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June 11, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
GEORGIA POWER COMPANY, ET AL.	)	Docket Nos. 50-424 OL
	)	50-425 OL
(Vogtle Electric Generating Plant, Units 1 and 2)	)	

APPLICANTS' RESPONSE TO CPG'S REQUEST FOR A WAIVER OF 10 C.F.R. § 51.53(c)

I. Introduction

In its "Supplement to Petition for Leave to Intervene and Request for Hearing," filed on April 11, 1984, Petitioner Campaign for a Prosperous Georgia (CPG) proposed a contention, CPG-2, alleging that there is no reasonable assurance that the production capacity of Plant Vogtle will be needed. Applicants, in their "Response to GANE and CPG Supplements to Petitions for Leave to Intervene" (May 7, 1984), opposed the admission of this contention as barred by the Commission's regulations, 10 C.F.R. § 51.53(c). For the same reason, the NRC Staff also opposed the admission of the contention. NRC Staff Response to Supplements to Petitions for Leave to Intervene and Request for Hearing Filed by Georgians Against Nuclear Energy and Campaign for a Prosperous Georgia (May 14, 1984).

Subsequently, CPG acknowledged the bar, but on May 27, 1984 filed a "Request for a Waiver of 10 C.F.R. 51.53(c) Pursuant to 10 C.F.R. 2.758."[1/] During the Special Prehearing Conference on May 30, 1984, CPG submitted further material in support of its Request.[2/]

Applicants continue to oppose the admission of proposed contention CPG-2. CPG has failed to make a prima facie showing of special circumstances that are such that application of 10 C.F.R. § 51.53(c) would not serve the purposes for which it was adopted. Accordingly, CPG's Request for a Waiver should be denied and CGP-2 rejected.

II. Standards for Waiver

The only ground for a petition for waiver of a rule is that there exist special circumstances with respect to the subject of the proceeding which are such that the application of the rule would not serve the purposes for which it was adopted. 10 C.F.R. § 2.758(c). The procedure entails a persuasive, evidentiary showing. Carolina Power & Light Co. (Shearon Harris

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1/ In addition, CPG amended its discussion of CPG-2 to reflect the statements made by Tim Johnson in the affidavit accompanying the request for waiver. CPG Amendment to Supplement to Petition for Leave to Intervene and Request for Hearing, filed May 27, 1984.

2/ To permit Applicants to review this supplemental material, the Board granted Applicants' request that the time period for response to CPG's Request for a Waiver should run from the date of the Special Prehearing Conference. Tr. at 10.

Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 N.R.C. 2069, 2073, 2080 (1982). The petition must be accompanied by an affidavit that identifies the specific aspect of the subject matter of the proceeding as to which application of the rule would not serve its intended purpose, and it must set forth with particularity the special circumstances alleged to justify the waiver. 10 C.F.R. § 2.758(b).

If the presiding officer determines that a prima facie showing has been made, he may certify the matter to the Commission for determination. Otherwise, the petition must be denied. 10 C.F.R. § 2.758(d).

III. The Need for Power Rule and its Rationale

As explained by the Appeal Board in Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-422, 6 N.R.C. 33 (1977), "'[n]eed for power'" is a shorthand expression for the 'benefit' side of the cost-benefit balance which NEPA mandates for a proceeding considering the licensing of a nuclear power plant." Id. at 90. "A nuclear plant's principal benefit is of course the electric power it generates. Hence, absent some 'need for power,' justification for building a facility is problematical." Id., citing Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 N.R.C. 397, 405 (1976). At the construction permit stage, an applicant meets its burden of proving need for power if it

shows "that its projections of demand are reasonable and that additional or replacement capacity is needed to meet that demand." Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 N.R.C. 179, 185 (1979); Energy Research and Development Administration (Clinch River Breeder Reactor Plant), CLI-76-13, 4 N.R.C. 67, 77 (1976); Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 N.R.C. 347, 352-53, 366-67 (1975).

Whether other viable energy sources exist is part of the collateral NEPA inquiry into alternatives. NEPA requires an agency to consider whether there are environmentally preferrable alternatives to a given proposal. 42 U.S.C. § 4332(c)(iii). Thus, if there is a need for power, alternatives to supply that need must be considered. However, if an environmentally preferrable alternative does not exist, there need be no cost-benefit balancing of alternatives. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 N.R.C. 155, 162 (1978). NEPA does not make the NRC responsible for assessing whether a proposed nuclear plant would be the most financially advantageous way for a utility to satisfy its customers' need for power. Id. at 163.

The NRC considers both need for power and alternative energy sources as part of its NEPA analysis at the construction permit stage of nuclear power reactor licensing. 46 Fed. Reg.

39440 (1981); 47 Fed. Reg. 12940 (1982). See Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 N.R.C. 347, 353-72 (1975). As the Commission explained in proposing its need for power/alternative energy source rule:

> The construction permit proceeding is the appropriate forum in the Commission's two step licensing process for resolution of these issues. Prior to the start of construction there has been little environmental disruption at the proposed site and only a relatively small capital investment has been made by the license applicant. Hence, real alternatives to construction and operation of the proposed facility exist, including no additional generating capacity at all if no "need" exists or generation of needed electricity by some non-nuclear energy source.

46 Fed. Reg. 39440 (1981).

The Commission determined, however, that consideration of these issues is not necessary at the operating license stage. As the Commission explained in its proposed rule:

> The situation is significantly different at the operating license stage. This stage of the licensing process is reached only after a finding at the construction permit stage that there existed a need for the power and that on balance, no superior alternative energy sources existed. At the time of the operating license decision, construction related environmental impacts have already occurred at the site and the construction costs have been incurred by the licensee. The facility is essentially completely constructed and ready to operate when the Commission's Atomic Safety and Licensing Board renders its decision on the operating license application.

Operation of a nuclear power plant entails some environmental cost which should be justified under NEPA, by some benefit from plant operation. In all cases to date, and in all foreseeable future cases, there will be some benefit in terms of either meeting increased energy needs or replacing older less economical generating capacity. Experience shows that completed plants are in fact used to their maximum availability for either purpose. Such facilities are not abandoned in favor of some other means of generating electricity. For purposes of this proposed rule the Commission has assumed, conservatively, that the plant is not needed to satisfy increased energy needs, but rather is justified, if at all, as a substitute for other generating capacity.

NEPA also requires the Commission to consider alternatives to the proposed action. This is not to say that need for power and alternative energy source issues previously considered in the construction permit proceeding need be reconsidered at the operating license stage. On the contrary, NEPA does not require the Commission to duplicate at the operating license stage its review of alternatives absent new information or new developments. Calvert Cliffs' Coordinating Committee, Inc. v. A.E.C., 449 F.2d 1109, 1128 (D.C. Cir. 1971). Union of Concerned Scientists v. A.E.C., 499 F.2d 1069, 1079 (D.C. Cir. 1974). In reaching its decision on the issuance of a construction permit, the Commission will have found that, on balance, no superior alternative energy source exists, and that the environmental consequences of the construction and operation of the proposed plant, are small relative to the anticipated benefits. There has never been a finding in a Commission operating license proceeding that a viable environmentally superior alternative to operation of the nuclear facility exists. Therefore, past experience suggests that rarely will an alternative energy source, including use of an existing fossil fired unit as substitute

for the nuclear plant, be found environmentally superior to the nuclear plant.

Unless the nuclear plant has environmental disadvantages in comparison to reasonable alternatives, differences in financial cost do not enter into the NEPA process. But if there are available alternatives which would result in lesser adverse environmental effects, then a cost-benefit analysis would be performed in reaching a licensing decision. Such a decision would, of course, include the possibility of not allowing the operation of the nuclear plant. See Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-458, 7 N.R.C. 155, 161-168 (1976). Hence it is only after an environmentally superior alternative has been identified that economic considerations become relevant. In the specific context of alternative energy source issues in operating license proceedings, the NEPA issue is whether an environmentally superior alternative exists. If one does exist, then economic considerations are considered in the cost-benefit balance and may offset environmental disadvantages.

Reports available to the Commission show that the economic costs of operating completed nuclear power plants have been below the operating costs of other available methods of baseload fossil generation. . . . Therefore, given the apparent economic advantages of the operation of existing nuclear plants, the Commission believes that even an alternative which is shown to be marginally environmentally superior in comparison to operation of a nuclear facility is unlikely to tip the NEPA cost-benefit balance against issuance of operating license.

Based on all of the above, the Commission believes that case-specific need for power and alternative energy source evaluations need not be included in the environmental evaluation for a particular nuclear power plant operating license. An exception

> would be made to this rule if, in a particular case, special circumstances are shown in accordance with 10 C.F.R. 2.758 of the Commission's regulations. Such special circumstances could exist if, for example, it could be shown that nuclear plant operations would entail unexpected and significant adverse environmental impacts or that an environmentally and economically superior alternative existed.

46 Fed. Reg. at 39441 (footnotes omitted).

The Commission reaffirmed these conclusions in its final rule. 47 Fed. Reg. 12940-43 (1982). This rule, 10 C.F.R. § 51.53(c), prohibits a presiding officer from admitting contentions concerning need for power or alternative energy sources in an operating license proceeding.

In summary, while the issues of need for power and alternative energy sources are slightly different, the reason the Commission excluded each from consideration in operating license proceedings is the same; the purpose of the exclusion "is to avoid unnecessary consideration of issues that are not likely to tilt the cost-benefit balance." 47 Fed. Reg. at 12940. With respect to need for power, the premise is that experience has shown that a completed plant is always used to its maximum availability either to meet increased energy needs or to replace older less economical generating capacity. 47 Fed. Reg. at 12940, 12942. With respect to alternative energy sources, the premise is that no viable alternative to a completed plant is likely to exist which could tip the

cost-benefit balance against issuance of the operating license. 47 Fed. Reg. at 12940. It is these premises which CPG must disprove to obtain a waiver of the rule barring admission of need for power and alternative energy source contentions in this operating license proceeding.

IV. CPG's Request for a Waiver

CPG's amended discussion of its contention and the affidavit accompanying the Request for Waiver address need for power and perhaps alternative energy sources. CPG asserts that there is over-capacity. Alternatively, CPG argues that even if additional capacity were needed, there are alternatives to Vogtle.

At the outset, it should be noted that CPG's affiant fails to establish his qualifications, which is necessary to support his averments. Therefore, his statements, particularly those which are opinion or conclusory, are entitled to little if no weight. Cf. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 N.R.C. 397, 408-409 (1976). Accordingly, as a matter of proof, CPG has failed to make a persuasive, prima facie showing in support of its petition.

Even if CPG's failure to establish the qualifications of its affiant is ignored, CPG's petition and supporting affidavit remain patently deficient.

With respect to the need for power, the affidavit of Alfred W. Dahlberg, III is attached. CPG only addresses

Georgia Power Company's past actual territorial energy sales growth rates and past projections of demand which proved different from the annual peak demands actually experienced. It does not address the company's future capacity or energy requirements for the years in which Plant Vogtle will be operational; and CPG fails even to mention the requirements of the other three owners of Plant Vogtle who now own the majority of the plant. CPG does not bother to contend that Plant Vogtle's capacity and associated energy will not be used, but instead registers complaints about the accuracy of past estimates. CPG accordingly fails to make a showing with respect to need for power which is even facially equivalent to that in Duquesne Light Company et al. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 N.R.C. ___, slip op. at 3-16 (January 27, 1984), which addressed future requirements of all the owners of that plant, albeit in a cursory fashion. Nor is there any reason for CPG to make such vague and irrelevant assertions. Georgia Power Company's generation expansion program, including all planned additions, retirements, projected loads, sales, and purchases through 1996 was presented in its last retail rate case, in which CPG participated.

Instead of making any estimate of future power requirements, CPG rests on the obvious observation that load forecasts have changed over the last decade. Changes in forecasts hardly constitute "special circumstances." The Commission promulgated

its need for power rule in 1982 and was certainly aware that the oil crisis and rising energy costs in the 1970s had affected demand forecasts. Moreover, as the Appeal Board indicated in Niagara Mohawk Power Corporation (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 N.R.C. 347, 357 (1975), the question raised by changes in demand forecasts is not whether additional generating capacity will be needed, but when. Therefore, CPG's discussion of whether Vogtle would be needed to meet increased energy needs is inadequate.

CPG also makes no attempt to show that plant Vogtle would not be used to replace older, less economical generating capacity. As Applicants' Operating License Stage Environmental Report demonstrates, the operating costs of Vogtle are less than the operating costs of existing fossil fuel generating capacity. OL-ER, § 8.1.1.4. See also attached affidavit. CPG's failure to demonstrate that Vogtle would not be used to replace this older, less economical operating capacity is fatal to its request for waiver. Duquesne Light Company, et al. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 N.R.C. ____, slip op. at 13 (January 27, 1984).

CPG's petition and affidavit are similarly deficient in their discussion of "alternatives" to Vogtle. CPG points to conservation and solar power. However, conservation is not a true alternative energy source; rather, it is an element of the demand forecasts. Consumers Power Company (Midland Plant,

Units 1 and 2), CLI-74-5, 7 A.E.C. 19, 22-23 (1973). Conservation is a consumer response to price increases and is reflected in the price elasticity of demand. Installation of a residential solar water heating system is but one method by which consumers practice conservation.3/

The Commission explicitly considered conservation in the need for power rulemaking. The Commission concluded:

> If conservation lowers demand, then utility companies take the most expensive operating plants off-line first. Thus a completed nuclear plant would be used as a substitute for less economical generating capacity.

47 Fed. Reg. at 12941. In other words, conservation may reduce the need for increased capacity, but new nuclear generating capacity should still be considered as a replacement for existing fossil fuel generating capacity. CPG's petition and affidavit do not refute this conclusion, and their sketchy allusions to conservation and solar power do not amount to a showing of "special circumstances."

Perhaps CPG is indeed advocating the use of solar power as an "alternative energy source." However, CPG makes no attempt to quantify the amount of generating capacity that might be obviated solar energy.4/ The CPG affidavit makes no attempt to compare

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3/ CPG also mentions, at the end of its Request, cogeneration and home insulation; however, CPG provides no further discussion of these methods of conservation whatsoever.

4/ The letter from the Georgia Solar Coalition, which CPG submitted during the Prehearing Conference, estimates the sav-

(Continued next page)

quantitatively the costs and impact of operating Vogtle with the costs and impacts of implementing such methods of conservation as solar energy, and it therefore fails to make a prima facie showing that this alleged alternative is "viable," "substantially environmentally superior," and might tip the NEPA cost-benefit balance against issuance of the operating license.[5/] See Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), LBP-82-106, 16 N.R.C. 1649, 1665 (1982). Instead, it offers a few superficial comments and the speculative opinion of a lay affiant. CPG has not even approached meeting its burden. See Beaver Valley, LBP-84-6, supra, 19 N.R.C. at ____, slip op. at 14-15.

(Continued)

ings in Btus which a residence might obtain by a solar domestic hot water system. However, it does not indicate how many of these systems could (or are likely to be) installed and over what time frame, nor does it indicate the extent to which increased use of solar power would reduce demand for electricity as opposed to reducing the demand for gas.

5/ CPG makes the irrelevant and conclusory statement, without any factual support, that "a solar water heating system could be installed on every household in Georgia at less cost than the remaining cost of the Vogtle Nuclear Plant." But it is the operating cost of Vogtle compared to the costs of alternatives (including the cost of constructing those alternative sources if they are not presently in existence) that is relevant. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-83-27A, 17 N.R.C. 971 (1983); Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), LBP-82-106, 16 N.R.C. 1649, 1665 (1982); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-95, 16 N.R.C. 1401, 1404 (1982).

V. Conclusion

In conclusion, CPG fails to make a prima facie showing that there is no need for the Vogtle capacity or that there are viable, substantially environmentally superior alternatives that could tip the NEPA cost-benefit balance. In particular, CPG totally fails to address whether Vogtle would be used to replace older, less economical generating capacity. Accordingly, CPG's "Request for a Waiver of 10 C.F.R. 51.53(c) Pursuant to 10 C.F.R. 2.758" should be denied, and CPG-2 should be rejected.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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