UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

B. Paul Cotter, Jr., Chairman
Dr. Richard F. Cole
Dr. Peter S. Lam

In the Matter of **Docket No. 50-458-OLA**
(ASLBP No. 93-680-04-OLA)

GULF STATES UTILITIES COMPANY, *et al.*
(River Bend Station, Unit 1) **January 27, 1994**

In this Decision, the Licensing Board grants a petition to intervene and request for a hearing. Standing was granted on the basis that the property interest of a petitioner in a nuclear facility, who was a co-owner of the facility, might be jeopardized by potential unsafe operation of the facility caused by underfunding. The Board accepted one of seven contentions. The accepted contention was based on potential unsafe operation of the facility caused by a lack of funding.

IMMEDIATE EFFECTIVE ORDERS

License amendments can be made immediately effective solely at the discretion of NRC Staff, following a determination by Staff that there are no significant hazards considerations involved. Immediate effectiveness findings are not subject to review by licensing boards.

STANDING: STANDING BASED ON PROPERTY INTERESTS

In past NRC cases, standing based on injury to property has been denied because the property interests in question were too far removed from the purpose of the underlying statutes governing those proceedings. Those cases

primarily involved economic interests of ratepayers and taxpayers or general concerns about a facility's impact on local utility rates and the local economy. Notwithstanding the ratepayer/taxpayer line of cases, property interests can confer standing since the Atomic Energy Act affords radiological protection for *both* human life and property. There is standing in this proceeding since the Petitioner's stated interest is to protect its property, the nuclear facility, from radiological hazards arising from the facility's unsafe operation.

STANDING: INJURY IN FACT

Injury-in-fact in this proceeding was based upon potential damage to a co-owner's property interest in a nuclear facility. Potential property damage included loss of the co-owner's share of the facility, loss of plant power and revenue, and potential liability to third parties from radiological accidents.

STANDING: SPECULATIVE INJURY

A petitioner need not establish that injury will inevitably result from the proposed action to show an injury in fact, but only that it may be injured in fact by the proposed action.

STANDING: FINANCIAL QUALIFICATIONS

Licensee's argument that a lack of funding could not adversely affect plant safety because the plant would be safely shut down is rejected by the board. This argument contradicts the rationale of 10 C.F.R. § 50.33(f) (1993) requiring applicants for operating licenses to demonstrate that they possess reasonable assurance of obtaining funds necessary to cover estimated operation costs for the period of the licenses.

FINANCIAL QUALIFICATIONS

Although an electric utility's financial qualification usually cannot be the subject of litigation in NRC operating license proceedings, this exemption does not apply to operators of a nuclear facility that are not electric utilities.

CONTRACTUAL DISPUTES BETWEEN CO-OWNERS OF NUCLEAR FACILITIES

Absent radiological health and safety concerns, environmental concerns, or antitrust matters subject to NRC license conditions, contractual disputes between

co-owners in nuclear facilities ordinarily should be resolved by the appropriate state, local, or federal court.

JURISDICTION OF LICENSING BOARDS: MATTERS WITHIN THE JURISDICTION OF THE FEDERAL ENERGY REGULATORY COMMISSION

Contractual disputes among electric utilities regarding interconnection and transmission provisions, rates for electric power and services, cost-sharing agreements, long-term and short-term planning functions, and similar, utility-related operational agreements are matters that fall within the jurisdiction of FERC or appropriate state agencies that regulate electric utilities.

ENFORCEMENT ACTIONS: ENFORCEMENT OF NRC LICENSE CONDITIONS

Licensing boards have no jurisdiction to enforce license conditions unless they are the subject of an enforcement action initiated pursuant to 10 C.F.R. § 2.202a (1993). The petitioner's only recourse in this instance is to request enforcement action by the Staff pursuant to 10 C.F.R. § 2.206 (1993).

MEMORANDUM AND ORDER
(On Petition to Intervene)

I. INTRODUCTION

Petitioner Cajun Electric Power Cooperative, Inc. (Cajun), seeks to intervene in Gulf States Utilities Company's (Gulf States) applications to amend the River Bend Station facility operating license. The amendments (1) authorize Gulf States to become a wholly owned subsidiary of Entergy Corporation (Entergy); and (2) include Entergy Operations Inc. (EOI) on the license as a new licensee to operate, manage, and maintain River Bend. The petition was filed in response to a July 7, 1993 "Notice of Consideration of Issuance of Amendments to Facility Operating License, Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing." 58 Fed. Reg. 36,423, 36,435-36 (1993).

The River Bend Station, a 940-MWe, single-unit, boiling water reactor, is located in Feliciana Parish, Louisiana. The facility is owned jointly by Gulf States and Cajun.

Cajun seeks two forms of relief in this proceeding. First, Cajun seeks to have additional conditions imposed on the license amendments to protect the

financial underpinning for River Bend operations and to preserve Cajun's rights and interests in River Bend. Second, Cajun requests the enforcement of two existing license conditions.[1]

II. THE PARTIES

Cajun is an electricity generation and transmission company supplying twelve rural Louisiana electric cooperatives serving approximately one million people. Cajun and its twelve members are nonprofit cooperatives under the Rural Electrification Act of 1936, 7 U.S.C.A. §§ 901, *et seq.* (1980). In addition to other generating facilities, Cajun owns 30% of the River Bend station, an interest Cajun values at approximately $1.6 billion.

Gulf States, a Texas corporation headquartered in Beaumont, owns the remaining 70% of River Bend which Gulf States operates for itself and Cajun under a joint agreement the two entered into in 1979. Under that joint agreement, both companies share proportionately the costs, benefits, and expenses of the facility. At the time the petition at issue here was filed, Gulf States was the operator for River Bend.

Entergy Operations Inc. (EOI) is a wholly owned subsidiary of Entergy Corporation. EOI operates nuclear units for four subsidiary companies owned by Entergy, its parent. EOI will operate River Bend in place of Gulf States under the terms of the proposed new Gulf States/EOI River Bend Station Operating Agreement.

Entergy Corporation will be the parent corporation of Gulf States if the merger is approved. Entergy is the parent corporation of EOI and several mid-south regional electric utilities including Arkansas Power & Light Co., Louisiana Power & Light Co., Mississippi Power & Light Co., and New Orleans Public Service, Inc.

III. REQUIREMENTS FOR INTERVENTION

As a threshold matter, Cajun must satisfy the NRC's requirements for intervention. Those requirements are set forth at 10 C.F.R. § 2.714(a)(2) (1993) which requires the statement of a cognizable interest in the proceeding, how that

[1] At the outset of this proceeding, Cajun also had claimed that a hearing should be held to decide whether these license amendments should have been made immediately effective. However, 10 C.F.R. § 50.91 (1993) of the Commission's rules makes clear that license amendments can be made immediately effective solely at the discretion of NRC Staff, following a determination by Staff that there are no significant hazards considerations involved. At the prehearing conference, counsel for Cajun conceded that immediate effectiveness findings are not subject to review by licensing boards, and he withdrew this issue from the proceeding. Tr. 8-9.

interest would be affected, the reasons why intervention should be allowed, and the specific subject matter as to which intervention is sought.

A. The Legal Standard for Standing

Judicial tests of standing are applied in NRC proceedings to determine whether a petitioner has sufficient interests to be entitled to intervene. These judicial tests require a petitioner to show that: (1) the proposal will cause "injury in fact" to the petitioner and (2) the injury is arguably within the zone of interests to be protected by the statutes governing the proceeding. *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25 (1993); *Public Service Co. of Indiana* (Marble Hill Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 439 (1980); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). In addition to these two elements of standing, the asserted injury must be redressable in the instant proceeding. *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 267 (1991).

B. The Positions of the Parties Regarding Standing

1. Cajun

Cajun contends that its ownership interest in the River Bend facility in and of itself confers standing in this proceeding. Among other things, it claims that the license amendments may cause unsafe operation of the plant because EOI (the new operating company resulting from the merger) will be thinly capitalized and may have insufficient operating funds due to pending legal actions against Gulf States. It also claims that safety will be jeopardized because the new arrangement (using EOI as operator rather than Gulf States) will foreclose Cajun from dealing directly with the plant's operator, thus preventing Cajun from confirming that the plant is being operated safely and from being able to influence its safe operation. Cajun contends that unsafe operations can jeopardize Cajun's ownership property interest in the plant and increase the potential for third-party liability resulting from accidents.

Cajun also makes the procedural argument that Gulf States does not have the right under state law to make changes that directly threaten Cajun's ownership in the plant and that Cajun should be allowed standing in this proceeding, as a co-owner, to contest whether Gulf States has the right to jeopardize this interest.

2. Gulf States

Gulf States opposes Cajun's standing primarily on the basis that Cajun's alleged injury is purely economic and therefore not within the zone of interests

protected by the Atomic Energy Act which is confined to radiological health and safety matters. Gulf States also argues that the scenario relied upon by Cajun to establish standing (i.e., safety concerns at the plant caused by a lack of funding) is illusory since the plant can be safely shutdown even if these concerns occur. Moreover, it claims that the same lack of funding alleged by Cajun would result without the license amendments because the responsibility for the cost of operating the plant will remain with Gulf States and Cajun even if the amendments are not granted. Gulf States additionally states that Cajun's argument concerning insufficient resources for safe operation is too speculative to be the basis for intervention. Finally, Gulf States contends that, to the extent that Cajun has attempted to gain standing by identifying injury to its member rural electric utility cooperatives, it has failed to do so in three respects. First, Cajun has failed to demonstrate that it has the authority to represent those persons who are members of those cooperatives. Second, Cajun has failed to show specific injury to them. Third, in any event, those persons are not members of Cajun but members of Cajun's members.

Gulf States additionally makes the procedural argument that there are two separate license amendments involved in this case and therefore two proceedings — one involving Gulf States' merger application with Entergy Corporation and the other involving the replacement of Gulf States with EOI as the operator of the River Bend plant. Gulf States maintains that the board must find standing for each of these proceedings.

3. Staff

Staff supports Cajun's standing to intervene. According to Staff, injury-in-fact by the amendments has been established because Cajun has shown it will suffer concrete and particularized harm traceable to the license amendment if the proposed new plant operator does not have the resources to safely maintain and operate River Bend or if the proposed amendment would cause a lessening of Cajun's influence, as an owner, to see that the plant is safely maintained and operated. Staff also states that Cajun has shown that it might sustain an actual injury if Gulf States lacks the authority to file the application on its behalf and that the grant of the application might adversely affect rights Cajun has under the present license. Staff additionally notes that Cajun has established that the alleged harm might be redressed in this proceeding by denying the amendment and keeping Gulf States primarily responsible for the safe operation of River Bend, or by granting the amendment with appropriate license conditions to protect Cajun's interests.

Staff concludes that Cajun's petition is within the zone of interests protected by the governing statute because the Atomic Energy Act states that the Commission shall provide for the protection of property, as well as of life, from

radiological hazards. As authority, it cites sections 103b, 42 U.S.C.A. § 2133(b) (1973), and 161b, 42 U.S.C.A. § 2201(b) (West Supp. 1974-1993) of the Act providing that licenses may be issued to those who will observe standards to "minimize danger to life and property" and it cites section 170 providing for the indemnification of damages caused by radiological accidents. As additional authority, it cites section 2f of the Act where Congress found that the use and control of atomic energy is necessary "for protection against possible interstate damage" occurring from the operation of nuclear facilities in interstate commerce. 42 U.S.C.A. § 2012(f) (1973).

C. Analysis of Standing

At the outset, we do not agree as a practical matter with Gulf States' argument that two proceedings are involved here — the merger proceeding and the operator proceeding — and that separate standing must be established for both. Although there were two *Federal Register* notices on July 7, 1993, regarding Gulf States' license amendments, one pertaining to the merger and one pertaining to the designation of an operator for the facility, the two amendments appear to be different facets of the same undertaking and do not require separate findings. That is, there is one nuclear power plant, one license being amended, and one part owner of that plant seeking to intervene. Gulf States' view of the matter could double the litigation burden and costs, an unhappy result this agency normally seeks to avoid.

Aside from this procedural issue, the issue here is whether the property interest of Cajun in River Bend is sufficient to confer standing in this license amendment proceeding. We conclude that it is.

There are a limited number of NRC cases involving standing that involve property interests. Most have held that the property interests involved were insufficient to confer standing since they were outside the zone of interests designed to be protected by the Atomic Energy Act — namely, interests related to health, safety, and radiological matters. The property interests in those cases primarily involved economic interests of ratepayers and taxpayers or general concerns about a facility's impact on local utility rates and the local economy. *See Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 128 (1977); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1984); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977).

Notwithstanding the ratepayer/taxpayer line of cases, property interests can confer standing. The ratepayer/taxpayer cases failed to find standing because the property interests were too far removed from the purpose of the underlying statutes governing those proceedings. Cajun's stated interest in this proceeding,

on the other hand, is to protect its property, River Bend, from radiological hazards arising from unsafe plant operation. Cajun's asserted interest in avoiding damage to property from nuclear-related accidents coincides with the Atomic Energy Act's stated purpose of affording protection from radiological hazards. As Staff correctly points out, radiological protection under the Act is afforded for *both* human life and property. In fact, the protection of property is specifically mentioned in the Atomic Energy Act in several places, including sections 103b and 161b which speak of minimizing "danger to life or property." 42 U.S.C.A. §§ 2133(b) and 2201(b) (West Supp. 1974-1993). Cajun's property interest in River Bend thus clearly meets the zone of interests requirement for standing.[2]

Both license amendments found in the July 7, 1993 *Federal Register* Notice play a role in the potential radiological hazards that Cajun has alleged in this proceeding. The amendment naming a new plant operator will install an allegedly underfunded operator whose lack of funding may jeopardize the safe operation of River Bend. According to Cajun, potential underfunding stems from multiple legal actions against Gulf States that could cause considerable financial difficulty, including bankruptcy. The merger amendment to permit Gulf States to become a subsidiary of Entergy Corporation also can cause unsafe operations since the terms of the merger agreement allegedly allow for underfunding at the plant. Thus, both amendments play a part in this proceeding and both are contributors to Cajun's standing arguments.

Cajun also has demonstrated injury-in-fact sufficient to confer standing. Because it is a co-owner of River Bend, it arguably can suffer substantial damage to its property interest from the plant's unsafe operation, including loss of its share of the plant, loss of plant power and revenue, and potential liability to third parties from radiological accidents.[3]

We reject Gulf States' argument that the alleged injury to Cajun is too speculative to be the basis for intervention. A petitioner need not establish that injury will inevitably result from the proposed action to show an injury in fact, but only "that it may be injured in fact" by the proposed action. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 104-05 (1976). In this case, Cajun has supplied information to establish that safety at the plant may be jeopardized by potential plant underfunding and a lack of oversight by Cajun. It has specifically alleged in this regard that only Gulf

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[2] We note that standing arguably may be granted for property interests other than those associated with physical damage from radiological hazards. *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316-17 (1985). However, we see no need in this case for us to determine whether standing may be granted for property interests that do not directly pertain to radiological hazards.

[3] Cajun has not specifically claimed standing based upon potential personal injury to individuals. However, it has listed various rural electric distribution cooperatives that are Cajun members whose service areas include individual members who are living adjacent to the River Bend facility. We agree with Gulf States that Cajun cannot obtain standing through those individuals who are members of these member cooperatives because it has neither demonstrated authority to represent them nor has it alleged any specific injury to them.

States will be responsible for funding the plant under the current terms of the merger agreement and that Gulf States' officials have conceded the potential for bankruptcy to Gulf States from pending litigation. We view these allegations as adequate to establish the necessary injury in fact.

We also reject Gulf States' argument that a lack of funding could not adversely affect plant safety. This argument clearly contradicts the rationale of 10 C.F.R. § 50.33(f) (1993) requiring applicants for operating licenses to demonstrate that they possess reasonable assurance of obtaining funds necessary to cover estimated operation costs for the period of the licenses. The regulatory basis for section 50.33(f) would include numerous safety factors including a consideration that insufficient funding might cause licensees to cut corners on operating or maintenance expenses. Even though, as Gulf States asserts, the plant could be safely shut down if funds are lacking, under section 50.33(f) financial assurances would still have to be provided.[4] We note that even during shutdown there are accident risks associated with a nuclear reactor. *See generally,* NUREG-0933, "A Prioritization of Generic Safety Issues" (1991).

Finally, we reject Gulf States' argument that the license conditions are immaterial to Cajun's property interests since the responsibility for operating costs at River Bend will still rest with Gulf States and Cajun, just as they did before the merger. This claim is controverted in Cajun's petition where Cajun asserts that the new Operating Agreement runs only between Gulf States and EOI and, therefore, Gulf States has the full obligation to compensate EOI for River Bend operation and EOI cannot look to Cajun for payment. Gulf States' argument also fails to recognize that license conditions could arguably be imposed that would help alleviate Cajun's financial concerns.

For the reasons explained in this section, we conclude that the potential injury to Cajun's property interest in River Bend establishes the requisite "injury in fact" for standing in this proceeding and that the potential injury to this interest is within the zone of interests protected by the Atomic Energy Act.[5]

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[4] Although an electric utility's financial qualification usually cannot be the subject of litigation in NRC operating license proceedings (*see* 10 C.F.R. § 50.33(f); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231 (1989)), the matter here concerns the financial viability of the operating company, EOI, which is not an electric utility. (For a more detailed analysis of this question, see discussion for Contention 2, *infra.*)

[5] Our ruling does not reach Cajun's argument that standing can also be derived from its rights as a co-owner of River Bend alone. Cajun appears to argue that co-owners and co-licensees of nuclear facilities should be allowed to contest license amendments that are contrary to their ownership interests (especially where, as here, state law does not allow a joint ownership agreement to be amended in the manner proposed) regardless of the subject matter at issue. Our subject matter jurisdiction is limited by statute, and we find Cajun's contractual property interest at issue here inappropriate to confer standing. Absent radiological health and safety concerns, environmental concerns, or antitrust matters subject to NRC license conditions, contractual disputes between co-owners in nuclear facilities ordinarily should be resolved by the appropriate state, local, or federal court. Contract disputes are not within the scope of this proceeding and will not be addressed by this board.

IV. CAJUN'S CONTENTIONS

To be admitted as a party in this proceeding, Cajun must not only establish standing, but also must proffer at least one admissible contention. The standards for admissible contentions are set out in 10 C.F.R. § 2.714(b)(2) and (d)(2) (1993). These regulations require that Cajun's contentions include a specific statement of the issue of law or fact to be raised or controverted, a brief explanation of the bases of the contentions, and a concise statement of the alleged facts or expert opinion which support the contentions, together with references to those specific sources and documents on which the petitioner intends to rely to prove the contentions. In addition, section 2.714 (b)(2)(iii) requires that Cajun present sufficient information to show that a genuine dispute exists on a material issue of law or fact. And, of course, Cajun's contentions must fall within the scope of the issues set forth in the notice of the proposed licensing action. *See Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

Cajun has listed the following seven contentions for litigation in this proceeding. *See* "Cajun Electric Power Cooperative Inc.'s Amendment and Supplement to Petition for Leave to Intervene Comments and Request for Hearing," dated August 31, 1993, at 7-22. Gulf States and Staff oppose these contentions on the basis that they are economic in nature and outside of the scope of health and safety issues in this proceeding, that they fail to have a sufficient basis, and that they would not entitle Cajun to relief even if proven.

Contention 1. The Proposed Amendments Fail to Reflect the Public Interest and Interests of Co-owners, Wholesale Customers and Customers That May Be Affected by the Outcome of the Cajun and Texas Litigation

Cajun contends that the NRC should consider the adverse financial impact that Gulf States, Entergy, and EOI would experience from a judgment or settlement resulting from presently pending litigation against Gulf States. These cases include *Cajun Electric Power Cooperative, Inc. v. Gulf States Utilities Co.*, No. 89-474-B, United States District Court for the Middle District of Louisiana, and *Southwest Louisiana Electric Membership Corp. v. Gulf States Utilities Co.*, No. 92-2129, United States District Court for the Western District of Louisiana. The case brought by Cajun involves an attempt by Cajun to rescind the River Bend Operating Agreement and collect damages of over $1.6 billion for alleged misrepresentation by Gulf States regarding Cajun's ownership purchase in River Bend. Cajun cites statements of Michael J. Hamilton of Price Waterhouse to establish that a decision in this litigation in favor of Cajun could bankrupt Gulf States and reduce the present net earnings of Gulf States/Entergy from

$2.20 per share to a loss of $3.34 per share. Cajun further claims Entergy will not protect Gulf States in the event of these litigation losses since the Entergy/Cajun Reorganization Plan allows Entergy to withdraw from the merger if Cajun prevails.

Contention 1, insofar as its allegations may establish the potential for unsafe operation of River Bend, does not directly refer to safety concerns but, in fact, is an integral part of Contention 2 which does refer to safety. In essence, Contention 1 states a basis for Contention 2 since the allegations in Contention 1 regarding the Gulf States litigation are an element in proving the allegation of underfunding and reduced safety in Contention 2. In fact, Cajun asserts the Contention 1 allegations concerning financial damage resultant from litigation as a basis for Contention 2. *See* Item (c) under Contention 2, below, and related discussion. Accordingly, for all the foregoing reasons, Contention 1 is denied.

Contention 2. The Proposed License Amendments May Result in a Significant Reduction in the Margin of Safety at River Bend

Cajun's claim in this contention is that safety at River Bend will be jeopardized because the proposed new operator, EOI, will be underfunded. It asserts, as bases for this contention, that:

(a) The proposed River Bend Operating Agreement runs only between Gulf States and EOI. Therefore, Gulf States has the full obligation under the Operating Agreement to compensate EOI for River Bend operation and EOI cannot look to Entergy or Cajun for payment. (These allegations are based on provisions in the River Bend Operating Agreement and the statements of Edwin Lupberger, Chief Executive Officer of Entergy, and Donald Hintz, Chief Executive Office of EOI.)

(b) EOI is very thinly capitalized. If Gulf States ceases to make its Operating Agreement payments, EOI has no other sources of funds to maintain safe and reliable River Bend operation. (Cajun cites the proposed Operating Agreement as the source for this allegation.)

(c) Gulf States faces severe financial exposure from litigation with Cajun and from certain Texas regulatory proceedings which could render Gulf States bankrupt and unable to make adequate payments to EOI to maintain safe and reliable River Bend operation. (To support this allegation, Cajun has provided the specific information described above in Contention 1.)

(d) Entergy views its obligations to support EOI in the event of lack of funding from Gulf States to be very limited. Officials of Entergy and EOI have admitted that EOI would be forced to shut down River Bend if EOI lacked adequate funds. (Cajun has cited the testimony of Edwin Lupberger and Donald Hintz in a Federal Energy Regulatory Commission (FERC) proceeding as a source for these allegations.)

See Cajun Amendment and Supplement at 11-13 and references therein.

We find these bases adequate to satisfy the contention requirements of this proceeding. Cajun, of course, is not obliged to prove its entire case at this time. *See* discussion in *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 205-06 (1993).

In its opposition to Contentions 1 and 2, Gulf States primarily argues that both contentions are contrary to the Commission's "financial qualification" rule which exempts electric utilities from demonstrating financial qualification. However, this reliance is misplaced since the exemption in 10 C.F.R. § 50.33(f) applies only to electric utilities, and EOI is not an electric utility. Contentions 1 and 2 concern EOI's, and not Gulf States', financial qualifications. EOI will be the facility's operator and it is EOI's underfunding that allegedly will cause safety concerns at River Bend.

Clearly, EOI is not an electric utility. EOI's sole function will be to operate and maintain the plant. An electric utility, as defined in 10 C.F.R. § 2.4 (1993), is an "entity that generates or distributes electricity and which recovers the costs of this electricity, either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority." Gulf States will be the entity functioning as an electric utility with respect to River Bend since it will continue to distribute and sell the River Bend power and will be the entity responsible for recovering its costs.

Other arguments Gulf States makes in opposing Contention 2 are the same arguments it made for opposing Cajun's standing. These include Gulf States' allegations that the responsibility for funding plant operations will remain with Gulf States and Cajun, that the economic injury that Cajun asserts is too speculative to be a basis for a contention, and that the plant could safely shut down if funds were lacking. We have found these arguments wanting in the standing section of this decision and they are wanting here. For all the foregoing reasons, Contention 2 is accepted.

Contention 3. The Proposed License Amendment Cannot Be Approved Without Cajun's Consent

In this contention, Cajun contends that the proposed license amendment requests were not properly made on Cajun's behalf and that the amendments are contrary to Cajun's ownership interest in the facility. We reject this contention for the reasons set out in our discussion regarding standing. Cajun has contracted with Gulf States to have Gulf States operate River Bend. That authority included the power to seek license amendments. When antitrust and radiological health and safety concerns are not involved, contractual disputes between co-owners in a nuclear facility should not be resolved by the NRC. Such questions should be handled by appropriate state, local, or federal courts.

Contention 4. The Proposed License Amendments Will Adversely Affect Cajun's Rights Regarding the Operation of River Bend

Cajun contends that the transfer of ownership and operation of River Bend violates Cajun/Gulf States contracts and that NRC approval of these transfers must be conditioned to protect Cajun's rights as a 30% co-owner of River Bend. Cajun claims in this regard that operational decisions for River Bend will no longer be made to protect the interests of Gulf States and Cajun, but rather will be made on behalf of the entire Entergy System which consists of a number of other electric utilities. Cajun also claims that the transfers to EOI will destroy Cajun's contractual privity with the plant's operator, which in turn will adversely affect River Bend safety by preventing Cajun from sharing plant operational information and participating in plant decisionmaking.

Just as for Contention 3, we reject this contention because it involves non-safety-related contractual matters between co-owners of a nuclear facility. Jurisdiction for such issues lies in other forums, not this one. No significant health or safety concern has been presented here since Cajun has not asserted or shown any basis to establish that a safety problem would exist without its oversight at River Bend.

Contention 5. The Proposed License Amendments Cannot Be Approved Without Certain License Conditions

In this contention, Cajun lists seven license conditions which it alleges will alleviate the problems caused by the license amendments. On their face, these contentions appear related only to contractual disputes between the co-owners of River Bend, and they do not appear necessary for the plant's safe operation.[6] Consequently, we reject these conditions with the proviso that Cajun can later request license conditions for Contention 2 that include aspects of these proposed conditions if Cajun can demonstrate their safety significance.

Contention 6. The Proposed Ownership Amendment Should Be Approved Only with Conditions Adequate to Remedy Its Adverse Impacts on the Cajun/Gulf States Interconnection Agreement

In this contention, Cajun alleges that the proposed Gulf States merger will adversely impact the Cajun/Gulf States interconnection agreements to

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[6] Cajun requests conditions that: (1) require a tripartite agreement among Gulf States, EOI, and Cajun; (2) require EOI to be the direct agent of Cajun; (3) require EOI to be directly liable to Cajun; (4) allow Cajun to have input into River Bend decisions regarding maintenance, fuel outages, budgets, and capital improvements; (5) allow Cajun to have access to EOI records and River Bend operational data; (6) require EOI to submit River Bend cost management and regulatory reports to Cajun; and (7) allow Cajun to attend Institute for Nuclear Power Operation (INPO) meetings and have access to INPO documents.

the economic detriment of Cajun and its consumers. According to Cajun, these agreements include, among other things, interconnection and transmission provisions, rates for electric power and services, cost-sharing agreements, long-term and short-term planning functions, and similar, utility-related, operational agreements. This contention describes utility functions that clearly lie within the jurisdiction of FERC or appropriate state agencies that regulate electric utilities. *See* 42 U.S.C.A. § 2019.

Moreover, to the extent that Cajun's interconnection agreement concerns relate to Cajun's antitrust license conditions in the River Bend NRC license, they have been evaluated by Staff as part of a Staff antitrust review involving the Gulf States' merger. *See* 58 Fed. Reg. 16,246 (1993). Antitrust matters were not included in the notices governing this proceeding and this board has no jurisdiction over them. Accordingly, the contention is denied.

Contention 7. The River Bend License Conditions Must Be Enforced

In this contention, Cajun requests that Gulf States and EOI be required to comply with the current River Bend license conditions. Cajun alleges that Gulf States is violating Condition 10 (by seeking to void a transmission contract between Gulf States and Cajun) and Condition 12 (by refusing to provide certain delivery points for electric power). We reject this contention since licensing boards have no jurisdiction to enforce license conditions unless they are the subject of an enforcement action initiated pursuant to 10 C.F.R. § 2.202a (1993). Cajun's only recourse to enforce these conditions is to request enforcement action by the Staff pursuant to 10 C.F.R. § 2.206 (1993).[7]

V. CONCLUSION

Cajun's Contention 2 regarding a potential safety risk caused by underfunding of the plant's operator is accepted. The remaining contentions are rejected because they do not concern health and safety matters or any other basis for Licensing Board jurisdiction. They involve contractual disputes and disagreements between co-owners of nuclear facilities, which are not within the jurisdiction of this forum. Matters argued by the parties but not addressed herein were not considered material to the decision reached.

[7] We note that the license conditions to which Cajun refers are the River Bend antitrust license conditions which were inserted in the River Bend license to alleviate antitrust concerns and ensure competition among utilities in Gulf States' service area. As discussed regarding Contention 6, *supra*, the antitrust aspects of the Gulf States' merger were the subject of a separate antitrust review conducted by NRC Staff and were not included in the notices governing this proceeding.

We conclude that Cajun has met the requirements for standing. It has proffered one viable contention, demonstrated an "injury in fact," and alleged an injury that falls within the zones of interest sought to be protected by the governing statutes. Cajun's petition to intervene is therefore granted, and a hearing is hereby ordered in this proceeding.

VI. APPEAL RIGHTS

In accordance with 10 C.F.R. § 2.714a (1993), Gulf States or Staff may seek appeal on the question of whether the petition and request for a hearing should have been wholly denied. Cajun may not appeal this Order because it does not wholly deny its petition.

An appeal to the Commission may be sought by filing a petition for review, pursuant to 10 C.F.R. § 2.714a(a) (1993), within 10 days after service of this Order. Any other party to the proceeding may, within 10 days after service of the appeal, file an answer supporting or opposing the appeal.

VII. DISCOVERY AND SCHEDULING

Discovery shall begin immediately. The parties shall commence negotiation concerning appropriate trial schedules and file a report with suggested scheduling by March 1, 1994.

THE ATOMIC SAFETY AND
LICENSING BOARD

B. Paul Cotter, Jr., Chairman
ADMINISTRATIVE JUDGE

Richard F. Cole
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Bethesda, Maryland,
January 27, 1994.

Cite as 43 NRC 135 (1996) LBP-96-5*

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

B. Paul Cotter, Jr., Chairman
Dr. Richard F. Cole
Dr. Peter S. Lam

In the Matter of **Docket No. 50-458-OLA**
(ASLBP No. 93-680-04-OLA)

GULF STATES UTILITIES COMPANY, *et al.*
(River Bend Station, Unit 1) **March 29, 1996**

The Licensing Board grants a motion of the bankruptcy trustee of the Intervenor, Cajun Electric Cooperative, to terminate its litigation, without prejudice, contesting a license amendment requested by Gulf States Utilities.

TERMINATION OF PROCEEDINGS: TERMINATION WITHOUT PREJUDICE

Under Rule 41 of the Federal Rules of Civil Procedure, a voluntary dismissal of a court action is generally without prejudice to the action being reinstituted at a later date. Although there is no provision in the Commission's Rules of Practice that corresponds to the voluntary dismissal procedure in Rule 41, the Board found that those provisions were applicable in this case, especially since the public interest theoretically would be served if Cajun could later establish that additional financial assurances were needed. Moreover, the Board found that it was unfair to impose a form of punishment, such as a bar of future action,

*This opinion was inadvertently omitted from the March Issuance.

against an Intervenor whose decisions were being directed by a person (the bankruptcy trustee) with legal responsibilities other than those that supported the original petition.

MEMORANDUM AND ORDER
(Grant of Motion to Terminate Proceeding)

BACKGROUND

On January 25, 1996, Ralph R. Mabey, the court-appointed Bankruptcy Trustee ("Trustee") for Intervenor Cajun Electric Power Cooperative, Inc. ("Intervenor"), filed with this Board a "Withdrawal of Contention and Motion for Termination of Hearing" ("Trustee's Motion").[1] The Motion seeks to withdraw the Intervenor's only contention and to terminate its litigation contesting a license amendment requested by Gulf States Utilities Company for its River Bend Station nuclear reactor.[2] The Motion seeks termination of the proceeding "without prejudice."

The NRC Staff supports the Trustee's motion insofar as it withdraws the admitted contention and asks that the hearing be terminated. However, the Staff takes exception to the Trustee's request that the contention be withdrawn without prejudice. The Staff does not believe that the Trustee can withdraw Cajun's contention without prejudice "given the posture of the proceeding before the Licensing Board."[3] The Staff would have the Board dismiss the proceeding *with* prejudice.

In support of his request to withdraw Contention 2 without prejudice, the Trustee states that Cajun

> is not withdrawing its Petition to Intervene, as amended and supplemented, or any of the other issues, matters or contentions contained therein . . . .
>
> . . . Cajun continues to have concerns about EOI's lack of financial qualifications, although the Trustee does not wish to litigate the safety contention at this time. Withdrawal without prejudice is the standard at this Commission. *See Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), LBP-73-41, 6 AEC 1057 (1973). . . .
>
> The Trustee requests that the ASLB terminate the hearing proceeding. Since Contention 2 is the only contention and Cajun is the only intervenor, withdrawal should bring this hearing proceeding to an end. . . . Since the Staff has advocated against Cajun's safety contention,

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[1] On February 9, 1996, the Trustee filed a Supplement to Withdrawal of Contention and Motion for Termination of Hearing that confirmed his authority to act on behalf of Cajun in this proceeding.

[2] For the complete background in this proceeding, see this Board's decision on intervention reported in LBP-94-3, 39 NRC 31 (1994).

[3] NRC Staff Response to Chapter 11 Trustee's Motion for Termination of Hearing, February 14, 1996 ("Staff Response") at 1.

> no party remains which could assume Contention 2. Therefore, a hearin[g] [sic] on Cajun's Contention 2 would serve no purpose at this time.

Trustee's Motion at 7.

Countering the Trustee's position, the Staff argues that dismissal of the Intervenor's contention without prejudice is somehow beyond the Board's jurisdiction, which the Staff insists is limited to "considering Cajun's petition for intervention and rendering a decision on any contentions that might be admitted." Staff Response at 2. The Staff says *Grand Gulf*, relied upon by the Intervenor, is not apposite because that proceeding apparently continued after the intervenor in question withdrew its contention. The *Grand Gulf* Licensing Board ruled that, following a voluntary withdrawal, an intervenor may reinstitute its intervention upon "good cause shown," the same standard as that for untimely intervention found under 10 C.F.R. §2.714(a). In other words, in an operating license proceeding, the intervenor, upon good cause shown, could again intervene in the ongoing proceeding. However, the Staff reiterates that "[t]his proceeding will not be an ongoing proceeding once the Trustee's contention is withdrawn." *Id.* at 3. The Staff argues that since withdrawal of the only admitted contention in a proceeding brings the proceeding to an end (citing *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382 (1985)), "the Trustee's unopposed withdrawal of Cajun's contention must result in a Licensing Board decision granting the Trustee's request and terminating the proceeding *with* prejudice." *Id.* (emphasis supplied).

ANALYSIS

There is no guidance in Commission rules addressing the situation before us. It is clear that the Trustee desires, in the best interest of Cajun's bankruptcy, to end Cajun's involvement in this proceeding. And the Trustee clearly acknowledges his understanding that the withdrawal of the only contention submitted by the only intervenor in the proceeding "bring[s] this hearing proceeding to an end." Trustee's Motion at 7. However, it is also implicit in the Trustee's statements that the Trustee does not wish Cajun to be barred from litigating its concerns at some future time. Therefore, the Trustee expresses his desire to have the contention dismissed without prejudice. It appears that the Trustee is following the guidance of Rule 41 of the Federal Rules of Civil Procedure.

Under Rule 41 of the Federal Rules of Civil Procedure, a voluntary dismissal of a court action is generally without prejudice to the action being reinstituted at a later date. Although there is no provision in the Commission's Rules of Practice that corresponds to the voluntary dismissal procedure in a court action,

we see no good reason why those rules should not be applicable here, especially since the public interest theoretically would be served if Cajun can later establish that additional financial assurances are needed. Financial assurance is an issue of renewed current importance given the industry's transition to a more competitive environment.

Moreover, even if it were within our power to bar future action, there is a consideration of fairness at play here. Cajun is withdrawing its contention and seeking the termination of this proceeding under the duress caused by its own fiscal situation. As the Trustee stated in his Motion

> I believe that the creditors of Cajun Electric's estate will be benefitted by the savings realized from terminating further participation in [this Board Proceeding] and by the dedication of the estate's limited resources, so far as practicable, to Cajun Electric's effective reorganization.

Trustee's Motion at 6. While the Trustee's current actions may be binding on Cajun in the event Cajun is returned to debtor-in-possession status, it would be unfair to impose a form of punishment, such as a bar of future action, against an Intervenor whose decisions are now being directed by a person with legal responsibilities other than those that supported the original intervention petition.

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 29th day of March 1996, ORDERED

That the motion of Cajun Electric Cooperative to withdraw its contention and terminate this proceeding, shall be, and it hereby is, granted and the proceeding is terminated without prejudice. [4]

THE ATOMIC SAFETY AND
LICENSING BOARD[4]

B. Paul Cotter, Jr., Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 29, 1996

[4] Judge Cotter was not present for the signing of this Memorandum and Order, but concurs in it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
E. Gail de Planque

In the Matter of **Docket No. 50-458-OLA**

GULF STATES UTILITIES COMPANY, *et al.*
(River Bend Station, Unit 1) **August 23, 1994**

The Commission considers the appeal of a Licensing Board decision, LBP-94-3, 39 NRC 31 (1994), which granted a request for intervention and for hearing on two applications submitted by the Gulf States Utilities Company (GSU). In one application, GSU sought to transfer its operating control over the River Bend nuclear power plant to a new licensee. GSU's second application sought a license amendment to reflect a change in the ownership of GSU. The Commission denies the appeal and affirms the Licensing Board's order, finding that the Petitioner has met the threshold requirements for standing and an admissible contention.

RULES OF PRACTICE: STANDING TO INTERVENE

To determine whether a petitioner has alleged the requisite interest to intervene, the Commission applies judicial concepts of standing.

RULES OF PRACTICE: STANDING TO INTERVENE

For standing, a petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision.

RULES OF PRACTICE: STANDING TO INTERVENE

In the absence of a clear misapplication of the facts or misunderstanding of law, the Licensing Board's judgment at the pleading stage that a party has crossed the standing threshold is entitled to substantial deference.

RULES OF PRACTICE: STANDING (INJURY IN FACT)

The Atomic Energy Act authorizes the Commission to accord protection from radiological injury to both health and property interests. *See* AEA, §§ 103b, 161b, 42 U.S.C. §§ 2133(b), 2201(b).

REGULATIONS: INTERPRETATION

Commission regulations recognize that underfunding can affect plant safety. Under 10 C.F.R. § 50.33(f)(2), applicants — with the exception of electric utilities — seeking to operate a facility must demonstrate that they possess or have reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license. Behind the financial qualifications rule is a safety rationale.

RULES OF PRACTICE: CONTENTIONS

Commission regulations mandate that a contention include a specific statement of the issue of law or fact to be raised or controverted, a brief explanation of the bases of the contention, and a concise statement of the alleged facts or expert opinion that support the contention, together with references to those specific sources and document on which the petitioner intends to rely to prove the contention. The petitioner must also demonstrate that a genuine dispute exists with the applicant on a material issue of law or fact.

RULES OF PRACTICE: CONTENTIONS

At the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in formal evidentiary form, nor be as strong as that necessary to withstand a summary disposition motion.

MEMORANDUM AND ORDER

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.714a, the Gulf States Utilities Company (GSU) has appealed the Atomic Safety and Licensing Board's Memorandum and Order LBP-94-3, 39 NRC 31 (1994). The Board found that the Cajun Electric Power Cooperative, Inc. (Cajun) has standing to intervene as a party in this proceeding and that one of Cajun's seven contentions is admissible. On appeal, GSU claims that Cajun lacks both standing and an admissible contention. The Nuclear Regulatory Commission (NRC) Staff concurs with the Licensing Board that Cajun has standing to intervene, but submits that the Board improperly admitted Cajun's contention. The Commission affirms LBP-94-3.

II. BACKGROUND

GSU is a Texas corporation and holds a 70% undivided interest in River Bend Station, Unit 1, located in Feliciana Parish, Louisiana. Cajun is a Louisiana cooperative corporation engaged in the transmission, distribution, and sale of electricity to rural electric distribution cooperatives. Cajun owns the remaining 30% undivided interest in River Bend. Specifically, this proceeding involves two separate applications filed by GSU in January 1993 for changes in the River Bend operating license. In one application, GSU sought to transfer control over River Bend's operations from itself to Entergy Operations, Inc. (EOI), pursuant to 10 C.F.R. § 50.80. GSU's second application was for a license amendment to reflect a change in the ownership of GSU, which through a merger would become a wholly owned subsidiary of Entergy Corporation (Entergy). The merger would not affect River Bend's ownership. The NRC Staff has approved both applications. *See* 58 Fed. Reg. 68,182 (Dec. 23, 1993).

Cajun and GSU entered into a Joint Ownership, Participation, and Operating Agreement (the JOPOA) in 1979. Under the agreement, Cajun and GSU, proportionate to their ownership interests, share the costs, expenses, and benefits of the River Bend Station. The agreement named GSU as the Licensee responsible for operating River Bend. Now, after the transfer of operating control requested by GSU, and pursuant to a new River Bend Station operating agreement executed by GSU and EOI, EOI is the new operator of the facility. EOI is a wholly owned subsidiary of Entergy Corporation, and also operates nuclear stations for four other Entergy subsidiaries.

Before the Licensing Board, Cajun alleged that both the transfer of operating control to EOI and GSU's merger with Entergy raise concerns about the safety of River Bend's operations. Cajun alleges that EOI may lack sufficient funds

to operate the plant safely. Cajun states that EOI is thinly capitalized, and that under the new River Bend operating agreement between EOI and GSU, GSU bears the full obligation to compensate EOI for the plant's operations. Accordingly, Cajun emphasizes that EOI will be dependent upon GSU for the funds to carry out River Bend's operations, and cannot look to Entergy or to Cajun itself. Cajun alleges that GSU faces potentially severe financial exposure because of pending litigation with Cajun and with Texas regulators, and that potential litigation losses could result in GSU being unable to fund EOI adequately to maintain safe operations at River Bend.[1]

The Licensing Board first determined that Cajun has standing to intervene. Cajun seeks to protect its property interest in the River Bend facility from radiological harm. Cajun allegedly has invested approximately $1.6 billion for its 30% ownership share of River Bend. The Licensing Board concluded that radiological harm to Cajun's property interest is a protected interest under the Atomic Energy Act. LBP-94-3, 39 NRC at 38. The Licensing Board also found that the alleged injury can be redressed because license conditions could be imposed to reduce the potential for injury to Cajun. *See id.* at 39.

The Licensing Board admitted one of seven contentions proferred by Cajun. The admitted contention alleges that proposed license amendments may result in a reduction in the margin of safety at River Bend. *See id.* at 41-42. The contention is based on claims identical to those that go to Cajun's standing; namely, that operations at River Bend may be underfunded because the new operator is thinly capitalized and intends to receive the bulk of its funding from GSU, which in turn faces the risk of substantial financial losses from pending litigation and which, in the event it has difficulty funding EOI, will not receive any assistance in funding EOI from the Entergy Corporation, the parent of both GSU and EOI.

On appeal, GSU claims that the Licensing Board erred in granting Cajun's petition to intervene because Cajun lacks both standing and an acceptable contention. Brief in Support of GSU's Appeal (GSU Appeal Brief) at 17-18 (Feb. 15, 1994). In brief, GSU argues that Cajun never alleged how GSU's merger with Entergy, or how the operation of River Bend by EOI, could adversely affect Cajun's interests. GSU emphasizes that responsibility for funding River Bend's operations remains unchanged by the license amendments. GSU Appeal Brief

[1] Cajun has filed a lawsuit against GSU concerning Cajun's ownership status in River Bend. Cajun seeks to rescind its operating agreement with GSU and obtain damages of at least $1.6 billion for alleged misrepresentation. Two of the Cajun Cooperative's members also have filed suit against GSU, alleging that the operating agreement between Cajun and GSU is null because it was never submitted to the Louisiana Public Service Commission. Cajun also filed two lawsuits in the D.C. Circuit Court of Appeals against the NRC attacking (apparently on antitrust grounds) the two license amendments granted to GSU in this proceeding. The Court consolidated the two cases but has not set a briefing schedule. Cajun states that GSU also is involved in litigation with the Public Utility Commission of Texas, which disallowed $63.5 million of River Bend plant costs, and ordered GSU to place in abeyance approximately $1.4 billion of its investment.

at 7, 22-24. The responsibility for funding plant operations will remain with the plant owners, GSU and Cajun, in proportion to their ownership interests. *Id.* at 24. GSU argues that EOI's "capitalization" is irrelevant because GSU is not relying on EOI to demonstrate financial qualifications, only to operate the plant. GSU concludes that Cajun's interests in River Bend could be affected only if GSU is unable to meet its financial obligations to fund plant operations. *Id.* at 18. GSU stresses that such an eventuality could result from GSU losing its pending litigation, but not from the two license amendments, which will have no effect on the pending litigation. *See id.* at 18, 20, 22. Moreover, GSU argues that the pending litigation against GSU is overly speculative a basis upon which to support Cajun's standing and contention. *Id.* at 23, 36. Lastly, GSU claims that no link exists between a financial qualifications review and plant safety because if adequate funds are not available for safe operation, a plant simply can be shut down. *See id.* at 34-35.

The NRC Staff concurs with the Board's finding of standing, but argues that the Board erred in admitting the contention.[2] The Staff claims that the transfer of operating control to EOI will affect neither GSU's obligation nor its ability to fund River Bend's operations, and therefore could not affect the plant's operations. Staff Appeal Brief at 9-10.

III. ANALYSIS

A. Cajun's Standing

Under section 189a of the Atomic Energy Act, the Commission must provide a hearing upon the request of any person "whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a). To determine whether a petitioner has alleged the requisite interest to intervene, the Commission applies judicial concepts of standing. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993) (*Perry*). For standing, a petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision. *See generally Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992); *Perry*, 38 NRC at 92. The injury must be to an interest that is arguably within the zone of interests protected by the governing statute. Injury may be actual or threatened. *Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987); *Perry*, 38 NRC at 92.

In the absence of a clear misapplication of the facts or misunderstanding of law, the Licensing Board's judgment at the pleading stage that a party has

[2] NRC Staff Response to GSU Appeal (Mar. 3, 1994) (Staff Appeal Brief) at 4, 6.

crossed the standing threshold is entitled to substantial deference. "'[W]e are not inclined to disturb a Licensing Board's conclusion that the requisite affected interest . . . has been established unless it appears that that conclusion is irrational.'" *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-273, 1 NRC 492, 494 (1975).[3]

The Licensing Board's conclusion here that Cajun has alleged sufficient interest and injury for threshold standing is not "irrational." The Atomic Energy Act expressly authorizes the Commission to accord protection from radiological injury to both health and property interests. *See* AEA, §§ 103b, 161b, 42 U.S.C. §§ 2133(b), 2201(b). Cajun alleges a threat of radiological harm to its property interest in the River Bend Station.

We reject GSU's argument that Cajun's stated interests are purely economic and "without a legitimate nexus to 'unsafe plant operation.'" GSU Appeal Brief at 18. Although seeking to protect a property interest, Cajun asserts an adverse impact on that interest from potentially unsafe operation of River Bend if the funding resources for the plant are unduly strained. As the Licensing Board recognized, such a claim is far different from the claims of disgruntled ratepayers or taxpayers whose complaints of rising rates or taxes have been rejected as a basis for standing in our proceedings. *See* 39 NRC at 37 (citing cases). Rather, Cajun's claim bears on safety in relation to the underlying financing for the plant, a matter that our regulations address.

Commission regulations recognize that underfunding can affect plant safety. Under 10 C.F.R. § 50.33(f)(2), applicants — with the exception of electric utilities — seeking to operate a facility must demonstrate that they possess or have reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license. Behind the financial qualifications rule is a safety rationale. In drafting the original financial qualifications rule (which did not exempt utilities), the Atomic Energy Commission "'must have intuitively concluded that a licensee in financially straitened circumstances would be under more pressure to commit safety violations or take safety "shortcuts" than one in good financial shape.'"[4] Indeed, the Commission has presumed that "[s]hortcuts in safety at full power conceivably could avoid shutdowns . . . and thereby contribute to greater plant availability and revenue from power sales."[5]

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[3] *Quoting Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 193 (1973), *aff'd on other grounds*, CLI-73-12, 6 AEC 241 (1973), *aff'd sub nom. BPI v. AEC*, 502 F.2d 424 (D.C. Cir. 1974). *See also Duquesne Light Co.* (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 (1973); *cf. Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 n.5 (1979).

[4] Final Rule, Elimination of Review of Financial Qualifications of Electric Utilities in Operating License Review and Hearings for Nuclear Power Plants, 49 Fed. Reg. 35,747, 35,749 (Sept. 12, 1984).

[5] *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 600 (1988); *see also* 49 Fed. Reg. 35,749 (Sept. 12, 1984).

In addition to highlighting EOI's thin capitalization and GSU's potential inability to fund River Bend's operations because of litigation risks, Cajun also stresses that the merger will contribute to the potential for underfunded operations at River Bend. Through the merger, Entergy Corporation will become the parent of GSU. Entergy's obligations to EOI are found in a River Bend Station Guarantee Agreement (Guarantee Agreement) made by Entergy, GSU, and EOI. Under the agreement, Entergy will have no obligation to support EOI financially if GSU ceases to fund EOI. And, according to Cajun, "EOI cannot look to Cajun for payment." 39 NRC at 39.[6] Because of GSU's pending litigation risks, Cajun stresses that "[t]he possibility that GSU may be unable to fund EOI operations of River Bend . . . is more than an academic concern." Cajun's Petition for Leave to Intervene (Aug. 6, 1993) (Cajun's Petition) at 17.

Cajun claims that the merger results in Entergy and its shareholders being financially "insulated" from events involving EOI and GSU.[7] After the merger, as reflected in the license amendment, GSU no longer is a publicly owned utility, but is a wholly owned subsidiary of the Entergy Corporation. GSU Appeal Brief at 7. Cajun explains that, before the merger, GSU shareholders would have been directly affected by a GSU bankruptcy, but that after the merger Entergy shareholders will be "insulated from liability through the corporate structure of Entergy's subsidiaries, GSU and EOI." *Id.* at 21. Because Entergy and its shareholders would be protected from any financial responsibility related to the underfunding of River Bend if GSU ceases to fund EOI, Cajun concludes that "EOI may be unable to ensure the safe shutdown of River Bend in the event of a GSU bankruptcy." *Id.* at 21-22.

In sum, we cannot conclude that the Licensing Board's standing determination was irrational. Whether the restructuring of GSU and the transfer of operating control to EOI ultimately harms or enhances River Bend's operation is a matter over which Cajun and GSU sharply disagree. It may well be that the two actions cannot be shown to have an impact on the safety of River Bend or that our regulations require no more demonstration of financial qualifications than that already found adequate by the Staff. But such findings would require us to reach beyond the minimum threshold for standing. Although we accept the Board's determination that Cajun has made a sufficient showing for threshold standing on the pleadings, we do not intimate any opinion on the merits of Cajun's claims, which upon further factual development may prove inadequate to survive the summary disposition stage.

GSU also argues on appeal that "[b]y rejecting the fact that two — not one — license amendment applications are at issue and collapsing both amendments into a single proceeding, the Licensing Board erroneously concluded that

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[6] *See also* Cajun's Brief in Opposition to GSU's Appeal (Mar. 2, 1994) (Cajun Appeal Brief) at 21.
[7] *See* Cajun Appeal Brief at 6.

separate standing (and a separate admissible contention) need not be established in connection with each license amendment." GSU Appeal Brief at 13. GSU submits that the Licensing Board's analysis involves only the transfer of operating control to EOI, and does not reflect any assessment of the potential impact to Cajun's interests from the merger of GSU with Entergy. *See id.* at 14-15. GSU complains that the Board did not make separate findings of standing and, in failing to do so, bootstrapped its jurisdiction over the merger amendment.

Although we concur with GSU that licensing boards do not have the liberty to assume jurisdiction over separate license amendments and hold a hearing simply because the same facility and same parties may be involved, we do not believe that the Licensing Board here has overstepped the bounds of its authority. A fair reading of Cajun's initial pleadings reflects that Cajun sought a hearing on *both* licensing actions.[8] The Board concluded that "the two amendments appear to be different facets of the same undertaking." LBP-94-3, 39 NRC at 37. We note, too, that GSU itself has linked the two actions. In its application for the transfer of operating control to EOI, GSU declared that the application was "submitted in contemplation of the proposed merger, and would become effective only upon consummation of the merger."[9] On appeal, GSU emphasizes that even had the transfer of control been denied, the merger could have proceeded as a matter of law,[10] but this assertion does not erase an apparent relationship between the actions.

In context, the Licensing Board's finding of standing goes to both challenged amendments. The Board noted that both amendments could increase the potential for underfunded operations at River Bend, and that thus both amendments "are contributors to Cajun's standing arguments." *Id.* at 38.

At this stage we accept, as the Licensing Board has found, that the issues pertaining to both the transfer of control and the merger may overlap, and that Cajun's alleged injury could result from both actions in tandem. The Board also has found Cajun's admitted contention pertinent to both actions, and we affirm the threshold admission of the contention in the next section of this Order. Although further litigation of Cajun's contention may well show it to be of little consequence to one or both of the licensing actions at issue, we discern no reason on the basis of the minimal record before us to disturb the Board's conclusions.

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[8] *See, e.g.*, Cajun's Amendment and Supplement to Petition, at 5-6 (Aug. 31, 1993). We note that Cajun's original Petition referred to the *Federal Register* notice for the proposed merger amendment, while the Petition highlighted the proposed transfer of control, the notice of which appeared on the following page in the *Federal Register*. When the Office of the Secretary (SECY) referred Cajun's petition to the Licensing Board on August 17, 1993, SECY noted only the proposed merger amendment. In its Supplement, Cajun clarified its intention to contest both proposed licensing actions. To the extent that any defect existed in the establishment of the Licensing Board, we remove it now.

[9] Letter from P.D. Graham, GSU, to NRC Document Control Desk, at 1 (Jan. 13, 1993) (attached to Letter from Mark Wetterhan, GSU counsel, to NRC Atomic Safety Licensing Board (Sept. 1, 1993).

[10] GSU Appeal Brief at 15.

To the extent that the Board consolidated its consideration of the amendments it is empowered to do so under 10 C.F.R. § 2.716 when reasonable. We generally will defer to the Licensing Board's judgment on consolidation. *See Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 89-90 (1992).

B. Cajun's Contention

For admission as a party, a petitioner for intervention must proffer at least one admissible contention. The standards for an admissible contention are found under 10 C.F.R. § 2.714(b)(2) and (d)(2). Commission regulations mandate that a contention include a specific statement of the issue of law or fact to be raised or controverted, a brief explanation of the bases of the contention, and a concise statement of the alleged facts or expert opinion that support the contention, together with references to those specific sources and documents on which the petitioner intends to rely to prove the contention. The petitioner also must demonstrate that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions must fall within the scope of the issues set forth in the notice of the proposed licensing action. *See Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

The contention rule, however, does not require Cajun to prove its case at this point. At the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in formal evidentiary form, nor be as strong as that necessary to withstand a summary disposition motion. What is required is "a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate."[11]

The Licensing Board admitted only one of Cajun's seven proffered contentions. The admitted contention alleges that "the proposed license amendments may result in a significant reduction in the margin of safety." LBP-94-3, 39 NRC at 41.[12] Central to Cajun's contention is the concern that EOI will lack adequate funds to operate River Bend safely.

Cajun's bases for the contention can be summarized as follows:

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[11] Final Rule, Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, 33,168, 33,171 (Aug. 11, 1989), *quoting Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245 (D.C. Cir. 1980).

[12] GSU submits that Cajun's contention contains a fatal defect because the "margin of safety" standard is a term of art that concerns only whether a "significant hazards consideration" exists that could affect the timing of the effectiveness of the licensing actions. We do not believe that the expression "margin of safety" has been used as a term of art in this manner by either Cajun or the Licensing Board. We understand Cajun to be alleging an adverse impact on safety.

1. The new River Bend Operating Agreement underlying the transfer of operating control to EOI runs only between GSU and EOI. Under the agreement, GSU is obligated to provide all of EOI's funding for River Bend's operations. As a result, EOI will be dependent upon GSU for the funds necessary to operate River Bend.
2. EOI is thinly capitalized. Consequently, if GSU ceases to make its operating payments, EOI will have no other source of funds to maintain safe River Bend operations.
3. GSU faces severe financial exposure from litigation with Cajun and from Texas regulatory proceedings. Losses could render GSU unable to make sufficient payments to EOI for continued safe plant operations.
4. Under the merger agreement, Entergy Corporation, the parent of GSU and EOI, will not be responsible for funding EOI's operation of River Bend if GSU ceases to fund EOI.

See id. at 41.

As the Licensing Board found, the arguments both in support of and against the contention are similar to the arguments presented on Cajun's standing. *See* 39 NRC at 42. Both GSU and Staff stress that the license amendments cannot affect River Bend's safety because funding for the plant's operations will remain primarily the responsibility of GSU, and GSU's financial exposure from litigation risks exists regardless of the amendments. Consequently, GSU believes EOI's financial qualifications to be irrelevant to the proposed actions.

We cannot accept GSU's conclusion that "[t]he financial qualification of EOI is not at issue in this proceeding." GSU Appeal Brief at 32-33. Our regulations make EOI's financial qualification an issue. *See* p. 48, *supra.* GSU's arguments simply fail to recognize that EOI as the new operator is subject to the financial qualifications rule, and that the reliability of funding for River Bend's operations has been placed into question. Cajun's contention and its bases bear directly on whether the Commission's regulations are satisfied.

GSU's conclusion that "[t]he financial status of River Bend is, at worst, unchanged by the merger and likely is improved,"[13] may upon inquiry prove to be true, but is open to some question. We note that Staff, which objects to the admission of the contention for generally the same reasons as GSU, states that it 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." Staff Appeal Brief at 10 n.6. But this conclusion merely restates the Staff decision. It is *contested* by Cajun. A Staff conclusion alone is not enough to defeat Cajun's right to litigate a contention.

[13] GSU Appeal Brief at 33.

The Licensing Board found that the terms of the merger agreement contribute to the potential for underfunding. 39 NRC at 38. At this stage, we are unable to resolve whether corporate restructuring under the merger will result in "insulation" from liability that can contribute to EOI's potential inability to safely operate or safely shut down the facility. We also cannot assess with finality the significance of the pending lawsuits against GSU,[14] or the significance of the new operating agreement making GSU solely responsible for funding River Bend's operations.[15] We cannot say, however, that the Licensing Board erred in finding that Cajun has delineated a basis for further inquiry into its contention that underfunding of operations may occur.

How much further examination the contention warrants must now be resolved by the Licensing Board. In sum, all we decide today is that Cajun has met the minimum threshold for the admission of its contention. Cajun has explained the bases, and identified facts and other matters supporting its contention. When Cajun's position is viewed in a light favorable to the petitioner,[16] we are unable to conclude that the contention and its bases are wholly immaterial or fail to show a genuine dispute on a material matter. Without engaging in a greater inquiry, more appropriate for a later stage of this proceeding, we cannot resolve the significance of Cajun's allegations about the potential combined effect of EOI's thin capitalization, GSU's financial exposure, and a new corporate structure under Entergy.

IV. CONCLUSION

For the reasons stated in this decision, GSU's appeal is *denied* and the Licensing Board's order in LBP-94-3 is *affirmed.*

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[14] GSU claims that the degree of financial exposure faced by GSU is too speculative to serve as a basis for Cajun's contention. Yet the litigation pending against GSU has been considered of significance by the NRC Staff. When the Staff approved the two applications at issue on December 16, 1993, Staff included a license condition requiring GSU to inform the Director of Nuclear Reactor Regulation within 30 days of any award of damages in the litigation between Cajun and GSU. *See, e.g.*, Amendment No. 69 to Facility Operating License No. NPF-47 (Dec. 16, 1993) at 2. In addition, Cajun notes that Entergy in its planned merger specifically included conditions that would allow it to withdraw from the merger if the Cajun litigation results in a decision against GSU before the merger is consummated. Cajun's Amendment & Supplement to Petition to Intervene at 10. Thus, sufficient interest in GSU's pending litigation has been raised by both the NRC Staff and Entergy that we cannot dismiss Cajun's concern as overly speculative.

[15] GSU maintains that although under the new operating agreement, EOI will look only to GSU for the funds to operate River Bend, ultimately the funding for River Bend will not be changed. GSU explains that the initial operating agreement between GSU and Cajun will remain in effect. This agreement has required and will continue to require Cajun to provide 30% of the funds necessary for River Bend's operations. GSU Appeal Brief at 32. The potential effects of the new operating agreement's direct funding relationship between GSU and EOI remains unclear to us at this stage. We cannot comfortably conclude from the limited record before us that the new operating agreement's financial arrangement will not affect River Bend's funding.

[16] *See Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Acting Secretary of the
Commission

Dated at Rockville, Maryland,
this 23d day of August 1994.

Mr. Mark A. McBurnett
Chief Executive Officer and Chief Nuclear Officer
Nuclear Innovation North America, LLC
4000 Avenue F, Suite A
Bay City, TX 77414

Dear Mr. McBurnett:

~~This is to acknowledge receipt of~~We have received your May 31, 2012, letter, *Request for Commission Consideration of Policy Issue Regarding Financial Qualifications for New Merchant Plants*, which requests the Commission to provide direction to the NRC Staff in its continuing review of the financial qualifications of the South Texas Project applicants for a combined license.

I appreciate your comments on the complexity of project finance as it relates to merchant plant applicants for a combined license. As you know, the Staff has your views under active consideration at this time and has discussed them with you on several occasions. I am confident that the Staff will bring any unresolved policy issues to the Commission's attention; however, I forwarded your letter to the Staff to provide additional insight into the issues. Thank you for your comments on this important subject.

~~Your letter asserts that the Commission has broad discretion regarding the standards for financial qualifications applicable to reactor licensees. NINA further asserts that an exemption to NRC regulations or imposition of license conditions allowing demonstration of financial qualification prior to the start of construction rather than at the time of COL issuance, may avoid an impasse on this topic between NINA and the NRC.~~

~~Your request raises important policy and procedural matters that the staff is currently considering. As we the staff engages stakeholders and potentially the Commission, we I will make certain that the staff considers your viewsyour views are considered.~~

Sincerely,

Gregory B. Jaczko

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Mr. Mark A. McBurnett
Chief Executive Officer and Chief Nuclear Officer
Nuclear Innovation North America, LLC
4000 Avenue F, Suite A
Bay City, TX 77414

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

B. Paul Cotter, Jr., Chairman
Dr. Richard F. Cole
Dr. Peter S. Lam

In the Matter of **Docket No. 50-458-OLA**
(ASLBP No. 93-680-04-OLA)

GULF STATES UTILITIES COMPANY, *et al.*
(River Bend Station, Unit 1) **June 15, 1995**

The Licensing Board denies a motion for summary disposition after determining that material facts remained in dispute. The Intervenor had shown that there were disputed material facts as to whether River Bend would be safely operated, shut down, and maintained during adverse financial conditions.

SUMMARY DISPOSITION: MATERIAL FACTS NOT PROVIDED

Summary disposition is not appropriate when the movant fails to carry its burden setting forth all material facts pertaining to its summary disposition motion.

SUMMARY DISPOSITION: BANKRUPTCY OF A LICENSEE

In response to a movant's claim that a bankruptcy court will ensure that a nuclear reactor receives sufficient funding to ensure safety, the board concludes that this claim involves disputed factual questions for which summary disposition is inappropriate.

FINANCIAL QUALIFICATIONS: NON-UTILITY APPLICANTS FOR OPERATING LICENSES

Non-utility applicants for operating licenses are required by the NRC's financial qualifications rule to demonstrate adequate financial qualifications before operating a facility. A board is not authorized to grant exemptions from this rule or to acquiesce in arguments that would result in the rule's circumvention.

THE FINANCIAL QUALIFICATION RULE: SAFETY SIGNIFICANCE

Safety considerations are the heart of the financial qualifications rule. The Board reasoned in this regard that insufficient funding can cause licensees to cut corners on operating or maintenance expenses. Moreover, the Commission has recognized that a licensee in financially straitened circumstances would be under more pressure to commit safety violations or take safety "shortcuts" than one in good financial shape.

MEMORANDUM AND ORDER

(Ruling on Licensee's Motion Requesting Summary Disposition of Contention 2)

On January 5, 1995, Gulf States Utilities Company (GSU) moved for summary disposition on Contention 2 of Cajun Electric Cooperative, Inc. (Cajun), the only remaining contention in this proceeding. For the reasons stated herein, GSU's motion is denied.

BACKGROUND

In August 1993, Cajun, a 30% owner of the River Bend Nuclear Reactor and a co-licensee on the River Bend license, filed a Petition to Intervene in this licensing proceeding in response to a Notice of Opportunity for Hearing published in the *Federal Register*. 58 Fed. Reg. 36,423, 36,435-36 (July 7, 1993). That notice included two proposed amendments to the River Bend operating license belonging to GSU. The first amendment would change the ownership of GSU by authorizing Gulf States to become a wholly owned subsidiary of Entergy Corporation (Entergy Corp.). The second would add Entergy Operations Inc. (EOI) as a non-owner licensee and would authorize EOI to operate River Bend.

On January 27, 1994, the Board found GSU's objections on standing and the lack of an admissible contention without merit and allowed Cajun to intervene in this proceeding. LBP-94-3, 39 NRC 31 (1994). Of the seven contentions proffered by Cajun, the Board admitted only Contention 2 which reads: "The proposed license amendments may result in a significant reduction in the margin of safety at River Bend." *Id.* at 41. Cajun provided four bases for this contention:

> (a) The proposed River Bend Operating Agreement runs only between Gulf States and EOI. Therefore, Gulf States has the full obligation under the Operating Agreement to compensate EOI for River Bend operation and EOI cannot look to Entergy or Cajun for payment. . . .
>
> (b) EOI is very thinly capitalized. If Gulf States ceases to make its Operating Agreement payments, EOI has no other sources of funds to maintain safe and reliable River Bend operation. . . .
>
> (c) Gulf States faces severe financial exposure from litigation with Cajun and from certain Texas regulatory proceedings which could render Gulf States bankrupt and unable to make adequate payments to EOI to maintain safe and reliable River Bend operation. . . .
>
> (d) Entergy views its obligations to support EOI in the event of lack of funding from Gulf States to be very limited. Officials of Entergy and EOI have admitted that EOI would be forced to shut down River Bend if EOI lacked adequate funds. . . .

Id.

Acting on GSU's appeal of that decision, on August 23, 1994, the Commission affirmed the Board's decision to allow Cajun to intervene and to litigate Contention 2. CLI-94-10, 40 NRC 43 (1994).

Following the Commission's decision, discovery was conducted by all parties. A prehearing conference was held on October 4, 1994, in an attempt to define and limit the issues and to settle outstanding discovery disputes. The Board ordered that all discovery be completed by November 24, 1994, and that Motions for Summary Disposition, or a written Waiver of Motions for Summary Disposition, be filed on or before January 9, 1995. Unpublished Memorandum and Order (Revised Prehearing Schedule) (Oct. 20, 1994). The discovery phase of this proceeding thus has been concluded.

On January 9, 1995, GSU filed a Motion for Summary Disposition[1] in this case arguing that there remain no outstanding factual issues to be resolved concerning the admitted contention. The Motion was predicated in part upon the responses to interrogatories GSU had received from Cajun and the Staff during the discovery period. Cajun filed an answer to the GSU Motion asserting

[1] Gulf States Utilities Company's Motion for Summary Disposition (Jan. 9, 1995) (hereafter GSU Motion).

that there are disputed material facts pertaining to the licensing of EOI.[2] Cajun appended two affidavits in support of its position.[3] The Staff of the Nuclear Regulatory Commission (Staff) filed its response to the Motion supporting GSU's position.[4] The Staff supported its response with the affidavit of one David L. Wigginton. Cajun subsequently filed an answer in opposition to the Staff's response.[5]

THE PARTIES' POSITIONS

The GSU Motion asserts that it is undisputed that under the terms of the new River Bend Operating Agreement (the Operating Agreement between GSU and EOI), EOI may look only to GSU as the source for payment of operating costs. Neither EOI nor Entergy Corp., the parent of EOI, will provide those funds. GSU also states that it is undisputed that GSU faces the potential for financial difficulties if Cajun prevails and is awarded the relief it has sought in its litigation against GSU.

GSU alleges that the responses elicited through discovery establish that Cajun has no factual or evidentiary basis on which to support its contention that safety at River Bend will be reduced as a result of the merger. To the contrary, GSU asserts that no safety problem exists because the NRC Staff has found that EOI and GSU "collectively" are financially qualified. GSU Statement of Undisputed Facts at 1. It further asserts that EOI intends to operate River Bend safely with the funds made available to it and, if such funds are not available to operate River Bend safely, that it will safely shut down and maintain the facility in accordance with the plant's operating procedures and technical specifications. GSU Motion at 10.

A major portion of the GSU Motion is given to the assertion that the NRC's oversight and enforcement powers over the safe operation of River Bend, including those that could theoretically arise from financial difficulties, ensure that River Bend will be safely operated by EOI. Moreover, according to GSU, even if the dire circumstances predicted by Cajun were to occur, the only experience the Commission has with bankrupt commercial light-water nuclear reactor power plants is that they are safely operated under the jurisdiction of

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[2] Cajun Electric Power Cooperative, Inc.'s Answer in Opposition to Gulf States Utilities Company's Motion for Summary Disposition (Jan. 23, 1995) (hereafter Cajun Answer to GSU Motion).

[3] Affidavits of John M. Griffin and Werner T. Ullrich.

[4] NRC Staff's Response in Support of GSU's Motion for Summary Disposition (Jan. 23, 1995) (Staff Response to GSU Motion).

[5] Cajun Answer in Opposition to NRC Staff Response in Support of GSU's Motion for Summary Disposition (Feb. 6, 1995) (hereafter Cajun Answer to Staff's Response).

the bankruptcy court and that the funds necessary for safe operation would be made available through that court. *Id.* at 21-35.

In support of its Motion, GSU attaches six statements about which it says no material disagreement exists:

1. The River Bend Operating Agreement, pursuant to which Entergy Operations operates River Bend, runs between Entergy Operations and Gulf States only.
2. Under the Operating Agreement, Entergy Operations looks only to Gulf States for the funds needed to operate River Bend.
3. Gulf States faces the potential for adverse financial conditions as a result of the litigation initiated by Cajun and Texas regulatory procedures.
4. The NRC Staff has examined the financial qualifications of Entergy Operations and Gulf States and has found them to be collectively financially qualified.
5. In every instance in which the owner of a commercial light water nuclear power plant has gone into bankruptcy, adequate funds were made available through the bankruptcy court to safely operate the facility.
6. Entergy Operations intends to safely operate River Bend within the requirements of the Operating License as long as funds are available for that purpose, and in the event such funds are not available, River Bend will be safely shut down and maintained in a safe condition.

GSU Statement of Undisputed Facts at 1-2.

The NRC Staff's Response agrees that any potential financial difficulties GSU may face from civil litigation would not pose a threat to the public health and safety, even if GSU were to declare bankruptcy. The Staff argues that its inspection and enforcement processes will ensure safe operations at the plant regardless of the level of funding. Moreover, the Staff asserts that it would be involved in any bankruptcy proceeding involving River Bend and that bankruptcy courts themselves have held the protection of the public's health and safety to be an important interest in a bankruptcy proceeding. Thus, according to the Staff, the mere fact that GSU faces bankruptcy does not indicate that the River Bend facility could not be operated safely.

In contesting GSU's Motion, Cajun asserts that important material facts are in dispute that prevent the granting of summary disposition. Its primary argument is that statements in the affidavits of Cajun's two expert witnesses, Werner T. Ullrich and John M. Griffin, establish that there are disputed material issues of fact regarding the safe operation of River Bend in the event of insufficient funding. In their affidavits, these individuals assert that a lack of funding will reduce safety at River Bend by impairing: (1) safe performance during operation; (2) safe shutdown; and (3) adequate decommissioning once shutdown is achieved. Cajun Answer to GSU Motion at 24-32. Cajun contends that the statements of these experts directly contradict GSU's Statement of Facts that

health and safety would not be jeopardized if there are insufficient funds to operate River Bend.

Citing to *National Association of Government Employees v. Campbell,* 593 F.2d 1023, 1027 (D.C. Cir. 1978), Cajun further states that summary disposition cannot be granted because GSU's Statement of Facts does not include all necessary material facts in dispute in this proceeding. Cajun contends that, as a matter of law, summary disposition is not appropriate when an adequate factual basis is not provided by the moving party for the trier of facts to conclude that no material facts are in dispute. According to Cajun, the GSU Statement of Facts fails to include facts establishing: (1) that River Bend will be adequately funded to continue safe operation in the event of an adverse determination in the River Bend litigation; (2) that a bankruptcy court would be obligated to provide sufficient funding to allow EOI to meet the terms of the River Bend license; (3) that there will be sufficient funding for River Bend's safe shutdown and storage if funding becomes insufficient for continued operation; and (4) that sufficient funding for decommissioning will be available in the event of an adverse determination in the River Bend litigation. Cajun Answer to GSU Motion at 10-14, 35-36.

Cajun also advances a legal and policy argument why summary disposition should not be granted. It contends that summary disposition should not be sanctioned when, as is the case here, important health and safety issues associated with the operation of nuclear power plants are at stake. Citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-90-44, 32 NRC 433, 437 (1990). Cajun Answer to GSU at 37-38.

In addressing the Staff's Response, Cajun asserts that the Staff is short-sighted in its support for GSU. In rebuttal of Staff's arguments, Cajun makes five assertions. First, it asserts that the obligation for a nuclear facility to stop operating when necessary funds are unavailable does not excuse an applicant from meeting financial qualification requirements under 10 C.F.R. § 50.33(f) and section 182 of the Atomic Energy Act of 1954. Second, the Staff's inspection and oversight process is not sufficient to ensure that inadequate funding will not affect safe operations. Third, Staff has failed to establish that no genuine issue exists with respect to the funding of River Bend Operation in the event of a GSU bankruptcy. Fourth, Staff's reliance on the electric utility exception to the financial qualification rule is misplaced because EOI is not an electric utility, and fifth, Staff ignores the significant concerns the Commission has had in the past regarding potential licensee bankruptcy.

STANDARDS FOR SUMMARY DISPOSITION

Summary disposition is appropriate where, based on the filings, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, there is no genuine issue of material fact and the movant has demonstrated that it is entitled to judgment as a matter of law. 10 C.F.R. § 2.749(d); *see also Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993) (*AMS*). The movant seeking summary disposition has the burden of demonstrating the absence of any genuine issue of material fact. *Id.* The evidence submitted by the movant must be construed in favor of the party opposing the motion, and that party receives the benefit of any favorable inference. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361 (1994). Yet a party opposing the motion may not rely on a simple denial of material facts stated by the movant, but must set forth specific facts showing that there is a genuine issue. 10 C.F.R. § 2.749(b); *AMS*, 38 NRC at 102.

Summary disposition is favored by the Commission as "an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues." *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982) (citation omitted). *See also Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 457 (1981). However, in an operating license proceeding, where significant health and safety or environmental issues may be involved, a licensing board should only grant summary disposition if it is convinced that the public health and safety and environment will be satisfactorily protected. *Seabrook*, LBP-90-44, 32 NRC at 437, *citing Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Station), LBP-81-2, 13 NRC 36, 40-41 (1981). Even if no party opposes a motion for summary disposition, the movant's filing must still establish the absence of a disputed material fact. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977).

DISCUSSION

Reduced to its simplest terms, the central issue in this proceeding is whether underfunding of River Bend, which may result from ongoing litigation and regulatory proceedings involving the River Bend facility, can adversely affect safety at the facility. GSU concedes, for purposes of this motion, that it will be the only source of funds for operating River Bend and that its ability to continue with this funding could be jeopardized by the River Bend litigation. Having made these concessions, however, it claims, as an uncontroverted fact,

that no safety concern is involved because the facility will be safely shut down if funds become unavailable. To support the assumption that safety would not be adversely affected, GSU claims that the NRC's oversight and enforcement power will ensure safe operations during financial hardship. It also claims that financially troubled reactors have been operated in the past without safety problems, and that sufficient funds for safe operation of River Bend would be made available through the bankruptcy courts. In addition, GSU argues that there is no safety concern because River Bend will be safely shut down if EOI lacks sufficient funds for its operation. The NRC Staff also adopts most of this same rationale. *See* Staff Response at 3-7.

As we have stated, to defeat GSU's motion for summary disposition, Cajun need only demonstrate that material facts are in dispute, and not that it will prevail in litigation. In our opinion, the affidavits of Cajun's two expert witnesses, John M. Griffin and Werner T. Ullrich, demonstrate such factual disputes.[6] Their statements, if correct, may be grounds for concluding that insufficient funding for River Bend could result in: (1) impairment of EOI's ability to safely operate River Bend; (2) impairment of the safe shutdown of River Bend after a determination is made that sufficient funding is unavailable to continue operating; and (3) impairment of safe and adequate decommissioning once shutdown is achieved. The bases for these assertions are as follows:

1. Factual Disputes Presented by Messrs. Griffin and Ullrich

a. Impairment of Safe Operations at River Bend Caused by Insufficient Funding

Mr. Ullrich contends that if funding is reduced while River Bend is being operated, its safety performance may be impaired in a number of ways. According to Mr. Ullrich,

> Reduced funding generally results in reduction of the variable costs that are more easily controlled by the plant management. In most cases, this impacts administrative and engineering staffing and workload; limits the amount of internal or external services purchased;

[6] Mr. Ullrich is currently a Senior Management Consultant with United Energy Services Corporation, a nationwide management consulting firm. He states that he holds a Bachelor of Science degree in Electrical Engineering from Drexel University and has completed a nuclear engineering course and graduate level courses in atomic physics, electrical engineering, and advanced mathematics. He has held a variety of management positions with electric utilities including Plant Manager for the Peach Bottom nuclear unit, various support management positions for Limerick Unit 2, and Field Service Manager for the restart of Brown's Ferry Unit 3.

Mr. Griffin is currently President of United Energy Services Corporation. He states that he holds a Bachelor of Science Degree in Naval Science from the United States Naval Academy. He has been a member of the Board of Directors of the American Nuclear Society and the Institute of Nuclear Operations National Nuclear Accrediting Board. He has held positions as the Assistant Manager of Nuclear Operations for the New York Power Authority, Manager of Nuclear Operations for Arkansas Nuclear Unit 1, and Start-Up Manager for the Brunswick Nuclear Units.

> and extends time schedules for implementation or completion of costly corrective action, mandated NRC study programs, and discretionary preventive and corrective maintenance. It may also impact discretionary training for the plant staff. When O&M budgets are reduced, staff workload typically increases because purchased service such as engineering support and vendor support is curtailed.
>
> . . . .
>
> Reduction of O&M funding also stimulates middle management to look for departmental activities that can be eliminated or curtailed without immediate detrimental effect . . . . Reduction of staffing in these groups has the potential for decreasing the effectiveness of training and quality oversight and transferring more of the workload to other groups that are more directly involved in the day-to-day operation of the facility. Typically, when a utility is forced to reduce O&M budgets, capital budgets are also reduced. This means that only the most important modifications mandated by the NRC or required for continued plant operation are funded, engineered and installed.

Ullrich Affidavit at 3.

Mr. Ullrich goes on to assert that River Bend's safety performance has been deficient and that additional funding is necessary for improvement. He states that once a plant's safety performance has declined, significantly increased funding is required to re-establish the plant's safety performance to an acceptable level. A declining safety performance, according to him, will increase the potential for a plant to experience a significant safety event. He estimates that the Long Term Performance Plans (LTPP) for River Bend being initiated by EOI will require additional funding, at least in the near term, to maintain safety. *Id.* at 2, 5-7.

Mr. Griffin, like Mr. Ullrich, believes that the overall cost of operation and maintenance of River Bend will be elevated at least in the near term. He also agrees with Mr. Ullrich that there is significant potential at River Bend for reduced funding which could substantially impact River Bend's operations and its long-term safety performance. Griffin Affidavit at 3-4.

b. Impairment of Safe Shutdown at River Bend Caused by Insufficient Funding

Mr. Griffin contends that River Bend cannot be shut down and maintained in a safe condition without significant funding. He estimates that the facility will require from $90 million to $110 million for the first 2 years to be maintained in a safe shutdown condition. Then, when the facility receives a Possession Only License, an additional $20 million to $30 million annually will be needed to protect spent fuel and control radioactivity. *Id.* at 4-5.

Mr. Ullrich agrees that safe shutdown will require substantial funding which GSU may not be able to provide. He claims that if insufficient funding forces River Bend to close, EOI will still be required to pay maintenance, testing,

training, programs, and O&M costs during shutdown. However, at the same time it is incurring these expenses, River Bend will no longer be generating revenue from its operations. Mr. Ullrich estimates that a plant that is permanently shut down on short notice could spend about $100 million prior to receipt of its Possession Only License. Ullrich Affidavit at 6-7.

c. Impairment of Safe and Adequate Decommissioning at River Bend by Insufficient Funding

Mr. Ullrich claims EOI may not be able to provide long-term funding to support River Bend's decommissioning. He explains that River Bend's decommissioning deficit will be made greater because reactor decommissioning costs for electric utilities are now higher than original estimates, caused in part by a lack of permanent high-level and low-level waste storage facilities. He contends that the total decommissioning costs for River Bend will be at least $20 million per year for about 30 years, which is considerably higher than the $382 million originally estimated by GSU. *Id.*

2. Analysis of Cajun's Disputed Facts

The assertions by Messrs. Ullrich and Griffin that insufficient funding may adversely affect safe operations, shutdown, and decommissioning of River Bend directly contradict GSU's Statement of Fact Number 6 that River Bend will be operated safely and will be safely shut down and maintained in a safe condition in the event sufficient funds become unavailable. The conflicting assertions clearly establish a dispute over material facts regarding Contention 2. What remains is to examine the rationale for GSU's Statement of Fact Number 6 and to determine whether it is sufficient to compel a finding in favor of the summary disposition motion despite the contradicting factual assertions of Messrs. Ullrich and Griffin.

Briefly stated, GSU's rationale for contending that River Bend will be safely operated, shut down, and maintained during adverse financial conditions is that: (1) NRC oversight and inspection will ensure safety; (2) financially troubled reactors have been operated safely in the past; (3) sufficient funding for safety will be supplied by bankruptcy courts; and (4) there is no safety concern because River Bend will be safely shut down if EOI lacks sufficient funds for its operation. We deal with each of these rationales in turn.

a. GSU's Assertion That NRC Oversight and Inspection Will Ensure Safe Operation During Financial Hardship

GSU contends that the NRC's reactor inspection program, combined with the input of the Office of Nuclear Reactor Regulation, enables the NRC Staff to ensure that its rules and regulations are being met and that the River Bend facility will be operated in accordance with all NRC requirements. GSU reasons that these Staff resources enable the Staff to ensure that River Bend will be safely operated or safely shut down even if the unit experiences financial difficulties. GSU Motion at 22-28. Cajun responds that Staff oversight and inspection programs are not sufficient to ensure safety. It points out that if these programs were enough, Congress and the Commission would not have required applicants to furnish assurance of obtaining funds necessary to cover estimated operation costs for the period of their licenses. Cajun Answer to GSU at 13-14; Answer to Staff at 8-9.

The Board agrees with GSU and Staff that Staff enforcement programs are vitally important in ensuring the safety of a nuclear facility. However, such programs will not always ensure that safety problems would not occur. Indeed, it is a fundamental principle of NRC regulation of civilian nuclear reactors that responsibility for safe facility operation rests primarily in the licensee and not the Staff. Moreover, as stated by Cajun, the financial qualification rule is indicative that Congress and the Commission wished to rely on more than just Staff oversight and inspection in ensuring that a nuclear facility will have sufficient funding.

The question of whether Staff oversight and inspection will ensure safety at River Bend involves factual issues that should not be resolved by summary disposition. Although GSU may wish to rely heavily on the existence of such programs in ultimately proving its case regarding Contention 2, these programs will not support the grant of its present motion.

b. GSU's Assertion That Financially Troubled Reactors Have Been Operated Safely in the Past

GSU cites experiences at the Seabrook and Palo Verde nuclear reactors for the proposition that River Bend's financial difficulties will not impair health and safety. As GSU points out, the NRC had allowed those facilities to operate while the owner(s) were in Chapter 11 bankruptcy. Cajun responds that GSU should not be allowed to rely on the experience of Palo Verde and Seabrook reactors since their situations may differ from River Bend's. It points out in this

regard that those reactors did not have to experience plant shutdown.[7] Cajun also emphasizes that GSU's rationale does not address the material issue of funding for shutdown or decommissioning. Cajun Response to GSU at 11-12, 15.

Aside from listing the Palo Verde and Seabrook bankruptcies, GSU has supplied very little information concerning the situations of the owners and operators of those utilities or the underlying situations involving the reactors. Certainly, the treatment at those facilities was dependent, at least in part, on the factual situations involved for each. Because there is insufficient information here for us to make meaningful comparisons on which to base summary disposition, GSU has failed to carry its burden of establishing all material facts. *National Association of Government Employees v. Campbell,* 593 F.2d 1023, 1027 (D.C. Cir. 1978). Moreover, comparing those situations with River Bend could involve factual disputes for which summary disposition would be inappropriate.

c. GSU's Assertion That Sufficient Funding for Safety Will Be Supplied by Bankruptcy Courts

GSU and Staff contend that if GSU is forced to declare bankruptcy, a bankruptcy court will ensure that River Bend receives sufficient funding to ensure safety. For support, they cite various bankruptcy regulations and court cases which they contend establish that bankruptcy courts will protect the public interest. GSU Motion at 29-31; Staff Response in Support of GSU at 6-7. Cajun's primary argument in opposition to summary disposition is that GSU has not supplied enough information to establish that a bankruptcy court would or could supply sufficient funding to safely operate, shut down, and decommission River Bend. Cajun Answer to GSU at 11, 15-16. Cajun also attempts to discredit reliance on bankruptcy courts by citing past Staff and Commission concerns about the bankruptcy process. Cajun's Response to Staff at 10-12.[8]

Based on the record before us, the Board concludes that the question of whether bankruptcy courts will adequately fund nuclear facilities to ensure safety is a disputed factual question for which summary disposition is inappropriate.

---

[7] The Board also notes that for Palo Verde, El Paso Natural Gas was neither the operator nor a principal owner of the Palo Verde units.

[8] For example, Cajun cites the history of 10 C.F.R. § 50.54(cc) requiring licensees to notify Regional Administrators following petitions for bankruptcy. According to Cajun, the Commission, in promulgating the notification requirements for this regulation, was concerned that "a licensee who is experiencing severe economic hardship may not be capable of carrying out licensed activities in a manner that protects public health and safety" and that "financial difficulties also can result [from bankruptcy] in problems affecting the licensee's waste disposal activities" (51 Fed. Reg. 22,531 (1986). Cajun also cites a statement in a SECY paper for Proposed Rulemaking on the Potential Impact on Safety of Power Reactor Licensee Ownership Arrangements. In that paper, Staff reported to the Commission that "it is not clear how the Bankruptcy Court will treat [El Paso's] operational and decommissioning obligations vis-a-vis obligations to other creditors . . . ." (SECY-93-075 at 3 (Mar. 24, 1993)).

Even if, as a matter of law, bankruptcy courts are legally required to favor a non-utility licensee operator of a nuclear reactor over a utility's other creditors, a principle that has not been established by the pleadings in this proceeding, factual questions would exist about whether sufficient funds would be available to the courts for necessary reactor expenses.

d. GSU's Assertion That There Is No Safety Concern Because River Bend Will Be Safely Shut Down if EOI Lacks Sufficient Funds for Its Operation

GSU and the Staff assert that no link exists between the financial qualifications of licensees and the safety of the nuclear reactors they operate. They base this assertion on the exemption in 10 C.F.R. § 50.33(f) excusing electric utilities from financial qualification requirements at the operating license stage. In allowing that exemption, the Commission employed the rationale that an electric utility will safely operate and then shut down a nuclear reactor if funds become insufficient. According to the Commission, this safety will be ensured by funding that a regulated utility can obtain through their regulator's ratemaking process. 49 Fed. Reg. 35,747, 35,749 (Sept. 12, 1984); GSU Motion at 32-33; Staff Response at 4-5.

GSU previously made this same "safe shutdown" claim at the intervention phase of this proceeding. What GSU wanted then, and requests now, is that EOI be treated in the same way as an electric utility is treated under the Commission's financial qualifications rule so that it can be presumed that a lack of EOI funding will not adversely affect River Bend's safety. In the alternative, GSU appears to be asking that its financial qualifications, and not EOI's, be an issue in this proceeding. In either case, what GSU requests is that EOI be exempted from the Commission's financial qualifications rule.

The Board and the Commission rejected these GSU arguments at the intervention stage. As the Board then stated, section 50.33(f) requires applicants for operating licenses to demonstrate that they possess reasonable assurance of obtaining funds necessary to cover estimated operation costs for the period of the licenses. Although electric utilities were exempted (with certain exceptions) in 1984 from these financial disclosure requirements, the Board found that this exemption does not apply to EOI because EOI is not an electric utility as defined by 10 C.F.R. § 2.4 (1994). LBP-94-3, 39 NRC at 39, 42. Therefore, we concluded in this earlier decision that EOI is bound by section 50.33(f) and that a "safe shutdown" presumption for River Bend is not appropriate. *Id.* On appeal, the Commission also declared that:

> We cannot accept GSU's conclusion that "[t]he financial qualification of EOI is not at issue in this proceeding." GSU Appeal Brief at 32-33. Our regulations make EOI's financial

> qualification an issue. *See* p. 48, *supra.* GSU's arguments simply fail to recognize that EOI as the new operator is subject to the financial qualifications rule, and that the reliability of funding for River Bend's operations has been placed into question. Cajun's contention and its bases bear directly on whether the Commission's regulations are satisfied.

CLI-94-10, 40 NRC at 52.

Safety considerations are the heart of the financial qualifications rule. Both the Commission's and Board's intervention decisions stressed that non-utility applicants for operating licenses must be required to demonstrate adequate financial qualifications before operating a facility. The Board reasoned that insufficient funding could cause licensees to cut corners on operating or maintenance expenses and that even during shutdown there are accident risks associated with a nuclear reactor. LBP-94-3, 39 NRC at 39. The Commission decision likewise stated that:

> Commission regulations recognize that underfunding can affect plant safety. Under 10 C.F.R. § 50.33(f)(2), applicants — with the exception of electric utilities — seeking to operate a facility must demonstrate that they possess or have reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license. Behind the financial qualifications rule is a safety rationale. In drafting the original financial qualifications rule (which did not exempt utilities), the Atomic Energy Commission "'must have intuitively concluded that a licensee in financially straitened circumstance would be under more pressure to commit safety violations or take safety "shortcuts" than one in good financial shape.'" [Citation omitted].

CLI-94-10, 40 NRC at 48.

GSU and Staff now would have us ignore these safety considerations, either by allowing EOI an exemption from the rule or by looking only to GSU's financial status and not to EOI's. We cannot do so. This Board is not authorized to grant exemptions to NRC regulations or to acquiesce in arguments that would result in circumvention of those regulations. Even if we had this authority, we would not grant exemptions when important safety considerations are at stake such as those underlying the financial qualifications rule. Nor would we summarily grant an exemption where, as here, expert witnesses disagree about the safety effects.

Under these circumstances, EOI is not entitled to the "safe shutdown" presumption granted to electric utilities in section 50.33(f). Because EOI is not an electric utility, GSU cannot invoke the regulatory presumption that River Bend be operated safely and then safely shut down in the event that it does not receive sufficient funding. GSU's Summary Disposition Motion regarding this request, therefore, must be denied.

CONCLUSION

For all the foregoing reasons, we find that material issues of disputed fact have been presented by Cajun as to whether River Bend will be safely operated, shut down, and maintained during adverse financial conditions. Accordingly, GSU's Motion for Summary Disposition for Contention 2 is denied.

THE ATOMIC SAFETY AND
LICENSING BOARD

B. Paul Cotter, Jr., Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 15, 1995

375

From: Chazell, Russell
To: Kirkwood, Sara
Subject: RE: Question
Date: Wednesday, May 22, 2013 10:15:00 AM
Attachments: 28NRC573.pdf

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[END]

From: Chazell, Russell
Sent: Wednesday, May 22, 2013 10:10 AM
To: Kirkwood, Sara
Subject: Question

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Alternatively, is there someplace I can get the NRC document itself other than copying it out of the NRC Reporter?

Paper is moving forward – albeit slowly. Once we get the NCP addressed, I'll be sending it to OGC for review.

Thanks!
Russ

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301-415-5003
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Lando W. Zech, Jr., Chairman
Thomas M. Roberts
Kenneth M. Carr
Kenneth C. Rogers
James R. Curtiss

In the Matter of

Docket Nos. 50-443-OL-1
50-444-OL-1
(Onsite Emergency Planning and Safety Issues)

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, *et al.*
(Seabrook Station, Units 1 and 2)

December 21, 1988

The Commission determines that reasonable assurance that $72.1 million are available for decommissioning must be provided before licensing for low-power testing and specifies acceptable means to provide such assurance. The Commission denies petitions to waive its 1984 financial qualifications rule so as to require a financial qualifications review and finding before low power, since, with decommissioning expenses reasonably assured, there remain no significant financial safety problems to address. The Commission holds that a low-power testing license, restricted to specified power levels and duration, may be issued after Applicants have satisfied Staff that all decommissioning terms of this Decision have been met and any pending motion to litigate onsite emergency planning issues has been resolved.

ATOMIC ENERGY ACT: SCOPE OF INFORMATION REQUESTED FOR LICENSING (FINANCIAL QUALIFICATIONS)

FINANCIAL QUALIFICATIONS: APPLICABLE STANDARD

LOW-POWER LICENSE: STANDARD FOR ISSUANCE

FINANCIAL ISSUE: FUNDING FUTURE COSTS

OPERATING LICENSE(S): LOW-POWER LICENSE (PREREQUISITE FINDINGS); DECOMMISSIONING (FUNDING)

Reasonable assurance that funds are available for decommissioning must be provided for a sum of $72.1 million before licensing for low-power testing. Assurance in the form of a prepaid external account, surety, or other guarantee method would be acceptable. Also acceptable here is Applicants' proffered plan to fund, before receipt of a low-power license, a separate and segregated account held by its disbursing agent, provided that applicants comply with certain specified additional conditions.

EMERGENCY PLAN(S): LOW-POWER LICENSE (STANDARD FOR ISSUANCE)

FINANCIAL QUALIFICATIONS: APPLICABLE STANDARD

OPERATING LICENSE(S): DECOMMISSIONING (FUNDING); LOW-POWER LICENSE (PREREQUISITE FINDINGS)

With decommissioning expenses reasonably assured, there were no remaining significant financial safety problems that needed a rule waiver to be resolved. Thus, a waiver of the 1984 financial qualifications rule so as to require a financial qualifications review and finding before low power was unnecessary.

EMERGENCY PLANNING: CONTENTIONS (OPPORTUNITY TO LITIGATE)

OPERATING LICENSE(S): DECOMMISSIONING (FUNDING); LOW-POWER LICENSE (PREREQUISITE FINDINGS)

A low-power license can be issued after the Applicants have satisfied Staff that all decommissioning terms of this Decision have been met, subject to the following qualifications: (1) the license should be conditioned to allow Seabrook Unit 1 to operate at power levels not in excess of 5% and should permit no more than 0.75 effective full-power hours of such operation without additional Commission approval; (2) before a low-power license could be issued,

the Licensing Board must have resolved the pending motion to litigate additional onsite emergency planning issues and any litigation before it on such additional onsite issues; and (3) to accommodate any party that might wish to seek a stay, a low-power license could not issue until 10 days after notice by Staff that the decommissioning funding terms of this Decision had been satisfied or issuance of the Licensing Board decision disposing of additional onsite emergency planning issues, whichever should later occur.

FINANCIAL QUALIFICATIONS: PUBLIC HEALTH AND SAFETY CONCERNS

OPERATING LICENSE(S): DECOMMISSIONING (FUNDING); HEALTH AND SAFETY REGULATIONS (LOW POWER); LOW-POWER LICENSE (PREREQUISITE FINDINGS)

The decommissioning rule does not apply here. The hypothesized circumstances — low-power testing not followed by commercial operation — were not considered or contemplated in the decommissioning rulemaking. Notwithstanding, the Commission recognized and affirmed that the safety concern underlying the rule that there be adequate funds available for safe and timely decommissioning was fully applicable to this case.

ATOMIC ENERGY ACT: SCOPE OF INFORMATION REQUESTED (FINANCIAL AND TECHNICAL QUALIFICATIONS)

FINANCIAL QUALIFICATIONS: APPLICABLE STANDARDS

OPERATING LICENSE(S): DECOMMISSIONING (FUNDING); DISPOSAL OF SPENT FUEL; LOW-POWER LICENSE (PREREQUISITE FINDINGS)

The Commission had not determined that decommissioning would be required after low power but simply that in these unique circumstances *financial* protections should be in place to provide reasonable assurance of the availability of funds should commercial operation not occur. Thus the Commission did not require the details of the low-level waste disposal sites and disposal fees so long as the proposed plan contains reasonable cost estimates for these matters.

ATOMIC ENERGY ACT: LICENSING STANDARDS

OPERATING LICENSE(S): DECOMMISSIONING (FUNDING); LOW-POWER LICENSE (PREREQUISITE FINDINGS)

The plan for decommissioning Seabrook after low power need not be a final plan. Nonetheless, the plan must contain the essential elements sufficient to ensure that a reasonable estimate of decommissioning costs could be made.

ATOMIC ENERGY ACT: LICENSING STANDARDS

OPERATING LICENSE(S): DISPOSAL OF SPENT FUEL

Applicants' plan to ship spent fuel abroad for reprocessing was speculative and therefore not a reasonable basis for cost estimation.

ATOMIC ENERGY ACT: WASTE DISPOSAL

NUCLEAR WASTE POLICY ACT: FUNDING FOR DISPOSAL OF SPENT FUEL

OPERATING LICENSE(S): DISPOSAL OF SPENT FUEL

Since the record contained no estimate of when a disposal site would be available, and since the Commission's Waste Confidence Decision estimated that a repository would be available for waste emplacement during the period 2007-2026, a reasonable estimate of when the repository could accept Seabrook spent fuel would be in the mid-range of these dates.

APPEAL BOARD(S): STANDARD OF REVIEW

OPERATING LICENSE PROCEEDINGS: FINANCIAL QUALIFICATIONS

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

The Commission held that ALAB-895, 28 NRC 7 (1988), was clearly correct that a showing that a rate commission would not allow rate recovery of the cost of operation cannot be the only permissible ground for waiver of the 1984 financial qualifications rule.

APPEAL BOARD(S): STANDARD OF REVIEW

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

Special circumstances are present only if the petition properly pleads one or more facts, not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the proceeding leading to the rule sought to be waived. Only with such a construction of the terms "special circumstances" is there assurance that safety matters will not be ignored. Safety matters will be examined either by rulemaking or in licensing adjudication, at least for the purpose of determining their materiality and threshold safety significance.

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

A rule waiver petition under 10 C.F.R. §2.758 ought not to be certified unless the petition and other allowed papers indicate that a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived. It would not be consistent with the Commission's statutorily mandated responsibilities to spend time and resources on matters that are of no substantive regulatory significance.

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

FINANCIAL QUALIFICATIONS: APPLICABLE STANDARDS; PUBLIC HEALTH AND SAFETY CONCERNS

OPERATING LICENSE(S): HEALTH AND SAFETY REGULATIONS (LOW POWER)

The PSNH bankruptcy, anti-CWIP statute, and delay or cessation of project payments by minority owners all present special circumstances, not considered when the 1984 waiver rule was adopted, and these circumstances, at least considered together, undercut the rationale of the 1984 rule. However, no significant safety problem was posed that needed a waiver to address the problem on its merits.

FINANCIAL QUALIFICATIONS: APPLICABLE STANDARD; PUBLIC HEALTH AND SAFETY CONCERNS

OPERATING LICENSE HEARING: ISSUES FOR CONSIDERATION (FINANCIAL QUALIFICATIONS)

The reason for conducting a financial qualifications review and requiring a finding of financial qualification was *solely* to provide some added assurance that a licensee would not, because of financial difficulties, be under pressure to take some safety shortcuts.

NUCLEAR WASTE POLICY ACT: FUNDING FOR DISPOSAL OF SPENT FUEL

OPERATING LICENSE(S): DECOMMISSIONING (FUNDING); DISPOSAL OF SPENT FUEL

The decommissioning rule excluded spent fuel costs from decommissioning expenses and classified them as operating expenses not because of a lack of safety significance but in reliance on fees and funding for spent fuel disposal required under the Nuclear Waste Policy Act of 1982.

NUCLEAR WASTE POLICY ACT: FUNDING FOR DISPOSAL OF SPENT FUEL

OPERATING LICENSE(S): DECOMMISSIONING (FUNDING); DISPOSAL OF SPENT FUEL

An evaluation of Applicants' plan can only fall back on the assumption that underlies the decommissioning rule that spent fuel will be stored on site until it can be shipped to a repository for disposal.

OPERATING LICENSE(S): DECOMMISSIONING (FUNDING)

There is no disagreement that the duration of operations significantly affects the extent of irradiation and thus decommissioning costs.

OPERATING LICENSE(S): DECOMMISSIONING (FUNDING)

It would be unduly onerous to require a totally prepaid external account beyond Applicants' control at this stage for so large a sum. Indeed, no similar requirement has been placed on any other licensee, and there are other means to provide reasonable assurance in the unique circumstances of this case.

ATOMIC ENERGY ACT: GRANDFATHERING CLAUSE

LICENSING DECISIONS: SCOPE

OPERATING LICENSE(S): LOW-POWER LICENSE (FUEL LOADING AND PRECRITICALITY TESTING)

REGULATIONS: INTERPRETATION

The Commission does not reach the question whether the rationale for the rule's "grandfathering" of holders of a license in 10 C.F.R. § 50.33(k)(2) would apply to the license to load fuel.

DECISION

I. SUMMARY

The Commission decides today all of the pending financial qualification questions that have been brought for its consideration in *Seabrook*. These questions have included matters of first impression presented in unprecedented factual circumstances. The Commission's lengthy deliberations have led it to a clear course that protects the health and safety of the public and allows this complicated litigation over financial qualifications for low-power testing to come to a close.

The Commission has determined, as will be explained more fully below, that reasonable assurance that funds are available for decommissioning must be provided for a sum of $72.1 million before licensing for low-power testing. Financial assurance for this amount in the form of a prepaid external account, surety, or other guarantee method would be acceptable. But, for reasons that are detailed below, the Commission will also accept Applicants' proffered plan to fund, before receipt of a license for low-power testing, a separate and segregated account held by its Disbursing Agent provided that the amount shall be $72.1 million rather than the $21.1 million suggested by Applicants, and provided further that no fewer than two of the Applicants, whose financial health has not here been called in question and who own substantial shares of Seabrook, shall each jointly and severally guarantee to make up any deficiency in the fund caused by disbursements for a nondecommissioning expense.

The Commission also has before it petitions to waive the Commission's 1984 financial qualifications rule so as to require a financial qualifications review and finding before low power. The Commission finds that with decommissioning expenses reasonably assured, as specified above, there are no remaining significant financial safety problems that need to be addressed. Since a rule waiver

is not needed to resolve any significant safety problem, the waiver petitions are denied.

A low-power testing license may be issued by the Director of the Office of Nuclear Reactor Regulation after the Applicants have satisfied Staff that all the decommissioning terms of this Decision are met, subject to the following qualifications. The license shall be conditioned to allow Seabrook Unit 1 to operate at power levels not in excess of 5% and shall permit no more than 0.75 effective full-power hours of such operation without additional Commission approval. In addition, before a low-power license may be issued, the Licensing Board must have resolved the pending motion to litigate additional onsite emergency planning issues and any litigation before it on such additional onsite issues. Finally, to accommodate any party that might wish to seek a stay, a low-power license may not issue until 10 days after notice by Staff to the Commission that the decommissioning funding terms of this Decision have been satisfied or issuance of the Licensing Board decision disposing of additional onsite emergency planning issues, whichever event shall later occur, but in any event not before January 6, 1989. Any motions for a stay or other relief from this order shall be brought to the Commission itself.

II. THE DECOMMISSIONING DECISION

A. Background

In ALAB-895, 28 NRC 7 (1988), the Appeal Board certified to the Commission a petition for waiver of the Commission's financial qualifications rules so as to require a review and finding whether the Applicants for a license to operate Seabrook Station (Applicants) are financially qualified to operate at low power. While the certification was pending, the Commission's final decommissioning rule became effective on July 27, 1988.[1] That rule established a regulatory framework for the purpose of establishing reasonable assurance that, at the time of termination of reactor operations, adequate funds would be available for safe and timely decommissioning. In light of the rule and the potential significance of the decommissioning financial assurance question, the Commission decided *sua sponte* to give initial consideration to the decommissioning issue and so advised the parties by order of September 22, 1988. CLI-88-7, 28 NRC 271 (1988).

[1] 53 Fed. Reg. 24,018 (June 27, 1988).

B. The Requirements Established by CLI-88-7

In CLI-88-7 the Commission stated its belief that the reasoning of the decommissioning rule

> when applied to the unique and unusual circumstances of this case, requires that before low power may be authorized, Applicants provide reasonable assurance that adequate funds will be available so that safe decommissioning will be reasonably assured in the event that low-power operation has occurred and a full-power license is not granted for Seabrook Unit 1.

28 NRC at 273. In that light, the Commission required Applicants to provide the basis on which a finding of such assurance might be made. Specifically, Applicants were to provide adequate documentation of their funding plan and appropriate commitments under that plan to support such a finding. The Commission also noted that the Seabrook record is closed for the consideration of new issues, but offered the parties an opportunity to move for reopening and to submit new contentions, and offered a subsequent opportunity for parties to file oppositions to such motions. The Commission said that it intended to resolve the matter on an expedited basis.

C. Responses to CLI-88-7

1. The Applicants' Submittal

Under cover letter dated October 20, 1988, the Applicants provided a notebook entitled "The Plan in Response to NRC Order CLI-88-7" (the Plan). The Plan contains Applicants' analysis of the steps necessary to decommission Seabrook in the event low-power testing has occurred and a full-power license is not granted (hereafter "the hypothesized circumstances"). The cover letter[2] summarizes the analysis, concludes that the necessary sum is $21.1 million, and provides the Applicants' discussion of its plan to fund decommissioning. No separate evidence of commitments under that plan was filed. However, the Applicants acknowledged their decommissioning responsibility, specifically stating that the joint owners were *severally* liable for decommissioning expenses under the joint owners agreement. The Applicants also told the Commission that they had voted to establish a separate and segregated "Pre-operation Decommissioning Account" in the control of a Disbursing Agent for the sole purpose of defraying expenditures incurred in implementing the plan and to fund

[2] Letter from Edward A. Brown, President and Chief Executive Officer of Public Service Company of New Hampshire (PSNH) to NRC, October 20, 1988, at 5 (hereafter October 20 Letter). PSNH is the lead applicant in this licensing proceeding.

that account promptly on issuance of a Commission order requiring them to do so. October 20 Letter at 7-10.

The Applicants' breakdown of the costs (in millions) includes:

Staff Operating and Decontamination Expense	$9.99
Dismantlement, Packaging, Shipment, and Disposal of Reactor Vessel and Internals	$4.79
NRC Fees and Insurance	$4.96
Contingency	$1.36
TOTAL	$21.10

Id. at 5.

Certain assumptions by the Applicants are key to the $21 million figure. We note particularly two assumptions: (1) that total low-power testing will be the equivalent of 0.75 of 1 effective full-power hour and (2) that the cost of spent fuel shipping, reprocessing, and disposal of any associated high-level waste was not required to be included. It is to be noted, however, that shipment to Europe for reprocessing was included in the plan and provides the basis for certain conclusions of the plan.

2. *Positions of the Parties*

a. *Intervenors*

On November 2, 1988, the Massachusetts Attorney General (MassAG), the New England Coalition on Nuclear Pollution (NECNP), the Seacoast Anti-Pollution League (SAPL), and the Town of Hampton (TOH) separately moved for reopening and admission of contentions related to decommissioning. MassAG also moved to reopen on financial qualifications and to admit a contention related to availability of funds to meet costs of spent fuel disposal. The titles of the motions are set forth in the margin.[3]

[3] Motion of Massachusetts Attorney General James M. Shannon Under 10 C.F.R. § 2.734 to Reopen the Record to Consider Evidence Concerning the Joint Applicants' Decommissioning Plan for the Seabrook Nuclear Power Station and to Admit the Attached Late Filed Contentions Concerning Said Decommissioning Plan, incorporating by reference MassAG's Petition under § 2.758 for a Waiver or an Exception from the Public Utility Exemption from the Requirement of a Demonstration of Financial Qualification. Town of Hampton Motion to Admit Late-Filed Contention and Reopen the Record on Applicants' Financial Qualification to Decommission Seabrook Station; New England Coalition on Nuclear Pollution's Contentions on Applicants' Decommissioning Plan, Motion for Stay of Low Power Operation, and Motion to Reopen the Record; and Seacoast Anti-Pollution League's Contentions on Applicants' Plan in Response to NRC Order CLI-88-7.

Each of the four Intervenors dispute that $21 million is a sufficient sum and argue some or all of the following: that it is deficient because Applicants have not complied with the provisions of the decommissioning rule; it fails to include adequate sums to cover the costs of low-level waste, spent fuel storage, spent fuel disposal, and other contingencies; and it is inadequate because the Applicants have not reasonably evaluated the decommissioning tasks to be completed and have relied on unrealistic assumptions. Moreover, they assert that the assurance of funding is inadequate because the assurances provided are speculative in nature and rely on good-faith promises and internal funds contrary to the Commission's decommissioning rule. However, in the main, the Intervenors rely on legal argument and argument based on undisputed facts, such as Public Service Company of New Hampshire's (PSNH's) bankruptcy. Very little by way of expert testimony was offered to refute Applicants' plan.

b. Applicants and Staff

The Applicants and Staff each filed in opposition to all of the Intervenors' motions.[4] Applicants' short answer was that even assuming the contentions had merit, and that the Applicants were short of funds to decommission the facility after low-power testing, there will not be any present threat to the health and safety of the public. They concluded that the motions could not therefore present a significant safety question and that all of them must fail for noncompliance with 10 C.F.R. § 2.734. Applicants' Response at 8. Applicants also ascribed to Intervenors a fundamental misunderstanding that the Commission wanted from them at this time a final decommissioning plan under the decommissioning rule, 10 C.F.R. § 50.82.

The Staff also maintained that Intervenors erred in relying on the rule, but unlike Applicants the Staff chose to address the merits of the plan by affidavits that supported the Applicants' $21 million figure. However, unlike Applicants, Staff suggested that the irradiated fuel (spent fuel) would not be reprocessed in Europe but rather could be sold to another domestic utility for use in a commercial nuclear power reactor.

[4] Applicants' Response to Motions to Reopen the Record to Consider Financial Qualification Issues Prior to Permitting Low Power Operations, Nov. 14, 1988 (Applicants' Response); NRC Staff Response to Intervenors' Motions to Reopen Record and Admit Late-Filed Decommissioning Contentions, Nov. 16, 1988 (Staff's Response).

c. Other Papers

Additional papers not directly authorized by the Commission have also been filed.[5] The Commission has considered all of these papers. In particular, the motion to accept the reply of the MassAG with accompanying affidavits is granted in light of the Staff's response which supports the Applicants on bases other than those put forward by the Applicants.

D. Applicability of the Decommissioning Rule

Intervenors, other than SAPL, argue or assume that the decommissioning rule is applicable and defines the terms of the Commission's order. SAPL, on the other hand, reads CLI-88-7 as creating a decommissioning funding requirement outside the context of the decommissioning rule, although SAPL finds that the rule provides requirements that are "generally applicable to a decommissioning plan" and at least one rule provision that by its terms would be inapplicable.

Both Applicants and Staff argue that the decommissioning rule is not applicable. Applicants argue that the decommissioning rule is applicable only to decommissioning in the context of an assumed period of routine full-power operation. Staff's position is that Applicants are already holders of a license and therefore are not required to file anything under the rule until July 26, 1990, and that the Commission therefore could not have intended that Applicants meet the rule requirements now. *See* 10 C.F.R. § 50.33(k)(2).

We agree with Applicants and Staff that the decommissioning rule does not apply here, although for somewhat different reasons. The decommissioning rule was issued to ensure that at the conclusion of the lengthy period in which reactors would be in commercial operation there would be funds available for safe and timely decommissioning. The hypothesized circumstances addressed in CLI-88-7 — low-power testing not followed by commercial operation — were not considered or contemplated in the decommissioning rulemaking. Thus the rule does not directly apply to the Commission's requirements in CLI-88-7.

The Commission considered and created an exception from the rule for shutdown reactors while declining to except research reactors. *See* 53 Fed. Reg. at 24,027, 24,021 (June 27, 1988). And the Commission also specifically noted the

[5]They include Applicants' Statement as to Status of Record as to PSNH Bankruptcy, November 14, 1988; Applicants' Advice to the Commission, November 16, 1988; Motion of Massachusetts Attorney General James M. Shannon for Leave to File a Document Not Authorized by the Commission's Rules of Practice, November 25, 1988, and Reply of Massachusetts Attorney General James M. Shannon to the Filings of the Staff and the Joint Applicants in Response to his November 2, 1988 Motions Under 10 C.F.R. § 2.734 to Reopen the Record, November 25, 1988; Applicants' Response to Motion of Massachusetts Attorney General James M. Shannon for Leave to File a Document Not Authorized by the Commission's Rules of Practice, December 1, 1988; NRC Staff Response to Massachusetts Attorney General's Request for Leave to File Reply to Responses of Applicants and NRC Staff, Dec. 1, 1988; and Intervenor's Advice to the Commission, Dec. 14, 1988.

financial difficulties of PSNH in its rule preamble and in that aspect contemplated PSNH's current financial difficulties. *Id.* at 24,032. But these considerations do not require construction of the rule so as to apply to the circumstances of this case. An examination of the rule reveals that it does not "fit" the hypothesized circumstances. First, the rule contemplated a step-by-step decommissioning funding assurance process over a long period of time with an initial certification of funding, periodic updates, a preliminary decommissioning plan at or about 5 years before projected end of operations, and a decommissioning plan submitted as part of the application for licensing termination. Here the hypothesized circumstances primarily present only a short-term problem, where the end of plant life is hypothesized to be only months after the initiation of operations. Next, the rule's formula which establishes the minimum sum required to be reasonably assured before operation includes an adjustment factor for reactor power level that is based on a substantial period of operation at full power. The minimum amount specified in the formula has no technical relevance to a very limited low-power testing. It is also significant that the rule permits accumulation of the required minimum sum over a lengthy period, and that provision has no relevance here. Thus the Commission concludes that the rule cannot reasonably be construed to apply to the hypothesized circumstances here. However, before full-power commercial operation, Applicants are expected to comply with applicable provisions of the rule.[6]

Notwithstanding its conclusion that the rule does not apply here, the Commission recognizes and affirms that the safety concern underlying the rule that there be adequate funds available for safe and timely decommissioning is fully applicable to this case. This concern was the impetus for the order in CLI-88-7.

E. Scope of the Plan

Intervenors claim that the plan for decommissioning is inadequate because it fails to include the designation of the waste disposal sites and disposal fees,[7] comparisons of other decommissioning cost estimates,[8] and specifics of the transportation, storage, and final dispositions of spent fuel,[9] such as would be submitted in a final decommissioning plan.

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[6] The Staff takes the view that holders of a license to load fuel should be considered licensees for the purposes of the decommissioning rule requirements. On the other hand, even if they receive a low-power license, Applicants will still be "Applicants" for a full-power license. The Commission does not reach the question whether the rationale for the rule's "grandfathering" of holders of a license in 10 C.F.R § 50.33(k)(2) would apply to the license to load fuel.

[7] *See, e.g.*, NECNP Motion at 6, Contention 1, Basis b; TOH Motion at 2, Contention P-1, Basis A.

[8] *E.g.*, MassAG Motion and Attachment — Contention 1, Basis d.

[9] *E.g.*, SAPL Motion at 9, Contention DC-1, Basis 2.

The Commission's order in CLI-88-7 did not require a *final* decommissioning plan. The Commission has not determined that decommissioning will be required after low power but simply that in these unique circumstances *financial* protections should be in place to provide reasonable assurance of the availability of funds should commercial operation not occur. In that light the Commission did not require or expect that the analysis of the costs of decommissioning would include precise information of the kind that Intervenors seek. The Commission expected approximate estimates of costs so that a reasonable minimum sum could be determined and then adequate assurance provided for its availability.

Thus the Commission does not require the details of the low-level waste disposal sites and disposal fees so long as the plan contains reasonable cost estimates for these matters. Applicants have estimated these costs and included them in their calculations. No contrary evidence has been offered. Richard I. Smith, of Battelle Laboratories, has in a sworn letter provided by Staff demonstrated that Applicants' low-level waste disposal cost estimate of $90 per cubic foot significantly exceeds his own estimate of approximately $60 per cubic foot based on disposal at Barnwell.[10]

Nor has the Commission required comparative decommissioning cost studies as a proof of reasonableness. The only requirement subsumed in the Commission's request is that the Applicants' estimate be a reasonable one.

However, the Commission agrees with Intervenors that reasonable estimates of the costs of spent fuel disposal are required under CLI-88-7. Nowhere in the decommissioning rule or its preamble is there a suggestion that adequate funding for spent fuel disposal is not a safety issue, and 10 C.F.R. § 50.54(bb) suggests to the contrary. The decommissioning rule excluded spent fuel costs from decommissioning expenses and classified them as operating expenses not because of a lack of safety significance but in reliance on fees and funding for spent fuel disposal required under the Nuclear Waste Policy Act of 1982. It is unclear how Applicants' plan relates to the provisions of that Act, perhaps because of the stated plans to ship the spent fuel abroad.[11]

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[10] Suggestions that the Applicants need at this stage calculate availabilities of disposal capacity under limitations imposed by § 5 of the Low-Level Radioactive Waste Policy Act are also off the mark. That section *permits* but does not *require* disposal sites to impose limits; moreover, there is transferability of available capacity. Absent any *evidence* that waste disposal is unavailable the Commission need not embark on speculation of this nature.

[11] Under § 302(b) of that Act, no license for "use" of a nuclear power reactor may be issued unless the Applicants have concluded an agreement with the Secretary of Energy or the Secretary notifies the NRC that good-faith negotiations are in progress. *See also* 49 Fed. Reg. 34,688 (1984) (any new reactor operating license will require that the licensee have a contract in place with DOE for disposal of all spent fuel generated). This record does not reflect such an agreement or letter.

F. Insufficiencies in Applicants' Plan

The Commission has found that the plan for decommissioning need not be a final plan. Nonetheless, as Applicants recognize, the plan must contain essential elements sufficient to ensure that a reasonable estimate of decommissioning costs can be made. In addition to the scope questions discussed above, issues have also been raised with respect to the reasonableness of the assumed plan for disposal of spent fuel and also the duration of low-power testing or, stated somewhat differently, the extent of irradiation.

1. The Plan for Spent Fuel

The Commission finds that Applicants' plan to ship spent fuel abroad for reprocessing is speculative and therefore not a reasonable basis for cost estimation. The Commission agrees with Intervenors that the problems with this approach are many and significant, not the least of which is the possible return of the reprocessing products to the United States and perhaps the Seabrook site.

The Staff has virtually ignored Applicants' plan in this regard and has itself urged Commission approval on the basis of a plan whereby fuel would be sold to another domestic power reactor operator. Staff says this plan would be "[a] less expensive and *more likely* alternative."[12] But Staff does not specifically say that sale is reasonably likely, and Applicants say only that the Staff proposal is "feasible" and have not adopted it.[13] In any event, Intervenors have provided some evidence of various factors that would make such a sale unlikely and note that such a sale of already irradiated fuel for reuse in another domestic reactor has never occurred.[14]

In these circumstances the Commission believes that the record before it will not clearly support either shipment abroad or domestic sale.[15] Given this, an evaluation of Applicants' plan can only fall back on the assumption that underlies the decommissioning rule that spent fuel will be stored on site until it can be shipped to a repository for disposal. Table 2 of § 3 of the plan shows that costs associated with storing fuel on site after completion of decontamination and removal of the reactor vessel and associated equipment are approximately $110,000 per month, not including contingency. No evidence was offered to

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[12] Staff Response, Affidavit of James C. Petersen, Peter B. Erickson, and Laurence I. Kopp in Response to Joint Intervenors' Decommissioning Contentions at 4).

[13] Staff alludes to a statement in an October 28 letter from Edward A. Brown as a "supplement" to the plan. Were it such and had Applicants intended it as such, simple fairness would have required so stating and an allowance for Intervenors to respond.

[14] *See* MassAG November 25 Response, Affidavit of Peter M. Strauss at 2-3. *See also* Letter of R. Harrison, then President of PSNH, dated September 3, 1987, there cited.

[15] The Commission might have reached a different conclusion had Applicants submitted an affidavit from some other utility that it would take the irradiated fuel.

dispute this estimate and thus we accept it. The record contains no estimate of when a disposal site will be available. However, the Commission's Waste Confidence Decision, reached after a lengthy proceeding entailing a public hearing, estimated that a repository will be available for waste emplacement during the period 2007-2026. *See* 49 Fed. Reg. 34,658, Appendix § 2.2 (Aug. 31, 1984). A reasonable estimate of when the repository could accept Seabrook spent fuel would be in the mid-range of these dates, since at this time it is speculative to suppose that Seabrook spent fuel would be either the first or the last to arrive at the repository for disposal. Thus we conclude that the spent fuel will need to be stored on site until around 2017, or for a period of about 28 years.[16]

Next must be determined the amount that Applicants must set aside now to generate $110,000 per month for the next 28 years to pay for spent fuel storage. This is a relatively straightforward present-value annuity calculation, but depends on the real interest rate assumed. The real interest rate means the amount of interest that can be obtained after inflation is taken into account. Various analyses indicate that the historical real interest rate over many years has averaged 2-3%, depending in part on what investments are considered (i.e., U.S. Treasury securities or high-grade corporate bonds). Because real interest rates have been above the 2-3% range in the past few years, a 3% rate is used here. Calculations using 3% indicate that an amount of approximately $24,985,000 would be needed to be set aside by Applicants today to yield $110,000 per month for the next 28 years.[17]

The only evidence on record of the cost for disposal in the repository is $13 million (which does not include the costs of shipping and handling for which the Commission has been given no figure by any party). (*See* MassAG Waiver Petition, Appendix X, Affidavit of Dale G. Bridenbaugh at 15 and Affidavit of Peter Strauss, cited *supra* note 14, at 3). Therefore the only reasonable estimate of the costs for spent fuel storage and disposal based on the record before the Commission is as follows:

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[16] We recognize in this regard that standard Department of Energy (DOE) contracts for acceptance of title and disposal of spent fuel, entered into pursuant to § 302 of the Nuclear Waste Policy Act, generally contemplate an earlier time for DOE acceptance of the spent fuel. Nevertheless, we have chosen the mid-range of 2007 to 2026 because it appears conservative and because the range is firmly rooted in a rulemaking proceeding which was conducted with extensive public participation. *See* 49 Fed. Reg. 34,658 (1984).

[17] A discussion of real interest rates that was part of the decommissioning rulemaking record may be found in NUREG-0584, Rev. 3, "Assuring the Availability of Funds for Decommissioning Nuclear Facilities," at 21. Cited at 53 Fed. Reg. 24,042.

Onsite Storage: Discounted Value (at 3%) $110,000 a Month for 28 years		$24,985,000
Repository Disposal		$13,000,000
	TOTAL	$37,985,000

2. *Extent of Irradiation*

Applicants recognize that their current estimate of the extent of irradiation is significantly less than earlier estimates that they or the NRC Staff have made. There is no disagreement that the duration of operations significantly affects the extent of irradiation and thus the decommissioning costs. The only evidence on the record is based on low-power testing limited to 0.75 effective full-power hours, and Staff's affiants are cautious in qualifying all of their estimates as based on the assumption of 0.75 effective full-power hours.

In these circumstances the Commission can avoid further dispute by providing that the low-power testing license be conditioned to allow no more than 0.75 effective full-power hours of operation without further Commission approval.

G. Costs of Decommissioning

The sole remaining issue regarding decommissioning costs, on which there appears to be some dispute, is the contingency factor selected for the plan. Applicants selected a contingency figure of 7% which is different from the 25% figure subsumed in the decommissioning rule; however, no explanation was provided as a basis for that percentage. MassAG has challenged the 7% and provided a factual basis for its disagreement and for the use of 25% from the customary usage of "AIF, DOE, Battelle and most other utilities" as well as from standard engineering practice.[18] Neither Applicants nor the Staff responded to this issue on the merits. Thus the Commission finds that the plan should include a contingency factor of 25%. For conservatism, this contingency is applied to the reactor decommissioning costs and spent fuel storage and disposal costs.

H. Conclusion on Cost Total for Funding

In light of the foregoing, the Commission concludes that the total amount required for decommissioning here, which includes spent fuel storage and disposal, is $72.1 million, calculated as follows:

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[18] MassAG Response, Nov. 2, Affidavit of Peter M. Strauss at 5, ¶ 8.

(Amounts in Millions)		
Reactor Decommissioning		$19.7
Spent Fuel Storage		$25.0
Spent Fuel Disposal		$13.0
Contingency		$14.4
	TOTAL	$72.1

I. Reasonable Assurance of Funding

Having established the sum, the Commission turns now to the means of establishing reasonable assurance that funds are available in this amount. At the outset we recognize the uncontroverted fact that PSNH, the joint owner with the largest share of Seabrook, has entered Chapter 11 bankruptcy and that uncertainty remains with respect to its reorganization or, theoretically, liquidation. There is also no dispute that another joint owner, Massachusetts Municipal Wholesale Electric Company (MMWEC) with an 11.6% share, is not contributing to project costs, and it appears that MMWEC cannot reasonably be counted on to make available voluntarily additional funds for decommissioning if needed after low power.[19] EUA Power Corporation (EUA), owner of 12.1324%, is not currently generating operating revenues.[20] There are also difficulties with two other small-percentage owners. *See* discussion in Part III of this Decision.

In light of the above, Intervenors challenge the relevance of Applicants' assertion that decommissioning costs are small compared with the *joint* net revenues of the Applicants, since Applicant joint owners have agreed among themselves only to several liability. Moreover, the record includes a showing of some $320-$390 million of liabilities in the event of plant cancellation in the hypothesized circumstances. October 20 Letter at 6.

While, in sum, approximately 60% of the ownership shares have been subject to doubt with regard to their financial health or willingness to contribute further financially to Seabrook, no evidence has been presented of any financial problems with respect to the remaining 40% ownership shares (the joint owners other than PSNH, MMWEC, EUA, New Hampshire Electric Cooperative (NH Coop), and Vermont Electric Generation and Transmission Cooperative (Vt. Coop)).

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[19] MMWEC's agreement with PSNH, which has not yet been formally presented to the Commission by PSNH and would in any event require further approvals before it becomes effective, represents that MMWEC agrees that in the event of cancellation before commercial operations MMWEC shall be liable for its share of decommissioning costs and the costs of cancellation (including property taxes and other payments) in an aggregate amount not exceeding $10 million.

[20] Applicants assert that EUA has a Decommissioning Costs Security Agreement into which $10 million of securities were deposited. It is unclear on the record whether payment is reserved for decommissioning as it is understood by this Commission, or whether it would include broader cancellation costs.

Clearly, the greatest assurance that funds would be available would be for Applicants to provide the total amount, prior to low-power testing, by one of the means authorized by the decommissioning rule (prepayment, external sinking fund, surety, issuance, or other guarantee — *see* 10 C.F.R. § 50.75(e)(1)). This would clearly obviate all of Intervenors' concerns since the money would be required to be prepaid or guaranteed by third parties. However, the Commission believes that it would be unduly onerous to require, for example, a totally prepaid external account beyond Applicants' control at this stage for so large a sum. Indeed, no similar requirement has been placed on any other reactor licensee, and there are other means to provide reasonable assurance in the unique circumstances of this case.

The Commission believes that the means chosen by the Applicants are suitable provided that the following conditions are met. The separate and segregated fund that Applicants will have created under the control of its Special Disbursing Agent must be funded to the amount of $72.1 million before licensing of low-power testing, and some of the large, financially secure joint owners must have fully, jointly, and severally guaranteed to make up promptly any deficiency in that amount that later occurs arising out of any payment other than in satisfaction of a decommissioning liability as understood in this order. We leave for Applicants to choose which joint owners shall participate in this guarantee, except that the participants *must* include at least two of the following utilities, the United Illuminating Company, the New England Power Company, and Connecticut Light and Power Company, which have relatively large ownership shares.

The foregoing requirement for a separate and segregated account in the amount of $72.1 million shall remain in place until Applicants receive a full-power license in compliance with the decommissioning rule (*see* note 6, *supra*), or until funds have been disbursed from the account for decommissioning in the amount guaranteed or decommissioning is completed, whichever shall earlier occur. In this fashion, the availability of funds will be reasonably assured. The guarantee removes the relevancy of any uncertainty regarding what the bankruptcy court will permit or what claims against PSNH, MMWEC, Vt. Coop, and NH Coop might take priority as a legal matter or in time over decommissioning costs.

J. ALARA and Related Issues

In various guises, for example SAPL's ALARA argument,[21] Intervenors have raised issues that in essence ask the Commission to ignore its rule

[21] *See* SAPL's Contentions in Response to CLI-88-7 at 20, *et seq.* *See also* SAPL's assertion of need for a NEPA statement for low power. *Id.*

providing for issuance of low-power licenses prior to decisions on full power. The short answer to these requests is that they are beyond the scope of the decommissioning funding matters the Commission authorized to be addressed pursuant to CLI-88-7.[22] Accordingly, the Commission summarily denies them.

K. Motions to Reopen the Record for a Hearing

The record considered in this Decision includes all motions, responses, and other documents referenced in this Decision on decommissioning. We need only now address whether there is any need to reopen the record for an evidentiary hearing. The Commission finds that this is not required as there is no remaining genuine issue of material fact on any significant safety question related to financial qualification for decommissioning following low-power operation.

III. PETITION FOR FINANCIAL QUALIFICATIONS RULE WAIVER

A. Background

Part II of this Decision resolves questions regarding the need for reasonable assurance of adequate funds for decommissioning of Seabrook in the event low-power operation has occurred and a full-power license is not granted. This resolves the most safety-significant financial qualifications matter pending before the Commission in this case. However, there remains the question whether one of the Commission's financial qualification rules should be waived. The rule sought to be waived was issued in 1984 (49 Fed. Reg. 35,747) and upheld on judicial review in *Coalition for the Environment v. NRC*, 795 F.2d 168 (D.C. Cir. 1986). It eliminates the need for case-by-case reviews of the financial qualifications of electric utility operating license applicants. If the 1984 rule were waived, the Commission's general financial qualifications requirements would become applicable. The effect would be to require review and permit litigation of Applicants' ability to pay the ordinary costs of low-power testing, decommissioning expenses aside.[23] We deal with this rule waiver question below.

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[22] The Commission notes that the decommissioning rule does embody an ALARA concept which requires application of ALARA for all steps in decommissioning. The ALARA concept has no relevance to decommissioning funding.

[23] Section 50.57(a)(4) of 10 C.F.R. requires generally that an applicant be "financially qualified to engage in the activities authorized by the operating license . . . ." The rule goes on to except electric utility applicants from the requirement of a finding of financial qualification. It is this exception which was added in 1984, and similar conforming exceptions, that is the subject of the waiver petitions. When these petitions were filed, the rules required that an applicant who must establish financial qualification must also "submit information that demonstrates [it] possesses or has reasonable assurance of obtaining the funds necessary to cover . . . the estimated

(Continued)

Three parties to this proceeding, TOH, NECNP, and SAPL, filed on July 31, 1987, a petition to waive the Commission's 1984 financial qualifications rule to the extent necessary to require PSNH to demonstrate, prior to low-power operation, that it is financially qualified to operate the facility safely at low power and to decommission after low power. The factual predicate for this petition was PSNH's Form 8-K filing with the Securities & Exchange Commission in which it said that it had instituted strict cash conservation measures and was working to develop alternative financial plans. The filing stated that were an adequate plan not placed in effect before the end of 1987, it would be "difficult, if not impossible" for the company to avoid proceedings under the Bankruptcy Code. *See* PSNH Form 8-K, Sheet 2, July 22, 1987, attached as Exhibit A to the Petition.

The July 31 petition was opposed by Applicants and the Staff, and on August 20, 1987, was denied by the Licensing Board. Among the chief stated reasons for the denial were that the circumstance of impending bankruptcy was speculative and that there was no suggestion that other "applicant-members of the consortium are financially incapable of operating and safely maintaining the facility." Memorandum and Order (unpublished), August 20, 1987, at 10. The Licensing Board's order was appealed, briefed, and argued before the Appeal Board on December 8, 1987. On January 28, 1988, while the matter was pending, what had been treated as speculative became reality when PSNH filed in bankruptcy. Using an opportunity provided by the Appeal Board, the same parties filed an amended petition, and in addition MassAG petitioned for a like rule waiver and later filed three supplements to that petition.

In ALAB-895, *supra*, the Appeal Board decided that the MassAG had established a *prima facie* case for a limited waiver of the rules. The Appeal Board also decided in ALAB-895 that the other petitions for a waiver had failed to make a *prima facie* showing and, therefore, dismissed them.

The Appeal Board discussed what the Commission had said in the 1984 rulemaking about the circumstances that would establish that a waiver would be warranted. The Appeal Board recognized that the Commission had specified that a waiver would be appropriate to review an electric utility applicant's financial qualifications if it could be shown that a rate commission would not allow recovery of the cost of operating. But the Appeal Board emphasized that the Licensing Board had wrongly determined that this was the only means of making the showing. The Appeal Board held that the example was merely illustrative. This it found was clear from the context in which the Commission had used the words "for example." The Appeal Board said that its conclusion was reinforced

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costs of permanently shutting the facility down and maintaining it in a safe condition. . . . 10 C.F.R. § 50.33(f)(2) (1988). This financial qualifications provision specific to decommissioning was deleted when the decommissioning rule became effective.

by the Commission itself, in that the Commission had elsewhere provided yet another example when it noted that a waiver would be appropriate if a nexus between the safe operation of the facility and the applicant's financial situation were shown. 28 NRC at 17, *citing* 49 Fed. Reg. at 35,751.

According to the Appeal Board, however, the initial TOH, NECNP, and SAPL petition failed because it relied on the lack of *certain* assurance of eventual rate allowances for operations at low power due to the alleged likelihood that Seabrook will never receive its full-power license and thus will not receive rate approval of costs of operation. The Appeal Board said that speculation on the full-power license was not warranted and in any event, *reasonable* assurance of funding was all that was required. The Appeal Board further found that reliance on the anti-CWIP law did not help Intervenors' case, because the anti-CWIP law did not bar recovery of costs for low-power operation, but simply prevented their recovery until full power, and moreover did not prevent other sources of revenue from being applied to low power. Thus the Appeal Board found that "absent a showing that the applicants have insufficient funds to cover the costs of low-power operation, this statute does nothing to advance their cause." 28 NRC at 18.

In the supplemental petition the same Intervenors focused on the need for a financial qualifications review to ensure that PSNH is qualified to operate Seabrook safely at low power, but the Appeal Board found that this too failed essentially because no showing had been made that the Applicants lacked resources to operate at low power because of bankruptcy. 28 NRC at 19.

Turning to the MassAG's petition and supplements, the Appeal Board found first that Staff's and Applicants' arguments that Applicants can recover low-power costs at some indeterminate time in the future when Seabrook is operating commercially does not respond to the MassAG's issue that Applicants currently lack sufficient funds to operate at low power safely. Initially MassAG relied on the unwillingness of other owners to be responsible beyond their own share for any costs. However, the Appeal Board held that MassAG only succeeded in meeting its burden to show without speculation that current funds were lacking when he asserted that MMWEC, an approximately 11.6% Seabrook owner, had halted its monthly pro rata share payments. 28 NRC at 20-26.

In sum, the Appeal Board found that in order to establish a *prima facie* case for a waiver, the MassAG needed to, and did to a limited extent, establish that Applicants lacked sufficient funds to operate safely at low power. The Appeal Board recognized that various possibilities could alter the situation, e.g., that other joint owners could meet the shortfall or MMWEC could change its mind. But, the Appeal Board said, just as the *prima facie* case could not be made by speculation, it could not be defeated by speculation.

The Commission promptly established a briefing schedule in response to ALAB-895. Among other things, the Commission specifically invited Appli-

cants and Staff to address any matters that they wished the Commission to consider in reviewing the Appeal Board's finding on the MassAG's petition and deciding whether a waiver is appropriate. Other parties were given an opportunity to reply. The briefing period concluded on August 2, 1988.

Intervenors TOH, NECNP, and SAPL have also timely petitioned the Commission for review of ALAB-895. They maintain that the Appeal Board misperceived the standard that applies to waiver of the rule. In addition, MassAG wrote to state on the record that he agreed with the other Intervenors that the Appeal Board opinion contained error, but did not appeal since the Appeal Board had found that his petition made a *prima facie* case for waiver.[24]

B. Analysis and Decision

As noted above, the Commission has before it both the Appeal Board's limited finding of a *prima facie* case for rule waiver premised on the cessation of project payments by one of the minority joint owners, MMWEC, and the petition for review of ALAB-895 by TOH, NECNP, and SAPL. We also take note of MassAG's assertion of error in ALAB-895. To reduce procedural complexity and to provide for a comprehensive resolution of the rule waiver issue, we will address all of the principal grounds asserted for a rule waiver: the bankruptcy of PSNH; the State of New Hampshire's anti-CWIP statute, and the MMWEC shortfall. We take account also of the undisputed fact that two of the smaller joint owners, Vt. Coop and NH Coop, are also behind in their project payments.

1. Grounds for Rule Waiver

a. The Waiver Rule

Rule waivers are addressed specifically in 10 C.F.R. § 2.758. Under this provision:

> The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter . . . are such that application of the rule . . . would not serve the purposes for which the rule or regulation was adopted . . . . [The petitioner] shall set forth with particularity the special circumstances alleged to justify the waiver or exception requested.

No case has been cited where the Commission has waived a rule under this section, nor are we aware of any. In *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-80-16, 11 NRC 674 (1980), the Commission took

[24] We have also considered MassAG's Fourth Supplement to Petition for Waiver, dated September 15, 1988, and the relevant papers referenced at *supra* note 5.

up a Licensing Board certification that a *prima facie* case for waiver of 10 C.F.R. § 50.44 had been made under § 2.758, but the Commission rejected the certification. The Commission stated that waiver was inappropriate because the petition presented no "special circumstances" peculiar to the case, but rather presented generic questions common to all light-water power reactors and best resolved by rulemaking. That decision is of limited usefulness to us here because, as will be discussed below, the special circumstances asserted as grounds for waiver here do *not* present generic questions.

The only other significant Commission discussion of § 2.758 appears in the 1985 rulemaking on the standards for specific exemptions in 10 C.F.R. § 50.12. At that time we said that special circumstances as those terms would be applied in § 50.12 would be consistent with the considerations the Commission expected parties to address in applying § 2.758. The rule in § 50.12 establishes that there is a special circumstance whenever, among other things, "[a]pplication of the regulation in the particular circumstances would not serve the underlying purpose of the rule . . ." (10 C.F.R. § 50.12(a)(2)(ii)), or "[t]here is present any other material circumstance not considered when the regulation was adopted for which it would be in the public interest to grant an exemption" (10 C.F.R. § 50.12(a)(2)(vi)).

Thus, while we take account of what we said in the § 50.12 rulemaking, the matter before us is essentially one of first impression. We must construe and apply our regulations in a manner that is in accord with public health and safety and general administrative law principles.

b. The Meaning of "Special Circumstances"

The Appeal Board was clearly correct in ALAB-895 when it held that a showing that a rate commission would not allow rate recovery of the cost of operation cannot be the only ground for waiver. The 1984 financial qualifications rulemaking is absolutely clear that this circumstance was offered for illustrative purpose only and arguments to the contrary by Applicants and Staff border on the frivolous. Moreover, even if we were to accept the proposition that what was once considered illustrative must now be taken as exclusive, this does not necessarily lead to denial of the waiver requests, because the anti-CWIP statute leads here to a circumstance that appears to fit the example cited in the rulemaking. Under anti-CWIP, the rate authority *cannot* grant rate relief specifically to pay in advance for the cost of low-power operation.

We believe that the 1984 financial qualifications rulemaking did not limit the "special circumstances" that could serve as grounds for waiver under § 2.758. And we believe further that the concept of "special circumstances" that is most in accord both with the general concept of rulemaking as "carving out" issues from adjudication for generic resolution, and with what we said about § 2.758

in the § 50.12 rulemaking is as follows. Special circumstances are present only if the petition properly pleads one or more facts, not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the proceeding leading to the rule sought to be waived. Only with such a construction of the terms "special circumstances" is there assurance that safety matters will not be ignored. Safety matters will be examined either by rulemaking or in licensing adjudication, at least for the purpose of determining their materiality and threshold safety significance.

c. The Kind of Special Circumstances Justifying Rule Waiver

Under § 2.758, it is not just any "special circumstance" that satisfies the requirements for a *prima facie* showing, but only those special circumstances that "are such that application of the rule . . . would not serve the purposes for which the rule or regulation was adopted." We believe that this means, at a minimum, that the special circumstances must be such as to undercut the rationale for the rule sought to be waived.

The Commission also believes that a rule waiver petition under § 2.758 ought not to be certified unless the petition and other allowed papers indicate that a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived. The Commission's agenda is crowded with significant regulatory matters, including new rules on nuclear plant maintenance, fitness for duty, and high-level waste repository licensing, and safety oversight of the over 100 nuclear power plants with operating licenses. It would not be consistent with the Commission's statutorily mandated responsibilities to spend time and resources on matters that are of no substantive regulatory significance.

2. The Petitions Before Us

As indicated above, we will take up all of the principal grounds that have been asserted as bases for § 2.758 rule waiver. These are the bankruptcy of PSNH, New Hampshire's anti-CWIP statute, and the cessation of or arrears in project payments by some of the minority joint owners, including MMWEC.

a. Special Circumstances

There is no question that the circumstance of PSNH's bankruptcy is unique to Seabrook. The PSNH bankruptcy is the first utility bankruptcy since the Great Depression. There is also no indication in the 1984 financial qualifications rulemaking that utility bankruptcy was a condition taken into account. Thus we

believe that the bankruptcy of PSNH does present a special circumstance within the meaning of § 2.758.

We reach the same result for the other rule waiver grounds. We do not believe that anti-CWIP statutes are the rule in the utility industry, and so we are not persuaded by the record before us that anti-CWIP statutes present generic, as opposed to case-specific issues. Moreover, there is no indication in the 1984 financial qualifications rulemaking that anti-CWIP statutes were considered. Finally, the delay and cessation of project payments by some of the minority owners also appear to be uncommon and a matter not considered in the financial qualifications rulemaking.

b. Other Requirements for Rule Waiver

Having decided that PSNH bankruptcy, anti-CWIP statutes, and delay and cessation of minority owner project payments do all present "special circumstances," the next critical issue is whether any of these special circumstances undercuts the rationale for the 1984 financial qualifications rule.

The essential rationale for the 1984 rule was that:

> case-by-case review of financial qualifications for all electric utilities at the operating license stage is unnecessary due to the ability of such utilities to recover, to a sufficient degree, all or a portion of the costs of construction and sufficient costs of safe operation through the ratemaking process.

49 Fed. Reg. at 35,748.

We think that it is apparent that PSNH bankruptcy and anti-CWIP, in combination, undercut this rationale. Under anti-CWIP the utility cannot, strictly speaking, specifically recover *any* portion of the costs of low-power testing. In most cases this may not be critical, given the fact that utilities generally have sufficient other funds derived through rates to carry them through temporary shortfalls and delays in rate recovery. Indeed the Commission recognized in its 1984 rulemaking that there could be phase-ins and other such delays in recovery of costs of construction or operation, and that such delays did not upset the rationale that rate setting would provide adequate funds.[25] But here the utility's bankruptcy clearly signals that something very unusual and serious has occurred because of a delay in rate increases — the utility is unable to meet all of its obligations to its creditors. We think that the combination of these two circumstances — bankruptcy and the anti-CWIP statute — does undercut the rationale for the 1984 rule.

[25] 49 Fed. Reg. at 35,749.

It is less clear that cessations of project payments undercut the logic of the rule. The record does not clearly suggest the reasons for cessations of payments, for example whether the cessations must be attributed to some ratemaking problem that would undercut the logic of the 1984 rule. But, in view of the discussion below, it is not critical to our decision to know whether delays or cessations of project payments undercut the logic of the rule, and we will assume for purposes of analysis that the minority owners' delay or cessation of project payments does indeed undercut the rule's rationale.

Having held that the PSNH bankruptcy, anti-CWIP statutes, and delay or cessation of project payments by minority owners all present special circumstances, not considered when the 1984 rule was adopted, and that these circumstances, at least considered together, undercut the rationale of the 1984 rule, we turn to the remaining critical issue: Is a waiver needed to address a significant safety problem on its merits? The record shows that PSNH's share of the additional costs of low-power testing is approximately $2,292,000.00 to be incurred over a 3-month period.[26] MMWEC is not paying its share of the monthly current operating budget, and its share of the additional low-power costs would be approximately one-third of those attributed to PSNH. The Vt. Coop and NH Coop shares would be even smaller.[27] If we assume that all of the contributions to the costs of low-power testing from PSNH, MMWEC, Vt. Coop, and NH Coop are in doubt, the total amount in question is on the order of $3.5 million. Thus, the critical issue left before us is whether a significant safety problem related to the 1984 financial qualifications rule is posed by doubts regarding the ability of Applicants to raise $3.5 million toward the cost of low-power testing.

We think that no significant safety problem is posed for the following reasons. The purpose of the 1984 rule sought to be waived is elimination of case-by-case financial qualifications reviews. If we go no further than the 1984 rule, no waiver could *ever* be granted because any waiver, by its nature, would defeat rather than advance the rule's purpose. Since the Commission clearly contemplated that there could be waivers, we must look further to determine the relevant "purposes" in applying §2.758. At this point we depart somewhat from the analysis in ALAB-895. The Appeal Board held that a *prima facie* showing sufficient to certify the waiver request to the Commission could not be made unless the petitioner established, *prima facie*, that there would be a shortfall in funds to conduct low-power testing. *E.g.*, 28 NRC at 25. In essence, in applying §2.758 the Appeal Board took reasonable assurance of financial qualifications as the purpose to be served by the rule. We think it is preferable to examine

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[26] ALAB-895, *supra*, 28 NRC at 23.

[27] The joint owners' shares of operating expenses are in proportion to their ownership shares. PSNH's ownership share is approximately 35.57%; MMWEC's share is 11.59%; Vt. Coop's share is approximately 0.41%; and NH Coop's share is approximately 2.17%. *See, e.g.*, Third Supplement to MassAG's Petition, Appendix L

the underlying purpose of the requirement that there *be* a financial qualifications review.

The reason for conducting a financial qualifications review and requiring a finding of financial qualifications is *solely* to provide some added assurance that a licensee would not, because of financial difficulties, be under pressure to take some safety shortcuts. Thus in the 1984 rulemaking we stated that:

> A financial disability is not a safety hazard per se because the licensee can and under the Commission's regulations would be obliged to simply cease operations if necessary funds to operate safely were not available. At most, the Atomic Energy Commission, in drafting the rule, must have intuitively concluded that a licensee in financially straitened circumstances would be under more pressure to commit safety violations or take safety "shortcuts" than one in good financial shape. Accordingly, the drafters of the rule sought to achieve some level of assurance, prior to licensing, that licensees would not be forced by financial circumstances to choose between shutting down or taking shortcuts while the license was in effect.[28]

Whatever may be the legitimacy of this safety purpose for full-power operation, it stretches reason to suppose that the safety rationale would have any bearing on a limited license for low-power testing. Shortcuts in safety at full power conceivably could avoid shutdowns or derating and thereby contribute to greater plant availability and revenue from power sales. But shortcuts in low-power testing safety will not lead to generation of more revenue that would benefit the plant owners. Low-power testing does not generate revenue from power sales. The *only* purpose of low-power testing is to further ensure plant safety by checking selected plant systems that cannot be checked without core criticality and confirming various operating parameters. There is every incentive to do the job well and no rational incentive to cut corners.

Second, the amount of money in question — $3.5 million dollars over a period of a few months — is relatively small. It is an insignificant fraction of the money already spent on the Seabrook project. It strains credibility to suppose that Applicants would jeopardize the billions already invested in Seabrook merely to save a few hundred thousand or even a few million dollars needed for safe low-power testing.

Finally, the safety risks of low-power testing are low. We have examined and reaffirmed this conclusion in a recent rulemaking[29] and nothing in any of the papers before us suggests otherwise. To be sure, low-power testing will contaminate some limited portions of the plant, and will irradiate the fuel, but these raise questions of proper decommissioning and spent fuel storage and disposal which are addressed separately in Part II of this Decision.

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[28] 49 Fed. Reg. at 35,749.

[29] 53 Fed. Reg. 36,955, 36,956 (Sept. 23, 1988).

For these reasons, we conclude that the rule waiver petitions before us do not present a significant safety problem, and therefore must be denied.

IV. NECNP'S MOTION FOR A HOUSEKEEPING STAY

We have not up to now considered NECNP's motion for a stay of the low-power authorization to permit stay motions before us or before a United States Court of Appeals. This order requires Applicants to meet several conditions, and it appears to us that the time to fulfill those conditions could leave adequate time for the filing of any appropriate stay motion. Moreover, a pending motion to litigate new onsite emergency planning issues must be ruled upon prior to licensing of low-power testing. Against the possibility that Applicants and the Licensing Board may fulfill these conditions sooner than any party that wished to could seek a stay, we delay the effective date of this Decision until 10 days after the referenced Licensing Board decision or Staff notice to the Commission that Applicants have satisfied the decommissioning requirements of this order, whichever is later. In order not to unduly burden the parties, adjudicating boards, and reviewing courts during the upcoming holidays, no low-power testing license may be issued at least until January 6, 1989. Any motion for a stay or other relief from this order shall be brought to the Commission itself.

V. ADDITIONAL COMMENT

We are constrained to make a concluding comment about the Staff's position in this case. Staff has consistently opposed any rule waiver in pleadings before the Licensing Board, the Appeal Board, and the Commission. This means that the Staff's "bottom line" position in this formal adjudicatory proceeding is that *no* review of or finding on Applicants' financial qualifications for low-power testing is either needed or required. Yet in its response to the Commission's July 14, 1988 Order, and also in a belated filing on December 13, 1988,[30] the Staff has apparently advised Applicants that "we [Staff] have required the Applicants to demonstrate, prior to commencement of low-power operation, that there is reasonable assurance that they possess or can obtain the financial resources needed to conduct that activity in a manner that does not endanger the public health and safety." This is flatly inconsistent with Staff positions in this case. Only by obtaining a waiver of the rule, which the Staff has not sought

[30]The exact nature of the filing is unclear. To a large extent it bolsters, and in some respects modifies, the position the Staff espoused in its November 16, 1988 response to the Commission's Order CLI-88-7. It should have included, but did not, some motion for acceptance of an otherwise unauthorized pleading. Moreover, there is no good reason why the views set forth in the filing could not have been included in the response to CLI-88-7. We have given *no* consideration to the filing except in this concluding comment.

here, may Staff assert authority to deny or condition the low-power testing license because of a concern about financial qualifications. Staff cannot have it both ways — it cannot advise the Commission that there are no grounds for a rule waiver, and at the same time conduct its informal licensing review as if a waiver was in fact needed. *See Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), *cert. denied, Arkansas Power & Light Co. v. UCS*, 469 U.S. 1132 (1985).

We should note in this regard that this Decision does not hold that the waiver petitions present no significant safety problem because PSNH and other Applicants are financially qualified. We hold instead that, on the facts of the case, lack of financial qualifications does not pose a significant safety problem.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Assistant Secretary of the
Commission

Dated at Rockville, Maryland,
this 21st day of December 1988.

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From: Chazell, Russell
To: Freeman, Stanley
Subject: More ADAMS Uploads
Date: Thursday, April 04, 2013 5:29:00 PM
Attachments: Proposed Rule, Fin Info Rqmts for Apps To Renew or Extend the Term of an Op Lic for a Power Reactor, 67 FR 38427.docx
Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, 62 FR 44071.docx
62FedReg44071.pdf
67FedReg38427.pdf

Hi Stan,

Here's a couple more to add to ML13093A158.

Thanks much,
Russ

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