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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSIONERS

OFFICE OF GENERAL COUNSEL  
DOCKET NO. 50-424-OLA  
BRANCH

In the Matter of	:	
	:	
GEORGIA POWER COMPANY,	:	
<u>et al.</u>	:	DOCKET NOS. 50-424-OLA
	:	50-425-OLA
	:	
(Vogtle Electric Generating :	:	AS'LP NO. 90-617-03-OLA
Plant, Units 1 and 2)	:	

LICENSEE'S MOTION TO DISMISS  
AND BRIEF IN OPPOSITION TO APPEAL

On May 25, 1991 Georgians Against Nuclear Energy ("GANE") filed with the Commission an untitled document, presumably a notice of appeal, asking the Commission to set aside the Atomic Safety and Licensing Board's May 15, 1991 Memorandum and Order (Terminating Proceeding). GANE's filing expressly requests an appeal "on the merits," but GANE has subsequently filed no appellant's brief, as is required by the Licensing Board's Order and the Commission's Rules of Practice.<sup>1</sup>

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<sup>1</sup>The Licensing Board's May 15, 1991 Order specifically set forth the requirements for perfecting appeals, including the time limitation of ten (10) days for filing a notice of appeal after service of the decision and a subsequent thirty (30) day period

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Accordingly, as discussed more fully below, GANE's appeal should be dismissed.

#### STATEMENT OF CASE

On May 25, 1990, Georgia Power Company ("Licensee") applied for license amendments to change a Technical Specification in both the Vogtle Unit 1 and Unit 2 licenses to permit the high jacket water temperature trip on the emergency diesel generators to be bypassed during emergency starts. This amendment was proposed to enhance plant safety by preventing a spurious trip during an emergency start. The proposed bypass of a diesel generator's high jacket water temperature trip during emergency starts is specifically permitted by Regulatory Guide 1.9, Rev. 2, if the operator has sufficient time to react appropriately to an abnormal diesel generator condition.

The NRC Staff concurred with Licensee's proposal and published a proposed no significant hazards consideration finding and provided an opportunity for hearing. 55 Fed. Reg. 25,756 (1990).

On July 23, 1990 GANE petitioned to intervene, but made no showing of standing. The Licensing Board, however, provided GANE a further opportunity to cure the deficiencies in its

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for filing the appellant's brief. GANE's filing on May 25, 1991 was within ten (10) days of service of the Order, but no brief followed.

petition and to plead contentions. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 N.R.C. 89 (1990).

GANE filed an Amendment to Petition for Leave to Intervene on September 4, 1990. In separate responses filed on September 14, 1990, both the NRC Staff and Licensee continued to oppose the intervention on the grounds that GANE had not demonstrated standing and had not satisfied the minimal pleading requirements for contentions set forth in 10 CFR 2.714 (1990).

A prehearing conference was held on September 19, 1990. At the prehearing conference, the Licensing Board advised GANE that its petition appeared deficient. Tr. 9. The Board observed that GANE had not sufficiently identified its factual basis for contentions, and that the Board and other parties had a difficult time identifying "what you're going to argue" as a factual basis. Tr. 75-76. Similarly, the Board noted a lack of any reference as a legal basis for GANE's contentions. Tr. 62. GANE asserted during the conference that "we don't feel called upon at this time to provide a basis for arguing with [the license amendment]." Tr. 8.

The Board noted that the NRC's regulations required GANE to identify the expert opinion on which GANE was relying and

that the petition did not do so. Tr. 75. GANE then identified an individual as an expert from whom it had derived information, but acknowledged that the expert was not aligned with GANE and had problems with GANE's position in this proceeding. Tr. 93. Ultimately, GANE acknowledged that it might not have a position in the absence of discovery. Tr. 151-152.

At the end of the conference, prompted by misunderstandings that were evident in several statements and questions during the conference, Licensee volunteered to provide additional information. Tr. 160-69. See also Prehearing Conference Order (Oct. 2, 1990). On November 14, 1990, Licensee provided the Board and parties responses to a number of questions, pertinent to plant procedures, engineering evaluations, and licensing correspondence. GANE and the NRC Staff were afforded an opportunity to comment, and in a telephone conference on January 22, 1991, the Board asked certain follow-up questions. Memorandum and Order (Telephone Conference Call, 1/22/91). The NRC Staff responded to these questions on March 18, 1991; Licensee responded to these questions on March 20, 1991; and GANE filed further response comments on April 22, 1991.

On May 15, 1991, the Licensing Board issued a Memorandum and Order (Terminating Proceeding). Georgia Power Co.

(Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 N.R.C. \_\_\_\_ (slip op. May 15, 1991). The Board ruled that GANE had not submitted any admissible contentions. Id. at 2. The Board found that none of GANE's contentions complied with 10 C.F.R. § 2.714. Id. at 6. The Board first observed that GANE's contentions as a whole made no reference whatsoever to the legal authority under which the application should be judged, did not include an explanation of the contentions' bases, and did not set forth the concise statement of alleged facts or expert opinion which the NRC's rules require in support of contentions. Id. at 6-7. In addition, examining the individual contentions offered by GANE, the Board concluded that various contentions failed to raise a genuine dispute, and the others failed to state a claim on which relief might be granted. Id. at 8-11.

#### ARGUMENT

- A. As With The Proceeding Below, GANE Has Failed To Comply With The Commission's Requirements For Adjudicatory Proceedings. GANE's Appeal, Therefore, Should Be Dismissed.

GANE has approached this appeal in the same manner as the proceedings before the Atomic Safety and Licensing Board -- as an opportunity for free-ranging dialogue and voicing of concerns unfettered by procedures adopted and implemented by the Commission for adjudicatory proceedings. GANE has repeatedly sought to have its procedural noncompliance

excused because of its lay status, in effect displaying little regard for its obligations in a formal adjudication. In the proceeding below, GANE ignored the pleading requirements, and as a result its contentions were found inadmissible. In this appeal, GANE has filed no brief, and as a result its appeal, too, should be rejected.

The NRC's procedures, as set forth in the Licensing Board's Memorandum and Order, expressly require an appellant to file a brief. The brief must clearly identify the errors of fact or law that are the subject to the appeal and, for each issue appealed, the precise portion of the record relied upon in support of the assertion must be provided. 10 C.F.R. § 2.762(d)(1). GANE has filed no document even remotely resembling a brief. No brief was filed within the thirty (30) day period provided by the Board's Memorandum and Order. And, GANE's initial filing is no substitute as it contains no specification of alleged error in the Board's ruling.

At least in the absence of a showing of extraordinary cause, an appeal will not be entertained where the appellant fails to file its brief. Dismissal for this failure is warranted irrespective of whether the appellant is represented by counsel or pro se, because fairness to other litigants and the orderly administration of the adjudicatory process precludes the waiver of so fundamental a requirement.

Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-140, 6 A.E.C. 575 (1973).

B. GANE's Failure To File A Brief And Identify Any Error In The Board's Ruling Is Prejudicial.

GANE's failure to brief its appeal as required by the Commission's rules is obviously highly prejudicial to the Staff and Licensee. Neither has been given notice of what GANE believes are the specific errors in the Licensing Board's ruling. As far as Licensee can discern from GANE's May 25, 1991 filing, GANE merely wants to further discuss technical issues.<sup>2</sup> Moreover, GANE does not dispute the inadequacy of its rejected contentions ("Our all-volunteer, citizen organization's procedural shortcomings notwithstanding, we appeal to you to consider this case on the merits.") The only issue that may be appealed, however, is the correctness of the Board's determination that GANE's proffered contentions did not satisfy 10 C.F.R. § 2.714. GANE has pointed to no error in that determination.

As a result of GANE's gross deficiencies in perfecting an appeal, Licensee is unable to do more than provide the Statement of Case above to show that GANE was provided ample

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<sup>2</sup>The technical concerns raised by GANE were addressed in the various answers, procedures, evaluations, and correspondence which Licensee and the NRC Staff provided to the Licensing Board and other parties. The Licensing Board was satisfied that this information "answered all outstanding legitimate concerns." May 15, 1991 Memorandum and Order at 8.



opportunity to satisfy pleading requirements and failed to do so. Indeed, the Licensing Board made every effort to allow GANE to cure its contentions and demonstrate the existence of a genuine issue. But even after having been provided a wealth of information, amounting in effect to discovery in advance of the Licensing Board's ruling on contention admissibility, GANE could not show the existence of a genuine issue in dispute.

Nor should GANE be permitted to shield itself from its obligations by pleading pro se ignorance. GANE has considerable experience in NRC proceedings. It participated in the Vogtle construction permit proceeding and the Vogtle operating license proceeding, and is currently pursuing a hearing on another Vogtle license amendment application. Moreover, in this case, the Licensing Board's May 15, 1991 Memorandum and Order explicitly advised GANE of its briefing obligation in connection with any appeal.

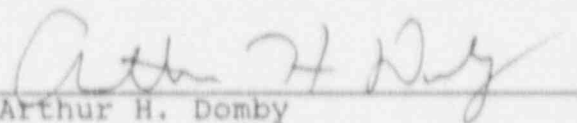
C. Conclusion.

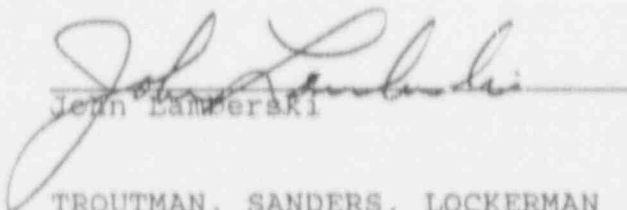
In sum, GANE's failure to file its brief and associated failure to provide the parties and the Commission with notice of any error in the Licensing Board's May 15th Order mandates dismissal of the appeal. Intervenors, even pro se intervenors, have a threshold responsibility to structure their participation in adjudicatory proceedings so that it is



meaningful and alerts the agency to the intervenors' position and contentions. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 N.R.C. 43, 50 (1981). Due process, fundamental fairness and agency effectiveness require, at a minimum, the fulfillment of these obligations to perfect an appeal in such formal matters.

Respectfully submitted,

  
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DATED: July 22, 1991

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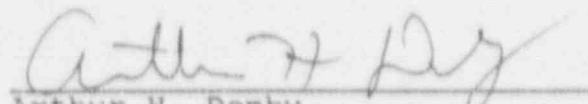
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: Plant, Units 1 and 2) :

CERTIFICATE OF SERVICE

This is to certify that copies of the within and foregoing "Licensee's Motion to Dismiss and Brief in Opposition to Appeal" were served, pre-paid to ensure proper delivery, via the United States Mail, First Class, or via Federal Express, overnight delivery, or via hand delivery, to all those listed on the attached service list.

This 22 day of July, 1991.

  
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