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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
GEORGIA POWER COMPANY, <u>et al.</u>)	Docket Nos. 50-424 (OL)
)	50-425 (OL)
(Vogtle Electric Generating Plant,)	
Units 1 and 2))	

APPLICANTS' MOTION TO STRIKE, AND
IN THE ALTERNATIVE FOR LEAVE TO REPLY
TO, INTERVENORS' RESPONSE
TO APPLICANTS' MOTION FOR
SUMMARY DISPOSITION OF CONTENTION 7

I. Introduction

On July 15, 1985, Applicants submitted "Applicants' Motion for Summary Disposition of Joint Intervenor's Contention 7 (Ground-water)" and "Applicants' Statement of Material Facts As to Which There Is No Genuine Issue to Be Heard Regarding Joint Intervenor's Contention 7 (Ground-water)." Applicants supported their motion with the Affidavit of D. S. Jagannathan, Stephen J. Cereghino, and Mark L. Mayer, and the Affidavit of Thomas W. Crosby, Clifford R. Farrell and L. R. West.

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On August 9, 1985, Joint Intervenors late-filed "Intervenors' Response to Applicants' Motion for Summary Disposition of Contention 7." Joint Intervenors did not support their response by countering affidavit or otherwise, but instead purported to recount an "analysis" by William F. Lawless. Joint Intervenors also submitted "Intervenors' Statement of Material Facts Relating to Contention 7," which repeated nearly verbatim Mr. Lawless' comments. Joint Intervenors amended their response on August 21, 1985.

Applicants move the Board to strike Joint Intervenors' Response. As discussed below, Joint Intervenors' Response is not supported by evidence, as is required by the Commission's Rules of Practice. Furthermore, Mr. Lawless, whom Joint Intervenors characterize as their expert witness on ground-water (Intervenors' Response at 1), is not such an expert and is not competent to testify to the statements in his "analysis."

Alternatively, Applicants move the Board for leave to file a substantive reply to Intervenors' Response. Intervenors' Response contains a number of inaccurate and misleading statements of which the Board should be aware.

II. Joint Intervenor's Response
Is Not Supported By Evidence
and Should Be Stricken

As noted above, Applicants supported their motion by affidavit. In such case, 10 C.F.R. § 2.749(b) provides:

When a motion for summary disposition is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his answer; his answer by affidavit^{1/} or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact. If no such answer is filed, the decision sought, if appropriate, shall be rendered. (Footnote added).

This provision is drawn from F. R. Civ. P. 56(e).

The purpose of F. R. Civ. P. 56(e), and consequently of 10 C.F.R. § 2.749(b), is to pierce the pleadings. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 159 n.20 (1970). See also Advisory Committee Note to 1963 amendment to Fed. R. Civ. P. 56(e) ("The very mission of the summary judgment procedure is to pierce the pleadings and assess the proof in order to see whether there is a genuine need for trial").

Consonant with this purpose, where a movant has made a proper showing for summary disposition and has supported his motion by affidavit, the opposing party must proffer countering

^{1/} 10 C.F.R. § 2.749 permits an answer to be supported by depositions and answers to interrogatories, in addition to affidavits.

evidentiary material or explain in an affidavit why it is impractical to do so. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-32A, 17 N.R.C. 1170, 1174 n.4 (1983), citing Adickes v. S. H. Kress & Co., 398 U.S. 144, 160-61 (1970). Joint Intervenors have failed to do so despite clear notice of the obligation. See Applicants' Motion for Summary Disposition of Joint Intervenors' Contention 7 at 5-6. The Board should therefore strike Joint Intervenors' response. Any other action would ignore both the express mandate in 10 C.F.R. § 50.49(b) that a party opposing the motion may not rely upon mere allegations or denials and the very purpose of the Commission's regulation.

This defect in Joint Intervenors' Response would not be cured even if Mr. Lawless' "analysis" were resubmitted as an affidavit. 10 C.F.R. § 2.749(b) requires that affidavits set forth such facts as would be admissible in evidence and show affirmatively that the affiant is competent to testify to the matters stated therein. Mr. Lawless' comments, however, are vague, speculative, and inadmissible lay opinion, and many of the comments are irrelevant.

Joint Intervenors' response does not demonstrate that Mr. Lawless is competent to give expert opinion testimony. Their response does not even indicate that Lawless has personal knowledge of the matters he recounts or that he believes them

to be correct. Moreover, Mr. Lawless is not a geologist or hydrogeologist. See Intervenor's Campaign for a Prosperous Georgia and Georgians Against Nuclear Energy Response to Applicants' Third Set of Interrogatories and Request for Production (Feb. 6, 1985) at 6-7 (Response to interrogatory G-4). Mr. Lawless has never studied geology, and has studied hydrology only as part of another course he took at Louisiana State University. Deposition of William Lawless (March 26, 1985) at 55-56.

III. Joint Intervenor's Response is Inaccurate,
and Applicants Should Be Permitted to Reply

Applicants have reviewed Intervenor's Response carefully and have found a number of inaccurate statements of which the Board should be aware. For example, Intervenor's Response at page 3 states that the 1971 ground-water chemical analysis should be updated, but fails to mention that Joint Intervenor's were informed of more recent analyses during discovery and the data made available to them. At the same page, Joint Intervenor's state it has been found that Strontium-90 contamination in the VEGP area is significant, and they cite the FES for this proposition. Applicants are aware of no such finding in the FES. An even more egregious example occurs on page 7. Joint Intervenor's state that "The SRP found contamination traveled about 4 or more times faster than had been calculated with

similar but more conservative methods than used by VEGP." Joint Intervenor, however, offer no citation and conveniently omit mentioning the fact that the increased travel time was the result of a stream erosion, which reduced a 1700-foot flowpath by about 1000 feet. A number of other inaccurate factual statements exist. In addition, Intervenor's Response is replete with mischaracterizations of Applicants' statements in Applicants' motion and affidavits. See e.g. Intervenor's Response at 8 (commenting on paragraphs 14-18 of the Affidavit of Crosby et al., confusing exploratory holes with observation wells, and incorrectly stating that closure is not discussed.^{2/}

Joint Intervenor's Response also raises new arguments which Joint Intervenor failed to disclose during discovery. For example, Mr. Lawless alleges that settlement of the VEGP facility will compromise the integrity of the marl as an aquiclude. See Intervenor's Response at 3. Applicants, however, asked Joint Intervenor and Mr. Lawless during discovery to describe any basis they might have to believe the marl was not an effective aquiclude. Neither Joint Intervenor nor Mr. Lawless ever mentioned a concern about settlement. CPG/GANE's

^{2/} These and other inaccuracies demonstrate the wisdom of requiring responses to be supported by countering evidential material. Applicants assume that were Mr. Lawless required to attest to having personal knowledge of the information in his comments and to attest to the veracity of that information, he would have been more circumspect and his comments more accurate.

Response to Applicants' First Set of Interrogatories and Request for Production of Documents (Dec. 5, 1984) (answers to interrogatories 7-22 to 7-27 on unnumbered pages 8-9); Intervenor Campaign for a Prosperous Georgia and Georgians Against Nuclear Energy Response to Applicants' Third Set of Interrogatories and Request for Production (Feb. 6, 1985) at 5 (answers to interrogatories 7-57 and 7-58); Deposition of William F. Lawless (March 26, 1985) at 83-88. This failure by Joint Intervenor to respond fully during discovery has prevented Applicants from anticipating and addressing Joint Intervenor's concern. Applicants should therefore be permitted to reply.

Applicants are aware of NRC precedent holding that a reply to a response to a motion should not be submitted until after permission to file a reply is received. See e.g. Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), LBP-76-38, 4 N.R.C. 435, 441 (1976). Applicants are also aware, however, of a recent, unpublished Appeal Board Order indicating that the preferred practice is to file the reply along with the motion. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), Docket No. 50-382, ASLAB Order dated Feb. 13, 1985. Not knowing whether this Board would wish to consider Applicants' proposed reply in conjunction with Applicants' motion for leave to reply, Applicants intend to submit their proposed reply to the Board as soon as it is completed.

IV. Conclusion

For the reasons discussed above, Applicants move the Board to strike Intervenor's Response to Applicants' Motion for Summary Disposition of Contention 7, and in the alternative, for leave to reply to that response.

Respectfully submitted,



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Dated: August 26, 1985

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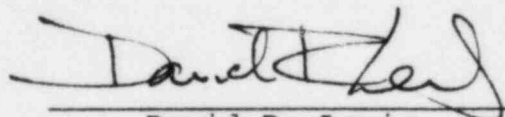
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Motion to Strike, and in the Alternative for Leave to Reply to, Intervenor's Response to Applicants' Motion for Summary Disposition of Contention 7," dated August 26, 1985, were served upon those persons on the attached Service List by deposit in the United States mail, first class, postage prepaid, this 26th day of August, 1985.



David R. Lewis

Dated: August 26, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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GEORGIA POWER COMPANY, <u>et al.</u>)	Docket No. 50-424
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(Vogtle Electric Generating Plant,)	
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