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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
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In the Matter of)

GEORGIA POWER COMPANY)
et al.,)

(Vogtle Electric Generating)
Plant, Unit 1 and Unit 2))

Docket Nos. 50-424-OLA-3
50-425-OLA-3

Re: License Amendment
(transfer to Southern Nuclear)

ASLBP No. 93-671-01-OLA-3

INTERVENOR'S MOTION TO ACCEPT ADDITIONAL
FACTUAL BASIS IN SUPPORT OF THE ADMITTED CONTENTION

Allen Mosbaugh, Intervenor in the above titled action, respectfully requests that this Board allow him to raise as part of the factual bases to the admitted contention other facts related to whether Georgia Power Company and Southern Nuclear possess the character and competence to operate a licensed nuclear power reactor. Specifically, Intervenor seeks to raise facts related to the opening of the plant Vogtle containment hatch after the site area emergency in violation of a commitment made to the NRC; and whether Southern Nuclear requested and obtained a waiver from NRC of technical specifications to cover-up the violation of the commitment and the technical specification pertaining to the opening of the hatch.

I. ADDITIONAL FACTUAL BASIS

On March 20, 1990, Plant Vogtle experienced a Site Area Emergency. In response to the Site Area Emergency, containment integrity was restored by, inter alia, closing the containment

equipment hatch. The Vogtle Control Room Log Book records the containment hatch closure occurring on March 20, 1990 at 09:42 CST. As of the evening of March 20, both diesels were inoperable (1A was declared inoperable due to failure and 1B was previously declared inoperable due to maintenance activity). That condition made both trains of RHR inoperable and placed Plant Vogtle Unit 1 in an immediate action statement from several violations of Technical Specifications most importantly, AC power, (TS 3.8.1.2) and RHR (3.9.8.2).

Commitments were made to the NRC in a meeting on or about the evening of March 20, not to open the containment hatch until the diesel and the RAT, both which are required for an Operable RHR system according to tech. specs., were operable. See Partial Transcript of NRC Tape No. 25 (appended hereto as Attachment 1). Nonetheless, on the evening of March 20, 1990, while still in Mode 6, SRO licensed outage managers Mike Lackey and Bernie Beasley planed to reopen the containment hatch in violation of the commitments made to the NRC. Concerns were expressed to them about reopening the containment hatch and removing the "fission product barriers", that had been established for accident recovery, e.g. containment integrity. See Attachment 1. The motivation for taking this action stems from the fact that containment integrity (required while the plant was at mid-loop in Mode 6 with no OPERABLE RHR Systems) was blocking critical outage progress and slowing down SONOPCO's planed outage schedule. Without regard to prior commitments made to NRC or the

precarious condition of having no OPERABLE emergency AC power, Plant Vogtle was intentionally placed in a less safe condition by removing the containment equipment access hatch. At the time the containment hatch was opened both the 1A and 1B diesel generators were declared inoperable. See Attachment 1. Intervenor has found that the hatch was open at 10pm on March 20, 1990.^{1/} This information was uncovered in the "War Room Unit 1 Refueling Outage Log" (at page 51, 22:00 hours). It appears that, in order to save critical path time, it was determined that plant personnel would open the Containment hatch in anticipation of making a Mode 6 to Mode 5 change on the morning of March 21, 1990. However, before this Mode change was made, it was recognized that TS 3.0.4 together with TS 3.8.1.2 and possibly others, prevented making the change to Mode 5. After recognizing this, the hatch was not immediately closed. SONOPCO personnel instead decided to seek a waiver of Technical Specifications from the NRC to make the mode change.^{2/} Despite whatever efforts were taken verbally on March 21, the change to Mode 5 was not made until March 22, 1990, at 03:23 CST (Control log), thus

^{1/} Both the control log and the shift supervisor log do not have any entry of the opening of the Containment hatch after the entry of the hatch closure of March 20, 1990 nor is there an entry where it was subsequently closed. The exclusion of logging both the opening and closing of the containment hatch represents a departure from normal operating procedure. Excluding this information covered up the evidence necessary to document the timing of these events.

^{2/} Once in Mode 5, the tech. specs. provisions requiring the closure of the containment penetration communicating with atmosphere were not applicable.

violating the action statement in tech. specs. 3.9.8.2. Concerns were raised with Lackey and Beasley that the hatch should be closed by tech. specs., but Lackey, Beasley and others refused to have the hatch closed. The above actions involved the deliberate and knowing violations of tech. specs. by SRO licensed personnel including Lackey, Beasley, Kitchens, and line management up to and including R.P. McDonald.

Apparently, a verbal NRC waiver to change modes from mode 6 to mode 5 was requested by high level corporate personnel, and granted by the NRC during the day or about March 21, with the justification being to place plant Vogtle in a safer condition by increasing water inventory. In actuality it was being sought to cover up violations of tech. specs. and to speed up the outage. Having obtained this waiver, personnel proceeded to tension the RPV head bolts. The tensioning of the head accomplished the mode change as defined in tech. specs. in the early morning of March 22 at 03:23 CST.

II. ARGUMENT

1. Intervenor Can Meet the Requirements Set Out in 10 C.F.R. § 2.714 (A)(1)(i)-(v).

- (i). Good cause exists for the failure to file on time.

Good cause exists for allowing Intervenor to include as part of the factual basis of the contention facts concerning the opening of the containment hatch in violation of an express commitment made by GPC/SONOPCO to the NRC that the containment hatch would not be opened until at least one diesel generator was

operational. First, the rule is ambiguous as to whether an intervenor would be required to submit all known factual bases at the time intervenor seeks to admit a contention. The issue of whether a petitioner must set forth all of the factual bases for a contention or waive the right to litigate a factual basis appears to be a question of first impression.^{2/} Good cause exists under this circumstance.

Second, Intervenor did not possess enough facts at the time he filed his amended petition to ascertain the date and time the containment hatch was opened. This prohibited Intervenor's counsel from alleging essential factual information pertaining to the newly asserted factual basis. In particular, the "War Room" log was in no way publicly available at the time Intervenor filed his amended petition.

Accordingly, Intervenor's additional factual basis in support of the admitted contention should be admitted because Intervenor has satisfied the good cause standard for admitting late-filed contentions.

- (ii). There are no other means available whereby Intervenor's interest will be protected.

Intervenor's interest in amending his contention cannot be protected by any other means. If Intervenor is unable to raise in this proceeding the new factual basis in support of the

^{2/} Intervenor argues he has satisfied the requirements of 10 C.F.R. § 2.714 without waiving his argument that he is not required to amend the factual bases of a contention once the contention has already been admitted. See, Section II.2., infra.

already admitted contention then there will be no other means by which Intervenor can have access to discovery, to cross-examine witnesses or to seek judicial review of this issue. No other party will have the ability or standing to adjudicate this issue before a licensing board.

Most significantly, the allegations contained in the new factual basis concern the primary issue at stake here -- the character and competence of the licensees and their officials. The new factual basis alleges facts which, if true, would demonstrate a continuing pattern of willful misconduct on the part of the licensees and their officials regarding the cover up of significant safety violations and their efforts to deceive the NRC. That these additional facts arose during the same period of time that it is alleged that licensee officials engaged in serious misconduct with respect to the status of the diesel generators is significant for two reasons. First, these new facts increase the interest of the Intervenor in this proceeding. Secondly, these facts have direct bearing on the ultimate issue of the character, competence, candor and credibility of the licensees and their officials.

This litigation is the proper, if not the only, forum for these allegations to be raised. Simply stated, if these additional allegations contained in the new factual basis are not litigated here they are unlikely to ever be litigated.

- (iii). Intervenor's participation will assist in developing a sound record.

Allowing Intervenor to raise facts related to the hatch and waiver of Technical Specifications will further develop facts directly relevant to the admitted contention. It is appropriate to consider these facts in this proceeding for the following reasons:

1. It is yet another example of where the whole truth was not given to the NRC. This cover-up involved the entire chain of management up to and including the Executive Vice President. This is important evidence pertaining to the character and candor of Southern Nuclear.

2. It involves violating verbal commitments made to the NRC regarding the breaching of safety barriers before returning the diesels to service; as such this represents direct evidence of Southern Nuclear's lack of commitment to safety.

3. It involved a failure to meet safety obligations in order to make schedule progress toward reactor restart, thereby indicating that Southern Nuclear would place prominence on scheduling issues rather than safety issues.

4. It involved a failure to meet the Plant's Technical Specifications that apply when both diesels are inoperable. This is essential evidence with respect to Southern Nuclear's competence to operate this facility.

By admitting the additional factual basis a more complete record will be developed on the issue of the character,

competence, candor and credibility of the Licensee and their officials.

- (iv). Intervenor's interest will not be represented by other existing parties.

The only additional parties to this proceeding are NRC Staff and Licensee. NRC Staff has already indicated that it is not interested in pursuing this issue; and it would be imprudent to believe Georgia Power Company would represent Intervenor's interest in this matter.

- (v). Admitting the new factual basis will not broaden or delay the proceeding.

The proceeding is governed by the admitted contention. The opening of the hatch and waiver issues solely pertain to the admitted contention pending before this Board. Discovery on this matter could be completed by Intervenor within the allotted discovery time period (assuming discovery could immediately commence).

- 2. 10 C.F.R. 2.714 does not require amending the factual bases after a contention is admitted.

Requiring an intervenor to seek leave to adjudicate facts clearly relevant to an admitted contention was not contemplated under the recent amendment to §2.714, as articulated in the Statement of Considerations set forth by the Commission in the Federal Register. In Georgia Power Co., et al. (Plant Vogtle Units 1 and 2), LBP-93-21, 38 NRC 143 (September 24, 1993) this Board concluded the Statement of Considerations language, "at that point in time", indicated that intervenor needed to allege

every factual bases prior to the admission of his contention. Intervenor contends that this interpretation does not adequately define the Commission's interest with respect to litigating additional facts after a contention has been admitted.^{4/} In the Statement of Considerations accompanying the amendment, the Commission states: "Under these new rules an intervenor will have to provide a concise statement of the alleged facts or expert opinion which support the contention and on which, at the time of filing, the intervenor intends to rely in proving the contention at hearing,..." 54 Fed. Reg. at 33170. As amplified by this section, Intervenor was not under an obligation to determine each and every fact supporting a contention but only those of which he intends to rely upon at the time of filing. Unlike other factual material contained in the 2.206 petition which Intervenor was aware, with respect to the Hatch and Waiver issues, Intervenor did not intend to rely on these facts because he had no independent recollection until he heard the recording for the first time in April of 1994. Notably, the Statement of Considerations does not require an intervenor to state every conceivable factual basis to admit a contention. In this respect, the Statement of Considerations states that the purpose for the amendment was to end the practice of a petitioner "filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or Staff"

^{4/} This is particularly true because the regulation concerns protecting the public health and safety and should be broadly construed. See, Section II.3, infra.

and that this would be accomplished by requiring an intervenor to set forth "some alleged fact or facts in support of its position sufficient to indicate that a genuine issue of material fact or law exists." 54 Fed. Reg. at 33170 (emphasis added).^{5/} The Commission goes on to state that once "some factual basis for its position" is established and a contention admitted, an intervenor "will continue to be able to develop the facts necessary to support its case" (i.e. the admitted contention) 54 Fed. Reg. at 33171 (emphasis added). The Commission specifically notes that the rule "only details what is expected of an intervenor as part of its burden of coming forward with information in support of a proposed contention," 54 Fed. Reg. at 33171, and does not govern what facts an admitted intervenor may ultimately choose to prove his case.

In the instant case Intervenor successfully set forth sufficient facts to admit a contention. The requirement that Intervenor set forth a sufficient factual basis was met. Since "the rule only details what is expected of an intervenor as part of its burden of coming forward with information in support of a proposed contention," there is no requirement that an intervenor amend the factual basis to with additional fact after a contention is admitted. The Commission specifically appears to

^{5/} The Commission specifically did not state that an intervenor was required to set forth all alleged facts known in support of a contention. To the contrary, the Statement of Considerations indicates just the opposite (i.e., stating that an intervenor need only set forth "some alleged facts"; must make a "minimal showing"; and present a "minimal basis").

have adopted this approach inasmuch as the Commission states that once a contention is admitted, the intervenor "will continue to be able to use discovery to develop the facts necessary to support its case." 54 Fed. Reg. at 33171.^{6/}

It is compelling that in reaching this opinion the commission relied upon Connecticut Bankers Assn v. Board of Governors, 627 F.2d 245 at 251 (D.C. Cir. 1980), in which the Board of Governors stated that the petitioner need only "make a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." 54 Fed. Reg. at 33171. The court also stated that there was not a need to make "detailed factual allegations in order to meet the requirement that he raise 'issues of material fact'". Connecticut Bankers Assn., 667 F.2d at 251. In the case at hand, Intervenor set forth sufficient facts to admit a contention and there is no logical or compelling reason to prohibit an intervenor from raising all relevant facts before the Licensing Board, whether those facts were known or unknown at the time the contention was admitted.

^{6/} The amendments to this rule required Intervenor to set forth a sufficient factual basis before a contention could be admitted. Had the Board concluded that a sufficient factual basis did not exist, then Intervenor would not be free to include additional facts in support of the contention and he would be required to follow the rules for late admitted contentions. See 10 C.F.R. 2.714(b)(1).

3. Statutes enacted for the purpose of protecting the public health and safety are to be construed broadly.

Statutes enacted to protect the public health and safety are to be construed broadly to achieve the remedial purpose of the statute. In Flour Constructors, Inc. v. Occupational Safety and Health Review Com'n, 861 F.2d 936, 941 (6th Cir. 1988), the court ruled that the an agency's broad interpretation of the regulation better served the "remedial purpose of the Occupational Safety and Health Act" because it effectuated the purpose of the Act. See also Whirlpool Corp. v. Marshall, 445 U.S. 1, 13 (1980) ("safety legislation is to be liberally construed to effectuate the congressional purpose"). The Regulations which allow for the intervention into a licensing proceeding by a member of the public were enacted for the purpose of protecting the public health and safety. Therefore, this regulation should also be construed liberally to effectuate its remedial purpose. Hence, the Board should accept the addition of the new factual basis in support of the admitted contention because such an interpretation would be in keeping with the spirit of the regulation to protect the public from the hazards of radiation.

III. CONCLUSION

Intervenor believes that the factors set out in 10 C.F.R. §2.714(a)(i)-(v) weigh in favor of admitting the requested additional factual basis. The equities and justice weigh in favor of allowing Intervenor an opportunity to adjudicate the

hatch and waiver issues as they will contribute to this Board's ability to adequately consider the validity of the admitted contention.

Respectfully submitted,

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March 30, 1990

Frederick : I haven't figured out yet how, what the justification was.

Mosbaugh: Well

Frederick : Though I've had it explained to me twice that management knew about it.

Mosbaugh: Lackey and Beasley told you that they weren't going to—
— They actually told— I just—That was just an impression that I had but they actually told you they weren't going to put the hatch on.

Frederick : Because I was argueing— I walked—What happened was, I walked into the War Room, uh, the afternoon of the event and uh, the evening of the event and it was late that that day and Mike was discussing with people the removal of the hatch. And I said "How can you discuss the removing the hatch? We need to keep our barriers.", and he recognised that I had a (UH) concern and so he went and got Barney and then I think Skip mentioned it to me, slightly. And then we had the big brief with the NRC.

Mosbaugh : Um huh.

Frederick : And basically, at the meeting I thought that the final discussion that I got from George and Skip, because they said it 4 times for clarification, I remember it had to be said 4 times before everybody understood, that we wouldn't reopen the hatch until we had the diesel and the RAT. And we never got the diesel. That night they wrote an LCO on it.

Mosbaugh : Yeah. The diesel was just declared operable 2 days ago.

Frederick : But they wrote an LCO that night, I mean an actual LCO saying that it was inoperable and B was torn apart.

Mosbaugh : Yeah.

Frederick : So there was no way that they could say that they had the diesel, and the next morning when I came in and found out that the hatch was open. Uh, I ask those questions again and uh, Mike, uh, I said how could you all do that, management briefed the NRC. He said, "No, management said we could go ahead".

Mosbaugh : I ask the—

Attachment 1
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Frederick : That's not what I heard.

Mosbaugh : I, I, I voiced the same concerns in the morning. When I found that the hatch was open in the morning I voiced the same concern.

Frederick : I remember, because you didn't know. You said—

Mosbaugh : I didn't know because, I was the duty manager.

Frederick : Said we breached it in the opposite way and they had to go rebreach it.

Mosbaugh : That's right.

Frederick : Right. I think we're going to—I think that when they get around to the event I think that's a mistake.

Mosbaugh : Yep, and I would say deliberately, I mean you know the pressurizer hatch SNAFU here uh I think was, is a very bad you know situation done out of the chain of command and all that, but I don't think that it was done deliberately.

Frederick : Right.

Mosbaugh : No body deliberately put that hatch on to put the Plant in a less safe condition.

Frederick : Right

Mosbaugh : Okay, It was done out of the chain of command it was a major SNAFU. But, but the hatch really puts the Plant in a less safe the containment hatch puts the Plant in a less safe condition and we did it on purpose.

Frederick : Yeah, I'm of the opinion that the hatch should still be shut right now, never have been reopened, they could have done then, well they might have had a little difficulty with leak rate—

Mosbaugh : The hatch, in my opinion the hatch could have only, to be safe, should have only be reopened once the diesel was operable.

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Re: License Amendment
(transfer to Southern Nuclear)

ASLBP No. 93-671-01-OLA-3

OFFICE OF SECRETARY
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CERTIFICATE OF SERVICE

I hereby certify that Intervenor's Motion to Accept Additional Factual Basis in Support of the Admitted Contention has been served this 6th day of July, 1994, by first class mail upon the persons listed in the attached Service List, with additional service by facsimile indicated by "*".

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)	ASLBF 1: 93-671-01-OLA-3

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