983

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 OL
	)	50-425 OL
Vogtle Electric Generating Plant, Units 1 and 2)	)	

MOTION FOR RECONSIDERATION
(MEMORANDUM AND ORDER ON SUMMARY DISPOSITION
OF CONTENTION 8 RE: VOGTLE QUALITY ASSURANCE)

On October 3, 1985 the Atomic Safety and Licensing Board dismissed Joint Intervenors, Campaign for Prosperous Georgia and Georgians Against Nuclear Energy, challenging the adequacy of Applicant's (Georgia Power Company, et al.) Quality Assurance Program for the Vogtle Electric Generating Plant ("Vogtle") contained in Contention 8.

Joint Intervenors request reconsideration of the Board's dismissal order; and/or a continuance of the Board's ruling pursuant to 10 C.F.R. 2.749(c) to permit proper affidavits to be prepared in response to Applicant's Motion for Summary Disposition.

Intervenors are mindful of the Commission's ruling that a denial of a motion for summary disposition is interlocutory and therefore not appealable, unless such a denial results in dismissal of an intervenor's sole contention. Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3),

DS03

ALAB-220, 8 AEC 93 (1974). Waterford, cited in Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 551 (1981). Since at this time there is one remaining contention Intervenors do not seek directed certification on this issue, but reserve the right to raise the issues discussed below on appeal.

I. Background

Contention 8 in its present form was admitted into the operating license pursuant to the Board's Memorandum and Order (Ruling on Joint Intervenors' Objection to Order of September 5, 1984 and other Matters, LBP-84-35, 20 NRC 887, 900-02) dated November 5, 1984.

The contention, as admitted, reads:

> Applicants have not and will not implement a Quality Assurance program for Plant Vogtle for welding, for properly documenting the placement of concrete, for adequately testing concrete, for the preparation of correct concrete quality test records, for procuring material and equipment that meet applicable standards, for protecting equipment and for taking corrective action as required, so as to adequately provide for the safe functioning of diverse structures, systems and components, as required by 10 CFR Part 50, Appendix B, such that reasonable assurance exists that the operation of the facility will not endanger the public health and safety.

Discovery was conducted pursuant to a stipulated schedule.

Prior to the conclusion of discovery Applicant filed a motion for summary disposition of the contention pursuant to 10 C.F.R. 2.749. The Joint Intervenors opposed the motion on July 31, 1985 (Response to Applicant's Motion for Summary Disposition of Intervenors Contention 8).

The Staff supported the Applicant's motion. (See NRC Staff

Response to Applicant's Motion for Summary Disposition of Contention 8 (Quality Assurance), August 5, 1985).

The Board granted Applicant's motion on October 3, 1985. The Board, on October 18, 1985, granted Intervenors' request for a one week extension to submit this request for reconsideration until October 28, 1985. (Order, October 18, 1985)

II. Applicable Law

The applicable law on summary disposition has been argued extensively in numerous filings in this proceeding.

Intervenors do not generally quarrel with the Board's recitation of the law on summary disposition as far as it goes. However, an analysis of the case law defining the use of summary disposition and the facts presented by this question demonstrates that Joint Intervenors responded to the initial Motion for Summary Judgment in a manner consistent with the rules and case law and that a reconsideration of Intervenors' position will demonstrate that hearings on Contention 8 must be held.

III. There Remain Genuine Issues of Fact In Controversy Which The Board Has Not Recognized In Its October 3 Decision.

The basis of Intervenors' opposition was that the material facts originally put into controversy through Contention 8 remain in controversy. Intervenor did not submit evidence in the form of affidavits in response to the motion for summary judgment because they believed on the basis of the record that the Applicant had not presented evidence which removed the question of the implementation of the quality assurance program as a

genuine issue of material fact.

Further, the Board ignored the Intervenors' request for an opportunity to present contradictory testimony evidence from former members of the workforce that the statements offered by Applicant regarding the successful implementation of the quality assurance program are not accurate.

Finally, the Board did not consider the Intervenors' argument that the results of the Readiness Review Program cannot be relied upon for purposes of a summary disposition motion unless the Applicant seeks a special exemption pursuant to 10 C.F.R. 2.758.

Intervenors resubmit their request that the Board allow Intervenors to present their case by contradicting the affidavits submitted in support of the Motion for Summary Disposition at a hearing. It is well settled NRC law that intervenors may make their case through cross-examination of Applicant's witnesses.

Intervenors are convinced that given the opportunity to conduct cross-examination on these matters, or at a minimum given a continuance of time to submit affidavits in opposition to Applicant's assertions, genuine issues of material fact will remain for trial.

A. The Board Should Not Have Considered Evidence Or Assurance Gained From The Readiness Review Program To Determine Whether Or Not The QA Program Was Implemented In A Manner To Insure The Public Health And Safety Is Protected; If It Considered The Evidence At All It Supports Intervenors Argument That The QA Program Was Not Properly Implemented.

The Board found that the facts alleged by Applicant "make it clear that the QAP not only meets the formal requirements of Appendix B but also functions in accordance with the intent of Appendix B." (p. 6) The Board states:

> In addition, Applicants state that they have initiated a Readiness Review Program (RRP) for the purpose of gaining added assurance of the operational readiness of the VEGP. The motivation for and description of the RRP are discussed by one of the affiants. The RRP was undertaken in consonance with generic considerations of the NRC regarding ways to improve the efficacy of QA efforts throughout the nuclear industry. The RRP is not a substitute for Applicants' QAP but is an overlay to that effort serving to increase the confidence of management in the operational readiness of the VEGP.

The Board has been misled about the submitted evidence.

The statement referred to by the Board is the affidavit of W.C. Ramsey, Attachment 7. It states, as does the Applicant's motion, that the RRP is only to "gain added assurances of the operational readiness of Vogtle ..." (Affidavit, at 2), and also identifies six objectives for the RRP (Affidavit, at 5-6) which is described as a management system. (Id.)

However, during the July 26, 1985 Commission meeting on the Operational Readiness Review Program for Georgia Power (Vogtle) Mr. R.W. Scherer of Georgia Power Company stated in response to questioning by Chairman Palladino that the purpose of the Readiness Review Program is

> If in fact we can, by doing this, demonstrate clearly that we have lived up to our commitment, therefore we can license this plant and put it into operation in a timely fashion, we will save our customers millions of dollars.

(Hearing Transcript, p. 50)

That observation is confirmed by Commissioner Bernthal that the RRP demonstrates a way to "find your way through the

licensing maze, one hopes relatively unscathed." (Id., p. 67)

Notwithstanding all the hopes for the success of the Readiness Review Program concept in the industry the fact remains that, at least as to Plant Vogtle, it is improper for the Board to consider any evidence submitted from the program to establish successful implementation of the 10 C.F.R. Part 50 Appendix B regulatory requirements.

The NRC Staff itself cautioned the Applicant about its optimism toward prejudging the results of the implementation of the RRP.

Mr. Nelson Grace, Region II Administrator, said

> So we are sold on the concept, and we reserve judgment as to whether it's going to be applied adequately and correctly and thoroughly and in a timely manner at Georgia Power. We don't prejudge the conclusion.
>
> If it's done correctly and done well, we feel confident that we're going to save resources in the long run. It's going to make everybody's job easier.
>
> But it is a pilot program. The work is cut out for them at Georgia Power. I think they ought to be commended for taking the initiative, and they are off to a good start, although they have already doubled their estimate from 75 man-years to 150 man-years. It's still in the evolutionary stage, and the hope is that it will be implemented correctly, and we will all benefit from it. But we are not prejudging the outcome. We don't accept programs in lieu of results. We're looking for results ultimately. (emphasis added)

(Hearing Transcript, pp. 72-73)

The RRP was designed to discover problems at Vogtle (Transcript, at 27) and it did that. That is a good thing for Applicant, sad for the public. (Id.) Nonetheless, the fact that it did find the problems is an admission that, but for the RRP, there were undiscovered and uncorrected hardware deficiencies at the plant which had escaped the original QA/QC program. Such a

finding prevents the Board from granting a summary judgment motion on quality assurance.

The fact is that Intervenors identified multiple deficiencies resulting during the construction of Vogtle. (See Statement of Material Facts, pp. 3-9). Assuming arguendo that all those deficiencies have been or will be corrected, there is still no reasonable assurance that all deficiencies have been identified.

Had there been evidence presented by Applicant to indicate that any breakdowns in the QA program had been identified, corrected, and specific deficiencies cured through the successful implementation of Vogtle's original QAP, then Intervenors would have had to produce affirmative evidence that some problems escaped detection in the QAP and therefore genuine issues still remained.

However, the Board in deciding the summary judgment motion must consider all evidence presented in deciding the motion, even evidence submitted by the movant, which indicates there is a question of a genuine issue of a material fact. Because Intervenor does not submit any evidence controverting disposition, it does not follow that Applicant automatically prevails. The burden is on Applicant to offer proof of the absence of a genuine issue of material fact. Cleveland Electric Illuminating Comp., et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-754 (1977); Pennsylvania Power and Light Comp., et al. (Susquehana Steam Electric Station), Units 1 and 2), LBP-81-8, 13 NRC 335, 337 (1981).

Intervenors submit that the results of the RRP are evidence that the QAP failed. Intervenors are not required to show at this juncture that they would prevail on the issues, only that there are genuine issues to be tried. American Manufacturing Mut. Ins. Comp. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272, 280 (2nd Cir. 1967).

In the denial of the Byron license the Appeals Board stated that "so long as legitimate uncertainty remained respecting whether the Byron facility has been properly built, the Licensing Board is obliged to withhold the green light for an operating license."

It will be difficult, if not impossible, should Applicant prevail on the other outstanding contention to state there was no legitimate uncertainty about the successful implementation of the QA/QC QAP. To the extent that such uncertainty is eliminated by reliance of the Board on the RRP the Applicant must submit the RRP to regulatory scrutiny equal to the QAP. To date it has not done so.

B. Material Facts Remaining In Controversy

The Board is apparently persuaded that, as a matter of law, Applicant is entitled to judgment here because it found no genuine issue of material fact remaining for trial.

Intervenor, of course, disagrees. There are two types of material facts which remain the subject of substantial dispute:

1) specific hardware deficiencies, and

2) undiscovered specific deficiencies to confirm a pervasive breakdown in the QA/QC program.

As to the first category of material facts the Board correctly observed that Intervenors did not present evidence in their response to the motion for summary disposition to contest Applicant's representation that the specific deficiencies have been corrected. Intervenors do not concede that Applicant's representations regarding their corrective actions are correct.

As to the second type of material fact, however, the potential for a pervasive breakdown, Intervenors did claim, pursuant to their rights under 10 C.F.R. 2.759(c) that if they were granted time to prepare for hearing that former workers and/or site employees would testify to the pervasive breakdown by demonstrating specific, uncorrected deficiencies.

However, it was not necessary for Intervenors to submit worker affidavits when Applicant itself presented evidence that its program failed to detect safety significant deficiencies.

The Readiness Review Findings disclosed by Applicant have identified six findings which have generic implications for the QAP at Vogtle. Those problems are:

1) problems with retrievability of documentation;
2) weaknesses in initial test program procedures;
3) deficient controls associated with field changes;
4) weaknesses in certain design calculations;
5) problems in electrical cable separation controls; and
6) problems with inspector certification records.

They are the same types of generic problems which the Appeals Board observed raised a "legitimate question" at Byron about whether the inspectors examining safety related equipment at Byron had actually been competent to perform their assigned

runctions. (Commonwealth Edison, Byron Nuclear Power Station, Units 1 and 2, ALAB-770, 20 (1984)

The findings by the RRP of generic problems raise lingering doubts and uncertainty about whether all construction defects of potential safety significance have been detected.

We invite the Board's attention to the instruction of the Appeals Board in Byron, at p. 21.

> We find nothing in Callaway that suggests, let alone holds, that an operating license can issue despite the presence of a cloud overhanging the adequacy of safety-related facility construction. Further, we are totally satisfied that the record before the Licensing Board was insufficient to disperse the cloud here. To be sure, as will be discussed in the next section, before the record closed the applicant had embarked upon programs designed to remove the concern engendered by the faulty inspector certification procedures. But neither the validity nor the results of those programs were (or, as a practical matter, could have been) explored in any depth at the hearing last summer.... Because the efficacy and outcome of the remedial programs are central to a finding of reasonable assurance of proper facility construction, the intervenors are plainly entitled to have their day in court prior to a possible resolution of the quality assurance matter in the applicant's favor. (footnote omitted)

Since here the issue is the disposition of a matter without the Intervenor having any opportunity to present their case the Boardd need be even more mindful of examining the subtlety of the key genuine issue in controversy here -- that is, the successful implementation of QAP.

Such an examination of the record as set forth in Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453, n.4 (1980).

C. Intervenors Resubmit Their Request To Present Testimony Contradictory To The Information Submitted By Applicant From Former Members Of The Workforce.

Under the provisions of 10 C.F.R. 2.749(c) "... a presiding officer may refuse the application for summary decision or may order a continuance to permit affidavits to be obtained or make such other order as is appropriate...." Joint Intervenors did not in the initial response submit an affidavit detailing the reasons that facts essential to justify the opposition to the motion for summary judgment could not be submitted by affidavit.

However, Intervenors did include in their initial response an explanation on why facts could not be presented by affidavits. (Initial Response, at 5).

Intervenors formalize their request through this motion for reconsideration and attach the requisite explanatory affidavit.

The truth as stated in the affidavit is that the Joint Intervenors did not know the type of information now available to it. As Mr. Teper pointed out in his deposition, Intervenors had only received bits and pieces of information which raised questions about the QAP's successful implementation.

Should the Board grant this motion for reconsideration, Intervenors will submit under an appropriate protective order, if necessary, the affidavits of those individuals who have personal knowledge of the failure of Applicants to implement their quality assurance program and who agree to participate in these proceedings under the Rules of the Commission.

The workers, of course, have evidence of discreet, specific deficiencies with their area of expertise; however, for the

purposes of the requested hearing we only seek through these workers to demonstrate that the identified deficiencies, which slipped through the QAP undetected, provide substantial evidence that the QAP was not implemented according to the commitments of Applicant and therefore raise legitimate doubt about [illegible]'s as-built condition.

CONCLUSION

For all the reasons stated above, Intervenors respectfully request that the Board reconsider its decision to grant summary disposition on Contention 8, and set this matter for hearing. In the alternative Intervenors request that the Board grant a continuance in order to provide time for the submission of affidavits of former plant workers with relevant evidence regarding the failure of Applicant's quality assurance program and specific, uncorrected, safety-related deficiencies.

Respectfully submitted,

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