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February 4, 1991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

'91 FEB -4 P4:06

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
GEORGIA POWER COMPANY, <i>et al.</i>)	Docket Nos. 50-424-OLA
(Vogtle Electric Generating Plant)	50-425-OLA
Units 1 and 2))	

NRC STAFF MOTION FOR RECONSIDERATION OF LICENSING BOARD'S ORDER OF JANUARY 22, 1991 AND REQUEST FOR STAY

I. INTRODUCTION

On January 22, 1991, the Licensing Board conducted a telephone conference call, which is commemorated in a Memorandum and Order of the same date. The call, in which all members of the Board and representatives of the Applicant, the NRC Staff and Petitioner (Georgians Against Nuclear Energy ("GANE")) participated, was scheduled by the Board for the stated purpose of posing clarifying questions based on Applicant's Supplementary Statement and responses to that statement filed by GANE and the NRC Staff. Order at 1.

The NRC Staff moves the Licensing Board to reconsider its Order of January 22, 1991, because, as discussed below, it is beyond the jurisdiction of the Board. The Staff also seeks a stay of the effectiveness of the Order pending a decision on the instant motion because, as discussed below, the important issues raised here should be decided and not mooted by the Order's becoming effective by its terms.

II. BACKGROUND

On May 25, 1990, the NRC Staff issued to the Georgia Power Co. license amendments for its two Vogtle plants. The license amendments revised the Technical

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Specification (TS) Surveillance Requirement § 4.8.1.1.2h(6)(c) to permit the high jacket water temperature trip to be bypassed to minimize the potential for spurious diesel generation trips in the emergency start mode. On July 23, 1990, Georgians Against Nuclear Energy ("GANE") filed a petition to intervene. By responses dated August 7, 1990, and August 13, 1990, the Applicant and the NRC Staff, respectively, opposed the petition.

On August 16, 1990, the Licensing Board designated to rule on the petition issued "Memorandum and Order (Intervention Petition)," LBP-90-29, 32 NRC 89 (1990). In LBP-90-29, the Licensing Board stated that the Petition "fails to include an adequate demonstration of standing" and fails to set forth how the interests of the organization or its members would be affected by the proceeding. 32 NRC at 91-92. The Board noted that GANE's petition was saved from summary dismissal only because 10 C.F.R. § 2.714(a)(3) allows petitioners to amend their petitions without leave of the Board until 15 days prior to the first prehearing conference in the proceeding. 32 NRC at 93. It further provided that GANE might supplement its petition to show standing and submit contentions by September 4, 1990.

GANE filed its supplement pursuant to the schedule established in LBP-90-29, and the Applicant and Staff filed responses opposing GANE's contentions as inadmissible under the criteria of 10 C.F.R. § 2.714.

A special prehearing conference was held on September 19, 1990. During the course of the conference, the Board indicated, in passing, that GANE's contentions were lacking in basis, but, nevertheless, failed to rule on them. *See, e.g.,* Tr. 73. When the Board indicated that it had concerns that it might refer to the Commission, the Staff

indicated that such a referral would be preferable to the Board's amending GANE's petition to render otherwise inadmissible contentions admissible. Tr. 122-23. The Licensing Board circulated and had bound into the transcript, following Tr. 156, a two-page document that it had drafted entitled "Contentions." The Board indicated that it had not yet decided whether to admit its *own* contentions or whether it would notify the Commission that it was adopting a contention *sua sponte*. Tr. 157. The Board also indicated its awareness of the need to have the Commission's approval to pursue its own contention in lieu of an adequately pleaded contention proposed by a petitioner. Tr. 158. The Licensing Board determined to allow the Applicant to file a supplement to its oral remarks. Tr. 165, 168.

On October 2, 1990, the Licensing Board issued a Prehearing Conference Order (Filing Dates for Further Submissions), in which it ruled that GANE had demonstrated standing to intervene. In summarizing the actions taken at the conference, the Board noted that it had "outlined health and safety matters derived from the petitioners' contentions which it believed might properly be suitable for hearing." Order at 2. The Board set a schedule for the filing of the Applicant's supplement, the Petitioner's response and the Staff's comments on those filings. The Board indicated that following receipt of the foregoing, it would determine whether further proceedings were necessary or appropriate. Order at 3.

Applicant's Supplement, GANE's response and the Staff's comments were filed according to the schedule set by the Board.

As noted above, the Licensing Board convened a telephone conference call on January 22, 1991, in order to pose questions based on the filings sought in its October 2,

1990 order¹. The Board concluded the Order of January 22, 1991 with the notation: "Following receipt of all this material, the Board will determine whether further activities in this proceeding are warranted." Order at 4.

III. DISCUSSION

The Licensing Board's January 22, 1991 order is beyond the jurisdiction of the Licensing Board.

An adjudicatory board of this Commission may not conduct an inquiry to determine if an issue is to be admitted into controversy. In the context of a motion to

¹The questions directed to the Staff are:

6. Inasmuch as Reg. Guide 1.9, Position 7, conditions the grant of bypass authority on the alarming in the control room of "abnormal values of all bypass parameters," how can the Staff justify granting the Applicants an exemption from this requirement (as applicable to the HJWT trip alarm) until after May, 1991 (see Applicants' letter, dated January 10, 1991; Architzel Aff., ¶5; Chopra Aff., ¶7). Informing operators that the alarm does not work does not appear to meet the Reg. Guide requirement satisfactorily. What action, if any, is the Staff proposing to take as a result of the apparent lack of the trip alarm from May 25, 1990 to December, 1990, when this deficiency was first uncovered by the Staff?

7. Which, if any, of the 11 power plants referenced by Mr. Alfred E. Chaffee at page 5 of his affidavit (line 20) have sought a license amendment to permit (or have licenses permitting) bypassing the Calcon sensors in emergency conditions? What was the Staff action on each request?

reopen the record, the Commission, in *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233 (1986), emphasized that an adjudicatory board could only consider the admissibility of contentions on the basis of information before it, and that it had no authority to seek additional information. Thus, the Commission ruled that the Appeal Board had erred in setting up proceedings to see if there was a basis for reopening the record so that contentions concerning the seismic design of a plant might be considered. Similarly, in *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1 (1986), the Commission held that the Appeal Board had no authority to see if there was information that might support the raising of the quality assurance issues which intervenors sought to raise on a motion to reopen a record. The Commission emphasized that, as a party could not engage in discovery prior to the admission of issues, so, too, an adjudicatory board might not engage in an inquiry to see if there might be support for a contention. 23 NRC at 6-7.

Discovery may only be permitted after a petition to intervene has been granted. *Wisconsin Electric Power Co.* (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 929 (1974). Discovery on contentions may be allowed only after those contentions have been admitted into the proceeding. *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-693, 16 NRC 1245, 1263 (1982). Nor may a contention be conditionally admitted so that discovery can be had to provide necessary specific basis for the contention. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 (1982), *vacated on other grounds* CLI-83-19, 17 NRC 1041 (1983).

No intervenor has been admitted into this proceeding. No contention has been admitted into this proceeding, and there is no basis for discovery herein. The fact that the discovery is at the instance of an adjudicatory board trying to find whether a significant issue exists, rather than at the instance of an intervenor trying to formulate contentions, is not material. In either event, it is only after contentions are admitted that discovery can be had. *See Perry, supra; Waterford, supra.*

Nor may the Board, under its *sua sponte* authority, seek the information here sought. It is only in ongoing proceedings that boards may raise such matters. 10 C.F.R. § 2.760a. Further, under the regulations of the Commission, a board must make findings that a serious safety or environmental issue exists before engaging in an inquiry *sua sponte*. *Id.* *See also, Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614, 615 (1981). No such findings have been made here, and no authority exists to propound *sua sponte* inquiries at this time. *See Waterford*, 23 NRC at 7.

Further, the Board has impermissibly embarked upon a course of overseeing the Staff in the performance of its administrative functions. *See Carolina Power and Light Co.*, (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-80-12, 11 NRC 514, 516 (1980). Before admitting intervenors into the proceeding or admitting contentions for litigation, the Board, first in its Order of October 2, 1990, and again in its Order of January 22, 1991, propounded questions dealing both with the license amendment here involved and Staff generic reviews concerning diesel generators.

In its Order of January 22, 1991, the Licensing Board has directed the Staff to address such matters as how the Staff can justify an "exemption" to a regulatory guide,

commented on what may or may not satisfy a regulatory guide, made inquiries on other plants, and asked the Staff about possible enforcement actions (January 22, 1991 Order, at 3).² As the Appeal Board stated in another proceeding:

Another questionable action is the Presiding Officer's several requests to the NRC staff, which come close to oversight of the staff's work. . . . But as the Commission explained in *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980, adjudicatory boards are not authorized to "direct the staff in performance of [its] administrative functions." There is no reason to assume that this principle, which simply recognizes the inherently different functions of the technical staff and neutral adjudicators, would not apply equally to presiding officers in Subpart L proceedings. This does not mean, however, that the Presiding Officer must ignore matters that raise serious safety questions. As discussed *supra* . . . there is a mechanism for bringing such matters to the Commission's attention, 10 C.F.R. § 2.1251(d). See also *Shearon Harris*, 11 NRC at 517.

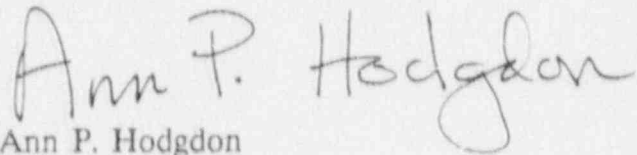
Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 721-22 (1989) (footnotes omitted); see also *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1) CLI-82-31, 16 NRC 1236 (1982); ALAB-772, 19 NRC 1193, 1263 (1984), *reversed in part on other grounds*, CLI-85-2, 21 NRC 282 (1985). In addition, it is noted that this Board has no authority to examine what action the Staff proposes to take in regard to enforcement actions. See January 22, 1991 Order at 3; cf. *Three Mile Island*, CLI-82-31, 16 NRC at 1238. The Board does not have the authority to oversee the Staff's performance of its functions and the Order of January 22, 1991, must be reconsidered for this reason also.

²The Board's questions to the Staff are also objectionable because Regulatory Guides are not requirements and an exemption is not needed where a licensee does not propose to follow regulatory guidance. *Petition for Emergency and Remedial Action*, CLI-78-6, 7 NRC 400, 406-07 (1978); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 737 (1985).

IV. MOTION

For the reasons discussed, the NRC Staff moves the Licensing Board to reconsider its Order of January 22, 1991, because it had no authority to engage in discovery prior to the admission of an intervenor and contentions, because it has not issued the findings required to precede such *sua sponte* inquiries, and because the Board has undertaken to oversee the Staff in the performance of Staff functions. The Board should stay the effectiveness of the Order pending a decision of the instant motion. Issuance of such a stay will prevent important issues from becoming moot by the Order's becoming effective by its own terms.

Respectfully submitted,

A handwritten signature in cursive script that reads "Ann P. Hodgdon". The signature is written in dark ink and is positioned above the typed name and title.

Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 4th day of February, 1991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

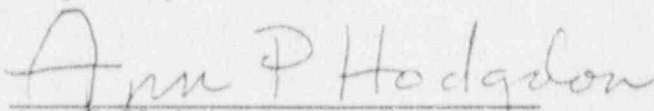
In the Matter of)
GEORGIA POWER COMPANY, *et al.*) Docket Nos. 50-424-OLA
) 50-425-OLA
(Vogtle Electric Generating Plant)
Units 1 and 2))

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Name of Party: - NRC Staff

Respectfully submitted,


Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 4th day of February, 1991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

FILED
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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of
GEORGIA POWER COMPANY, *et al.*

(Vogle Electric Generating Plant,
Units 1 and 2)

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH
Docket Nos. 50-424-OLA
50-425-OLA

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION FOR RECONSIDERATION OF LICENSING BOARD'S ORDER OF JANUARY 22, 1991 AND REQUEST FOR STAY" and "NOTICE OF APPEARANCE" for Ann Hodgdon 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 through deposit in the Nuclear Regulatory Commission's internal mail system, this 4th day of February, 1991.

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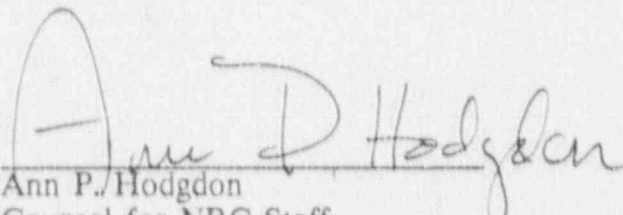
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