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'94 AUG 24 August 23, 1994

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

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-3

Re: License Amendment
(transfer to Southern Nuclear)

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

INTERVENOR'S RESPONSE TO NRC STAFF'S
MOTION TO COMPEL THE RETURN OF THE OI EXHIBITS

INTRODUCTION

On August 2, 1994, the NRC Staff filed a motion for an order compelling the immediate return of documents in which Staff requested the immediate return of a copy of the OI Exhibits which it had given to Intervenor's counsel to review and copy.¹ This motion was added to the agenda during the August 12, 1994, status conference. Intervenor's counsel stated at that time that there would be no problem returning the copy, but that since a copy had been filed with the Board the Staff is under an obligation to serve Intervenor with a copy. Therefore, Intervenor would be returning the copy of the OI Exhibits only to have the Staff send it back. Staff did not agree that it was required to serve Intervenor with a copy of the OI Exhibits because, Staff

¹ The Staff has filed a motion for protective order regarding certain exhibits which were released in unredacted form. Intervenor will be responding to this motion in a separate filing to the Board.

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asserted, it is a public document. The Board instructed the Intervenor to respond to this motion in writing addressing: 1) the requirement of a party, when making a filing, to serve it on all parties; and 2) ex parte communications with the Board.

ARGUMENT

- I. The Staff is required to serve a copy of the OI Exhibits upon all parties.

All documents offered for filing shall be served upon all the parties to the proceeding. 10 C.F.R. §2.701(2)(b). The Staff is deemed to be a party. Id. On June 7, 1994, the Staff served the OI Exhibits upon the Board. According to the regulations the Staff was then required to serve the OI Exhibits on the other parties in this proceeding. In a letter to Ms. Mitzi Young, Esq., dated June 23, 1994, attached to Staff's motion, Mr. Michael Kohn stated to Ms. Young, that since the OI Exhibits had been filed with the Board, Intervenor would consider the copy in the possession of his counsel to be the service copy. The letter also requested that if the Staff did not agree with Intervenor's position to inform Mr. Kohn. Nonetheless, Intervenor had not heard from the Staff, and assumed the matter had been resolved, until the Staff filed its motion on August 2, 1994.

The Staff argued at the August 12, 1994, status conference that the OI Exhibits are public documents and therefore they should not be required to serve copies upon the parties. Intervenor has difficulty with this argument for two reasons.

The first is that the OI Exhibits were not made available to the public on June 7, 1994, when they were served upon the Board. In fact, they were not sent to the Public Document Room ("PDR") until August 15, 1994. The Staff was under the duty to serve exact copies upon the parties at the time it filed the OI Exhibits with the Board. 10 C.F.R. §2.701(2)(b). The Staff cannot withhold service for two months waiting for the documents to become publicly available. Secondly, there is simply no provision in 10 C.F.R. §2.701, releasing a party of its duty to provide proof of service upon all parties because the document is publicly available. Subsequently, the Staff has a duty to serve the other parties with an exact copy of any document it files with the Board in this proceeding. Therefore, the Staff had a duty to serve Intervenor with an exact copy of the OI Exhibits when it filed one with the Board.

II. The Staff may not engage in ex parte communications with the Board.

Ex parte communication is not permitted in this proceeding between the parties and the Board. Section 2.780(a) states that:

[I]n any proceeding...interested persons outside the agency may not make or knowingly cause to be made to any Commission adjudicatory employee, any ex parte communication relevant to the merits of the proceeding.

While this regulation is aimed at persons outside the agency 10 C.F.R. §2.781(e) states that "Communications to, from, and between Commission adjudicatory employees not prohibited by this

section may not serve as a conduit for... an ex parte communication that otherwise would be prohibited by §2.780." Section 2.781 also states that a NRC employee engaged in the performance of a litigation function may not advise a Commission Adjudicatory employee in written communication unless it is served on all parties. 10 C.F.R. §2.781(a)(2). The Staff, while participating in this proceeding, is engaged in a litigation function. In this function if the Staff files documents with the Board that are relevant to the merits of this proceeding, and does not serve the other parties with copies, then this filing is considered a prohibited ex parte communication. Therefore, it would be necessary for the Staff to serve Intervenor with a copy of the OI Exhibits.

Prohibiting ex parte communications is a fundamental principle of administrative law. As one commentator has noted, "[a]ll extra-record attempts to influence a pending case are blatantly illegal, unless the agency itself makes the communication part of the record, its decision is subject to reversal." B. Schwartz, Administrative Law, §127 (1976). The prohibition against ex parte communication extends to administrative agencies as well as parties to a proceeding. id.

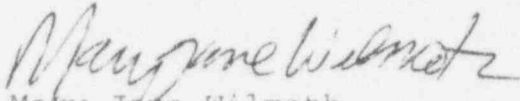
Accordingly, the Staff must provide the other parties with copies of all material it submits to the Board.

CONCLUSION

In accordance with the foregoing reasons, Intervenor will return a copy of the OI Exhibits to NRC Staff only if the Board

determines that the Staff was under no obligation to serve a copy of the OI Exhibits upon the parties after submitting them to the Board.

Respectfully submitted,



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(Vogtle Electric Generating)	Re: License Amendment
Plant, Unit 1 and Unit 2))	(transfer to Southern Nuclear)
)	ASLBP No. 93-671-01-OLA-3

CERTIFICATE OF SERVICE

I hereby certify that Intervenor's Response to NRC Staff's Motion to Compel the Return of the OI Exhibits has been served this 23rd day of August 1994, by first class mail upon the persons listed in the attached Service List.

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