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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of
GEORGIA POWER COMPANY, et al.
(Vogtle Electric Generating
Plant, Units 1 & 2)

Docket Nos. 50-424-OLA
50-425-OLA

MEMORANDUM AND ORDER

CLI-92- 03

I. Introduction

On May 25, 1991, Georgians Against Nuclear Energy (GANE) filed an appeal from the Atomic Safety and Licensing Board's Memorandum and Order, LBP-91-21, 33 NRC 419 (1991), that dismissed GANE's proffered contentions and denied its petition for leave to intervene in this proceeding on a proposed amendment to each of the operating licenses for the Vogtle Electric Generating Plant. Because GANE was the only party seeking a hearing on the amendment, the Board's order also had the effect of terminating the proceeding. Although GANE's May 25th filing satisfied the requirement to file a notice of appeal, GANE has not filed a brief in support of its position on appeal. Both the

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NRC staff and Georgia Power Company, the licensee, have noted this deficiency and ask that we dismiss the appeal.

The Commission has jurisdiction over the appeal in accordance with the interim appellate procedures in effect at the time of the Licensing Board's decision. See 10 CFR §2.785, note (b) (1991). We agree that GANE should be dismissed for failing to file a brief in support of its appeal; however, we are directing the NRC staff to provide its evaluation of certain matters related to the operation of the diesel generators and their associated instrumentation.

II. Background

The proceeding concerns an amendment to the technical specifications for each of the Vogtle units to permit the licensee to bypass, in emergency start conditions, the high jacket-water temperature trip of the emergency diesel generators. The intended purpose of the change is to minimize the potential for spurious trips of the diesel generators during emergency starts. The staff and the licensee believe the change will enhance safety, particularly in light of a serious loss-of-power event that occurred at Vogtle Unit 1 on March 20, 1990. During that event, the licensee had difficulty in establishing sustained operation of one of its emergency diesel generators, and investigation of the event indicated that a trip of the diesel

generator was likely caused by spurious trip signal from the high jacket-water temperature sensors.¹

A notice of the proposed change and of opportunity for hearing was published in the Federal Register on June 22, 1990, and the staff approved the change as an amendment involving "no significant hazards consideration" on July 10, 1990.² GANE filed a petition to intervene on July 23, which was referred to the Licensing Board for consideration. Although both the staff and the licensee opposed the petition, the Board declined to reject the petition on its face but scheduled a pre-hearing conference to further consider the petition and any supplement thereto. LBP-90-29, 32 NRC 89 (1990).

Prior to the pre-hearing conference, GANE filed a set of eight proposed contentions. Both the staff and the licensee opposed GANE's contentions and indicated their belief, inter alia, that GANE had failed to provide adequate bases for its contentions. The Board summarily rejected two of the contentions for lack of relevance to the proceeding.³ Despite the

¹ See NUREG-1410, LOSS OF VITAL AC POWER AND THE RESIDUAL HEAT REMOVAL SYSTEM DURING MID-LOOP OPERATIONS AT VOGTLE UNIT 1 ON MARCH 20, 1990, at 3-21, 6-12 (June 1990). This document contains the report of the NRC's special Incident Investigation Team.

² 55 Fed. Reg. 25756 (June 22, 1990) & 55 Fed. Reg. 32337 (Aug. 8, 1990). Even prior to issuing the formal amendment, the NRC staff gave tacit approval to the change under a "Temporary Waiver of Compliance" from the technical specifications until the amendment application could be processed. See Letter from G. Lainas, Office of Nuclear Reactor Regulation, to W.G. Hairston III, Georgia Power Co. (May 25, 1990).

³ Prehearing Conference Order (Filing Dates for Further Submissions) (Oct. 2, 1990, unpublished).

structural flaws in the remaining contentions, the Board believed a number of safety matters derived from the contentions might be appropriate for hearing, but it deferred ruling on the contentions, largely on the strength of the licensee's offer to provide the Board and parties additional information in an attempt to resolve potential issues informally.

The licensee thereafter submitted a supplemental statement, which described its response to the loss-of-power incident and provided additional analysis supporting the proposed changes to the technical specifications. After considering the staff's and GANE's initial responses to the licensee's filing and an additional round of comments from the parties, the Board eventually dismissed GANE's remaining contentions, primarily for their lack of sufficient specificity to warrant admission, and indicated its satisfaction that any outstanding concerns over the amendment had been answered. LBP-91-21, 33 NRC 419 (1991). GANE asks that we "put aside" the Licensing Board's decision.

III. Analysis

As noted at the outset of this decision, both the licensee and the NRC staff urge us to dismiss GANE's appeal because GANE has not filed a supporting brief. We agree that GANE has not satisfied the briefing requirement to perfect its appeal, despite GANE's urging that we consider its original May 25th filing as its brief.

In its August 8th "Acknowledgement of NRC Staff and Georgia Power Comments on GANE's Appeal", GANE asserts that it was

uncertain of the "conventions" involved in an appeal and had "no prior knowledge that a brief would be expected". GANE's claimed unfamiliarity with the procedural rules does not excuse its failure to file a brief. We expect all participants in NRC proceedings, whether acting pro se or represented by counsel, to become familiar with the applicable rules of practice. See Duke Power Co. (Perkins Nuclear Station, Units 1-3), ALAB-615, 12 NRC 350, 352 (1980). The necessity of a brief in our appellate practice has long been emphasized. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-91-5, 33 NRC 238, 241 (1991); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-140, 6 AEC 575 (1973).

In this case, the Licensing Board provided specific instructions for taking an appeal. Although the Commission believes that the Licensing Board erroneously indicated that an appeal would be governed by the provisions of 10 CFR §2.760 and §2.762 then in effect (rather than §2.714a), the error was of no consequence to GANE's fundamental obligation to file a brief.⁴

⁴ Because the Board's order had the effect of dismissing all of GANE's contentions and denying intervention, we believe that §2.714a governed appeals from LBP-91-21. See Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-585, 11 NRC 469 (1980); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273, 284 (1991). The primary significance of the distinction between §2.714a and then applicable §2.762 concerns the timing of the supporting brief. The brief must be filed concurrently with an appeal under §2.714a, but is not required until 30 days after the notice of appeal if §2.762 governs. Under the Commission's revised appellate procedures, 56 Fed. Reg. 29403 (June 27, 1991), the distinction in procedure may have greater significance,

(continued...)

At most, the Board's error allowed GANE a more generous period within which to file a brief. While GANE could be excused for relying on the instructions contained in the Licensing Board's order, GANE did not heed those instructions and file a brief.

Even if we were to allow, as GANE asks, its May 25th filing to stand as GANE's "brief", that document simply does not come to grips with the Licensing Board's determination that GANE failed to meet the requirements of 10 CFR §2.714 applicable to its proffered contentions.⁵ Mere recitation of GANE's prior position in the proceeding and its general dissatisfaction with the outcome of the proceeding is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below. See Cleveland Electric Illuminating Co. (Perry

⁴(...continued)

because most appeals, except those that lie under §2.714a, are subject to the new discretionary review procedures.

⁵ Generally, the Licensing Board found that GANE had failed to refer to the legal authority under which it believed the application should be judged, to provide a brief explanation of the bases for the contentions, to set forth a concise statement of the facts, expert opinion, or sources and documents on which it intended to rely, or to provide the supporting reasons for its dispute with the licensee. LBP-91-21, 33 NRC at 422-24; see 10 CFR §2.714(b)(2). As the Board notes, GANE's contentions could have been summarily dismissed. We believe the licensee deserves great credit here for attempting to settle or resolve GANE's concerns informally through its proffer of additional information. We do not view, however, the informal exchange of comments that followed as having had any substantial bearing on the admissibility of GANE's contentions. In the absence of the litigants' agreement to pursue informal resolution of the issues, the Board would have been bound to rule on the contentions and, having dismissed them, to refer any outstanding concerns it might have had to the staff for appropriate action. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-91-13, 34 NRC 185, 188 (1991).

Nuclear Power Plant, Units 1 & 2), ALAB-841, 24 NRC 64, 69 (1986). We therefore dismiss the appeal in view of GANE's failure to file a brief.

Although we dismiss GANE's appeal in the adjudicatory proceeding, we are asking the staff to give further consideration to certain matters that appear related, at least in part, to GANE's expressed concerns with operation of the diesel generators at the Vogtle plant. In this regard, GANE appears to concede that the Licensing Board, within the limits of its jurisdiction in this proceeding, ruled appropriately with respect to GANE's contentions and that, even from GANE's perspective, the change to permit bypass of the high jacket-water temperature trip in emergency conditions is preferable to prior practice.⁶ Thus, we believe GANE's "appeal" can be fairly understood to seek relief from the Commission in its broader safety oversight role, rather than to challenge the Licensing Board's disposition of GANE's contentions in the narrow amendment proceeding. Where, for any number of reasons, an adjudicatory proceeding is terminated, we may still refer safety matters of potential concern to the staff for review. See Florida Power & Light Co., supra note 5, 34 NRC at 188.

⁶ In its May 25th filing GANE states, "We understand the Board's limitations under ... 10 CFR 2.714 to take our case to a conclusion that would give us relief". GANE states in its August 8th filing, "Acknowledgement of NRC Staff and Georgia Power Comments on GANE's Appeal" at 1, that "the safety switch is not performing correctly and would pose a danger if left in place". The latter statement essentially recognizes that, as the NRC staff and licensee have concluded, bypass of the trip under certain circumstances is a preferable course of action.

Our specific direction to the staff which describes the issues of interest to the Commission will be contained in a separate Staff Requirements Memorandum to be issued to the staff in the near future.

IV. Conclusion

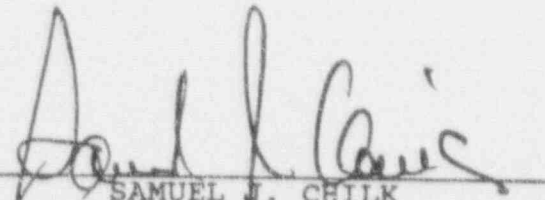
For the reasons stated in this decision, GANE's appeal from the Licensing Board's Memorandum and Order, LBP-92-21, is dismissed and the proceeding is terminated. The Commission is referring certain other matters to the NRC staff for evaluation pursuant to the Commission's general supervisory authority and responsibility over safety matters.

Commissioner de Planque did not participate in this matter.

IT IS SO ORDERED.

For the Commission,⁷




 SAMUEL J. CHILK
 Secretary of the Commission

Dated at Rockville, Maryland,
 this 17th day of February 1992.

⁷ Commissioner Remick was not present for the affirmation of this Order; if he had been present he would have approved it.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION M&O RE CLI-91-21 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)50-424/425-OLA
COMMISSION M&O RE CLI-91-21

Dated at Rockville, Md. this
12 day of February 1992

Helen R. Bond
Office of the Secretary of the Commission