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

OFFICE OF SECRETARY
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BRANCH

Before Administrative Judges:

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

In the Matter of)	
GEORGIA POWER COMPANY)	Docket Nos. 50-424-OLA-3
<u>et al.</u> ,)	50-425-OLA-3
(Vogtle Electric Generating)	Re: License Amendment
Plant, Unit 1 and Unit 2))	(transfer to Southern Nuclear)
)	ASLBP No. 93-671-01-OLA-3

INTERVENOR'S RESPONSE TO THE BOARD'S MEMORANDUM AND ORDER
(Effect of Department of Labor Case No. 90-ERA-30)

On October 3, 1995, the Atomic Safety and Licensing Board authorized the parties to file briefs setting forth the legal significance of Hobby v. Georgia Power Co., Department of Labor Case No. 90-ERA-30 to this proceeding. Intervenor hereby files his response.

I. Issue Preclusion is applicable to Department of Labor decisions

Recently, in Safety Light Corporation, et al. (Bloomsburg Site Decommissioning and License Renewal Denials) LBP-95-9, 41 N.R.C. 412, 442 (1995), the Atomic Safety and Licensing Board ("ASLB") reaffirmed its position on the applicability of the doctrine of collateral estoppel, noting that "issue preclusion is a settled principle of NRC adjudicatory proceedings." The Board succinctly stated the application of the doctrine of collateral estoppel as requiring the "identity of parties, identity of

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issues, and issue materiality." 41 N.R.C. at 443 (footnote omitted).¹

The application of the doctrine of collateral estoppel with respect to a final decision issued by the Secretary of Labor was reached in Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2) LBP-83-34, 18 N.R.C. 36 (1983). In Comanche Peak, the Board specifically held that, with respect to any facts necessary to the Secretary's decision and relevant to the licensing action, a final order issued by the Secretary is binding if the licensee is found to constitute a party to the labor case.² 18 N.R.C at 38. Also see Norman v. Niagara Mohawk Power Corp., 873 F.2d 634, 638 (2d Cir. 1989).

A. "Identity of parties."

There is no question that Georgia Power is the same party in interest in the instant matter as well as in Hobby.³

¹ Also see Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 212 (1974), which holds that collateral estoppel applies if: (1) the issue for which preclusion is sought is the same as was involved in the prior action; (2) the issue was actually litigated; (3) the issue was determined by a valid final judgment; and (4) the determination of the issue was essential to the prior judgment. Florida Power & Light Co. (St. Lucie Plant, Unit 2), LBP-81-58, 14 NRC 1167 (1981) discusses and provides authority for these criteria.

² A significant factor considered in Comanche Peak was the "quality of the labor department decision" which was found to be "carefully reasoned, explaining the interrelationships of facts in a complex factual record." 18 N.R.C at 38. A review of the Hobby decision demonstrates that the Secretary has, again, set forth a careful and well reasoned statement of facts in a complex factual record.

³ In Hercules Carriers, Inc v. claimant State of Fla., 768 F.2d 1558, 1458 (11th Cir. 1985), the court, citing to Parklane Hoisery Co. v. Shore, 439 U.S. 322, 328, 99 SW.Ct. 645, 650, 58 (continued...)

B. "Identity of issues" and "Materiality."

The factual issues reached in Hobby are identical and material to the factual record litigated by the parties during the "Phase I" portion of this proceeding.⁴ Perhaps the best way to demonstrate the extent of the relevance of the facts is by way of example. One example of the overlap can be found in the issues the Board admitted from Intervenor's Prehearing Statement of Issues, dated December 30, 1994. Therein, Issue No. 8, which was admitted by the Board, alleges that Georgia Power failed to identify NOCA as an oversight organization in response to a Board question contained in LBP-94-916, 39 N.R.C. 257 (May 25, 1994).⁵

The issue of whether NOCA was established to provide oversight

³(...continued)
L.Ed.2d 552 (1979), states:

Finally, the most significant consideration in determining whether to invoke collateral estoppel is whether the party had a full and fair opportunity to litigate the issue to be estopped."

The record before the Secretary of Labor demonstrates that Georgia Power had a full and fair opportunity to litigate the factual issues set forth in the Hobby decision.

⁴ See Tr. 1045-1046, Georgia Power's opening statement in Phase I, which reads, in relevant part:

Judge Bloch, Judge Carpenter, and Judge Murphy, this is effectively the third time Intervenor's case on transfer of control has been presented. It was first presented in Mr. Hobby's Department of Labor proceeding in 1990. They lost.

Georgia Power effectively concedes the materiality and identity of issues.

⁵ The Board question was as follows: "What organizational units or executive personnel of Georgia Power had any form of oversight activity...with respect to SONOPCO? What were the activities [of the organization]?... In response to this question, Georgia Power only identified its CEO and Management Council. The entire purpose and function of NOCA was omitted.

of SONOPCO is therefore before the Board. Significantly, the Hobby decision squarely dealt with the reason why NOCA was established as well as why it was disbanded. In this respect, the Secretary determined the following:

- 1) that NOCA was "created and supported by President Dahlberg," Hobby at p. 14;
- 2) that "Dahlberg created NOCA to perform work beyond contract administration," Hobby at p. 21;
- 3) that the December 27, 1988, memo creating NOCA demonstrates that there was "a legitimate function to be performed by an organization separate from SONOPCO," Hobby at p. 22;
- 4) that Mr. Hobby, NOCA's General Manager, "as specifically removed from the information "pipeline" to "silence" him from raising additional concerns about an illegally transfer of control. Hobby at pp. 16, 23.

This example demonstrates that factual issues are mutually material. Intervenor asserts that a careful review of the Hobby decision will demonstrate that all of the factual issues set forth therein relate to the contested Phase I issues.

C. Finality of the Secretary's decision

A necessary element of Collateral estoppel is that the decision constitute a final decision. Pursuant to 42 U.S.C. 5851(c), the decision of the Secretary is final and unappealable unless a party seeks review "within sixty days from the issuance of the Secretary's order." Georgia Power did not appeal the decision and the sixty day period has expired. That damages remain to be determined is immaterial as to the determination of when agency action is final. See Franklin v. Massachusetts, 500

U.S. ___, 112 S.Ct. 2767, 120 L.Ed.2d 636, 647-648 (1992).

Georgia Power has failed to appeal the Hobby decision

Conclusion

The Bloomsburg and Comanche Peak precedents demonstrate the applicability of issue preclusion as to any material fact contained in the Hobby decision that would also be material to any issue pending with this Board.

Respectfully submitted,



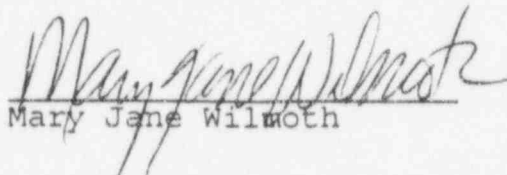
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CERTIFICATE OF SERVICE

I hereby certify that this pleading was served by first class mail (and facsimile on those designated with an "**") on October 13, 1995 on the persons identified in the attached list.

By:



Mary Jane Wilmoth

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