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

93 MAR 31 P3:06

Before Administrative Judges:
Peter B. Bloch, Chair
Dr. James H. Carpenter
Thomas D. Murphy

In the Matter of)

GEORGIA POWER COMPANY)
et al.,)(Vogtle Electric Generating)
Plant, Unit 1 and Unit 2))Docket Nos. 50-424-OLA-3
50-425-OLA-3Re: License Amendment
(transfer to Southern Nuclear)

ASLBP No. 93-671-01-OLA-3

ALLEN MOSBAUGH'S RESPONSE TO SCHEDULING QUESTIONS

Allen Mosbaugh hereby files a response to the Atomic Safety and Licensing Board ("ASLB") Memorandum and Order (Questions for Scheduling Conference.

1. What discovery, if any, can be conducted that would not interfere with the criminal referral?

The criminal referral is limited to documentation and information in the control and possession of the Nuclear regulatory Commission's Office of Investigations (NRC OI) and the United States Department of Justice ("DOJ"). In order to insulate the governments' criminal investigation from the instant matter, the ASLB need only issue an order delaying the parties access to documentary and testimonial evidence that is not in the control or possession of Georgia Power Company ("GPC") or its employees but is apart of the NRC OI or DOJ investigative files. In this respect, Mr. Mosbaugh's counsel is aware that NRC OI has

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conducted numerous interviews with Southern Nuclear Operating Company ("Southern Nuclear") and/or Georgia Power Company employees. This material, to the extent that it is already known to GPC, should be released to Mr. Mosbaugh.

In sum, the parties should be allowed to engage in discovery that cannot interfere with the on-going NRC/DOJ criminal investigation. In particular, information and documentation already known to GPC should be subject to immediate access by the parties. Additionally, Mr. Mosbaugh should be allowed to take depositions of all relevant GPC and/or Southern Nuclear employees, as necessary. In this respect, Mr. Mosbaugh believes that, as a result of this discovery, factual matters will be conceded by GPC and/or Southern Nuclear that will entitle him to summary judgment on certain issues relevant to the instant matter.

2. What advantage, if any, is there to commencing discovery now?

By allowing the parties to immediately commence discovery, the likelihood of future delays in the hearing will be curtailed. Equally and perhaps more compelling is the assertion by GPC that its (or Southern Nuclear) employees will seek to raise Fifth Amendment protection against self-incrimination. It is well settled that, in the context of the instant administrative matter, Mr. Mosbaugh would be entitled to receive adverse inferences stemming from the invocation of the Fifth Amendment privilege. Indeed, Mr. Mosbaugh believes that the scope and breadth of the privilege invoked by GPC and Southern Nuclear

management will entitle Mr. Mosbaugh to a default judgment in his favor. Thus, by allow discovery to commence with respect to key Southern Nuclear managers, including Messrs. McDonald, Hairston and McCoy, and assuming these individuals invoke a blanket Fifth Amendment privilege, Mr. Mosbaugh would be in a position to seek summary judgment and/or default judgment on issues relevant to the instant matter.¹ This would altogether eliminate the need for a hearing thereby conserving judicial resources and dispatch justice with great speed.

3. Does the referral for prosecution include Georgia Power? Can the company assert Constitutional rights of employees in a licensing action?

Mr. Mosbaugh does not know whether the referral for prosecution from NRC OI includes Georgia Power. Assuming it does, GPC still could not invoke a constitutional privilege against self incrimination on behalf of any of its employees. It is well settled that a corporation is not entitled to shield its own wrongdoing by asserting Fifth Amendment protection on behalf of its employees:

¹ The burden is on GPC to demonstrate that Southern Nuclear has the requisite character and competence to operate Plant Vogtle. If the top three managers of Southern Nuclear are unable or unwilling to present evidence demonstrating that they possess the requisite character and competence necessary to amend the license, then Mr. Mosbaugh should be allowed to file for summary judgment and to otherwise seek default judgement. Moreover, summary judgment and/or the issuance of a default judgment may also constitute collateral estoppel and res judicata with respect to the pending 10 C.F.R. §2.206 petition (and amendment thereto) filed by Mr. Mosbaugh (and Mr. Marvin Hobby) that remain pending against GPC.

A corporate office or employee, like any other individual, has no privilege against some other person producing incriminating evidence against him. The privilege is against compulsory self-incrimination only. Defendants' contention would result in corporations and corporate directors, officers and employees having a privilege against discovery of incriminating evidence against them available to no other person.

In re Folding Carton Antitrust Litigation, 76 F.R.D. 417, 419 (N.D.Ill. 1977). Indeed, GPC's attempt to stay discovery on the nebulous assertion that its employees may have to sacrifice fifth amendment protection is, in the words of the Court, an invitation for "Corporations to manipulate events so as to effectively eliminate the finely drawn distinction in fifth amendment jurisprudence between the treatment of individuals and the treatment of corporations." In re Grand Jury Empaneled March 17, 1987, 836 F.2d 150, 152 (3rd Cir. 1988).

Only individuals can invoke fifth amendment privileges and neither Southern Nuclear nor GPC has the requisite standing or the right to deflect inquiries into Southern Nuclear's character and competence on the basis of fifth amendment protection for its employees:

[I]ndividuals, when acting as representatives of a [corporation], cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination.

Braswell v. U.S., 487 U.S. 99, 110, 108 S.Ct. 2284, 101 L.Ed.2d

98 (1988) (quoting U.S. v. White, 322 U.S. 694, 699, 64 S.Ct. 1248, 1251 (1944)).

As such, neither GPC nor Southern Nuclear may assert Constitutional Fifth Amendment privileges of their respective employees in a licensing proceeding.

4. What miscellaneous suggestions would the parties make for the purpose of obtaining a realistic schedule from the Department of Justice or otherwise expediting this case?

Mr. Mosbaugh suggests that the schedule of DOJ's investigation and potential prosecution should not control the outcome of the commencement of discovery in this matter. Until such time as the DOJ issues indictment(s), this tribunal should commence with the instant proceedings and allow full discovery, except for discovery NRC Staff specifically identifies as directly interfering with pending criminal investigations and which this tribunal, after full briefing by the parties, determines should not commence at this time.

In sum, this tribunal should, as far as possible, separate the criminal investigation and/or prosecution from pending licensing issues. This is particularly so inasmuch as the burdens of proof and production are inapposite between the two. In this respect, if DOJ issued indictment, the burden would fall of the government to show that GPC/Southern Nuclear executives engaged in criminal misconduct and would need to produce sufficient evidence to demonstrate such beyond a reasonable doubt. In the instant matter the burden is on GPC to show that Southern Nuclear executives have the requisite character and

competence needed before an amendment to the operating license can issue, and GPC must so demonstrate by a preponderance of the evidence. Given the difference in burden of production and proof, Mr. Mosbaugh suggests that the instant matter proceed expeditiously regardless of the status of the DOJ investigation or until such time, if ever, criminal indictments issue.

Respectfully submitted,



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Dated: March 31, 1993

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 1993 Allen Mosbaugh's Response to Scheduling Matters was served by first class mail upon the following:

*Hon. Peter B. Bloch, Chair
*Hon. James H. Carpenter
*Hon. Thomas D. Murphy
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"*" indicates additional service by facsimile

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