

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	Docket No. IA-19-027
	)	ASLBP No. 20-963-01-EA-BD01
	)	
Mr. Thomas B. Saunders	)	Date: January 3, 2020

**CONSENT MOTION FOR EXTENSION OF TIME**

Comes now, Leonard Sparks, and submits this consent motion for a one-day extension of time, from January 2 to January 3, 2020, to file a Reply to Thomas Saunders' Answer to Sparks' Motion to Intervene in the above-referenced matter. Counsel for the NRC Staff and for Mr. Saunders both consented to a one-day extension.

10 CFR 2.309(i)(2) provides that a party may file a Reply brief within seven (7) days from the filing of an Answer to a Motion to Intervene. Saunders filed an Answer to Sparks' Motion to Intervene on Thursday, December 26, 2019, making a Reply brief due on Thursday, January 2, 2020. That seven-day period included a 2-day weekend and a federal holiday.

An extension of time was needed to allow Counsel for Mr. Sparks to travel from her family home in Wisconsin where she spent the Christmas holidays back to the East Coast. In addition, Counsel's mother was hospitalized on December 30, 2019 necessitating the need to delay counsel's departure from Wisconsin. A one-day extension of time will not cause harm to any party or the Commission.

For the foregoing reasons, Mr. Sparks requests that this Consent Motion for Extension of Time of one day be granted.

Respectfully submitted

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Mr. Thomas B. Saunders	)	Date: January 3, 2020

**SPARKS' REPLY TO SAUNDERS' ANSWER  
TO SPARKS MOTION TO INTERVENE**

Comes now, Leonard Sparks, pursuant to 10 CFR §2.309(i)(2), and submits this *Reply to Thomas Saunders' Answer to Sparks' Motion to Intervene* in the above-referenced matter.<sup>1</sup>

While Mr. Saunders' Opposition is lengthy, the issues raised are straightforward. First, Mr. Saunders argues two procedural defects that he claims are grounds to deny the Motion to Intervene in its entirety. He argues that the Motion to Intervene should be denied because it was untimely and improperly filed through the Nuclear Regulatory Commission's (NRC) E-file system. He also argues that because Mr. Sparks' counsel failed to certify that she conferred with SNC and Mr. Mark Rauckhorst regarding his request to combine his challenges to the Southern Nuclear Company (SNC) Confirmatory Order that the Atomic Safety and Licensing Board (ASLB) should deny the request. Second, Mr. Saunders makes substantive objections that Mr. Sparks lacks standing because he has failed to define any injury to support his claim as an aggrieved party under 10 CFR §2.309(c)(i), and that "his two proposed contentions are unsupported and inadmissible under 10 CFR §2.309(f)(1). For the reasons discussed below, Mr.

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<sup>1</sup> See, Answer of Thomas B. Saunders In Opposition To Leonard Sparks' Motion To Intervene and Request for Hearing, filed December 26, 2019.

Sparks requests that the ASLB admit his Motion to Intervene and proceed with prehearing considerations.

I. Procedural Issues Should Not Result in Dismissal

A. Manner of Timely Service

Counsel for Mr. Saunders spends much time arguing that Mr. Sparks' Motion to Intervene in the above-referenced matter was not timely E-filed through the E-filing system, and for that reason should be dismissed.<sup>2</sup> Mr. Sparks acknowledges that he did not request the E-filing certificate until the day that the Motion for Intervention was filed, nor did he seek permission to file the Motion by paper copy. The circumstances of the original extension, i.e., ten days after the NRC issued the SNC Order, did not also allow the ten days to seek the E-filing certificate ahead of time, since no decision was made about intervention until that time had passed.

However, the Motion for Intervention was placed in the United States mail on November 29, 2019 to the Commission and Counsel for Mr. Saunders and sent electronically. Counsel for Mr. Saunders admits to receiving the Motion electronically on Saturday, November 30, 2019 and in the

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<sup>2</sup> As Counsel for Mr. Saunders states in much detail, Counsel for Mr. Sparks was granted permission by the NRC's Director of Enforcement to file a Motion to Intervene in the Enforcement Action against Saunders within 10 days of the issuance of a Confirmatory Order (CO) against the Licensee, Southern Nuclear Company (SNC) (Vogle 3 and 4). The SNC CO was issued on November 20, 2019, making Mr. Sparks' Motion due by November 30, 2019, which was a Saturday. Counsel for Mr. Sparks made several attempts to get certification for digital filing on Friday, November 29, 2019, the Friday after Thanksgiving, but was unsuccessful in reaching anyone in the Office of the Secretary (which issues certification), despite calls and messages. Failing to receive the certification, Counsel did file the Motion with the Secretary, Counsel for Mr. Saunders, and the Hearing Docket by regular U.S. Mail on that date; as well as electronically, and completed the E-filing Certification as soon as possible thereafter.

U.S. Mail on Monday, December 2, 2019. The NRC also received the Motion, the Staff has opposed it, and the Commission has established an ASLB to consider the issues.

Should the ASLB request or require an affidavit of these circumstances, Counsel for Mr. Sparks will be happy to provide it; however, since Mr. Saunders has proffered no harm as a result of the delayed E-filing, this procedural defect should not be grounds for dismissal of the Motion.

B. Failure to Confer on Initial Motion to Intervene and Consolidate Not Required

Mr. Saunders contends that the failure of Mr. Sparks' counsel to confer with counsel for SNC, and Mr. Rauckhorst, regarding the request to combine the Intervention with a subsequent request to intervene in the SNC CO matter is grounds to deny his Motion to Intervene. This argument doesn't make sense. At the time that the initial Motion to Intervene in the Saunders Confirmatory matter was filed, the subsequent Motion to Intervene in the SNC matter was not yet due and had not been filed. Further, since the matter involving Mr. Rauckhorst was not a Confirmatory Order, but rather simply a Notice of Violation, there was no opportunity for Intervention in that case, and no need to confer with anyone regarding consideration of those facts along with the SNC CO.<sup>3</sup> However, the facts regarding Mr. Rauckhorst's actions and conduct resulting in the failure to hire a potential candidate because of his engagement in legally protected activities are relevant to the overall understanding and adherence to the NRC's expectations for a safety conscious work environment (SCWE), and whether the SNC Confirmatory Order should be sustained.

While it is clear that counsel should confer before filing motions regarding hearing disputes, initial motions to intervene, including a request to consolidate, could not require

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<sup>3</sup> November 20, 2019 Notice of Violation, NRC Inspection Report (Office of Investigations Report No. 2-2017-004 to Mr. Mark Rauckhorst.

conferring since the proceeding had not yet been established. Now that a proceeding has been established for both cases,<sup>4</sup> presumably the ASLB will determine if it will entertain preliminary Motions, to dismiss and to Consolidate the proceedings.

## II. Mr. Sparks Has Established Standing to Challenge the Confirmatory Order

Mr. Sparks agrees with Counsel for Mr. Saunders that in order to establish *permissive* standing in this case, as opposed to standing as a matter of legal right, he must meet the tests of an injury that is traceable to Mr. Saunders' Confirmatory Order. To be clear, Mr. Saunders' Confirmatory Order and the supporting investigation by the Office of Investigations confirms that someone in management did something to directly interfered with Mr. Sparks' employment, resulting in his immediate – and wrongful termination – from work at Vogtle. However, the heavily redacted OI report and the nebulous and equivocal language in the Confirmatory Order itself, neither explain nor support the action taken by the Staff.<sup>5</sup>

Mr. Sparks does NOT seek a remedy for his wrongful termination in this forum, and is pursuing those issues through the appropriate avenues of the U.S. Department of Labor (DOL). However, the DOL does not provide for the remedial relief sought by Mr. Sparks in this forum, i.e., an NRC determination of all the relevant facts regarding Mr. Saunders' actions that led to

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<sup>4</sup> See, Establishment of Atomic Safety and Licensing Board, In the Matter of Southern Nuclear Operating Company Vogtle Electric Generating Plant, Units 3 and 4, Docket Nos. 52-025 and 52-026, ASLBP No. 20-965-03-EA-BD01, issued December 27, 2019.

<sup>5</sup> The CO states only “1. Mr. Saunders acknowledges that a violation of 10 CFR 52.5 (Employee Protection) occurred.” The heavily redacted Report of Investigation only states, in conclusion, “Based on the evidence, the allegation that \_\_\_\_\_ (redacted) at Vogtle, was discriminated against by management for raising safety concerns is substantiated.” *Concerns You Raised TO the NRC Regarding Vogtle 3 & 4 - Allegation Report RII -2017-A-01-09/OI Investigation Case No. 2-2017-032*, at 29. (Attachment 1 to the Motion To Intervene) These vague and undefined statement do not explain or support the Confirmatory Order, and do nothing to “improve safety” at the Vogtle facility or the industry.

the retaliatory termination and the resulting, continuing, damage to Mr. Sparks' reputation and credibility.

Mr. Sparks also does NOT seek "harsher enforcement action" as Mr. Saunders asserts. Rather, as set forth in his Motion to Intervene, he seeks the withdrawal of the Confirmatory Order in its entirety; arguing that since it is not based on any facts, the agreements between the Staff and Mr. Saunders cannot serve the public interest in this case. Creating a false or inaccurate or incomplete narrative, and then fashioning a remedy to that narrative, is illusory at best and deceptive at worst. The public interest is best served by the disclosure of the truth. "Sunlight is said to be the best of disinfectants: electric light the most efficient policeman." Louis Brandeis, Supreme Court Justice (1916-39 "What Publicity Can Do," *Harpers Weekly*, 20 December 1913." Interestingly, Justice Brandeis explained his thoughts in a letter to his fiancé, in which he stated that "he had been thinking about the wickedness of people shielding wrongdoers and passing them off (or at least allowing them to pass themselves off) as honest men." Berger, Andrew "*Brandeis and the History of Transparency*," May 26, 2009.

In this case, Mr. Sparks seeks disclosure of the facts, not shielded by the NRC staff, who is passing the situation off as resolved in the best interest of the public health and safety – who it has decided is not entitled to the facts. Mr. Saunders attempts to turn Mr. Sparks' argument into a general disagreement with the use of Alternative Dispute Resolution (ADR) processes by the NRC. That is not the case. ADR provides a useful tool for the resolution of many disputes within the Agency – but not this one.

Nor is this situation addressed by the leading cases cited by both the Staff and Mr. Saunders. Neither the situations addressed by the Court in *Belotti* nor by the Commission in *Farmer v DOT*, CLI -04-26, Memorandum and Order, dated October 7, 2004, was based on the

type of NRC sponsored ADR process that was utilized in this case, as well as in the more egregious case of the SNC Confirmatory Order in which the NRC and SNC do not agree on the facts at all.<sup>6</sup> Both of those cases followed Notice of Violations in which facts were fully disclosed. In this case, Mr. Sparks' reputation is harmed by the illusion created at the ADR, in which he was not allowed to participate, and in which his name does not even appear in the Order – even though the whole situation was about him.

Notwithstanding Mr. Saunders' recitation of NRC case law regarding the history of challenges to Confirmatory Orders, in general; and attempts to shoehorn those holdings onto this case, the issue remains both simple and valid – in fact the only valid question allowed – “whether the remedy selected is supported by the facts.” *Bellotti v. NRC*, 725 F2d at 1382.<sup>7</sup> Mr. Sparks asserts that it does not, and thus that the Confirmatory Order worsens the safety situation in general by the promulgation of alternative facts and also harms his reputation within the industry in general and at SNC in particular as a result thereof.

Mr. Sparks recognizes that he faces a high hurdle to establish standing in this case, and agrees that the issue boils down to “facts” -- do they matter? Does promulgating a narrative that

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<sup>6</sup> See, Confirmatory Order to Southern Nuclear. (Confirmatory Order Modifying License: Effective Upon Issuance EA-18-130 and EA -18-171) stating:

“This Confirmatory Order is the result of an agreement reached during as Alternative Dispute Resolution (ADR) mediation session conducted on August 5, 2019 in Rockville, Maryland to address two apparent violations. The NRC and SNC agree to disagree as to whether the violations occurred.”

<sup>7</sup> See, also, the Commission decision in *Farmer*, stating that:

“In practicality, it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders. That's because such orders presumably enhance rather than diminish public safety. Nevertheless, the notice of opportunity for hearing provides the public a “safety valve” because an order conceivably may remove a restriction upon a licensee or otherwise have the effect of worsening the safety situation. Such an order remains open to challenge. Citing *Bellotti*, at 1383. “



is not based on the facts, improve the safety condition of a facility or diminish it? We assert that facts do matter, and that the ADR process, while useful for some disputes, is counter-productive in this situation.

Assuming that the Board agrees that Mr. Sparks has established standing on this issue as articulated, the contentions he proffered in the original motion are sufficient for initial consideration. This is particularly true should the Board consider further the request for consolidation of this matter with the SNC CO.

For the reasons asserted herein, along with the initial Motion to Intervene, Mr. Sparks requests that the Board consider his request to be heard on this matter.

Respectfully submitted,

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Counsel for Petitioner Leonard Sparks

cc: Certificate of Service

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Consent Motion for Extension of Time and Reply To Saunders Answer to Sparks Motion To Intervene have been served electronically on all interested parties through the Electronic Information Exchange, this 3<sup>rd</sup> day of January, 2020.

**Billie Pirner Garde**

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Attorney for Petitioner Leonard Sparks

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**COMPLIANCE STATEMENT**

In compliance with 10 CFR §2.305, I certify that a copy of Mr. Sparks' Consent Motion for Extension of Time and his Reply to Saunders' Answer To Sparks' Motion To Intervene has been served through the E-filing System on this 3<sup>rd</sup> day of January, 2020.

Respectfully submitted

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