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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Morton B. Margulies, Chairman
Gustave A. Linenberger, Jr.
Dr. Oscar H. Paris

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)	December 3, 1985

MEMORANDUM AND ORDER
(Ruling On Joint Intervenors'
Motion For Reconsideration And Other Relief)

Introduction

By motion dated October 28, 1985, Joint Intervenors, Campaign for a Prosperous Georgia and Georgians Against Nuclear Energy, request that the Board reconsider its Memorandum and Order of October 3, 1985 granting Applicants' motion for summary disposition and dismissing Contention 8. That Contention challenged the adequacy of the Quality Assurance Program (QAP) for the Vogtle Electric Generating Plant (VEGP). Alternatively, Joint Intervenors request that the Board grant a continuance in order to provide time for the submission of affidavits of plant workers bearing on the alleged failure of Applicants' QAP. The motion was supported by an affidavit from the Director of the

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Environmental Whistleblower Protection Clinic of Washington, D.C., relating to obtaining affidavits from individuals who have been employed at VEGP.

Applicants filed a response, dated November 12, 1985, to the motion for reconsideration. They request that the motion be denied in its entirety, allegedly because it is unfounded and unsupportable. Applicants submitted two affidavits and ten documents in support of their position.

NRC Staff (Staff) filed a response on November 18, 1985. It asserted that the Board properly granted summary disposition of Contention 8 and that Joint Intervenors' motion for reconsideration or for a continuance should be denied.

For the reasons set forth below, we will deny Joint Intervenors' motion of October 28, 1985.

Contention 8, admitted by the Board on November 5, 1984, alleged Applicants would not provide an adequate QAP for the operation of VEGP as evidenced by deficiencies in areas involving welding activities, concrete testing and placement, procurement practices, storage adequacy and corrective actions. Joint Intervenors contended that the totality of discrepant situations in these areas showed a lack of an adequate QAP and a breakdown of that program, all of which supports the conclusion that there is inadequate assurance that the VEGP will operate in a manner that is not dangerous to the public health and safety.

Applicants' motion for summary disposition of June 24, 1985, supported by affidavits from competent personnel, analyzed in extensive

detail the discovery of the deficiencies put forth by the Joint Intervenors, their nature, how they occurred, their resolution and action taken to prevent reoccurrence. The program elements of the QAP were also detailed.

Staff, in a response dated August 5, 1985, supporting Applicants' motion for summary disposition, based on affidavits from NRC personnel with inspection responsibilities at Vogtle, reviewed the deficiencies raised by Joint Intervenors and found that there had been no breakdown of the QAP in the areas involved and that the QAP is effective.

Joint Intervenors in their response of July 31, 1985 to the motion for summary disposition offered nothing by way of probative facts to counter Applicants' factual review of its QAP program, the extent of the deficiencies, how they were resolved, and the manner in which the QAP program was upgraded. No response was filed to refute the findings of Staff inspection personnel that there were no breakdowns of the QAP program in the five relevant individual areas or in the program as a whole.

Joint Intervenors merely alleged the existence of conflicting material facts. Their major position was that they were in the process of further investigating the matter of the QAP and that they would make their case at the hearing, whatever eventually that case might be. Joint Intervenors provided nothing specific and substantive beyond that already responded to by Applicants and confirmed by Staff. Again, without substantiation, Joint Intervenors further alleged that Applicants, in an improper attempt to circumvent the requirements of

Appendix B to 10 CFR Part 50, as a substitute, instituted a Readiness Review Program (RRP). An affidavit of a competent employee of the Applicant established that RRP was not a substitute for Applicants' QAP but an overlay to that effort serving to increase the confidence of management in the operational readiness of the VEGP. It was undertaken as the result of generic interest by the NRC for means to improve the efficacy of QA efforts throughout the nuclear power industry.

Based upon the undisputed facts of record, the Board concluded that the deficiencies raised by Joint Intervenors, which had been addressed by Applicants and Staff, were not shown to carry any material safety significance with respect to plant operation nor did their totality indicate a pervasive breakdown of Applicants' QAP. The facts established that the QAP not only meets the formal requirements of 10 CFR Part 50, App. B but actually functions in accordance with its intent. From the foregoing, we concluded that Contention 8, which challenged the adequacy of the QAP, was without foundation, and we dismissed it as was requested by Applicants' motion for summary disposition.

The Board's decision is consistent with established Commission legal principles. For there to be an effectively functioning quality assurance program there need not be a demonstration of error-free construction. Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983). It would be unreasonable to expect a quality assurance program to uncover all errors. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-56, 18 NRC

1340, 1345 (1983). Most critical to the Joint Intervenors' case are the precepts that a party opposing a motion for summary disposition may not rely upon a simple denial of material facts or merely contend that they are in dispute, but it must set forth specific facts showing that there is a genuine issue of fact remaining. See Virginia Electric Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 (1980); and a party cannot avoid summary disposition on the basis of guesses or suspicions or on the hope that at the hearing the licensee's evidence may be discredited or that something may turn up. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246, 248 (1975). Joint Intervenors wholly ignored the propositions in the last two cited cases. Applicants met their burden of proof by establishing, without meaningful opposition, the effectiveness of the QAP, which was confirmed by Staff. As a matter of law, Applicants merited summary disposition of Contention 8, having proven it to be without foundation on the basis of a showing of material facts not in dispute.

The Motion For Reconsideration Or A Continuance

Joint Intervenors' motion for reconsideration or a continuance provides no adequate basis for the relief sought. In the subject motion, Joint Intervenors basically follow the same approach they did in opposing the motion for summary disposition of Contention 8, which was insufficient. They state in the subject motion:

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

Motion For Reconsideration at 4.

We are in agreement that NRC law permits intervenors to make their case through cross-examination of an applicant's witnesses, but this principle presupposes that a right to a hearing has been established. It does not authorize bypassing the process for determining whether there is a legal bases for holding a hearing, which is precisely what the Summary Disposition on Pleadings procedure, 10 CFR 2.749, is intended to accomplish. For one to prevail in opposing a motion for summary disposition, the party must abide by the requirements of the regulation and the case law which interprets it. They do not allow for successful opposition to the motion on the basis of unsupported allegations or on hopes of what may be developed if one could obtain additional time.[1] Intervenors again only follow the approach they did previously which provides no basis for granting their motion.

We will proceed to treat in turn with Joint Intervenors' individual claims in support of the motion.

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1 The Board is fully cognizant of the requirement that a proponent of a motion must meet the burden of proof in establishing that there is no issue of material fact, even if the opponent fails to controvert the conclusions reached in the motion's supporting papers. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754 (1982).

A. Joint Intervenors assert that the Board should not have considered evidence or assurance gained from the RRP to determine whether or not the QAP was implemented in a manner to ensure that the public health and safety is protected. Joint Intervenors are incorrect in their assertion that we relied on the RRP to determine that the QAP was implemented in a manner to ensure the public health and safety. A reading of the Memorandum makes it clear that we found, separate and apart from the RRP, that Applicants' QAP meets the formal requirements as well as the intent of 10 CFR Part 50, App. B. Memorandum and Order at 6. In order to clarify the record, we noted that the RRP was instituted as a result of general interest of the NRC and not as a substitute for Applicants' QAP. It constituted an overlay to that effort for the purpose of serving to increase the confidence of management in the operational readiness of VEGP. Id. at 3-4. Intervenors had contended that the RRP was instituted as a substitute for the QAP in an improper attempt to circumvent the requirements of 10 CFR Part 50, App. B. Response to Motion for Summary Disposition at 6-7.

Joint Intervenors further allege that if the RRP is to be considered at all by the Board it should be for the purpose of showing that the QAP was not properly implemented. Intervenors state that the RRP itself provides proof that there were undiscovered and uncorrected hardware deficiencies at the plant which had escaped the original QAP. They claim that this alone prevents the Board from granting a summary disposition motion on quality assurance. Motion at 6-7.

Joint Intervenors provided no probative information as to the alleged deficiencies or how they relate to the contention. Their identification of the deficiencies found by the RRP consists of a reference to page 27 of the transcript of the Commission meeting of July 26, 1985, on a briefing given on the RRP for the VEGP. Applicants' representative stated:

> The next area that I would like to cover, having done the self-assessment, obviously the program was put together to find problems, and, in fact, it has achieved that goal. We are finding problems.

Again without elaboration, at page 9 of the motion, Joint Intervenors state that the RRP has identified six findings which have generic implications for the QAP at Vogtle, which consists of the following:

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

Applicants in their response to the motion have come forward to give substance and perspective where possible to the deficiencies said to be identified by the RRP. This was done by affidavits from the Deputy Manager of the RRP and the Quality Assurance Manager of VEGP, both of whom are qualified to report on the subject. They established that as of the beginning of November 1985, the RRP has made more than 500 'findings' of construction errors, defects or deviations from PSAR/FSAR commitments. Applicants found that none of the deficiencies, if left uncorrected, could have adversely affected the safety of operations of the nuclear

plant at any time throughout the expected lifetime of the plant. They were not reported under 10 CFR 50.55(e) which requires reporting of deficiencies with safety significance. Reports of the Regional Administrator of Region II of the NRC show that the NRC makes detailed reviews and analyses of the RRP. None of the RRP findings has resulted in a Notice of Violation by the NRC.

These undisputed disclosures of what the RRP has revealed provides no basis for determining that there is a genuine disputed issue of fact as to Contention 8, which embodies Joint Intervenors' claim that deficiencies as to quality assurance in five discrete areas, when considered together show a lack of an adequate QAP and a breakdown of that program.

The RRP, in finding defects that do not have safety significance, confirms that construction at VEGP is not perfect and error free and that Applicants' QAP has not uncovered all errors. None of the foregoing is inconsistent with having an effective and acceptable quality assurance program. The test is whether there is reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety. See Union Electric Co. and Pacific Gas and Electric Co., supra. We have found independently of the RRP that the QAP was not shown to be ineffective and unacceptable as alleged by Joint Intervenors. The fact that the RRP has revealed defects does nothing to invalidate the finding, because the defects were not shown to be of safety significance and to pose a threat to public health and safety. Reasonable assurance of the effectiveness of the QAP has not been placed in dispute.

Furthermore, the RRP's disclosure of defects is consistent with our prior finding of the adequacy of the QAP in that the RRP failed to reveal that the QAP missed any defects of safety significance. No grounds have been submitted for altering our prior determination.

B. Joint Intervenors assert that there are two types of material facts which remain the subject of substantial dispute:

1. specific hardware deficiencies, and

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

In support of their statement as to Category 1, Joint Intervenors only say that Intervenors did not present evidence in their response to the motion for summary disposition to contest Applicants' representation that the specific deficiencies have been corrected but Intervenors do not concede that Applicants' representations regarding their corrective actions are correct.

Because Joint Intervenors refuse to agree that Applicants' QAP functions as required by regulation does not mean that under 10 CFR 2.749 there is a genuine issue of material fact. To the contrary, Applicants sustained their burden of proof by independently establishing through facts of record that proper corrective actions had and were being taken as to deficiencies and that 10 CFR Part 50, App. B is otherwise being complied with so that there is reasonable assurance that the operation of the facility will not endanger the public health and

safety. Intervenors' unsupported protestations to the contrary are devoid of merit, and under 10 CFR 2.749(a) and (b) are without substance. Subsection (a) provides that all material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party. Subsection (b) provides that a party opposing a supported motion may not rest upon the mere allegations or denials of his answer; his answer by affidavits or as otherwise provided in the section must set forth specific facts showing that there is no genuine issue of fact.

Joint Intervenors' bare allegation supporting Category 1 provides no basis for reconsideration by the Board.

As to the second category which Joint Intervenors claim remains the subject of substantial dispute, i.e., those undiscovered specific deficiencies presenting the potential for a pervasive breakdown, Intervenors assert that they did claim previously, pursuant to their rights under 10 CFR 2.749(c), that if they were granted time to prepare for hearing they could present former workers and/or site employees who would testify to the pervasive breakdown by demonstrating specific, uncorrected deficiencies. Intervenors further assert they they were denied the opportunity to present their case, and that irrespective of the foregoing, it is unnecessary for Intervenors to submit worker affidavits because the RRP presented evidence that the QAP failed to detect safety significant deficiencies.

10 CFR 2.749(c) provides:

> (c) Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the presiding officer may refuse the application for summary decision or may order a continuance to permit affidavits to be obtained or make such other order as is appropriate and a determination to that effect shall be made a matter of record.

Joint Intervenors did not seek relief under the provisions of the above regulation as indicated. All that Joint Intervenors stated in response to the motion for summary disposition was that "Intervenors have not yet selected their witnesses for the QA contention and are continuing to investigate the issues surrounding it. Intervenors are in touch with current and former workers at the plant, some of whom are willing to testify on QA concerns" and Mr. Teper "informed the Applicants that he had spoken with a former worker at the plant who might testify as to specific shortcomings in the quality assurance of welding at Plant Vogtle" (emphasis supplied). Response to motion for summary disposition at 5 and 13. We can find no support for Intervenors' assertion that they previously invoked 10 CFR 2.749(c) and that they would demonstrate specific, uncorrected deficiencies.

What Joint Intervenors previously sought to do was to make their case at the hearing, which proposal we correctly denied for the reason we discussed previously. A party cannot avoid summary

disposition on the hope that at the hearing something may turn up. This expectation was all that Joint Intervenors held out. They never provided anything meaningful as to why they could not proceed in responding to the motion for summary disposition, nor specifically what would be testified to at a hearing and how it would be relevant to Contention 8. The Board never did anything to impede Joint Intervenors from making their case under 10 CFR 2.749. The Board properly refused to allow Intervenors to bypass the Summary Disposition On Pleadings procedure and make their case at the hearing.

We previously found Joint Intervenors' position on the importance of the RPP disclosure of deficiencies to be without merit and we will not repeat that finding.

Joint Intervenors have provided no grounds for reconsidering our prior determination of granting the motion for summary disposition.

C. As its alternative request for relief, Joint Intervenors for the first time invoke the provisions of 10 CFR 2.749(c) for a continuance to permit the filing of affidavits from unnamed individuals who are alleged to have personal knowledge of the failure of Applicants to implement their quality assurance program. It is represented that these individuals are workers that have evidence of discrete, specific deficiencies within the area of their expertise which have slipped through the QAP

undetected and that the information they supply will provide substantial evidence that the QAP was not properly implemented. An affidavit was submitted in support of the request.

The supporting affidavit of October 28, 1985 was submitted by Billie Perner Garde, Director of the Environmental Whistleblower Protection Clinic, of Washington, D.C. It is a joint project of the Government Accountability Project and Trial Lawyers for Public Justice. She states that during August and September she had been in contact with current and former employees of Georgia Power Company, Pullman Company and Williams Company. The information she received from these workers "was general in nature in response to my questions about procedural issues, the implementation of the quality control program, and the specific deficiencies of which they are aware." She had not asked any of the employees to put their concerns or experiences into an affidavit for submittal to the Board.

She further stated that, "Some of the workers have filed complaints with the Department of Labor alleging that they were discharged, demoted, transferred or in other ways discriminated against for raising safety concerns to their management. Some of these workers have agreed to provide information to this licensing board regarding their knowledge of quality control/quality assurance problems at the Vogtle Plant." Affiant states that affidavits are normally prepared after the Government Accountability Project has concluded a verification

study of the workers' allegations and none has been prepared as yet.

The Board finds no basis to grant the continuance sought by Joint Intervenors. Again, all that they have presented to us is the hope that Joint Intervenors may turn something up if they are provided with additional time. The affidavit does not support Joint Intervenors' stated expectations as to what the workers will testify about. The Garde affidavit does no more than state that an investigation has been undertaken regarding an undisclosed number of workers who claim to have been disciplined for raising "safety concerns" and that some would provide information regarding their knowledge of "quality control/quality assurance problems at the Vogtle Plant." No information is provided to indicate whether the "safety concerns" and "quality control/quality assurance problems" are significantly material and relevant to Contention 8. Because Contention 8 involves specific quality assurance matters, it does not mean ipso facto that anything relative to quality assurance at Plant Vogtle meaningfully applies to the Contention. It was Joint Intervenors' burden to come forward and show that the matters that the workers would make known are significantly applicable to Contention 8, but they have failed to do so. At this stage, it

is unknown whether the workers have anything to offer that supports Contention 8. Joint Intervenors have not made a minimum presentation for granting the request for a continuance.

It is noted that the request for a continuance is made wholly without regard to timeliness. No indication is given as to when the investigation would be concluded. Joint Intervenors first proposed Contention 8 in April 1984. They had the unfettered opportunity to investigate the subject from that time, or even before, whether conducted by themselves or by a representative. No good reason has been given as to why the investigation has not already been completed. The request for a continuance under 10 CFR 2.749(c) also comes late in the Summary Dispositions On Pleadings procedure, having first been made only after the Board ruled on the motion for summary disposition.

The requested continuance under 10 CFR 2.749(c) lacks factual and legal justification and is denied.

ORDER

Based upon all of the foregoing, it is hereby ORDERED that Joint Intervenors' motion of October 28, 1985 for reconsideration

or a continuance is hereby denied.

THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies, Chairman
ADMINISTRATIVE LAW JUDGE

Gustave A. Linenberger, Jr.
ADMINISTRATIVE JUDGE

Dr. Oscar H. Paris
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 3d day of December, 1985