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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
GEORGIA POWER COMPANY, <i>et al.</i>)	Docket Nos. 50-424-OLA-3
)	50-425-OLA-3
(Vogtle Electric Generating Plant)	
Units 1 and 2))	Re: Licensee Amendment
)	(Transfer to Southern Nuclear)
)	

NRC STAFF RESPONSE TO INTERVENOR MOTION
FOR ADMISSION OF LATE-FILED CONTENTION BASIS

INTRODUCTION

In LBP-93-5, 37 NRC 96 (1993), the Board ruled on Intervenor's "Amendments to Petition to Intervene and Request for Hearing," dated December 9, 1992. The sole issue admitted for litigation was the contention alleging that Southern Nuclear Operating Company (SONOPCO) lacked the requisite character, competence and integrity, among other things, to be a license transferee. 37 NRC at 110. The only two bases underlying the contention pertained to the alleged illegal transfer of operating authority and false reporting of diesel generator reliability. *Id.* at 103-04.

On July 6, 1994, Intervenor requested that the Board allow the late-admission of an additional "factual basis" to the admitted contention. "Intervenor's Motion to Accept Additional Factual Basis in Support of the Admitted Contention." (Motion).¹ For the

¹ Although Intervenor's filing was sent to the Board by facsimile transmission, the first class mailing of the request for admission of a late-filed basis established the Staff's response date pursuant to 10 C.F.R. § 2.714.

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reasons discussed below, that request should be denied for failing to meet the late-filing criteria and contention admission standards in 10 C.F.R. § 2.714.

DISCUSSION

A. Intervenor Must Satisfy the Late-Filing Criteria in 10 C.F.R. § 2.714

The instant request seeks to amend Intervenor's intervention petition to include an additional "factual basis" related to (1) the alleged "opening of the plant Vogtle containment hatch after the site area emergency in violation of a commitment made to the NRC" and (2) "whether Southern Nuclear requested and obtained a waiver from NRC to technical specifications to cover-up the violation of the commitment and the technical specification pertaining to the opening of the hatch." Motion at 1. This attempt to inject a new basis for the admitted contention (which arguably is a new contention) should be rejected.

In LBP-93-21, 38 NRC 143, 148 (1993), the Board rejected Intervenor's argument that matters raised in a 10 C.F.R. § 2.206 petition and incorporated by reference in its intervention petition were admitted in this proceeding. The Board opined that additional bases may be supplied for the admitted contention, but Intervenor must show that the matter is relevant and newly discovered. *Id. citing Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 20-21 (1993). Subsequent to numerous attempts by Intervenor to expand the scope of matters for discovery, the Board ruled that new matters may not be raised in the proceeding unless

Intervenor satisfies the late-filing criteria. Memorandum and Order (Scope of Discovery), dated June 2, 1994 (unpublished) (June 2 Order), at 3-4.²

The alleged opening of the containment hatch in 1990 is not relevant to the admitted bases for Intervenor's contention -- the alleged illegal transfer to SONOPCO and the falsification of reports of diesel generator reliability. Because the admitted contention poses a very general issue for litigation -- whether the transferee has the necessary character, competence, integrity -- it is of utmost importance that Intervenor be specifically required to particularize its claim through timely-raised, detailed bases that allege that the license should not be transferred to SONOPCO. *See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1740-41 (1985) (a contention that poses a broad question must be supported by a clear identification of the supporting facts), rev'd and remanded on other grounds, CLI-86-6, 23 NRC 241 (1986).*

B. Intervenor Fails to Satisfy the Late-Filing Criteria

Requests to introduce a new issue in the proceeding raised after the special prehearing conference to consider an intervention petition cannot be entertained absent

² In addition, the Board indicated it would consider whether: (a) the issues should be accepted as late-filed contentions, (b) whether adequate documentation is presented for the Board to determine whether receipt of the issue is needed for an adequate record on the admitted contention and (c) whether a ruling should be postponed until after pending matters have been litigated. June 2 Order at 4. As discussed further below, Intervenor has not met the 10 C.F.R. § 2.714 standards for admission of a late contention basis. Consequently, the Board need not determine whether receipt of the information is necessary for an adequate record or whether a determination of admissibility should be held over for a later stage in the proceeding.

a favorable balancing of the five factors enumerated in 10 C.F.R. § 2.714(a)(1).

10 C.F.R. § 2.714(a)(3). Those factors are:

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

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 n.3 (1983). The Commission has emphasized that licensing boards are expected to demand compliance with the 10 C.F.R. § 2.714 requirements for a late-filed issue. See *Pacific Gas & Electric Co.* (Diablo Canyon, Units 1 and 2), CLI-81-5, 13 NRC 361, 364 (1981). The burden is on the proponent to demonstrate that a balancing of these five factors favor admission of the issue.

1. Good Cause

Where an intervenor does not show good cause for the nontimely submission of a contention, the showing on the other four factors must be compelling. *Cincinnati Gas & Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983), citing, *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982). Intervenor's purported good cause for its late-filed basis concerning the alleged opening of the containment hatch in violation of a commitment to the NRC is that (1) Intervenor is not required to submit "all known bases" at the contention pleading stage and (2) Intervenor did not have sufficient

information when he filed his petition to "ascertain the date and time the containment hatch was opened." Motion at 5 (emphasis in original). Intervenor asserts that he did not remember the alleged incident until April 1994, when he listened "for the first time" to a recording of Tape 25, and after he reviewed a "War Room" log that was not publicly available when his petition was filed. See Motion at 9, 2-5.

Intervenor's first assertion should be rejected as contrary to the requirements of 10 C.F.R. § 2.714. See section C, *infra*. In addition, the Board has previously ruled that Intervenor may only raise new issues in this proceeding if they are proffered as late-filed issues. June 2 Order at 3-4; see LBP-93-21, *supra*. Thus, Intervenor must show he has good cause for the late-filing.

The Appeal Board has recognized that good cause may exist for a late-filed contention where: (1) it is wholly dependent on the content of a particular document, (2) it could not therefore be advanced with any degree of specificity in advance of the public availability of that document and (3) it is tendered with the requisite degree of promptness once that document comes into existence and is accessible for public examination. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983), *citing*, *Catawba*, CLI-83-19, 17 NRC 1041, 1045 (1983).

Intervenor's faulty recollection of this matter does not constitute "newly discovered" information. The information that allegedly supports the late-filed basis was readily available to Intervenor. Tape 25 was in his possession in 1990 and Intervenor could have reacquainted himself with its contents before he filed his amended petition i.

December 1992. The conversation upon which he relies took place in March 1990, over four years ago. The fact that the information was in his possession precludes Intervenor from arguing that this information is newly discovered. Further, Intervenor fails to show when he received the "War Log" and that he promptly filed the instant request after the information became publicly available.³ This overall failure to show that the issue was timely raised warrants a finding that Intervenor lacks good cause for the late-filing. Thus, this factor weighs against the admission of the late-filed basis.

2. Availability of Other Means and Representation by Existing Parties

With respect to the second and fourth factor, Intervenor arguably has no other means to protect his interest in pursuing this issue⁴ and would otherwise be precluded from raising the allegation concerning the containment hatch in the current proceeding. However, the Appeal Board has observed that the availability of other means to protect one's interest may be properly accorded less weight than the other three factors in § 2.714. *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 894-95 (1981). Thus, these factors favor only slightly the admission of the late-filed basis.

³ Licensee asserts that the document was produced in discovery in November 1993. See Georgia Power Company's Answer to Intervenor's Motion to Accept Additional Factual Basis in Support of Admitted Contention, dated July 21, 1994 (GPC Answer), at 15.

⁴ The availability of other protective means should be viewed based on the issue sought to be raised, the relief requested, and the stage of the proceeding. See *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 21-22 (1986). A Board need not conclude that an adjudicatory hearing is required if, for example, a 10 C.F.R. § 2.206 petition is sufficient to protect a proponent's interest. *Id.*

3. Development of a Sound Record

The third factor, the extent to which Intervenor can assist in developing a sound record, also weighs against admitting the issue. Intervenor must demonstrate that he has special expertise which would aid in the development of a sound record to prevail on this factor. *See Summer*, 13 NRC at 892-93; *Cincinnati Gas & Electric Co.* (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 576 (1980). A petitioner "should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. Vague assertions regarding [a] petitioner's ability or resources . . . are insufficient." *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982) (citations omitted).

Here, Intervenor generally argues that the admission of the basis will provide a more complete record on the issue of the character and integrity of SONOPCO officials, but fails to show (1) that a commitment or technical specification was violated (whether knowingly or not), (2) that the plant was placed in an unsafe condition to minimize the outage time, and (3) that the waiver was intended to conceal the violation. *See Motion* at 7-8, 2-4. In addition, Intervenor fails to identify an expert witness and to summarize proposed testimony. *See Grand Gulf*, 16 NRC at 1730; 10 C.F.R. § 2.714(b)(2)(ii). The proffered transcript and statements do not provide sufficient facts or constitute expert opinions or authoritative documents. They merely show that Intervenor was of the opinion that the opening of the hatch was improper when the diesel was inoperable. Thus, this factor weighs against admission of the new contention basis.

4. Delay and Broadening of Issues

Finally, the fifth factor, the extent to which admission of the late-filed basis will broaden the issues or delay the proceeding weighs against Intervenor. Although it is difficult to estimate the delay that can be directly attributed the Intervenor's tardiness, *see Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 276 (1975)*, it is clear that the filing of a new issue within weeks of the August 8, 1994 close of discovery will cause delay and a broadening of the issues in this proceeding. Admission would most likely invite requests for a new round of discovery. This will further protract this litigation and broaden the issues for hearing just as this proceeding is nearing the end of discovery and matters, conceivably, become ripe for motions for summary disposition.

In sum, the late-filed basis should not be admitted for litigation because a balancing of the five factors does not favor its admission.

C. The Basis Fails to Properly Raise a Litigable Issue

The Commission's regulations specify a high threshold for the admission of an issue into an NRC proceeding in accordance with the requirements of 10 C.F.R. § 2.714(b)(2). That regulation provides, in part:

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention.

(i) A brief explanation of the bases of each contention.

(ii) A concise statement of alleged facts or expert opinion which support the contention on which the petitioner intends to rely in proving the contention at hearing, together with references to those specific sources and

documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

* * *

(iv) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicants environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

In addition, a presiding officer or adjudicatory board designated to rule on the admissibility of a contention shall refuse to admit it if (1) the contention and supporting material fail to satisfy the requirements of 10 C.F.R. § 2.714(b)(2) or (2) "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), as corrected, 54 Fed. Reg. 39728 (September 28, 1989).⁵

The contention basis requirements of 10 C.F.R. § 2.714(d)(2) are (1) to assure that the contention in question raises a matter appropriate for adjudication in a particular proceeding, (2) to establish a sufficient foundation for the contention to warrant further

⁵ The revised rule overturned those cases holding that petitioners are not required to describe facts which would be offered in support of a proposed contention. 54 Fed. Reg. 33, 170, *citing Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 425-26 (1973); *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB 590, 11 NRC 542, 546-49 (1980).

inquiry into the subject matter addressed by the assertion, and (3) to put the other parties sufficiently on notice of the issues so that they know generally what they will have to defend against or oppose. See *Philadelphia Electric Co.* (Peach Bottom Atomic Power station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).⁶

In essence, a proponent must supply information showing the existence of a genuine dispute of law or fact. 54 Fed. Reg. 33,168, 33,170; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 426 n.104 (1990). As the Commission has observed, this requirement is consistent with *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983), that

[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention. Neither Section 189a of the Atomic Energy Act nor § 2.714 of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against applicant or Staff.

⁶ An issue must be rejected if it (1) constitutes an attack on applicable regulatory requirements, (2) challenges the basic structure of the Commission's regulatory process or is an attack on the regulations (3) is not more than a generalization regarding the intervenor's view of what applicable policies ought to be, (4) seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question, or (5) seeks to raise an issue which is not concrete or litigable. *Peach Bottom*, 8 AEC at 20-21.

54 Fed. Reg. 33,170.⁷ If any of the requirements set forth in 10 C.F.R. § 2.714(b)(2)(i), (ii) or (iii) is not satisfied, a contention (or its basis) must be rejected. *Arizona Public Service Co.* (Palo Verde Nuclear Station, Unit Nos. 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991). An issue should not be admitted for litigation where "an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts." 54 Fed. Reg. 33,171; *see also BPI v. AEC*, 502 F.2d 424, 429 (D.C. Cir. 1974).

As discussed in section B, above, the late-filed basis is not supported by sufficient information to support its admission and to raise a genuine issue of material fact. Intervenor has not offered facts, expert opinions or references to documents that are sufficient to show that (1) SONOPCO officials violated a "commitment" to the NRC, (2) Vogtle Technical Specifications 3.8.1.2 and 3.9.8.2 were violated by opening the hatch without operable diesel generators, (3) line managers (up through and including the Executive Vice President) knowingly and willingly placed the plant in an unsafe condition so as to minimize the outage time, and (4) a subsequent waiver of the technical specifications was intended to cover up the violations. Intervenor's conclusory assertions about the propriety of the alleged events are not sufficiently supported by expert opinion or reference to documents to support admission of this late-filed basis. *See GPC Answer*

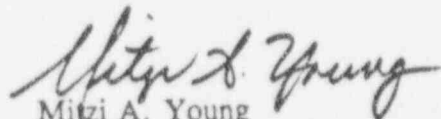
⁷ For example, an adequate basis for a contention is not established by simply referencing a large number of documents, but requires a petitioner to clearly identify and summarize the facts on which it relies, particularly when the contention poses a broad issue. *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1740-41 (1985), *rev'd and remanded on other grounds*, CLI-86-6, 23 NRC 241 (1986).

at 4-12 and Exhibit A. Accordingly, this basis should be rejected as failing to meet the requirements of 10 C.F.R. § 2.714(b)(2).⁸

CONCLUSION

Intervenor seeks to amend its contention to include, as its basis, the above-mentioned containment hatch issue. Inasmuch as Intervenor has failed to meet the late-filing criteria in § 2.714 and to satisfy the Commission's specificity requirements, the request should be rejected.

Respectfully submitted,


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Dated at Rockville, Maryland
this 26th day of July 1994

⁸ Intervenor argues that the Board should construe the Commission's intervention regulations broadly so as to admit the late-filed contention basis because the regulations are to protect the public health and safety. Motion at 12. This revised rule was upheld in *UCS v. NRC*, 920 F.2d 50, 53-57 (D.C. Cir. 1990), where the court viewed the Commission's contention rule as procedural.

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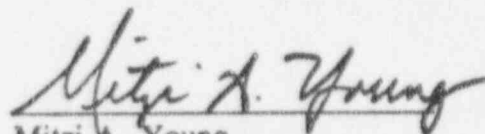
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