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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
DUCKETT AND SERVICE
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In the Matter of)	
)	
GULF STATES UTILITY COMPANY)	Docket No. 50-458-OLA
)	
(River Bend Station, Unit 1))	
)	

NRC STAFF RESPONSE
TO GULF STATES UTILITIES APPEAL

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March 3, 1994

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INTRODUCTION

On February 15, 1994, Gulf States Utilities (GSU) filed an appeal pursuant to 10 C.F.R. § 2.714a from the Atomic Safety and Licensing Board's "Memorandum and Order (On Petition to Intervene)," LBP-94-3, (Order), dated January 27, 1994. In that Order, the Licensing Board ruled that Cajun Electric Power Cooperative Inc. (Cajun or Petitioner) had standing to intervene and admitted one of the seven contentions (Contention 2) proffered by Petitioner. GSU argues on appeal that the Licensing Board erred in finding that Petitioner had standing and that one of its proffered contentions satisfied the Commission's regulation regarding admissibility of contentions. The NRC Staff believes that Cajun has standing to intervene, but agrees with GSU that the Licensing Board erred in finding that Cajun's proffered Contention 2 satisfies the Commission's standards for admissibility.

BACKGROUND

On July 7, 1993, the NRC published in the *Federal Register* a "Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing." 58 Fed. Reg. 36,423. That notice included two proposed amendments to Gulf States Utilities' River Bend operating license, one, noticed at 58 Fed. Reg. 36,435, concerning a revision to the license to reflect a change in ownership of Gulf States Utilities, and the other, noticed at 58 Fed. Reg. 36,436, concerning a revision to the license to include Entergy Operations Inc. (EOI) as a licensee and to authorize EOI, as agent for the owners, to use and operate River Bend. Both notices included proposed no significant hazards consideration determinations. The general "Notice of Consideration of Issuance" specified that any person whose interest might be affected by the proceeding and who wished to participate as a party "must file a written request for a hearing and a petition for leave to intervene by August 6, 1993." 58 Fed. Reg. 36,423; 36,424.

On August 6, 1993, Cajun Electric Power Cooperative, Inc. filed a "Petition to Intervene, Comments on the Proposed No Significant Hazards Consideration Determination and Request for a Hearing" ("Petition").¹ An Atomic Safety and

¹ In its "Petition for Leave to Intervene," filed August 6, 1993, Cajun stated that its petition was pursuant to the Commission's *Federal Register* notice at 58 Fed. Reg. 36,435, regarding change of *ownership*; however, Cajun's comments concerned the proposed change of *operation*, noticed at 58 Fed. Reg. 36,436. The Staff noted the discrepancy in its "Response to Cajun Electric Power Cooperative, Inc's Comments, Petition and Amended Petition for Leave to Intervene," filed August 26, 1993, at 2, n. 3. Cajun, in its Supplement, announced that it was its intention to intervene on both amendment requests. Supplement at 5-6. Cajun reiterated this intention at the
(continued...)

Licensing Board was established on August 17, 1993, to consider Cajun's Petition. Also, on August 17, 1993, Cajun filed an amendment to its Petition.² On August 23, 1993, Gulf States Utilities Company filed its "Opposition . . . to the Petition to Intervene and Request for a Hearing of Cajun Electric Power Cooperative, Inc." On August 26, 1993, the NRC Staff filed its "Response to Cajun Electric Power Cooperative, Inc's Comments, Petition and Amended Petition for Leave to Intervene and Request for Hearing." In its "Opposition," Gulf States Utilities argued that Cajun had failed to show standing to intervene on the proposed amendments in that the injury Cajun alleged was merely economic and thus not cognizable under the Atomic Energy Act and the Commission's regulations, was not related to the proposed amendments and was too speculative to support intervention. The NRC Staff argued in its "Response" that Cajun had demonstrated standing in that it had shown a property interest relating to radiological damage that was protectable under the Atomic Energy Act. On August 27, 1993, the Licensing Board issued an Order in which it scheduled a prehearing conference for September 15, 1993, to hear argument on the petition to intervene and responsive pleadings.

The Licensing Board set a schedule for written responses to Cajun's contentions.

Tr. 86. In accordance with the schedules, GSU responded in opposition to the

¹ (...continued)
prehearing conference. Tr. 20. The NRC Staff argued that Cajun had not demonstrated standing with regard to the proposed change in ownership of GSU. Tr. 41.

² "Cajun Electric Power Cooperative, Inc.'s, Amendment to Its Previously Filed Comments, Petition for Leave to Intervene, and Request for Hearing . . .," (Amendment to Petition).

contentions on September 29, 1993, and the NRC Staff responded on October 13, 1993, also opposing the contentions. Cajun filed a reply on October 27, 1993.

On December 16, 1993, the NRC Staff issued the license amendments. Copies of the amendments were provided to the Licensing Board and parties.

As stated above, in a Memorandum and Order dated January 27, 1994, the Licensing Board found that Cajun had standing and that one of its proposed contentions was admissible. The Licensing Board, therefore, granted Cajun's petition for leave to intervene and request for hearing.

ISSUES ON APPEAL

- 1) Whether the Licensing Board erred in finding that Cajun has standing.
- 2) Whether the Licensing Board erred in admitting Contention 2.

ARGUMENT

A. The Board Correctly Found That Cajun Had Standing With Regard to the Transfer of Operating Authority.

GSU argues that Cajun has not established that its interest is within the "zone of interests" protected by the Atomic Energy Act. Brief at 12-21. Cajun has a substantial interest in the River Bend plant as the owner of a thirty percent (30%) share of the facility. Among the purposes of the Atomic Energy Act is the minimization of "danger to life and property." AEA, Sections 103.b and 161(b), 42 U.S.C. §§ 2133(b)

and 2201(b). Thus, Cajun's interest is within the zone of interests protected by the AEA and Cajun has shown that it might be injured in fact by the unsafe operation of River Bend. See LBP-94-3, slip op. 11-12.

GSU also argues that the Licensing Board erred in consolidating the two proceedings, the one regarding the merger and the other operation by EOI, prior to assessing whether Cajun had satisfied the requirements for causing a hearing to be held, namely, showing standing and proposing an admissible contention. Brief at 13. The question of whether the Licensing Board correctly or incorrectly merged the two proceedings is immaterial.³ Cajun's Petition and Amendment to the Petition indicated that Cajun's interest related to the transfer of operating authority over River Bend to EOI, which appeared at 58 Fed. Reg. 36,436. Although the Petition cited 58 Fed. Reg. 36,435, which noticed the license amendment recognizing the merger of GSU and Entergy, Cajun addressed its standing to intervene regarding the transfer of operating authority and the admitted contention relates to operation.⁴ The citation to the wrong page in the *Federal Register* was a matter that could be and was corrected. See 10 C.F.R. § 2.714(a)(3). The Petition properly alerted the parties that Cajun was challenging the transfer of the operation of River Bend.

³ GSU addresses consolidation under 10 C.F.R. § 2.402, which relates to Part 52. The Staff believes that § 2.716 is the proper citation. In any event, the Staff believes that, as the Licensing Board did not admit a contention regarding the merger, there was no proceeding regarding that matter to consolidate with the proceeding concerning operation.

⁴ The Licensing Board's analysis accepts the Staff's view of Cajun's standing to intervene regarding EOI operation. See LBP-93-36 at 7-8, 9-11.

The Licensing Board's conclusion that Cajun has standing to intervene on the transfer of operating authority was correct, without regard to whether it wrongly merged the proceedings.

B. The Board Erred in Admitting Contention 2 in This Proceeding.

The Licensing Board admitted Cajun's Contention 2 which reads as follows:

The proposed license amendments may result in a significant reduction in the margin of safety at River Bend.

The four bases for the contention assert that a) the proposed operating agreement runs between GSU and EOI; thus, GSU has the full obligation to compensate EOI for operation of River Bend and EOI cannot look to either Entergy (the parent holding company under the merger of GSU with Entergy) or Cajun for payment; b) EOI is thinly capitalized and, if GSU ceases to make its payment to EOI, EOI has no other source of funds to maintain safe and reliable River Bend operation; c) GSU faces severe financial exposure from litigation with Cajun and certain Texas regulatory proceedings, which could bankrupt GSU and render it unable to make payment to EOI; and d) Entergy is not required to fund EOI in the event of a default by GSU, and EOI would be forced to shut down River Bend if EOI lacked adequate funds.

In sum, the bases of the contention assert a lack of financial qualifications of EOI.

1. Standards for Admission of Contentions.

In admitting Contention 2 and its bases, the Licensing Board misapplied the Commission's pleading requirements set forth in 10 C.F.R. § 2.714(b)(2)(i),(ii), and (iii). Those requirements establish a high threshold for admissible contentions by requiring a

clear statement of their basis and the submission of supporting information and references to specific documents. See 54 Fed. Reg. 33,168; 33,170 (August 11, 1989); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

The regulations require, among other things, a statement of the alleged facts or expert opinion on which the petitioner intends to rely along with references to the specific sources and documents establishing those facts or expert opinion. 10 C.F.R. § 2.714(b)(2)(ii). Reference must be made "to the specific portions of the application disputed." 10 C.F.R. § 2.714(b)(2)(iii). A petitioner must also supply sufficient information to show that a genuine issue exists between petitioner and applicant on a material issue of law or fact. *Id.* Subsection (d)(2) further provides that a presiding officer or adjudicatory board designated to rule on the admissibility of a contention shall refuse to admit a contention if (a) the contention and supporting material fail to satisfy the requirements of 10 C.F.R. § 2.714(b)(2), or (b) "the contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief." 10 C.F.R. § 2.714(d)(2); see *Rules of Practice for Domestic Licensing Proceedings--Procedural Changes in the Hearing Process*, 54 Fed. Reg. 33,168 (August 11, 1989). If any one of these requirements is not met, the contention must be rejected. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991). Cajun's pleadings fail to supply the information required by these standards and the Licensing Board erred in not applying these standards.

The pleading rules do not permit the admission of vague, unparticularized contentions. Further, a contention will not be admissible where "if proven, [it] would be of no consequence in the proceeding because it would not entitle petitioner to relief." 10 C.F.R. § 2.714(d)(2). See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 91 (1990); *Public Service Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976). See also *Wisconsin Elec. Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 416-17 (1990). Indeed, it is error for a Licensing Board to infer a basis for a petitioner's contentions where the petitioner has failed to comply with the requirement to provide a basis for the contention and to provide sufficient information to support the contention. *Palo Verde*, CLI-91-12, 34 NRC at 155-56. See also *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273, 279 (1991) (Licensing Board is "not free to assume any missing information in a contention.")

While the Staff agrees with the Board that Cajun has standing in the operator amendment proceeding, *i.e.*, the potential for injury in fact, that showing of standing is insufficient to satisfy the standard for admission of a contention. The Licensing Board discussion, LBP 94-3 at 13-15, 22, fails to distinguish the two standards.

2. Contention 2 Fails to Provide Adequate Bases for Admission in This Proceeding.

The bases asserted for Contention 2 all relate to the financial qualifications of EOI and rest on the speculation that GSU may at some future date be unable to fulfill its contractual obligations to provide operating funds to EOI, with EOI solely dependent on GSU for operating funds. This lack of funds, asserts Cajun, has the potential to reduce the "margin of safety" at River Bend.⁵

Current funding for operations at River Bend is borne by GSU and Cajun in proportion to the ownership interests of each by terms of the Joint Operating Agreement. See Joint Ownership Participation and Operating Agreement, Section 8.4. There is no matter of fact or law regarding basis "a" that invites further inquiry by the Commission. Cajun does not show how the license amendment would affect GSU's obligation to finance safe operation of the plant. Cajun sets forth no basis upon which it could be concluded that the subject amendment would affect GSU's obligation or ability to finance the safe operation of River Bend whatever the outcome of the pending litigation between those parties.

With regard to basis "b," regarding EOI's thin capitalization and its dependence on GSU for operating funds, the Staff agrees with the Licensing Board that, while GSU and Cajun as electric utilities may be exempt from the requirements in 10 C.F.R.

⁵ Both Cajun and the Licensing Board refer to "margin of safety" which is a standard related to a significant hazards consideration finding, an issue the Board has recognized is not before it. LBP-94-3 at 2, n.1. The applicable standard is reasonable assurance of adequate protection of the public health and safety. See, A.E.A Section 103b, 42 U.S.C. § 2133(b); 10 C.F.R. 50.92(a).

§ 50.33(f)(2), EOI is not.⁶ EOI is not an electric utility as defined in 10 C.F.R. § 50.2. However, Cajun has not met its burden of showing a basis to conclude that the funding for River Bend operation is changed by EOI's operation of River Bend. Thus, since there is no change with regard to this matter, it cannot provide a basis for the contention.

Basis "c," regarding GSU's financial exposure from litigation in Louisiana and Texas, provides no basis for Contention 2. As the Staff has indicated, Cajun has not supplied any basis to conclude that the subject license amendment would affect GSU's obligation to pay its share of the costs of the operation of River Bend, regardless of the outcome of the litigation brought by Cajun against GSU. Although the outcome of the litigation could conceivably affect GSU's ability to finance the cost of operating River Bend, the subject license amendment has no effect on that situation and the litigation is

⁶ The Staff has examined the financial qualifications of EOI and found the requisite reasonable assurance of source of funds in the Operating Agreement between GSU and EOI. SER at 4. While EOI is dependent on GSU and Cajun's continued ability to pay operating expenses, there are no additional financial considerations beyond those that would pertain to GSU had it kept such operating responsibility. *Id.* GSU and Cajun's obligation to fund EOI's safe operation of River Bend supplies information sufficient to demonstrate that EOI has the financial qualifications to carry out the activities for which the license is sought, as required by 10 C.F.R. § 50.33(f). The Commission has historically approved the transfer of operations to a separate operating company without looking at the operating company's financial qualifications where an electric utility was obligated to provide funds for the costs of operations. *See, e.g.,* Arkansas Nuclear One, 55 Fed. Reg. 944 (January 10, 1990); Farley, 56 Fed. Reg. 64,666 (December 11, 1991); Grand Gulf, 54 Fed. Reg. 53,220 (December 27, 1989); Seabrook, 57 Fed. Reg. 24,685 (June 10, 1992); and Waterford, 55 Fed. Reg. 945 (January 10, 1990).

not relevant to the question of whether the subject license amendment should have been issued. Cajun has failed to demonstrate how the litigation provides a basis for Contention 2.⁷

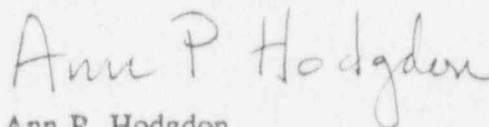
Basis "d" relates to the relationship between Entergy and EOI and has no bearing on the current funding arrangements for operation of River Bend, which provide for GSU and Cajun to jointly fund operating costs of the plant. The relief Cajun seeks is to have Entergy fund or indemnify EOI, a matter not covered by the subject license amendment.

None of the bases of Contention 2 is admissible in this proceeding.

CONCLUSION

For the reasons discussed, the Licensing Board should reverse LBP-94-3 and dismiss the proceeding.

Respectfully submitted,



Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of March 1994

⁷ The subject License Amendments, issued on December 16, 1993, contain two conditions that require GSU to inform the Director of NRR 1) sixty (60) days prior to any transfer from GSU to Entergy or Entergy subsidiaries of facilities valued at more than one percent (1%) of the value of GSU's net utility plant; and 2) of an award of damages in litigation regarding River Bend. LBP-94-3 does not reflect any consideration of these conditions.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO GULF STATES UTILITIES APPEAL" in the above captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 3rd day of March 1994:

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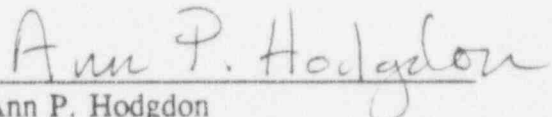
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