protection under the Act is afforded for both human life and property. In fact, the protection of property is specifically mentioned in the Atomic Energy Act in several places . . . Cajun's property interest in River Bend thus clearly meets the zone of interests requirement for standing.

Order at 11. The Licensing Board concluded that Cajun had standing in each of the Ownership and Operations Application proceedings. Order at 12.

Second, the Licensing Board accepted Cajun's Contention 2 -- and Contentions 1 and 5 to the degree that they supported Contention 2 -- wherein Cajun stated that GSU's financial problems and proposed license amendments would result in increased safety concerns at River Bend, due to the underfunding of the operator, EOI. In reaching this conclusion, the Licensing Board made the following findings of fact:

1. Gulf States has the full obligation under the Operating Agreement to compensate EOI for River Bend operation and EOI cannot look to Entergy or Cajun for its payment. (Order at 19.)
2. EOI is very thinly capitalized. If Gulf States ceases to make its Operating Agreement payments, EOI has no other sources of funds to maintain safe and reliable River Bend operation. (Id.)
3. Gulf States faces severe financial exposure from litigation . . . which could render Gulf States bankrupt and unable to make adequate payments to EOI to maintain safe and reliable River Bend operation. (Id. at 20.)
4. Entergy views its obligations to support EOI in the event of lack of funding from Gulf States to be very limited. (Id.)

The Licensing Board concluded that NRC regulations require financial review of the proposed licensee and operator of

the facility, EOI. Noting that GSU asserted no financial qualifications on the part of EOI and that the license amendments indicated that EOI would be unlikely to obtain support from Entergy, the Licensing Board accepted Cajun's contention that these financial problems could lead to a decline in safety at River Bend. Order at 21-22.

III. ISSUES ON APPEAL

The following issues have been identified on appeal:

- (1) Whether the Licensing Board has erred in concluding that "Cajun has met the requirements for standing", and
- (2) Whether the Licensing Board has erred in admitting Contention 2 "regarding a potential safety risk caused by the under-funding of the plant's operator".

GSU Appeal at 12, quoting Order at 27.

Cajun does not contest GSU's statement of the issues on appeal. However, three points merit discussion.

First, GSU fails to even appeal the Board's finding that EOI lacks the financial qualifications to be plant operator. As noted herein, this failure compels affirmance of the Licensing Board's Order.

Second, GSU takes the position that its appeal is limited to the safety issues resulting from EOI's underfunding. GSU Appeal at 12. In fact, Cajun's contention, as accepted by the Licensing Board, addressed the health and safety concerns raised by the insertion of EOI as an operator at the facility and the merger of GSU and Entergy. See, e.g., Cajun October 27 Reply at 16-20. Therefore, GSU's appeal is fatally flawed in not addressing both the operational and ownership aspects of Cajun's Contention and the Licensing Board's findings.

Third, the Commission should note that the Licensing Board concluded that Contention 1, concerning GSU's financial condition, was an essential element of Contention 2. Order at 18. Therefore, while the Licensing Board denied Contention 1 as an independent contention, it accepted it as a "basis" for Contention 2 on the underfunding of EOI. Id. Similarly, the Licensing Board rejected Contention 5 on proposed license conditions as an independent contention, but with the proviso that Cajun could request similar license conditions as a remedy for safety-related concerns arising out of Contention 2.

Therefore, Cajun's "contention," as accepted by the Licensing Board, is broader than the Statement of Contention 2 reflected in GSU's Appeal, and GSU's Appeal is deficient to that degree.

IV. ARGUMENT

GSU's Appeal must be denied, since the Licensing Board's rulings rest on a substantial record and the Board used reasoned decision-making. Cajun has standing to intervene in this proceeding, since the Act clearly provides that Cajun's property interest in its \$1.6 billion investment in River Bend is within the "zone of interests" protected under the Act. Further, Cajun has proffered an acceptable contention in stating that GSU's two proposed license amendments will result in the underfunding of the facility operator, EOI, as a result of the merger of GSU and Entergy, which presents a safety risk at River Bend. Accordingly, the Commission must affirm the Licensing Board's decision.

A. The Licensing Board Appropriately Consolidated the Two Application Proceedings

In struggling to find a legal ground for appealing the Licensing Board's Order, GSU claims that the Licensing Board impermissibly consolidated the Operations and Ownership Application proceedings by not addressing the standing issues separately for each license amendment. GSU Appeal at 13-14. To the contrary, the Licensing Board explicitly addressed the standing issues separately for each license amendment and concluded that Cajun had standing in both proceedings.

The Licensing Board reasoned that:

Both license amendments found in the July 7, 1993 Federal Register Notice play a role in the potential radiological hazards which Cajun has alleged in this proceeding. The amendment naming a new plant operator will install an allegedly under-funded operator whose lack of funding may jeopardize the safe operation of River Bend. . . . The merger amendment to permit Gulf States to become a subsidiary of Entergy Corp. also can cause unsafe operations since the terms of the merger agreement allegedly allow for under-funding at the plant. Thus, both amendments play a part in this proceeding and both are contributors to Cajun's standing arguments.

Order at 12.

After reaching this conclusion, the Licensing Board went on to consolidate the two cases. The Licensing Board has broad authority to consolidate cases. 10 C.F.R. § 2.716; Safety Light Corporation (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13; 36 NRC 79 (1992). GSU's reliance on 10 C.F.R. § 2.402 as the basis for the Licensing Board's consolidation authority is inappropriate. Section 2.402 only pertains to construction permits and consolidation of phased proceedings. Neither situation is applicable here.

The Licensing Board concluded that the Ownership and Operations Applications were closely related and that consolidation of the proceedings would avoid unnecessary litigation. Order at 9-10. The Commission should not impose a different judgment on this issue. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-26, 4 NRC 608 (1976).

B. GSU Errs Completely in Claiming this Appeal Addresses Cajun's "Economic Interests"

Cajun raised seven contentions in its August 31 Petition. As noted, the Licensing Board only accepted Cajun Contention 2, as supplemented by Contentions 1 and 5, on the grounds that this contention raised issues concerning safety. The Licensing Board declined to rule on Cajun's request that Cajun, as a co-licensee of a licensed facility, has standing as a matter of right to intervene in this licensing proceeding (Order at 15, n. 5), and it rejected in whole or part other Cajun contentions. See Order at 23.

Under the Commission's Rules, 10 C.F.R. § 2.714a (1993), Cajun cannot appeal at this time the Licensing Board's determinations adverse to Cajun. Cajun will raise these matters at an appropriate time. However, the contentions Cajun wished to raise concerning what GSU calls "economic interests" are simply not before the Commission at this time.

GSU errs completely in attempting to suggest that the Cajun contention that is on appeal addresses only economic interests. GSU Appeal at 15. Since it is apparently unable to rebut Cajun's contention on safety grounds, GSU merely repeats

the same arguments it made below. The Licensing Board properly rejected GSU's position on this matter. As the Licensing Board found:

Cajun has supplied information to establish that safety at the plant may be jeopardized by potential plant under-funding and a lack of oversight by Cajun.

Order at 13. The issues on appeal relate to safety, not economic interests.

C. Cajun's Interest In Protecting Its Property, River Bend, From Radiological Harm Confers Standing on Cajun

Judicial tests of standing are applied in NRC proceedings to determine whether petitioners have sufficient interests to be entitled to intervene. Judicial concepts of standing as a matter of right require a showing that (a) the action sought in a proceeding will cause injury in fact and (b) the injury is arguably within the zone of interests protected by statutes covering the proceeding. Warth v. Seldin, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970); Metropolitan Edison Co., (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327 (1983); Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), LPB-91-7, 33 NRC 179 (1991).

As the Licensing Board concluded, supported by Commission Staff, this is a straightforward matter and Cajun clearly has standing. GSU's eight page argument on this issue (GSU Appeal at 13-21) -- which is tellingly directed at Cajun's pleadings rather than the Licensing Board's Order -- attempts to

confuse matters by again alleging that only economic issues are raised, rather than safety concerns related to Cajun's property interest in River Bend.

Under the first part of the test, Cajun's property interest in protecting its \$1.6 billion investment in River Bend from radiological hazards is protected by the Atomic Energy Act. Radiological protection under the Act is afforded for both human life and property. In fact, the protection of property is specifically mentioned in the Act in several places, including Sections 103(b) and 161(b) which speak of minimizing "danger to life or property". 42 U.S.C.A. §§ 2133(b) and 2201(b) (West Supp. 1993).

While GSU cites a lengthy list of cases at page 17 of its Brief on Appeal for the proposition that purely economic concerns are not cognizable interests under the Act, these cases are irrelevant to the issues on appeal. Cajun has raised issues concerning radiological harm and safety related to its property interest, as the Board recognized.

Second, as the Licensing Board concluded, Cajun has demonstrated that it "may be injured in fact" by the proposed action. Virginia Electric Power Co. (North Anna Power Station, Units 1 and 2) ALAB-342, 4 NRC 98, 104-105 (1976). Underfunding of EOI and a lack of oversight by Cajun may lead to injury to Cajun's property interest in River Bend.

This injury can be clearly traced to the two proposed license amendments. While GSU appears to argue that decreased safety is not related to the underfunding of the plant operator

(see pages 21-25 of GSU's Appeal), this contradicts long-standing Commission policies and regulations and common sense. The Commission requires financial qualifications review and evaluation of licensees precisely because financial security is directly related to safety and health. The Commission has repeatedly stressed that financial problems may lead to safety problems. 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).

D. The Atomic Safety And Licensing Board
Correctly Accepted Cajun's Contention

The Board correctly admitted Cajun's Contention 2, as supplemented by Contentions 1 and 5, in which Cajun alleged that GSU's financial problems and the license amendments would result in a significant reduction in the margin of safety and health at River Bend.

GSU acknowledges that the new operator of River Bend, EOI, fails the Commission's financial qualifications test, 10 C.F.R. § 50.33(f) (1993). GSU Appeal at 33. The Licensing Board concluded that financial qualifications review of EOI is required. Order at 21. GSU has not specifically appealed that

decision. As a result, the Commission must conclude that EOI does not meet the financial qualifications requirements at this time.

Separately, the Licensing Board made factual findings that EOI is unable to obtain adequate financial support from Entergy or Cajun, or even GSU in the event of a GSU bankruptcy. Cajun provided detailed factual support in the Record for this decision and the Commission should defer to the Licensing Board's findings.

1. Standards For Contentions

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. 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) (1993).

The Commission's contention rule must be reasonably applied and not be construed mechanically. See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 1993 NRC LEXIS 53 (November 30, 1993). This recent order states:

[I]t is clear that the "raised threshold" incorporated by the Commission into its contention rule must be

reasonably applied and is not to be mechanically construed. The Commission has long held that its rules of procedure are not to be applied in an "overly formalistic" manner. . . . Thus, failure of an intervenor . . . to dot an "i" or cross a "t" should not necessarily undermine the acceptability of a contention, particularly where a significant health and safety or environmental issue is attempted to be raised.

Id., slip op. at 5 (citations omitted). The Commission does not require "an intervenor or petitioner to prove its case prior to the admission of its contention" (id.), which is how GSU apparently interprets the contention rule.

The contention rule is to be applied in a manner analogous to an answer to a motion for summary judgment. See 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). Here the Licensing Board stated:

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.

Id., 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" and that the Board should not "penalize Petitioners for being briefer and more concise than others might have been." Id., slip op. at 6-7. 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 reasonably and 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. Cajun's Contention was Properly Accepted

Cajun has contended that the contractual framework for maintaining safe and reliable River Bend operation by EOI is tenuous 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. Further, Cajun contended that the merger of GSU and Entergy sets up a complicated corporate structure that presents the opportunity for Entergy to take advantage of the corporate structure of GSU and EOI, which will increase the safety risk at River Bend.

GSU mistakenly claims that it is GSU's financing that is at issue. GSU Appeal at 34. To the contrary, it is EOI's qualifications that are at issue in this proceeding, as the Licensing Board recognized. Because EOI is not an electric utility, it is subject as the operator of River Bend to full

financial qualifications review.^{3/} The Licensing Board reviewed the financial qualifications of EOI and concluded that EOI was very thinly capitalized and that it had no access to funds from Entergy and Cajun. Order at 20. Further, the Licensing Board concluded that the one party that EOI had direct access to, namely GSU, was in severe financial straits. Id. at 20.

GSU appears to take the position that Cajun has not adequately "quantified" the decrease in safety at the facility. GSU Appeal at 30. Cajun fails to see how it could possibly provide the type of quantification that GSU appears to be requesting at this time. The purpose of a hearing on this issue is to provide Cajun with an opportunity to provide some "quantification". At this time, Cajun lacks sufficient information to provide further details and can only allege that financial problems create the risk of health and safety problems.^{4/}

3/ The only limited exemption from financial qualifications review applies to "electric utilities" which are defined as entities which generate or distribute electricity and recover its costs, directly or indirectly through rates established by the entity or by a regulatory authority. See 10 C.F.R. § 50.2. The Licensing Board concluded that "clearly EOI is not an electric utility". Order at 21 (emphasis added). GSU has not appealed this finding.

4/ GSU also appears to allege that Cajun has incorrectly alluded to the "margin of safety" rather than health and safety under the Act in preparing its contentions. In light of the Commission's requirements to avoid overly formalistic or mechanical interpretations, Cajun fails to see how this can be a serious issue. Regardless of how the issue is phrased, Cajun has clearly asserted its concern regarding health and safety and the Commission should the Licensing Board to conduct its hearing.

For the reasons discussed below, each of the Licensing Board's four factual conclusions is correct and the Licensing Board's conclusions should be affirmed.

- (a) The proposed River Bend Operating Agreement runs only between Gulf States and EOI. Therefore, Gulf States has the full obligation under the Operating Agreement to compensate EOI for River Bend operation and EOI cannot look to Entergy or Cajun for payment. (Order at 19.)

In its Contentions, Cajun explained that GSU and EOI propose to enter into the Operating Agreement for the provision of operating services by EOI and for payment by GSU. The Operating Agreement provides that EOI shall take all actions necessary to manage, control, possess, use, monitor, repair and decommission, 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.

The fact that EOI is "only a conduit -- not a source - of funds" (GSU Appeal at 32), is precisely the problem. Whereas, before the merger, GSU shareholders would be directly impacted by a GSU bankruptcy, post-merger, Entergy shareholders are insulated from liability through the corporate structure of Entergy's subsidiaries, GSU and EOI. GSU may declare bankruptcy and EOI shut down operations related to River Bend, while Entergy escapes its obligations. As a result, EOI may be unable to

ensure the safe shutdown of River Bend in the event of a GSU bankruptcy.

- (b) EOI is very thinly capitalized. If Gulf States ceases to make its Operating Agreement Payments, EOI has no other sources of funds to maintain safe and reliable River Bend operation. (Order at 19.)

GSU has acknowledged that EOI does not satisfy the financial qualifications test required by the Commission's Regulations. Rather than being a "straw man" (GSU Appeal at 33), this lack, coupled with GSU's litigation exposure and EOI's inability to obtain funds from other sources, is precisely Cajun's concern about the two proposed license amendments.

Related to EOI's lack of financial qualifications 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 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.

- (c) Gulf States faces severe financial exposure from litigation with Cajun and from certain Texas regulatory proceedings which could render Gulf States bankrupt and unable to make adequate payments to EOI to maintain safe and reliable River Bend operation. (Order at 20.)

The Licensing Board agreed with Cajun's contention that GSU faces severe financial exposure. Cajun provided the Licensing Board with a concise statement of the facts regarding the two Cajun lawsuits that pose a threat to the financial security of GSU. See Cajun August 17 Petition at 13-15.

Without question, GSU faces severe financial exposure which could render GSU bankrupt and result in an underfunded EOI. This fact distinguishes this case from other arrangements, cited by GSU as "precedent" (GSU Appeal at 33-34), where the owners have not been shown to be at risk of severe financial exposure. The Licensing Board's Order rests on a substantial and reasoned basis.

- (d) Entergy views its obligations to support EOI in the event of lack of funding from Gulf States to be very limited. (Order at 20.)

As discussed in more detail above, Entergy has no obligations under the guarantee agreement and very limited obligations to EOI under the license amendment. In statements before the Federal Energy Regulatory Commission, Entergy officials have confirmed that Entergy views its obligations to be very limited. Entergy would shut down River Bend if EOI lacked adequate funds. While shutdown of the plant may be GSU's and Entergy's solution to the safety problem, in fact the plant operator must also ensure that the shutdown is performed safely.

There is no assurance that EOI, which would be shutting down the plant because it lacks financial resources, would somehow have sufficient resources to shut it down safely. Nor is there any assurance that EOI could satisfy its other obligations, e.g., decommissioning expenses, related to safe operation of the facility.

Cajun has provided a sufficient basis for its contention that the financial arrangements among GSU, EOI and Entergy may adversely affect the safety of River Bend. Cajun has adequately contended 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.

In addition to the health and safety concerns raised by the underfunding of EOI, the merger of GSU and Entergy creates the possibility for underfunding of GSU and EOI, since relationships with and among Entergy affiliates could result in Entergy's shareholders being insulated from the costs and obligations associated with River Bend.

Finally, while GSU complains that Cajun has not provided adequate information regarding the specific health and safety problems that could result from the license amendments, 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. See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, Slip Opinion at 5, 1993 NRC LEXIS

53 (November 30, 1993)("This [contention] requirement does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions . . . of which it is aware at that point in time which provide the basis for its contention"). Cajun cannot know at this time the precise nature of any future safety violations by GSU. Consequently, Cajun cannot now project how EOI will operate the plant or in what manner safety problems will arise in the event of a GSU bankruptcy. These matters are the subject of discovery before the Licensing Board. Cajun has established, however, that the financial problems raised by the merger may affect safety at the plant.

The Licensing Board correctly concluded that Cajun's second contention pleads a genuine issue of material fact regarding EOI's ability to operate River Bend. The Commission must affirm this finding.

E. The Fact that the Commission Declined to Issue a Notice of Rulemaking is Not a Valid Policy Reason for Overturning the Licensing Board's Order

GSU is grasping at straws when it suggests that a valid policy reason exists to overturn the Licensing Board's Order, based on the fact that the Commission declined to issue a Staff-sponsored Notice of Rulemaking, which would have considered alternatives to mitigate the impacts on safety of licensee ownership arrangements. GSU Appeal at 3 and 37, n.27. The unique facts of GSU's financial situation and Entergy's proposed corporate structure would lend themselves to a hearing even if the Commission were pursuing a rulemaking on ownership

arrangements. The fact that the Commission declined to issue the notice of rulemaking removes any possible justification for GSU's suggestion.

The Staff recommended the approval of the notice of rulemaking in question because it is concerned, inter alia, that situation where a licensee-subsiidiary's only asset in the licensed reactor itself, the ability of the Commission to reach the assets of the parent company may be limited if the subsidiary defaults, absent legally enforceable commitments by the owners. See SECY-93-075, "Issuance of an Advanced Notice of Proposed Rulemaking on the Potential Impacts on Safety of Power Reactor Licensee Ownership Arrangements," March 24, 1993, at 1; disapproved, SECY-93-075, Memorandum to J.M. Taylor (EDO) from S.J. Chilk (Secretary), April 28, 1993.

One of the situations the Staff explicitly addressed was related to Entergy's wholly-owned subsidiary, System Energy Resources, Inc. ("SERI"). Given SERI's poor financial performance in the 1989-90 period, the fact that SERI's only asset is the Grand Gulf Station, and the fact that Entergy itself was not a licensee of Grand Gulf, the Staff was concerned about decommissioning of Grand Gulf and other safety-related obligations. Id. at Enclosure 2, Attachment 1, at 1-6 and 1-7. The Staff noted that potentially mitigating the situation was the fact that Entergy operating subsidiary Mississippi Power & Light Company ("MP&L") remained as a licensee. Id. at 1-7.

The instant situation is distinguishable in that Entergy subsidiary EOI has virtually no assets, not even the

reactor itself, as does SERI. Further, compared to MP&L, the fact that GSU remains on the license is not a mitigating factor if GSU is bankrupt or otherwise severely financially strained. Because of the ownership arrangement proposed in GSU's Ownership Application, Entergy is insulated by its corporate structure from any decommissioning and other safety-related obligations.

Entergy's changes to the organizational and corporate structure of River Bend's licensees raise serious safety and health concerns. Many of Entergy's changes are explicitly intended to limit its liability at River Bend, including liability for safety and health issues. For example, Entergy has avoided a commitment to fund EOI should GSU cease providing operating funds. Similarly, Entergy has indicated that the merger of GSU and Entergy does not obligate Entergy to support GSU financially.

Therefore, Cajun opposes GSU's Appeal to allow the Board to examine at hearing the health and safety effects of the Entergy/EOI/GSU licensee ownership arrangements and to explore alternatives to mitigate the potential negative impacts of these arrangements on health and safety issues.

V. CONCLUSION

Based on the foregoing, the Atomic Safety and Licensing Board correctly concluded that Cajun has standing in this proceeding and proffered a contention that complies with the requirements of 10 C.F.R. § 2.714(b)(2)(i)-(iii) (1993). Cajun

requests that the Commission affirm the Licensing Board's decision and allow this matter to proceed to hearing.

Dated: March 2, 1994

Respectfully submitted,



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



In the Matter of)
)
GULF STATES UTILITIES)
COMPANY, et al.)
)
(River Bend Station, Unit 1))

Docket No. 50-458-OLA

CERTIFICATE OF SERVICE

I, Thomas L. Rudebusch, hereby certify that on this 2nd day of March, 1994, I served on the following by first class mail, postage pre-paid, copies of the CAJUN ELECTRIC POWER COOPERATIVE, INC.'S, BRIEF IN OPPOSITION TO GULF STATES UTILITIES COMPANY'S APPEAL BY THE ATOMIC SAFETY AND LICENSING BOARD.

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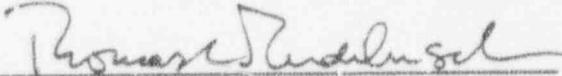
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