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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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| In the Matter of | ) | Docket No. 50-458-OLA |
| Gulf States Utilities Co., et al. | ) | ASLBP No. 93-680 |
| (River Bend, Unit 1) | ) | |

# CAJUN ELECTRIC POWER COOPERATIVE, INC.'S ANSWER IN OPPOSITION TO GULF STATES UTILITIES COMPANY'S MOTION FOR SUMMARY DISPOSITION

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Cajun Electric Power Cooperative, Inc. ("Cajun"), pursuant to 10 C.F.R. § 2.749(a)(1994), respectfully files this "Answer in Opposition to Gulf States Utilities Company's ["GSU"] Motion for Summary Disposition" ("Cajun's Answer"). Accompanying Cajun's Answer is Cajun's "Concise Statement of Material Facts to Which a Genuine Issue Exists" ("Cajun's Statement") and two affidavits submitted on behalf of Cajun. Cajun's Answer and Statement are in opposition to GSU's Motion for Summary Disposition, dated January 9, 1995 ("GSU Motion"), and GSU's "Statement of Undisputed Facts In Support Of Its Motion For Summary Disposition ("GSU Statement"). The Board must deny GSU's Motion for the reasons and facts demonstrated herein.

## I. INTRODUCTION AND SUMMARY

The two amendments to Operating License No. NPF-47 at issue in this proceeding relate to (i) the acquisition of GSU by Entergy Corporation ("Entergy") and (ii) the transfer of operating control of River Bend Nuclear Station from GSU to Entergy Operations, Inc. ("EOI"). In GSU's Motion, Entergy and its affiliated companies try one more time to deny Cajun, the co-

licensee and intervenor, an opportunity at relief without a hearing.

A panel of the Atomic Safety and Licensing Board was established to consider Cajun's contentions related to the license amendments on August 23, 1993. The Board admitted one of Cajun's contentions, as follows:

> The proposed license amendments may result in a significant reduction in the margin of safety at River Bend.

In the Matter of Gulf States Utilities Company, et al. (River Bend Station, Unit 1), LBP-94-3, Docket No. 50-458-OLA, 39 N.R.C. 31, 41 (1994) ("January Order"). The bases for Cajun's contention were accepted by the Board and by the Commission, in denying GSU's appeal of the Board's ruling on Cajun's contention. They are that:

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 operations. As a result, EOI will be dependent upon GSU for the funds necessary to operate River Bend.

2. EOI is thinly capitalized. Consequently, 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 operations.

4. Under the Merger Agreement, Entergy, the parent of GSU and EOI, will not be responsible for funding EOI's operation of River Bend if GSU ceases to fund EOI.

Id.

One portion of the relief Cajun is seeking is a condition on the NRC's approval of the license amendments which provides that Entergy will guarantee GSU's obligations in the event GSU is unable to provide sufficient funds to EOI for the safe operation of River Bend as might occur if GSU goes bankrupt. On cross-examination at a hearing on the merger before the Federal Energy Regulatory Commission, both Edwin A. Lupberger, the Chief Executive Officer of Entergy, and Donald C. Hintz, the Chief Executive Officer of EOI, stated that Entergy would shut down River Bend if GSU declared bankruptcy.

Historically, River Bend has both extremely high operations and maintenance ("O&M") costs and low Systematic Assessment of Licensee Performance ("SALP") scores (an average rating of 2.5 for May 1994). In 1994, there were numerous notices of violations issued at River Bend, culminating in an unplanned outage in September 1994 which kept the facility off-line for several weeks.

GSU filed its Motion for Summary Disposition on January 9, 1995. Preliminarily, GSU purports to admit as facts the bases for Cajun's contention (for the purposes of its motion only), including that GSU may be "unable to make sufficient payments to EOI for continued safe operations." Of course, as argued herein, GSU's admission leaves only the question of appropriate remedy. GSU argues, inter alia, that the bankruptcy court will provide sufficient funds, as if this makes an NRC license condition moot.

Although GSU purports to accept Cajun's asserted facts as true for purposes of the motion, in the course of arguing its motion, GSU assumes certain other facts are uncontested. As

discussed in the body of Cajun's Answer, GSU is mistaken in so assuming. There are material facts at issue concerning the funding necessary to safely operate River Bend or maintain it in a shutdown condition. Because there is a genuine dispute about material facts, there must be a hearing to determine what the facts are, and whether license conditions are appropriate.

In any event, GSU's motion must denied be for no other reason than that summary disposition is not appropriate where, as here, there are important issues related to the safety of a nuclear facility.

II. THE COMMISSION STANDARD FOR SUMMARY DISPOSITION

A. There Must Be No Material Fact At Issue

The Commission's Rules of Practice permit a party to move for a decision in that party's favor if "there is no genuine issue as to any material fact and the moving party is entitled to a decision as a matter of law." 10 C.F.R. § 2.749(d) (1994).

The Commission has held that Section 2.749 is "[s]imilar to its judicial counterpart, Rule 56 of the Federal Rules of Civil Procedure, [in that] the proponent of a motion for summary disposition carries the burden of demonstrating the absence of genuine issues of material fact to litigate." Sequoyah Fuels Corp. and General Atomics Corp., LBP-94-17, 39 N.R.C. 359, 361 (1994) (citation omitted); see Sacramento Municipal Utility District (Rancho Seco), LBP-93-23, 38 N.R.C. 200, 239 (1993); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-554, 10 N.R.C. 15, 20 n.17 (1979); Alabama Power Co. (Joseph M. Farley Nuclear Power Plant, Units 1 and 2), ALAB-182, 7 A.E.C. 210, 217 (1974).

At this stage, the "Board's function, based on the filings and supporting material, is simply to determine whether genuine issues exist between the parties. It has no role here to decide or resolve such issues." Sequoyah Fuels Corp. and General Atomics Corp., LBP-94-17, 39 N.R.C. 359, 361 (1994) citing Weiss v. Kay Jewelry Stores, Inc., 470 F.2d 1259, 1261-62 (D.C. Cir. 1972); see American Manufacturers Mutual Ins. Co. v. American Broadcasting - Paramount Theatres, Inc., 388 F.2d 272, 279 (2d Cir. 1967)(the role of the court on motion for summary judgment is not to "try issues of fact; it can only determine whether there are issues to be tried").

"A material fact is one that may affect the outcome of the litigation." Public Service Co. of New Hampshire, et al. (Seabrook Station, Units 1 and 2), 32 NRC 433, 436 (1990) citing Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620, 624 (9th Cir. 1977). For a material fact to be in dispute, "[t]he opposing party need not show that it would prevail on the factual issues, but only that there are such issues to be tried." Id. at 437, citing Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-77-45, 6 N.R.C. 159, 163 (1977).

> [T]he law provides no magical talisman or compass that will serve as an unerring guide to determine when a material issue of fact is presented. As is so often true in the law, this is a matter of informed and properly reasoned judgment.

388 F.2d at 279.

8 B. The Strict Standard for Summary Disposition

There are guideposts that provide a strict standard for the Board's analysis of whether a material issue of fact is in dispute. First, Section 2.749 requires GSU, as the moving party, to provide a "statement of the material facts as to which the moving party contends that there is no genuine issue to be heard." 10 C.F.R. § 2.749(a) (1994). In reviewing this Motion, GSU's contentions are to be closely scrutinized while Cajun's opposition is to be indulgently treated in determining whether movant has satisfied its burden. See 6 J. Moore, Federal Practice ¶ 56.15(3) p. 56-258 (2d Ed. 1994).

Second, the Board must hold GSU to a strict standard. Not only must GSU bear the burden of proof on this motion, 10 C.F.R. § 2.732, under Section 2.749, as the proponent of the motion, "[t]he party seeking summary judgment has the [further] burden of proving the absence of genuine issues of material fact." In the Matter of Cameo Diagnostic Centre, Inc., LBP 94-34 (1994) citing Advanced Medical Systems, Inc., CLI 93-22, 38 N.R.C. 98, 102 (1993); see Cleveland Electric Illuminating Co. (Perry Nuclear Power Plants, Units 1 and 2), ALAB-443, 6 N.R.C. 741, 753-54 (1977). The Commission has stated that "[t]o meet this burden, the movant must eliminate any real doubt as to the existence of any genuine issue of material fact." Public Service of New Hampshire, et al. (Seabrook Station Units 1 and 2), LBP-89-09, 29 N.R.C. 271, 273 (1989) citing Louisiana Power & Light Co., (Waterford Steam Electric Station, Unit 3), LBP-81-48, 14 N.R.C. 877, 883 (1981); Cleveland Electric Illuminating Co.

(Perry Nuclear Power Plants, Units 1 and 2), ALAB-443, 6 N.R.C. 741, 753-54 (1977). GSU must prove that "it is quite clear" what the truth is and that GSU's proof excludes any real doubt as to the existence of any genuine issue of material fact. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 154 (1970); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944).

Third, "since the burden of proof is on the proponent of the motion, the evidence submitted must be construed in favor of the party in opposition thereto, who receives the benefit of any favorable inferences that can be drawn." Sequoyah Fuels Corporation and General Atomics Corp., LBP-94-17, 39 N.R.C. 359, 361 (1994) citing 10A Charles A. Wright, et al., Federal Practice and Procedure § 2727 (2d ed. 1983); see Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962) ("look at the record on summary judgment in the light most favorable to . . . the party opposing the motion"). The fact that the Board is not entitled to adjudicate genuine, factual issues at this stage of the proceeding, further explains that the Board is to draw all inferences for Cajun. See National Ass'n of Gov't Employees v. Campbell, 593 F.2d 1023, 1029-30 (D.C. Cir. 1978). Where the Board is presented with a choice of inferences to be drawn from the facts, the inferences drawn must be in favor of Cajun, the party opposing the motion. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Fourth, since "dismissal motions . . . are not generally viewed favorably by the courts, all factual allegations of the complaint are to be considered true and to be read in a light most favorable to the non-moving party." Sequoyah Fuels

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66 citing 5A Wright & Miller, Federal Practice and Procedure § 1357 (2d ed. 1990); see Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 A.E.C. 877, 897 (1974); Dairyland Power Cooperative, (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982).

C. GSU Must Not Be Entitled to Summary Disposition in its Favor As a Matter of Law and Policy

At the threshold, GSU must prove that it is entitled to judgment as a matter of law. See 10 C.F.R. § 2.749(a); National Ass'n of Gov't Employees v. Campbell, 593 F.2d 1023, 1027 (D.C. Cir. 1978). To prevail on its motion for summary disposition, it is not enough for GSU to establish that no material issues of fact are in dispute. GSU must further prove that the facts entitle GSU to judgment as a matter of law. See Weinberg v. Hynson Westcott & Dunning, 412 U.S. 609, 622 (1973); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); 6 J. Moore, Federal Practice, ¶ 56.15(e3), p. 56-250 (2d Ed. 1994).

Even if GSU establishes that there are no material issues of fact and that it is entitled to judgment as a matter of law, propositions which Cajun strenuously dispute, summary judgment is not well-adapted to a case such as this involving a significant public health and safety issue. See James W. Moore, 6 Federal Practice ¶ 56.15[1.-0]("seldom will a summary judgment be proper in a case involving large public issues"). "[I]n an operating license proceeding, where significant health and safety or environmental issues are involved, the Licensing Board should only grant summary disposition if it is convinced that the public

health and safety and environment will be satisfactorily protected." Public Service Co. of New Hampshire, et al. (Seabrook Station, Units 1 and 2), 32 N.R.C. 433, 437 (1990) citing Cincinnati Gas & Electric Co., et al. (William H. Zimmer Nuclear Station, LBP-81-2, 13 N.R.C. 36, 40-41 (1981).

At this stage of the proceeding, the Board has not heard Cajun's evidence and should not summarily conclude that the determination of the truth with respect to this health and safely issue does not warrant a full evidentiary hearing.

III. GSU, AS THE MOVING PARTY, HAS FAILED TO MEET ITS BURDEN OF DEMONSTRATING THE ABSENCE OF A GENUINE ISSUE OF MATERIAL FACT

While Cajun responds below to the GSU Motion, Cajun submits here that it need not do so where the defects in GSU's pleadings make it unnecessary for such response. Where movant's papers are insufficient to satisfy its burden, opponent need not respond or proffer evidence to defeat the motion. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 161 (1972). The Board is presented with such a motion for summary disposition in this proceeding. GSU has stated that it agrees, "for the purposes of this motion," that it is unable to fund the safe operation of River Bend" but fails to recognize that that is the end of the story. GSU's only contention is not that the premises of Cajun's position are incorrect, but only that it does find acceptable at this time Cajun's remedy that Entergy guarantee GSU's obligations. GSU has failed in its burden to establish the absence of material facts in dispute. In these circumstances, it is unnecessary for Cajun to respond or otherwise come forward

with evidence to defeat the motion. The motion simply fails of its own weight.

Cajun submits that GSU has not met its burden of burden of proving that all material facts are not in dispute or, as the Commission has stated its burden, "eliminating" any genuine issue of material fact. Public Service Co. of New Hampshire, et al. (Seabrook Units 1 and 2), LBP-89-09, 29 N.R.C. 271 (1989) citing Louisiana Power & Light Co., (Waterford Steam Electric Station, Unit 3), LBP-81-48, 14 NRC 877, 883 (1981); see also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plants, Units 1 and 2), ALAB-443, 6 N.R.C. 741, 753-54 (1977).

GSU failed to address numerous material issues of fact in its both its Statement and its Motion, and its failure in this respect is one of omission. The GSU Statement and the GSU Motion also failed to prove that certain material facts that it did address are not in dispute. This section will address the genuine issues of material fact that are in dispute with reference both to those material facts that GSU ignores and those that GSU address but fails to dispel the existence of a genuine issue.

A. GSU Ignores Material Facts That are the Subject of Genuine Issues of Dispute

GSU listed six material facts in the GSU Statement that it alleged were not the subject of a genuine issue. It failed, however, to list in the GSU Statement all of the material facts in this case that are the subject of a genuine dispute.

First, the GSU Statement fails to prove that there is an adequate source of EOI funding for River Bend operations if an

adverse determination occurred in the River Bend litigation that made GSU incapable of providing sufficient funding to EOI for continued safe plant operations. See GSU Motion at 8. GSU concedes that it is the only source of funding for EOI's River Bend operations (see GSU Statement, Fact 2.). GSU also concedes that, "[l]osses could render GSU unable to make sufficient funding to EOI for continued safe plant operations." See GSU Motion at 8. A material fact in dispute is the source of funding for EOI to fulfill its River Bend License obligations if GSU is unable to provide funding. However, GSU fails to make a basis for a finding that there is not a dispute. It does not even allege, let alone prove, the adequacy or the source of funding in such circumstances.

Second, the GSU Statement fails to prove that a bankruptcy court is obligated to allow GSU to provide sufficient funding to allow EOI to meet the terms of the River Bend license. The Board has previously recognized that "Gulf States' officials have conceded the potential for bankruptcy to Gulf States from pending litigation." See 39 N.R.C. at 39. GSU further concedes that it "faces severe financial exposure from litigation with Cajun and from Texas regulatory proceedings." See GSU Motion at 8. Although GSU asserts that EOI could carry out its license responsibilities in the event of a GSU bankruptcy, see GSU Motion at 9, it fails to include a statement that demonstrates that a bankruptcy court must provide the necessary funds to safely operate River Bend. GSU's reliance on the experience of two electric utilities under Chapter 11 bankruptcies (reorganization), does not prove the absence of a genuine issue

as to this material fact. See GSU Statement at 1-2 (Material fact number 5). GSU fails to demonstrate that GSU would receive the same treatment related to funding for safe operation. These two cases provide no guarantee that funds would be available. See In the Matter of All Chemical Isotope Enrichment, Inc., 32 N.R.C. 30 (1993) (summary disposition granted on issue of financial qualifications where licensee is bankrupt).

Moreover, GSU's allegations respecting funding for operations in bankruptcy does not address the material issue of funding for shutdown or decommissioning. See GSU Statement at 1. Although GSU states that "River Bend will be safely shut down and maintained in a safe condition[,]" GSU's proffer with respect to bankruptcy only addresses the sufficiency of funding "to safely operate the facility." See GSU Statement at 2. GSU has failed to adduce any evidence that a bankruptcy court would or could guarantee sufficient funding for either safe shutdown or decommissioning.

Third, the GSU Statement fails to provide any evidence to allow the Board to make a finding as to the source of funding for EOI operations "in the event such funds are not available [and EOI determines that] River Bend will be safely shut down and maintained in a safe condition." See GSU Statement at 2. GSU failed to identify the level of costs associated with such a shutdown and with maintaining the facility in a safe condition. It also failed to identify the source of funding for EOI in such circumstances. Since the premise for the shutdown is the absence of adequate funds, the availability of adequate funds to shut down and maintain River Bend in a safe condition is similarly a

material fact. GSU, however, offered no fact, contested or uncontested, that would demonstrate the availability of sufficient funds to EOI for shutdown and decommissioning

The Board previously found that a genuine issue of fact exists as to EOI's source of funding if GSU is unable to provide funding. See January Order at 19-20. GSU has provided no facts, affidavits or evidence that would demonstrate adequate funding for EOI in the event GSU is unable to provide that funding.

Fourth, the GSU Statement fails to provide any facts for GSU's assertion that NRC regulation guarantees that an absence of sufficient funding will not affect the safe operation of a nuclear power plant. See GSU Motion at 28-29. The GSU Motion relies on the Commission's inspection program and regulations to overcome any funding shortfall to ensure plant safety. Yet, the GSU Statement does not even identify this as a material fact. The Board previously considered and rejected GSU's argument that "a lack of funding could not adversely affect plant safety." See 39 N.R.C. at 39. GSU has provided no affidavits or other evidence that would allow the Board to reach a different conclusion at this juncture of the hearing.

The GSU Motion contends that NRC regulation will "Assure Protection of Public Health and Safety." See GSU Motion at 22. However, GSU's proffer fails to address the fact that the NRC 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." See 39 N.R.C. at 39, citing 10 C.F.R. § 50.33(f) (1993). Since all inferences are to be drawn for the party

opposing the motion, Cajun is entitled to the inference that Section 50.33(f) provides an independent mechanism for ensuring safe plant operations by requiring adequate funding for such operations. This inference compels the rejection of GSU's alleged fact that the Commission does not rely on the financial qualifications of a non-utility applicant to protect public health and safety.

GSU has failed to show how any order of the NRC will yield funds for River Bend operations. If GSU does not provide funding to EOI and if Entergy does not guarantee GSU's obligations, there is a question of fact as to how NRC regulation would produce the necessary funding for safe operation, maintenance of a safe shutdown condition, and decommissioning of River Bend.

Fifth, the GSU Statement fails to provide any facts that would allow the Board to find that there would be sufficient funding for decommissioning in the event of an adverse determination in the River Bend litigation or if GSU were in bankruptcy.

These five material facts are not addressed in the GSU Statement. While Section 2.749 requires the movant's statement to be short and concise, the statement is defective if it fails to identify material facts that are in dispute. See National Ass'n of Gov't Employees v. Campbell, 593 F.2d 1023, 1027 (D.C. Cir 1978). GSU has known at least since August 31, 1993, that the sufficiency of funds for EOI to meet its license obligations was a central issue in this proceeding. See "Cajun Electric Power Cooperative, Inc.'s, Amendment and Supplement to Petition

for Leave to Intervene, Comments and Request for Hearing and Conditions," Docket No. 50-458, August 31, 1993. In the January 27, 1994 Memorandum and Order by the Board, the alleged under-funding of EOI was identified as a central issue in this proceeding. See In the Matter of Gulf States Utilities Company, et al. (River Bend Station, Unit 1), LBP-94-3, Docket No. 50-458-OLA, at 12, 13, 14. GSU has not provided a basis for finding that the availability of funds for EOI's operation of River Bend is not a material fact or is not a material fact that is in genuine dispute.

GSU's failure to establish that these material facts are not genuine issues in dispute is fatal to the GSU Motion. Standing alone, this warrants a ruling for Cajun.

B. The GSU Motion Also Ignores Material Facts That are the Subject of Genuine Issues of Dispute

The GSU Motion repeats the same fatal defects just identified with respect to the GSU Statement. For those material facts that GSU either did not identify or did not prove to be beyond genuine dispute, Cajun incorporates its arguments by reference for the purpose of addressing the same flaws in the GSU Motion.

The GSU Motion states that bankruptcy laws "assure that sufficient funds are available for safe . . . shutdown." GSU Motion at 30. The two examples of bankrupt electric utility licensees provided by GSU did not involve plant shutdown. See Id. GSU provides no basis for finding that the Bankruptcy Code requires the bankruptcy court to "assure" sufficient funds for shutdown or decommissioning costs.

Bankruptcy can leave a licensee unable to perform the licensed activity. The Atomic Safety And Licensing Board found that such a scenario rendered the licensee "not financially qualified to conduct the licensed activity. . ." and granted summary disposition to the Staff. In the Matter of All Chemical Isotope Enrichment, Inc., 32 NRC 30 (1990) ("All Chemical"). In All Chemical, the licensee filed for reorganization, which was converted to a proceeding under Chapter 7 of the Bankruptcy Code. The Board held that the licensee was not financially qualified to conduct licensed activities. The Board must consider EOI's source of funding and ultimately its qualifications to hold a license since its only source of funding is a utility that faces the possibility of bankruptcy. Furthermore, Cajun affiant John M. Griffin testifies that the courts have never ruled on the extent to which funds will be provided to shut down a nuclear facility. See Affidavit of John M. Griffin, attached as Attachment B, at 5.

GSU has failed to provide a basis for stating that a bankruptcy court will provide adequate funds for shutdown. GSU's failure to establish this as a material fact not in dispute, taken in conjunciton with the testimony of Mr. Griffin, warrants a different conclusion. The Board must find for Cajun on this issue, or find that there is a material issue of fact with respect to the availability of funds for shutdown and decommissioning by licensee that is solely dependent upon a bankrupt utility for funding.

Since the GSU Motion does not prove the absence of a genuine issue with respect to material issues of fact, the Board

need look no further than the failure of GSU to meet its burden to resolve this motion.

IV. CAJUN HAS DEMONSTRATED MATERIAL ISSUES OF FACT THAT ARE IN DISPUTE

If the Board does not deny GSU's motion on the grounds that GSU failed to eliminate all disputes about material facts, then GSU's Motion for Summary Disposition must be denied because there are genuine issues of material fact between the parties. That there are material issues of fact which must be tried at a hearing is demonstrated by this section of Cajun's Response and by the two attached affidavits of Messrs. Werner T. Ullrich and John M. Griffin. See Affidavits of Werner T. Ullrich and John M. Griffin, attached as Attachments A and B, respectively. The two affidavits are summarized and incorporated herein by reference. Because there are genuine issues of material fact under the standard of Section 2.749(d), GSU's motion must be dismissed.

A. Relevant Recent History of Safety Performance at River Bend

To place GSU's Motion for Summary Disposition and the two license amendments in context, it is necessary to briefly review the relevant recent history of safety performance at River Bend.[1/] The NRC's SALP Reports indicate a declining safety performance at River Bend for the period from April 1, 1991, to January 29, 1994. The SALP ratings reported by the Commission averaged 1.67 in 1991, 1.89 in 1992, and 2.50 in 1994. See Attachment A, ¶ 12. The Commission Staff has determined that:

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1/ The term "safety performance" is used by Cajun in the same context as used in NRC Directive 8.6, SALP Policy and Objectives.

> the reasons for this overall decline in performance have been the lack of clear management expectations, oversight, and control of plant activities. In addition, management's willingness to live with degraded hardware and equipment problems contributed to the willingness of operators to work around problems. This attitude resulted in frustration of the operations staff when questioning and aggressively pursuing potential plant issues and has resulted in an ineffective corrective action program. In addition, engineering's poor support to other organizations contributed to the untimely resolution of emergent issues and equipment problems.

Id., quoting March 8, 1994 SALP Report. Safety performance has been declining at River Bend to the point where it is only marginally acceptable to the NRC. A marginally acceptable SALP rating of 2.5 followed by a significant operational event or violation of NRC regulations, would result in River Bend being placed on the NRC's problem plant list or being shut down. See id. at ¶ 16.

Mr. Ullrich testifies that, while safety performance has been declining at River Bend, funding for safety performance has been at continued high levels, as measured by O&M funding (without fuel) expense. The average River Bend O&M funding without fuel during the last five years (1989 to 1993 in 1993 dollars) was $143 million per year. See id. at ¶ 13. By comparison, funding at a facility similar in size and design to River Bend (Clinton) during this same period was $105 million per year, $38 million dollars per year less than the funding at River Bend. Meanwhile, Clinton's SALP ratings improved steadily from 1990 (2.00) to 1993 (1.33). Id. Based on these funding comparisons, the deteriorating performance at River Bend prior to

1994 was not caused by inadequate O&M budgets. Rather, higher funding related to safety performance has been required just to maintain marginal performance at River Bend.

The performance of River Bend was an issue in the acquisition of GSU by Entergy, which merger was consummated on December 31, 1993. As EOI's counsel revealed at the prehearing conference convened on October 4, 1994:

> As the company got closer to the merger, and River Bend started experiencing some operating problems, I think [GSU] was somewhat concerned that the operation of the facility could jeopardize the merger. At that point, Entergy became more involved in the day-to-day operation of the plant.

Tr. 28, lines 11-16. The "operating problems" referenced by counsel led to GSU's stop work directive in August 1993 for all activities in maintenance, operations, and engineering because of "human performance" problems. It was at this point, the period from September 1, 1993 through December 31, 1993, that Entergy (through EOI) "became more involved in the day-to-day operation of the plant."[2/] Id.

Based on the declining performance at River Bend, aggressive remedial action by Entergy was required to avoid an NRC shutdown order and improve River Bend's safety performance. See Attachment A, ¶ 14. The actions taken by EOI included the development and completion of the River Bend Near-Term Performance Improvement Plan ("NTPIP") and the development and

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2/ These are the issues, in this time period, that are the subject of Cajun's still-pending motion to compel discovery, dated November 7, 1994.

implementation of the three-year Long-Term Performance Improvement Plan ("LTPIP").[3/]

The results have been mixed. As Mr. Griffin testifies, there were numerous notices of violations issued in 1994, the proposed imposition of civil penalties (two are for amounts equal to or greater than $100,000), and a scram in September, 1994 that kept River Bend off-line for several weeks. See Attachment B, ¶ 17. Nonetheless, River Bend was not placed on the NRC problem plant list in 1994, which likely would have occurred had not the operation of the facility been transferred to Entergy. See Attachment A, ¶ 16.

The cost has been high. The 1994 O&M (excluding fuel) expenditures for River Bend apparently exceeded the original budget by approximately 20 percent as a result of the implementation of the NTPIP and LTPIP and the events of 1994. As a consequence, Cajun notified GSU on October 21, 1994 that it was suspending payment of most O&M funding for River Bend for the balance of 1994. See attachment to November 1, 1994 letter from GSU to the Board.

Additionally, on December 21, 1994, Cajun was itself forced to seek the protection of the bankruptcy laws. See attachment to December 23, 1994 letter from Cajun to the Board. This action followed a December 15, 1994 order of the Louisiana Public Service Commission that Cajun reduce its rates. The rate reduction order is premised in large part on the Louisiana

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3/ The development and implementation of the NTPIP and LTPIP are at the heart of Cajun's still pending November 7, 1994 motion to compel discovery. See previous footnote.

Commission's finding that Cajun's participation in River Bend was imprudent.

B. Cajun's Affiants are Competent to Testify On the Issues in Dispute

As a threshold matter is noted that Cajun's affiants are competent to present facts and expert opinions on the matters expressed in their respective affidavits.

Mr. Werner T. Ullrich is a Senior Management Consultant with United Energy Services Corporation ("UESC"). UESC is a nationwide management consulting firm which specializes in commercial nuclear and Department of Energy ("DOE") complex engagements providing operational, engineering and management consulting support. Mr. Ullrich earned a Bachelor of Science degree in Electrical Engineering from Drexel University in 1957, and completed a nuclear engineering course and graduate level courses in atomic physics, electrical engineering and advanced mathematics.

Mr. Ullrich joined PECO Energy Company in 1957 and worked in various engineering and management positions until 1990. See Affidavit of Mr. Ullrich, Attachment A, ¶ 3. From 1971 to 1983, he was Station Superintendent (or Plant Manager) for the Peach Bottom Atomic Power Station. As Station Superintendent, he was responsible for the safe and reliable operation of the facility, including operations, maintenance, radiological protection, chemistry, security, budget and staffing. He was also the principle interface with the NRC inspectors and corporate engineering and quality organizations. Between 1983 and 1990, he held various corporate and Limerick

Station line and support management positions related to the start-up of Limerick Unit 2 and operation of both Peach Bottom and Limerick. Id. He has also been employed with the Tennessee Valley Authority as Field Services Manager for the restart of Browns Ferry Unit 3.

Mr. Ullrich testifies on the relationship of reduced nuclear plant O&M expenditures to a plant's safety performance. Based on his analysis of industry data and his personal experience he testifies that reduced O&M funding (excluding fuel) of a nuclear plant over a period of years will cause a reduction in the plant's safety performance. Id. at ¶ 5. Furthermore, 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.

Mr. Ullrich also testifies that, if a decision is made to permanently shut down and decommission the plant, significant funds are still needed to maintain the plant in a safe shutdown condition until full decommissioning is completed. Id. at ¶ 6. Recent industry experience has shown that the cost of totally decommissioning a facility is significantly more than the decommissioning costs estimated in accordance with NRC guidelines.

Cajun second affiant is John M. Griffin, President of United Energy Services Corporation. Mr. Griffin earned a Bachelor of Science Degree in Naval Science from the United States Naval Academy in 1967. See Attachment B, ¶ 2. While serving as an officer in the United States Navy, he completed the Nuclear Propulsion Training Program. 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.

In 1973 Mr. Griffin joined Carolina Power and Light Company as a Start-Up Manager for the Brunswick units. In 1976, he became the Assistant Manager of Nuclear Operations at the New York Power Authority, where he supervised and provided direction to the corporate staff responsible for providing support for two nuclear sites, in the areas of operations, maintenance, performance, radiological controls, training, and in-service inspection.

In 1978, Mr. Griffin joined Arkansas Power and Light Company ("APL"), an affiliated company of Entergy, as Manager of Nuclear Operations for Arkansas Nuclear One ("ANO"). Id. at ¶ 3. In 1984, he became Senior Vice President, Generation, Transmission and Engineering for APL. He was responsible for production and transmission facilities, including the two nuclear units at ANO, four coal units, fifteen gas units, and two hydro facilities.

Since 1988, Mr. Griffin has provided consulting and support services to the utility industry in the areas of strategic maintenance, operations, outage management, performance and business enhancement, strategic process management, risk assessment and nuclear safety services, licensing and regulatory support, materials management, and plant life extension. In 1994, he joined UESC as President.

In his affidavit, Mr. Griffin testifies how River Bend's past performance has necessitated an elevated level of O&M

expenditures and that these expenditures will continue to be required for several years in order to safely operate the units and to effect the necessary changes at the station to improve future performance. Id. at 8. He also discusses the need for adequate funding to maintain a nuclear facility in a safe shutdown condition and to effect a transition to some form of decommissioned status.

Mr. Griffin further testifies that while GSU and EOI have stated that should adequate funds not be available due to GSU bankruptcy, they would pursue additional funding through the regulatory process or the courts, this pursuit will be lengthy. Even after the lengthy process there is no guarantee that adequate funding for the safe operation or shutdown of River Bend will be provided. Id. at ¶ 9. His conclusion is that given these uncertainties and the continuing need for adequate funding during the potentially lengthy process, that it is reasonable for the NRC to require Entergy Corporation, the parent of both GSU and EOI, to guarantee their obligations.

C. Reduced Funding of River Bend Operations Will Impair River Bend's Safety Performance

As noted above, while GSU has admitted, in one place, as it must, that for purposes of the motion, GSU will be unable to fund safe operations at River Bend in the event of a GSU bankruptcy or a determination adverse to GSU in the Cajun litigation, it states in another place that:

> Entergy Operations would continue to carry out this responsibility [for safely operating River Bend at all times] in the event of a determination adverse to Gulf States in the River Bend litigation or the bankruptcy of Gulf States.

See GSU Motion at 9. While this is contradictory, and GSU's motion must be denied on that basis alone, it is useful to review why reduced O&M funding at River Bend will impair the safe operation of the facility. Indeed, given the massive amounts of O&M funding required, it is not clear that GSU can fund the safe operation of River Bend, even in the absence of a determination adverse to GSU in the River Bend litigation or the bankruptcy of GSU.

As Mr. Ullrich states, a plant's O&M budget has a significant impact on the plant's ability to maintain it's safety performance. Attachment A, ¶ 8. Adequate funding is required to meet regulatory requirements and industry standards of excellence. Reduced funding generally results in reduction of the variable costs that are more easily controllable by the plant management. In most cases, this impacts administrative and engineering staffing and workload; limits the amount of internal or external services purchased; and extends time schedules for implementation or completion of costly corrective actions, mandated NRC studies and programs, and discretionary preventive and corrective maintenance. It may also impact discretionary training for the plant staff.

Moreover, reduction of O&M funding also stimulates middle management to look for departmental activities that can be eliminated or curtailed without immediate detrimental effects. When staff reductions are initiated due to budget limitations, reductions initially impact the training department, quality assurance organizations, administrative staff, and support staff such as security and technical support. 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.

With regard to River Bend, one of the stated goals of the LTPIP is to reduce the three-year average production costs (which include fuel costs) from 41.7 mills/KwHr in 1994, to 26.6 mills/KwHr in 1996. These numbers must be compared to the River Bend 1991 through 1993 three year average production costs of 48.38 mills per KwHr. To achieve the 26.6 mills/KwHr goal, the River Bend capacity factors will have to be near the industry average (72% during the 1991 through 1993 three year period) and the O&M without fuel funding will have to decrease significantly. Only if the LTPIP achieves the desired improvements in the performance of the plant staff and equipment will the planned reduction in funding (reductions in staffing and support services) not result in a decline in the safety performance of the facility. If the LTPIP is unsuccessful or ineffective even in a few areas, O&M funding will continue at relatively high levels and River Bend's marginal safety performance will not improve and may decline.

GSU has contended that:

> Gulf States anticipates that no specific actions would be taken other than the usual and normal operation and maintenance of the plant.

See GSU Motion at 10.[4/] To the contrary, Cajun affiant Mr. Griffin has testified that:

> In light of River Bend's operating history briefly discussed earlier, it is not credible that "no specific actions would be taken other that the usual and normal operation and maintenance of the plant" if GSU goes bankrupt. Even in the best of situations, today's regulatory, competition and corporate pressures are forcing the nuclear industry to change the way business is conducted.

Attachment B, ¶ 30.

The NRC has expressed concerns regarding the decline of the safety performance at River Bend. Entergy is presently increasing expenditures, through GSU, to implement the performance improvement plan at River Bend. O&M funding levels for River Bend, which have consistently been high ($143 million per year on average) will probably increase further before they have any hope of returning to a level near $120 million per year, assuming GSU has adequate funding and assuming the LTPIP is successfully completed.[5/] If this level of funding is not available, the River Bend safety performance will not improve or will again decline.

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4/ See also, "GSU has sufficient financial resources to assure that the River Bend Station will be operated safely even were there adverse decisions in the pending litigation . . . ." See GSU Motion at 27. To the contrary, it is not even clear that GSU has sufficient financial resources to assure that the River Bend Station will be operated safely even absent adverse decisions in the pending litigation.

5/ Therefore, it is a disputed issue as to whether GSU statement is correct that "[a]s long as funds were available to continue the safe operation of River Bend, and Gulf State anticipates they would be. . . ." (emphasis supplied). In Cajun's view, this period may not be very long.

Cajun clearly disputes what GSU calls an "uncontroverted" fact, namely that:

> There is no reason to expect that a determination adverse to GSU in the River Bend litigation or the bankruptcy of GSU would prevent GSU and Cajun from carrying out the responsibilities to provide the funds necessary to safely operate River Bend.

See GSU Motion at 10-11. To the contrary, in Messrs. Ullrich and Griffin's opinions, high levels of GSU funding will have to continue if Entergy wishes to complete the Long Term Performance Improvement Plan as scheduled. See Attachment A, ¶ 23; Attachment B, ¶ 28. If this funding is not provided for any reason, the LTPIP will not be successful or will not be completed as scheduled, and River Bend's safety performance will not improve. If the LTPIP is successful, but if O&M funding is reduced to less than about $120 million per year, the plant's safety performance will again decline over a period of years. Declining safety performance increases the potential for the plant to experience a significant safety event and eventually result in a plant shutdown or placement of the plant on the NRC watch list.

Cajun's affidavits establish that reduced O&M funding over a period of time has the potential to create any or all of the declining safety performance associated with poor SALP ratings. This effect can only be magnified if O&M funding is reduced quickly in the event, e.g., of a GSU bankruptcy. If O&M funding decreases for a period of time for any reason, even in the absence of a determination adverse to GSU in the River Bend litigation or the bankruptcy of GSU, the likely result will be

declining safety performance and safety margins and placement of the plant on the NRC's problem plant list. The declining safety performance could also result in a significant operational event or the issuance of an NRC shutdown order.

D. Reduced Funding of River Bend Will Impair Safe Shutdown in the Event River Bend is Shut down

GSU claims that "[i]f a decision were made not to continue the operation of River Bend, it would be safely shut down and maintained in a safe condition." See GSU Motion at 9.[6/] However, it is a disputed issue of material fact whether, in light of reduced O&M funding, it would be possible to safely shut down and maintain River Bend in a shutdown condition. See Affidavit of Mr. Ullrich, Attachment A, ¶ 24; Affidavit of Mr. Griffin, Attachment B, ¶ 20.

In general, the data indicates that significant increases in O&M expenditures are required for plants which are identified by the NRC Senior Managers as problem plants. For these problem plants, even after getting off the problem plant list, O&M funding levels remain at the watch list funding levels for several years.

A management consulting firm recently issued a report based on a survey of utilities which had a plant on the NRC's watch list, and which were asked to estimate the costs incurred "to get off the watch list beyond what would have otherwise been

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6/ GSU makes a similar contention when it claims that:

> Sufficient internal controls are in place to assure that the plant can be operated safely with the funds available or that the plant is placed in a safe shutdown condition. (See GSU Motion at 28).

spent." Attachment A, ¶ 17. The twenty-two capital cost response estimates ranged from $0 to $1.5 billion. The four responses regarding extra person-hours expended ranged from 250,000 to 1,540,000 person-hours. Additional O&M expenditure estimates provided by 20 responses ranged from $40,000 to $200,000,000. Id.

If sufficient funding is not provided to continue the operation of River Bend and the plant is permanently shut down, the plant ceases to generate revenue while continuing to spend funds to maintain the plant's systems and programs as required by the Operating License and Technical Specification. Without planning for such a premature shutdown, it could take one to two years to obtain regulatory relief and a Possession-Only License that permits significant reductions in plant staffing, maintenance, testing, training, programs, and O&M costs. Mr. Ullrich testifies that a plant which is permanently shut down on short notice without adequate planning could spend about $100 million dollars prior to receipt of a Possession-Only License. Id. at ¶ 21.

Therefore, if a decision is made to permanently shut down the plant, costs will continue at significant levels for over one year if planning for a permanent shutdown and decommissioning has not been completed prior to shutdown. Id. at ¶ 25. With these additional costs of a shutdown decision, reduced funding of River Bend will impair safe shutdown in the event the facility is shut down.

E. Reduced Funding of River Bend Will Impair Adequate Decommissioning of River Bend

If it is assumed that GSU may be unable to fund safe operation of River Bend, then a disputed issue is whether reduced funding will impair adequate decommissioning of River Bend. As a starting point, GSU has estimated that its decommissioning costs for River Bend are $382 million in 1990 dollars. At this time, there is $16.0 million in the decommissioning trust fund. See Affidavit of Mr. Griffin, Attachment B, ¶ 24.

Industry experience indicates that it takes over one year to develop a decommissioning plan for a nuclear facility. Decommissioning cannot start until the plan is approved by the NRC. Moreover, decommissioning costs as experienced by plants that have been permanently shut down are higher than the estimated costs generated in accordance with NRC guidelines.

As Mr. Ullrich testifies, the ultimate cost of decommissioning River Bend is very difficult to estimate, since River Bend does not have access to a Low Level Waste burial ground at this time. Attachment A, ¶ 22. Also, expenditures will continue to be incurred since DOE will not be able to accept all the fuel at the site until about the year 2030. In any case, the real total decommissioning costs for River Bend will certainly exceed the $382 million estimated by the GSU 1991 study. Funding the total decommissioning of a nuclear facility will require average funding of at least $20 million per year for about 30 years. Id.

Mr. Ullrich's conclusion is that GSU may not be able to provide the significant long term funding needed to maintain

River Bend in safe operation or support permanent shutdown and decommissioning if there is a determination adverse to GSU in the Cajun litigation. Some other source of funding should be committed to River Bend in the event that GSU is unable to adequately fund the operating, shutdown, or decommissioning cost of River Bend.

F. The Remedy for GSU's Inability to Fund Safe Operations is a License Condition that Entergy Corporation Guarantee GSU's Obligations

GSU's only non-contradictory contention is that Cajun's proposed remedy for the facts admitted by GSU ("only for purposes of this motion"), is not the remedy that GSU and Entergy would propose. Entergy proposes a different remedy: that there be no immediately effective remedy.[7] To the contrary, the appropriate

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7/ GSU claims that:

> [I]t expected that such funds [i.e., to operate River Bend if there were an adverse determination in the River Bend litigation or if GSU were in bankruptcy] could be available through rate relief in the appropriate jurisdictions, existing rates which would not be affected by the adverse determination or bankruptcy, and/or funds released by the bankruptcy court.

See GSU Motion at 10.

> The NRC's treatment of the issue of financial qualifications for electric utilities is dispositive of any assurance that GSU's financial condition, without more, constitutes a health or safety issue.

See id. at 32.

> Clearly, the Commission has adequate means at its disposal to ensure that any financial difficulties or problems

(continued...)

remedy is for the Commission to require as a license condition that Entergy guarantee the legal obligations of GSU and EOI as Mr. Griffin testifies. Attachment B, ¶ 31.

The operating agreements that run only between GSU and EOI do not obligate or require Entergy to provide any funding for the operation of River Bend, and EOI must look to GSU as the sole source of those funds. Id. at ¶ 29. As established in Cajun's affidavits, River Bend has consistently maintained high operating and maintenance costs with load factors that are not equal to the industry average. See Attachment A, ¶¶ 13, 15; Attachment B, ¶¶ 12, 15. The current Near Term and Long Term Performance Improvement Plans at River Bend focus on management effectiveness issues and concerns that potentially will need corporate and non-rate-base funding to complete. As Mr. Griffin testifies, should the Louisiana Public Service Commission find that the root causes of the current River Bend problems and issues were avoidable, the corrective action costs may not be borne by ratepayers. Attachment B, ¶ 29. GSU and EOI will need to have access to alternative operating funds for safe operations of River Bend. Id.

GSU and EOI have stated that should adequate funds not be available due to GSU bankruptcy, they would pursue additional funding through the regulatory process or from the bankruptcy

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7/(...continued)

> experienced by a power reactor licensee -- including GSU -- do not affect the safe operation of that licensee's nuclear facility.

See id. at 28-29).

court. However, there are no provisions by Entergy Corporation to provide funding to EOI and GSU, the licensees at issue, to safely operate the facility should GSU be unable to meet its funding obligations under its agreement with EOI. The potential dependence on the jurisdiction of the bankruptcy court to ensure that the funds necessary are available for safe operation puts the burden of public safety on a third party which is not an expert in nuclear plant decommissioning and safety issues. Id. at ¶ 23.

As Mr. Griffin testifies, in Cajun's "worst case scenario" with GSU bankrupt and financially unable to fund safe operations, the NRC should not rely on the bankruptcy court to approve shutdown funds and decommissioning costs, which cost GSU estimates to be $382.0 million in 1990 dollars, since this will prove to be a more difficult task than the challenges that faced Public Service of New Hampshire or El Paso Electric Company. Id. at ¶ 22. In neither of those cases did the operator seek to shut down the facility.

EOI admittedly is not a utility and does not meet the NRC's financial qualifications test on its own. EOI is responsible for the safe operations of River Bend while working on behalf of a subsidiary company (GSU) under the Entergy Corporation umbrella. The lack of financial capability on the part of EOI leaves it vulnerable to the ability of GSU to fund its operation and subsequent decisions of the Public Service Commission which regulates GSU. Id. at ¶ 26. The purpose of the NRC financial qualifications rule does not permit an admittedly financially unqualified EOI to be added to the Operating license

as the operator with funding supplied solely by an owner which may be unable to fund safe operations of the facility.

While GSU claims it "anticipates" funds would be available for the safe operation of River Bend, it would be prudent for the NRC to condition approval of the license amendments on an Entergy guarantee for GSU's obligations. Id. at ¶ 27. Where licensed subsidiaries are financially troubled, the Commission should require the parent corporation to guarantee the subsidiaries' obligations, according to Mr. Griffin. Id. To return River Bend to acceptable levels of performance or shut the unit down, EOI will require a corporate commitment of support for the necessary resources and funding required for safe operation of River Bend.

Mr. Griffin concludes that, given these uncertainties and the continuing need for adequate funding during the potentially lengthy process of restoration or shutdown, it is reasonable for the NRC to require Entergy Corporation, the parent of both GSU and EOI, to provide this funding until such time as the matter is resolved. Id. at ¶ 31. A determination adverse to GSU in the Cajun litigation, or a GSU bankruptcy would likely prevent GSU from providing the funds necessary to safely operate River Bend.

V. GSU IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW

To prevail on its motion, GSU must show not only that there are no material issues of fact that are subject to genuine dispute, it must also be "entitled to a decision as a matter of law." 10 C.F.R. § 2.749(d) (1994). GSU is not entitled to decision in its favor as a matter of law. Accordingly, even if

the Board could find that there were no material issues that are subject to genuine issues of dispute, GSU is not entitled to judgment as a matter of law and the GSU Motion must be denied. See Weinberg v. Hynson Westcott & Dunning, 412 U.S. 609, 622 (1973); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

The facts that the Board must rely upon to grant summary judgment are those contained in the GSU Statement. The Board cannot find that these facts compel the conclusion that EOI will have adequate funding for River Bend operations. Just as GSU failed to allege sufficient facts to prove the absence of material issues of fact, particularly with respect to the sufficiency of funding for River Bend, the facts that it would have the Board rely upon do not support a judgment for GSU as a matter of law.

GSU's facts establish that "Entergy looks only to Gulf States for the funds needed to operate River Bend." GSU Statement at 1. Its facts also establish that "Gulf States faces the potential for adverse financial conditions as a result of the litigation initiated by Cajun and Texas regulatory procedures." GSU Statement at 1. Finally, GSU establishes that the experience of other bankrupt utilities showed that "adequate funds were made available through the bankruptcy court to safely operate the facility." GSU Statement at 1-2. Even if GSU's facts were to be undisputed, they do not support a judgment for GSU as a matter of law.

These facts do not establish as a matter of law that EOI will receive sufficient funding for the operation, shutdown or decommissioning of River Bend. GSU has not stated any facts

that establish the sufficiency of funding for EOI's River Bend operations prior to, or in absence of, bankruptcy. Further, GSU has not stated any facts that establish the financial qualifications of a non-utility licensee that receives all funding for operation from a bankrupt utility. Since GSU has not stated any facts that establish that a bankruptcy court would provide sufficient funds for shutdown or decommissioning as distinguished from operation. In fact, the GSU Statement and other record evidence would compel a judgment for Cajun. 6 J. Moore, Federal Practice, ¶ 56.12 (2d Ed. 1994).

The GSU Statement, taken as a whole, does not establish, as a matter of law, that judgment should be rendered for GSU. Similarly, the GSU Motion does not support a judgment as a matter of law. The GSU Motion cannot be granted since GSU is not entitled to judgment as a matter of law.

VI. THIS IS NOT AN APPROPRIATE PROCEEDING OR RECORD ON WHICH TO GRANT SUMMARY JUDGMENT FOR GSU

This proceeding presents important issue pertaining to the health and safety associated with the operation of nuclear power plant. The transfer of the River Bend operating license will materially affect the health and safety of the plant and requires the Commission's full and careful inquiry. Issues of this nature and significance militate against granting summary disposition. See Public Service Co. of New Hampshire, et al. (Seabrook Station, Units 1 and 2), 32 N.R.C. 433, 437 (1990) citing Cincinnati Gas & Electric Co., et al. (William H. Zimmer Nuclear Station, LBP-81-2, 13 N.R.C. 36, 40-41 (1981). Accordingly, the Board should deny the GSU Motion even if it

finds that there are no material issues of fact in dispute and that GSU is entitled to judgment as a matter of law, findings that the Board cannot make on this record.

VII. CONCLUSION

Based on the foregoing, Cajun Electric Power Cooperative, Inc., respectfully requests that the Atomic Safety and Licensing Board deny GSU's Motion for Summary Disposition.

Dated: January 23, 1994

Respectfully submitted,

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



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|---|---|---|
| In the Matter of | ) | |
| | ) | |
| GULF STATES UTILITIES | ) | Docket No 50-458-OLA |
| COMPANY, et al. | ) | |
| | ) | |
| (River Bend Station, Unit 1) | ) | |



CERTIFICATE OF SERVICE

I, Thomas L. Rudebusch, hereby certify that on this 23rd day of January, 1995, I served on the following by hand or first class mail, postage pre-paid, copies of the CAJUN ELECTRIC POWER COOPERATIVE, INC.'S, ANSWER IN OPPOSITION TO GULF STATES UTILITIES COMPANY'S MOTION FOR SUMMARY DISPOSITION.

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Administrative Judge
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Attachment A