UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair
Dr. James H. Carpenter
Thomas D. Murphy

In the Matter of

Docket Nos. 50-424-OLA-3
50-425-OLA-3
(ASLBP No. 93-671-01-OLA-3)
(Re: License Amendment)
(Transfer to Southern Nuclear)

GEORGIA POWER COMPANY, *et al.*
(Vogtle Electric Generating Plant, Units 1 and 2)

February 18, 1993

The Licensing Board grants the intervention petition of a person who lives 7 days per month in a house located 35 miles from a nuclear power plant in a license amendment case. Licensee sought through the amendment to transfer operating authority over its plant to a new operating company. Petitioner alleged that the new operating company lacked the character and competence to operate the plant.

Licensee and the Staff argued that relief could not be granted because denial of the requested amendment would not solve the alleged problem, which relates to individuals involved both in the new operating company and in the present company. The Board reasoned that standing can be based on alleging that the transfer of operating authority would violate regulatory requirements for character and competence of operators of nuclear power plants, and it also ruled that standing to intervene cannot be destroyed because the alleged problem may also affect the current operations of the plant.

RULES OF PRACTICE: STANDING; CHARACTER AND COMPETENCE

In a license amendment case involving allegations of management's lack of the required character and competence, there is an obvious potential for offsite consequences, so standing is analogous to that in an operating license case. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989).

RULES OF PRACTICE: STANDING; DISTANCE FROM PLANT

In a license amendment case involving allegations of the unfitness of management, there is an obvious potential for offsite consequences, so standing is analogous to that in an operating license case. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989). Consequently, standing was granted to a petitioner who lived 35 miles from the nuclear power plant for 7 days per month.

OPERATION OF NUCLEAR POWER PLANT: CHARACTER AND COMPETENCE

The license to operate a nuclear power plant may only be transferred to a company that has the necessary character and competence to provide an adequate assurance of safety through its management practices.

OPERATION OF NUCLEAR POWER PLANT: ALIENATION OF CONTROL

A contention was admitted that alleged that a licensed operator of a nuclear power plant had improperly alienated control of its plant without written approval from the NRC. The Board said that this might adversely reflect on the character and competence of the individuals who took control of the plant.

CONTENTIONS REQUIREMENT: 10 C.F.R. § 2.714(b)(2); ALLEGATION OF AN ADMISSION

A contention may be admitted to the proceeding in satisfaction of the contentions requirement if it alleges adverse facts, not included in the amendment application, that would entitle petitioner to relief.

MEMORANDUM AND ORDER
(Admitting a Party)

Memorandum

We have decided to grant the petition of Allen L. Mosbaugh to be admitted as a party to this case.

We find that Mr. Mosbaugh's petition meets the applicable criteria. He suffers an injury in fact because he has alleged, with an adequate basis, that an operating license for a nuclear power plant should not be transferred to an entity that employs in senior positions individuals alleged to have submitted material false and misleading safety information to the United States Nuclear Regulatory Commission (NRC). The allegation establishes, for the purpose of determining standing, the seriousness of the situation to which Mr. Mosbaugh may be exposed. He is at risk because he owns a house 35 miles from the Vogtle Electric Generating Plant (Vogtle) and lives there one week a month.[1]

The Staff of the Nuclear Regulatory Commission (Staff) and Georgia Power Company, *et al.* (Georgia Power) have argued that Mr. Mosbaugh may not intervene in this license amendment case because the management deficiencies he alleges, if true, are already present in Georgia Power and that no new risk is added by amending the license to transfer authority to Southern Nuclear. We disagree with this way of conceptualizing the risk. Mr. Mosbaugh has standing because he has alleged, with an adequate basis, that the proposed amendment does not meet the safety requirements of the NRC. We would not deprive him of his right to intervene because the material safety deficiencies he has alleged may already be occurring.[2]

I. BACKGROUND

Georgia Power proposes to amend its license to operate Vogtle. The proposed amendments would have no effect on the ownership of Vogtle, but they would allow Southern Nuclear Operating Company, Inc., ("Southern Nuclear") to become the operator — thus, operation would pass from one wholly owned subsidiary of Southern Company (Georgia Power) to another (Southern Nuclear).

On October 22, 1992, Allen L. Mosbaugh and Marvin B. Hobby filed a petition to intervene. Staff filed its answer on November 2, 1992 ("Staff

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[1] See below, beginning on p. 107, for further facts about standing.

[2] Georgia Power also has argued that Mr. Mosbaugh should be denied standing because he has already filed a 10 C.F.R. § 2.206 petition. However, that argument is invalid. That a petition concerning Georgia Power may be pending does not preclude intervention in this license amendment case.

Answer"). Georgia Power filed its answer on November 6, 1992 ("Georgia Power Answer"). Mr. Hobby's petition was dismissed for lack of standing by our Memorandum and Order of November 17, 1992 (unpublished).

Even though the proposed amendment would transfer the authority to operate Vogtle from Georgia Power to Southern Nuclear, executive management would continue to be the same key people. To summarize how similar the staffing would be, we quote verbatim (with footnote numbers changed to be consecutive within this opinion) from the NRC Staff's Response to Licensing Board Questions, February 5, 1993 (Staff Response to Board), at 3-4:

> Southern Nuclear has been identified, since March 1991, in chapter 13 of the Final Safety Analysis Report (FSAR), as providing support services for the Vogtle facilities.[3] *See* Revision 1, dated March 1991; Revision 3, dated December 1992.[4] The Vogtle Electric Generating Plant FSAR § 13.1.1.2, Rev. 1 3/91, sets forth the organizational arrangement regarding Vogtle in terms of the corporate affiliation of various management officials. The executive vice president for nuclear operations is an officer of Georgia Power Company, Alabama Power Company, and Southern Nuclear Operating Company, Inc. FSAR § 13.1.1.2.1.1. The senior vice president for nuclear operations is an officer of all three *supra* named corporations. FSAR § 13.1.1.2.1.2. The vice president for nuclear for the Vogtle facilities is an officer of Georgia Power Company and Southern Nuclear Operating Company, Inc. FSAR § 13.1.1.2.1.5. Since March 1991, the FSAR has shown that a number of officers of Georgia Power Company are also officers of Alabama Power Company and Southern Nuclear Operating Company, Inc. *See also* Figure 13.1.1-1.[5]

Mr. Mosbaugh's principal allegation is that Southern Nuclear lacks the character and competence to operate a nuclear power plant. Briefly, Mr. Mosbaugh alleges that in 1988 Southern Company began making changes at Vogtle that eventually would lead to the filing of the pending application. The first operative step was the organization of a Southern Nuclear Operating Company (SONOPCO) project. At the time, Mr. Mosbaugh served as Superintendent of Engineering Service, at the Vogtle Plant, with 400 employees reporting to

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[3] [Staff footnote 1.] 10 C.F.R. § 50.34(b)(6) requires that the FSAR submitted on application for an operating license shall provide, among other matters: "The following information concerning facility operation: (i) The applicant's organizational structure, allocations or responsibilities and authorities, and personnel qualifications requirements." Although that regulation does not require revisions to an FSAR after a plant is licensed, 10 C.F.R. § 50.71(e) provides that a licensee shall periodically update its FSAR to keep it current, and submit those revisions to the Commission.

[4] [Staff footnote 2.] A copy of Revision 3 was sent to the Licensing Board by Licensee's counsel on January 21, 1993.

[5] [Staff footnote 3.] Further, Southern Nuclear's provision of technical support services for the Vogtle facility has been discussed among Georgia Power Company and NRC's Office of Nuclear Reactor Regulation and NRC's Regional Office in Atlanta, Georgia, since 1988. *See* NRC Meeting Summary, dated March 25, 1988 . . . . The NRC conducted an inspection of the Vogtle facilities in the summer of 1991. As a part of that inspection, NRC inspectors visited the Southern Nuclear Operating Company offices in Birmingham, Alabama. The primary purpose was to gain a more detailed working knowledge of the various Vogtle support activities and groups. The inspection report concluded: "No violations or deviations were identified." NRC Inspection Report Nos.: 50-424/92-22 and 50-425/92-22 at pages 13 and 15, dated October 28, 1991. . . .

him.[6] Mr. Mosbaugh concluded that the organization of SONOPCO marked a change from a "conservative" to a more "risk taking" attitude in the operation of Vogtle.[7] He was particularly concerned that SONOPCO seemed less concerned about NRC reporting requirements.[8] Mr. Mosbaugh alleges that, subsequent to the time that SONOPCO began to have influence, Georgia Power filed false and misleading reports with the NRC and its officials filed material false statements in response to NRC questions.[9] At least some of the charges initiated by Mr. Mosbaugh are sufficiently serious that the Staff has referred them to the United States Justice Department for evaluation with respect to possible criminal prosecution.[10]

II. CONTENTIONS AND BASES

Traditionally, contentions are discussed in cases involving intervention only after there has been a finding of standing. However, in license amendment cases there may be an interrelationship between what is alleged in the contentions and whether there is standing. This occurs because "injury in fact" in an amendment case depends on whether the alleged risk to health and safety is significant and involves "obvious potential for offsite consequences."[11]

A. Legal Background

We are convinced that the granting of the requested amendment legally requires that Southern Nuclear have the character and competence to operate a nuclear power plant. The brief[12] of the Staff of the Nuclear Regulatory Commission is highly persuasive on this point, and we adopt it verbatim (footnotes changed to be consecutive in this opinion), as follows:

> Section 182 of the Atomic Energy Act, 42 U.S.C. § 2231, provides that the Commission, by rule or regulation, may require such information as it determines to be necessary to decide the "character of the applicant." The Commission has enacted no regulations in regard to the

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[6] Recommended Decision and Order, *Allen Mosbaugh v. Georgia Power Co.*, 91-ERA-1, 11 (Oct. 30, 1992) (Mosbaugh Labor Case), at 4-5; "Georgia Power Company's Answer to the December 9, 1992 Amended Petition of Allen L Mosbaugh," December 22, 1992 (Georgia Power's Second Answer), Exh. 3.

[7] Mosbaugh Labor Case at 6. We consider that this information, submitted by Georgia Power, places the allegations in context.

[8] *Id.*

[9] "Amendments to Petition to Intervene and Request for Hearing" (Mosbaugh), December 9, 1992 (Amendments to Petition), at 15-19.

[10] "NRC Staff Response to Allen L. Mosbaugh's Amendments to Petition to Intervene and Request for Hearing and Contingent Motion to Defer the Staff's Reply to Contentions and Rulings on Contentions," December 30, 1992 (Staff's Second Response), at 6-7.

[11] See a further explanation of this legal standard below, beginning on p. 106.

[12] NRC Staff Response to Licensing Board Questions (Feb. 5, 1993) at 4-6.

"character" of an applicant. However, the Commission addressed the character of licensees and applicants in *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1136-37 (1985); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 291 (1980); *see also Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1206-08 (1984), and *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-84-13, 19 NRC 659, 673-79 (1984). Each of the cited decisions indicates that the character of an applicant may be considered in appropriate licensing actions. In *Three Mile Island*, 21 NRC at 1136-37, the Commission stated:

> A generally applicable standard for integrity is whether there is reasonable assurance that the Licensee has sufficient character to operate the plant in a manner consistent with public health and safety and applicable NRC requirements. The Commission in making this determination may consider evidence regarding licensee behavior having a rational connection to the safe operation of a nuclear power plant. This does not mean, however, that every act of licensee is relevant. Actions must have some reasonable relationship to licensee's character, i.e., its candor, truthfulness, willingness to abide by regulatory requirements, and acceptance of responsibility to protect public health and safety. In addition, acts bearing on character generally should not be considered in isolation. The pattern of licensee's relevant behavior, including corrective actions, should be considered [footnote omitted].

In *South Texas*, 12 NRC at 291, the Commission stated:

> In large part, decisions about licenses are predictive in nature, and the Commission cannot ignore . . . abdication of knowledge by a license applicant when it is called upon to decide if a license for a nuclear facility should be granted.[13]
>
> We believe that the above issues relating to technical competence and to character permeate the pleadings filed by Citizens. They do deserve a full adjudicatory hearing, as they will no doubt get in the operating license proceeding, and they do deserve expeditious treatment because they could prove disqualifying.[14]

The licensee has requested that amendments be issued to the Vogtle licensees to grant permission for Southern Nuclear instead of Georgia Power to operate the Vogtle facilities. The issuance of an operating license or amendment requires an affirmative finding of compliance with the Atomic Energy Act, the Commission's regulations and reasonable assurance of health and safety of the public. 10 C.F.R. § 50.57. If personnel who will be involved in the operation of the facility lack character to operate the facility, then the requested operating license or amendment may not be issued. *South Texas, supra*, 19 NRC at 669 and 831, and *Three Mile Island, supra*, 21 NRC at 1137 n.37.

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[13] [Staff footnote 4.] Equally, and perhaps of more concern, the Commission cannot ignore false statements in documents submitted to it. Congress has specifically provided that licenses may be revoked for "material false statements," *see* section 186a of the Atomic Energy Act, and we have no doubt that initial license applications or renewal applications may also be denied on this ground, certainly if the falsehoods were intentional, *FCC v. WOKO*, 329 U.S. 223 (1946), and perhaps even if they were made only with disregard for the truth. *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454 (D.C. Cir., 1980); *Virginia Electric and Power Co. v. NRC*, 571 F.2d 1289 (4th Cir. 1978).

[14] [Footnote 5 in original.] We include, of course, the false statements charge in this category.

B. Contentions

1. De Facto *Transfer of Control*

Contention 1 states:

> The Southern Company (working in conjunction with its corporate affiliates and officers) effectuated transfer of control of the operation of the Vogtle Electric Generating Plant from the licensees to a *de facto* corporation, known as the Southern Nuclear Operating Company, without the knowledge or consent of the co-owners of Plant Vogtle. The corrupt corporate policy effecting the creation of the *de facto* Southern Nuclear Operating Company resulted in the creation of a management chain of command so lacking in character, competence, integrity, candor, truthfulness and willingness to abide by regulatory requirements as to represent a threat to the health and safety of the public and/or represent a potential unsafe operating condition which must be corrected before formal transfer of operating responsibility may pass to the Southern Nuclear Company, Inc.

Immediately, the Board notes that the part of the contention alleging lack of knowledge or consent of the co-owners of Vogtle has not been shown to be relevant. For similar reasons, the word "corrupt" in the second sentence of the contention also has not been shown to be relevant or appropriate. On the other hand, as a legal basis for this contention, Mr. Mosbaugh cites[15] 10 C.F.R. § 50.54(c) (hereinafter "nonalienation requirement"), which states:

> Neither the license, nor any right thereunder . . . shall be transferred, assigned, or disposed of in any manner, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of the act and give its consent in writing.[16]

He also cites 10 C.F.R. § 50.34(b)(6)(i) (hereinafter "reporting requirement"),[17] which requires the NRC to be informed about: "The applicant's organizational

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[15] "Petitioner's Brief in Response to the Board's Request for Information," February 5, 1993 (Mosbaugh Response to Board) at 2.

The cited regulation is relevant to Mr. Mosbaugh's contention but relates to facts that the other participants do not accept as true. See, particularly, "Georgia Power Company's Brief in Response to the Board's January 15, 1993 Request for Information and Briefs," February 4, 1993 (Georgia Power's Response to Board) at 11-19. (*Also see id.* at 10, asserting that "since each of the Vogtle units began operation, it [Georgia Power] has been in control of the operation of Plant Vogtle . . . .")

[16] Our record does not indicate that the U.S. Nuclear Regulatory Commission has given its consent in writing to any change of control of operations. *See* Tr. 74 (Georgia Power's counsel states that Southern Nuclear is not mentioned in the license) and Tr. 74-75 (Georgia Power's counsel does not provide reference to "any formal way in which the NRC was informed of or agreed to that kind of organizational structure"); *but see* Georgia Power's Response to Board at 14-15. (Use of Southern Nuclear as a support services company and the double-hatting of officers were disclosed in three Updated Final Safety Analysis Reports. No mention of formal NRC approval. No statement concerning control having passed away from Georgia Power, as alleged.)

[17] Georgia Power also cites 10 C.F.R. §§ 50.36(c)(5), 50.36(b)(6)(i), and Generic Letter No. 88-06. According to its view of the facts, it is in compliance with these requirements. But Georgia Power does not discuss Mr.

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structure, allocation of responsibilities and authorities, and personnel qualification requirement."

He then states that, contrary to the nonalienation and reporting requirements, that Southern Company established a *de facto* board of directors of what was called the "SONOPCO" project. Mr. Joseph M. Farley is alleged to have been the chairman of that Board and to have reported directly to the Board of Southern Company about Georgia Power Company's nuclear units. Mr. Farley was not an officer of Georgia Power Company.[18] Mr. R.P. McDonald, who is involved in the running of Southern Nuclear,[19] allegedly had a set of joint responsibilities with Mr. Farley — who served in "non-operating areas" — and the two jointly served as chief executive of the project with respect to administrative matters.[20] Mr. Farley also is alleged to have worked closely with the SONOPCO Technical Services vice president.[21] Mr. McDonald, who was an officer of Georgia Power, allegedly gave contradictory and misleading testimony about the management structure and formation of SONOPCO.[22] Georgia Power's Senior Executive Vice President testified that he thought Mr. Farley was an officer of Georgia Power.[23]

Georgia Power's principal defense is that these allegations — involving past actions — are irrelevant to the license amendment application. We find, however, that this conclusion is not warranted. Mr. Mosbaugh has adequately alleged, with basis, that the formation of Southern Nuclear's relationship to Vogtle violated NRC regulations, evidencing a lack of a trustworthy character in Southern Nuclear. If this contention were sustained, we might direct that the license amendment be denied or conditioned on changes in the structure and personnel of Southern Nuclear.

We note that 10 C.F.R. § 2.714(b)(2)(iii) requires the specification of how the application fails to contain information that it should contain. In this instance, Mr. Mosbaugh has alleged material facts that are relevant to the application. The omission of these facts from the application is not surprising, since they are adverse to the interest of the Applicant. Consequently, Mr. Mosbaugh fulfills

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Mosbaugh's allegations. Hence, its argument is more helpful in understanding its underlying factual position than in determining whether to admit the contention. The decision about whether to admit does not require us to make determinations concerning the truth of the allegations.

[18] Mosbaugh cites *Hobby v. GPC*, 90-ERA-30, at 308, 39-40, 13-14, attached to a 10 C.F.R. § 2.206 petition filed by Mosbaugh on July 8, 1991; *see* Amendments to Petition at 6-14.

[19] *See* "Phase III Proposed Southern Nuclear Organization Chart (Plants Hatch and Vogtle only are shown)," tendered by Georgia Power, ff. Tr. 116.

[20] Amendments to Petition; *see especially id.* at 7.

[21] Mosbaugh cites *Hobby v. GPC*, 90-ERA-30, at 37-38, attached to a 10 C.F.R. § 2.206 petition filed by Mosbaugh on July 8, 1991; *see* Amendments to Petition at 9.

[22] Amendments to Petition at 10-11, 12.

[23] Mosbaugh cites *Hobby v. GPC*, 90-ERA-30, Hearing Tr. at 690-91, attached to a 10 C.F.R. § 2.206 petition filed by Mosbaugh on July 8, 1991; *see* Amendments to Petition at 9.

the requirements of this section because the omission from the application of the facts he has alleged is material to proper consideration of the amendment.

For the reasons we have just stated, we find that this contention — amended to delete irrelevant material, as determined in the beginning of this section of our memorandum — has met the criteria of 10 C.F.R. § 2.714(b)(2) and shall be admitted as a contention.

2. *Character of Southern Nuclear*

Mr. Mosbaugh attempts to show a factual basis for Contentions 2, 3, and 4 in one fell swoop.[24] However, Contentions 2 and 3 deal with Southern Nuclear, and we have decided to consider those two contentions separately from Contention 4, which relates to Southern Company. Contention 2 states:

> The Southern Nuclear Operating Company, Inc., does not possess the requisite character, competence and integrity, and does not have the candor, truthfulness and willingness to abide by regulatory requirements to become the licensee to operate the Vogtle Electric Generating Plant.

Contention 3 states:

> The Southern Nuclear Operating Company, Inc., a wholly owned subsidiary of The Southern Company, does not possess the requisite character, competence and integrity, and does not have the candor, truthfulness and willingness to abide by regulatory requirements to become the licensee of the Vogtle Electric Generating Plant, and as such transfer of the license represents an increased risk to the health and safety of the public and/or represents a potential unsafe operating condition which must be corrected before responsibility for operating plant Vogtle can be transferred to the Southern Nuclear Operating Company, Inc.

As a basis for his contentions, Mr. Mosbaugh alleges that, "SONOPCO's highest levels of management conspired to submit and did submit materially false information to the NRC concerning critical safety-related information pertaining to a March 1990 Site Area Emergency."[25] In support of this allegation, Mr. Mosbaugh describes evidence that, among other things, implicates Mr. R.P. McDonald — an officer of Southern Nuclear — in material false statements in Licensee Event Report 90-006. One of the alleged material false statements is the intentional falsification of data on diesel engine starts in order to persuade the NRC to permit Vogtle to restart.[26] The evidence that Mr. Mosbaugh intends to introduce includes Mr. Mosbaugh's own eyewitness testimony plus tape recordings of relevant conversations. He states that he made the tape recordings,

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[24] Amendments to Petition at 14-19.
[25] *Id.* at 15.
[26] *Id.* at 18-19, particularly n.15.

which are currently in the possession of the NRC's Office of Investigations (OI).[27]

Mr. Mosbaugh also claims that he made tape recordings, currently in possession of OI, that provide irrefutable evidence that Mr. McDonald swore to a variety of other false statements before the NRC.[28] From his memory of events, refreshed by these tape recordings, it would appear that Mr. Mosbaugh also could provide eyewitness testimony of the underlying events.

We find that there is adequate basis for Mr. Mosbaugh's contention that at least one senior officer of Southern Nuclear is lacking in character and competence and that Southern Nuclear lacks the integrity required of a licensee for the operation of a nuclear power plant. If this contention were sustained, we might direct that the license amendment be denied or conditioned on changes in the structure and personnel of Southern Nuclear.

For the reasons above, these contentions have met the criteria of 10 C.F.R. § 2.714(b)(2) and shall be admitted.

3. *Character of Southern Company*

Contention 4 states:

> The Southern Company, by virtue of the corporate structure and make-up of the Southern Nuclear Operating Company, Inc., Board of Directors, controls and directs the management of its wholly owned subsidiary, the Southern Nuclear Operating Company, Inc. Because the Southern Company does not have the requisite character, competence and integrity, and does not have the candor, truthfulness and willingness to abide by regulatory requirements required of a licensee and because the Southern Company exercises substantial control over management of the Southern Nuclear Operating Company, Inc., transfer of the Vogtle Electric Generating Plant license to the Southern Nuclear Operating Company, Inc., represents an increased risk to the health and safety of the public and/or represents a potential unsafe operating condition which must be corrected before said transfer can occur.

We have considered this contention and find that Mr. Mosbaugh has not provided an adequate basis for questioning the character of Southern Company, its officers or directors, beyond the allegation already admitted as Contention 1.[29] Consequently, we will not admit this separate contention. However, our denial of this contention will not in itself bar Mr. Mosbaugh from introducing evidence relevant to appropriate remedies involving Southern Company if he first succeeds in demonstrating the need for remedies by establishing wrongdoing by Southern Nuclear or its organizational predecessor.

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[27] *Id.* at 15-16.
[28] *Id.* at 17-19.
[29] *See id.* at 15-20.

III. STANDING

As set forth in *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-92-27, 36 NRC 196 (1992), a petitioner for intervention must, as a prerequisite to achieving party status, establish that it has standing and that it has proffered at least one viable contention. To establish standing, a petitioner must demonstrate an "injury in fact,"[30] that the injury falls within the zone of interests sought to be protected by the statutes, and that the injury may be redressed by a favorable decision in this proceeding. *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991).

In *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989), the Commission noted that, in construction permit or operating license proceedings for nuclear reactors, residence of a person within 50 miles of a facility would be sufficient to confer standing. The Commission went on to hold that this 50-mile presumption did not apply in all operating license amendment proceedings but only in those involving a significant amendment involving "obvious potential for offsite consequences." *Id.*, 30 NRC at 329-30.

In our Memorandum and Order of November 17, 1992 (unpublished), slip op. at 7, we noted:

> that petitioner alleges that he resides 35 miles from the plant and that he has some additional contacts with the plant. For an amendment case, residence at that distance, with some additional contacts, does not automatically result in standing. *Boston Edison Co.* (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98-99 (1985) (petitioner, who lived 43 miles from the plant and allegedly consumed fish and cranberries, did not show a reasonable scenario through which the amendment could produce an injury), *aff'd on other grounds*, ALAB-816, 22 NRC 461 (1985).

We also noted:

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[30] To establish the basis for standing, petitioner must show injury in fact. It is easy to misunderstand this standard because the phrase "injury in fact" as used in this context does not bear its normal everyday meaning. For example, a person living 45 miles from a nuclear power plant who canoes in the general vicinity of the plant has been found to suffer "injury in fact" from an amendment of a power plant license in order to permit the expansion of the capacity of the spent fuel pool. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 (1979).

Careful analysis reveals that, of course, the fuel pool was not even built at the time "injury in fact" was alleged. No accident had occurred. No release of nuclear materials had occurred. Hence, *in fact*, there had not been any injury to the petitioner as those words are commonly used. Nevertheless, he was said to have been injured in fact because of the possibility of an accident. Of course, this was an early stage of the case in which he had not yet proved that there was a possibility of an accident. What the petitioner had to do to obtain party status was to submit contentions (with an adequate basis) whose subsequent proof could result in a finding of injury in fact to him. So: injury in fact is indeed the same, in this context, as an allegation that a real injury might reasonably be expected to occur in the future.

that Georgia Power challenges Mr. Mosbaugh's statement that he actually *resides* at the property he owns 35 miles from the plant. It bases its claim on the fact that he receives electric bills at an address in the State of Ohio. It also apparently has some other undisclosed source of "information and belief." This is enough of a basis for us to require Mr. Mosbaugh to amend his petition to state specifically how much of the time he resides at his Georgia residence.

As a result of our concerns about standing, we held an evidentiary hearing on this limited subject at our prehearing conference in Augusta, Georgia, on January 12, 1993. As a result of that hearing, and after evaluation of all the evidence, we find that the significant facts concerning standing are:

- Mr. Alan Mosbaugh owns a detached house located approximately 35 miles from the Vogtle Plant.[31]
- From about 1985 to fall of 1990, Mr. Mosbaugh and his family resided full time in the house he built.[32]
- Since August of 1991, Mr. Mosbaugh's family has resided in Ohio but Mr. Mosbaugh has continued to live in his house in Georgia about 7 days of every month.[33]
- Mr. Mosbaugh is currently seeking employment either in Georgia or Ohio. He also is considering starting his own business. The outcome of this job-seeking process will cause him to live either in Georgia or in Ohio.[34]

Mr. Mosbaugh has alleged that his health, safety, property rights and personal finances could be affected by an order granting Georgia Power's request to transfer control of Vogtle to Southern Nuclear.[35] We conclude that the exposure that Mr. Mosbaugh has to Vogtle is sufficient to sustain the claim for standing.

IV. CONCLUSION

We conclude that Mr. Mosbaugh has met all the requirements for standing. He has proffered at least one viable contention, demonstrated an "injury in fact," alleged a health-and-safety injury that falls within the zones of interest sought to be protected by the statutes, and demonstrated that the injury may be redressed by a favorable decision in this proceeding.

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[31] Tr. 15.

[32] Tr. 15-16, 30.

[33] Tr. 17, 18, 39-40. (Mosbaugh's family also comes to Georgia about 3 weeks per year.) Tr. 49-50, 51.

We note that Georgia Power and the Staff would have us decide standing based on legal residence. To determine whether Mr. Mosbaugh has had sufficient exposure to Vogtle to support standing, we do not consider it necessary to determine, either as a matter of state law or of federal common law, whether Mr. Mosbaugh is a legal "resident" of the State of Georgia.

[34] Tr. 36-37, 44-46.

[35] Petition at 2-3.

Southern Nuclear must meet the regulatory requirement that it demonstrate its character and competence before it be granted operating authority over a nuclear power plant. Where the contention raised alleges, as here, that Southern Nuclear officials have intentionally withheld material safety information from the NRC, the issue is one that affects the safety of the entire plant. The risk of non-safety-conscious management is as great as many other risks that could be adjudicated in an operating license case. For this reason, we are considering a significant amendment involving "obvious potential for offsite consequences." *St. Lucie*, CLI-89-21, *supra*.

In this case, a few key individuals who are currently employed by the licensee, Georgia Power, are also employed by the prospective licensee, Southern Nuclear.[36] Because they are key employees of Southern Nuclear, their character is relevant to approval of the requested amendment. However, Georgia Power and the Staff would deny Mr. Mosbaugh standing because the proposed amendment will not increase the risk to which he is already exposed. We have concluded that this argument is not valid.

Mr. Mosbaugh has raised a valid safety concern related to the transfer of authority that is being requested in the pending license amendment. We have concluded that it is not a defense to Mr. Mosbaugh's allegations of deficiencies that those deficiencies may already exist. We do not recognize as a defense the conditional argument that if key people in Southern Nuclear are lacking in character and competence then the same people working for Georgia Power are similarly lacking and therefore there is no loss or "injury" to Mr. Mosbaugh due to the transfer of authority.

An analogous issue was decided in *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 203, 208-11 (1992) (*Millstone*). *Millstone* concerned an amendment necessitated by a calculational error that would have permitted a fully loaded spent fuel pool at Millstone to have had a criticality constant or K_{eff} of as much as 0.963, which is in excess of the maximum value of 0.95 permitted by NRC regulations. The purpose of the amendment was to place new restrictions on the fuel pool and to require new blocking devices so that the maximum permitted K_{eff} would not be exceeded. Thus, it is clear that the amendment would have made things *safer*. Nevertheless, the Licensing Board ruled that it would admit a contention that alleged that the new, admittedly safer fuel pool arrangement, still did not meet regulatory requirements. The Licensing Board said, 36 NRC at 211:

> We return to Licensee's argument that it was the prior calculational error, not the amendment, which caused a reduced margin of safety, therefore an injury in fact. That argument depends too heavily on compartmentalized reasoning. The potential for reduced

[36] A detailed description of the extent of overlap of senior personnel is set forth beginning at p. 99, above.

safety here (injury in fact) is both the prior calculational error and an amendment that does not redress that error but permits operation of the spent fuel pool according to its terms. The two concepts are logically inseparable.

Assuming that the record of the proceeding were to demonstrate that the risk from the calculational error is not abated by Amendment 158, interested persons may have redress by a denial of that amendment.[37] True, as Licensee states, that action would not correct the prior calculational error, but it would remove the authority to operate the spent fuel pool under an inadequate amendment. Such a denial would return the matter to the Licensee and the NRC enforcement staff for a proper resolution of the problem.

In our case, Mr. Mosbaugh should be given the opportunity to oppose the issuance of an amendment. He would be injured if the authority to operate Vogtle were transferred to people who lack the character and competence to operate that nuclear power plant. *See Seabrook*, CLI-91-14, 34 NRC at 267 (appearing to suggest that petitioner would have had standing to challenge the transfer of *operating* authority over the Seabrook plant on the grounds of character — alleged harassment of workers at another plant).

V. STAFF MOTION FOR DELAY

Staff stated that it could not respond to Mr. Mosbaugh's contentions because a pending criminal investigation of Mr. Mosbaugh's charges has been referred to the Department of Justice for its action. Staff stated:

> Each of Mr. Mosbaugh's contentions maintains that the proposed transfer for which permission is sought in the subject license amendment may not take place because of an alleged lack of "candor, truthfulness and a willingness to abide by regulatory requirements" of the proposed transferee, Southern Nuclear Operating Company, Inc. As a basis for contentions 2, 3 and 4, Mr. Mosbaugh makes allegations regarding material false statements attributed to officers and [he also mentions] a related investigation. *See* Amendments to Petition at 15-16, n.10. ***These allegations are being pursued by the Department of Justice for possible criminal prosecution, and until this investigation is complete the NRC Staff is unable to take a position on the allegations contained in the contentions.*** [Emphasis added; concluding footnote omitted.]

We do not find that the Staff provided us with an adequate reason not to comment on the proffered contentions, as there is no indication that the materials forwarded by this agency for potential criminal prosecution would be relevant to the adequacy of the basis provided by Mr. Mosbaugh for his contentions. It would appear that the material being kept confidential would either be

[37] [Footnote 11 in the original.] In the real world of NRC adjudications, applicants for licenses and amendments to licenses accept modification as a condition of issuance. Seldom are NRC adjudicators faced with an up or down choice.

irrelevant or would provide additional grounds for questioning the character and competence of Southern Nuclear. There is no reason to believe that the allegedly confidential materials would destroy the basis for the contentions.

We recognize that Georgia Power could be suffering from a potential difficulty. Access to these confidential files could permit it to rebut the basis for the proffered contentions. However, the standard for assessing the basis for contentions is far less than what would be required to accept their truth. Part of the basis for the contentions is the personal knowledge of Mr. Mosbaugh. Part is tapes that Mr. Mosbaugh says he made and apparently has listened to. His statements, about what he has seen and about what he believes to be in the tapes, provide adequate basis for his contentions. Hence, we have been able to act on the contentions even though the Staff did not file its comments on them.

We note that Georgia Power did respond to these contentions in Georgia Power Company's Answer at 20-26, as well as some general remarks that preceded these pages.

VI. CONSOLIDATION OF CONTENTIONS

We have examined the contentions we have admitted and have determined, in the interest of efficiency, that they amount to the following one contention:

> The license to operate the Vogtle Electric Generating Plant, Units 1 and 2, should not be transferred to Southern Nuclear Operating Company, Inc., because it lacks the requisite character, competence, and integrity, as well as the necessary candor, truthfulness, and willingness to abide by regulatory requirements.

We shall order that the admitted contentions all be consolidated so that this one contention, originally submitted in slightly altered form as Contention 2, will be the only one pending before us.[38]

VII. DISCOVERY — NEGOTIATIONS; STAFF TO SHOW GOOD CAUSE

It is the policy of this agency to adjudicate all its cases promptly and efficiently. There is an opposing policy: to protect the confidentiality of documents contained in criminal prosecutions pursued by the agency. In this

[38] Contention 1, which we have admitted, alleges a lack of character of Southern Nuclear allegedly occurring from the actions of Southern Company. The principal issue in Contention 1 is stated in the consolidated contention. Should Mr. Mosbaugh demonstrate the truth of the consolidated contention, we would then need to fashion a remedy and might at that point admit evidence (or stipulations) concerning the role of Southern Company, for the purpose of fashioning a remedy.

case, these apparently conflicting interests could be harmonized if the parties could reach an agreement on how the relevant information can be shared pursuant to a protective order that contains a carefully constructed provision that would keep all potential defendants, and all potential counsel for those defendants, ignorant of the contents of the investigation.

If those negotiations succeed, discovery or partial discovery of investigative documents can commence. If they fail, we will need to harmonize the policies for efficient adjudication and those for protecting criminal prosecution. To assist us in doing that, we will schedule filings by the parties. The first filing will be that of the Staff, to show cause why discovery of prosecution documents should not start immediately. In its filing, the Staff should include answers to the following questions: (1) What deadline, if any, can the Staff agree to as the latest date that discovery can start? (2) How does the Staff compare the importance of the civil questions relating to the adequate assurance of safety for the continued operation of the plant and a decision on the license amendment, to the importance of possible criminal prosecution?

VIII. OTHER DISCOVERY AND SCHEDULING

Other discovery, which may not be related to confidential documents that are possessed by the Office of Investigation or the United States Justice Department, may commence immediately. The parties shall commence negotiations concerning an appropriate schedule for this "other discovery," which may be reopened after other documents become available. If there is no agreement on a schedule before March 8, 1993, the parties shall simultaneously file suggested discovery and trial schedules on that date.

Order

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 18th day of February 1993, ORDERED that:

1. Mr. Allen L. Mosbaugh is admitted as a party to this case.
2. The following contention is admitted as the only contention in this case:

> The license to operate the Vogtle Electric Generating Plant, Units 1 and 2, should not be transferred to Southern Nuclear Operating Company, Inc., because it lacks the requisite character, competence, and integrity, as well as the necessary candor, truthfulness, and willingness to abide by regulatory requirements.

3. Discovery shall commence immediately.

4. Negotiations among the parties shall commence immediately, concerning: (a) a protective order and an insulating wall that might make the discovery of investigative documents possible at this time, and (b) a schedule for concluding discovery and holding a prehearing conference and a hearing.[39]

5. On March 8, 1993, the Staff shall file a brief showing cause why discovery of prosecution-related documents should not commence immediately. On that same date, the parties shall simultaneously file their suggested schedule for the case, including the events mentioned in the accompanying Memorandum. On March 18, 1993, Mr. Mosbaugh and Georgia Power Company shall file their response to the Staff's March 8 brief.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

James H. Carpenter
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

[39] The schedule should include a future date on which the parties will discuss the scheduling of witnesses during the hearing, stipulations to reduce the need for live testimony, and any other prehearing matters the parties choose to raise.