

15094

DOCKET NUMBER  
PROD. & UTIL. FAC. 50-424/425-OLA-3

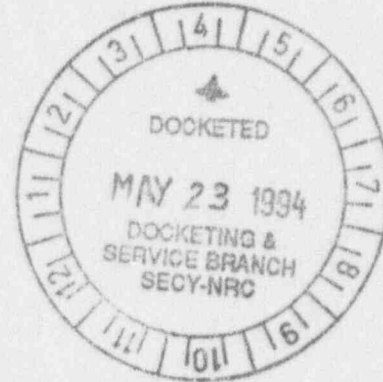
**TROUTMAN SANDERS**  
ATTORNEYS AT LAW  
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

NATIONSBANK PLAZA  
600 PEACHTREE STREET, N.E. SUITE 5200  
ATLANTA, GEORGIA 30308-2216  
TELEPHONE: 404-885-3000  
FACSIMILE: 404-885-3900

JOHN LAMBERSKI

DIRECT: 404-885-3360

May 23, 1994



Administrative Judge Peter B. Bloch, Chairman  
Administrative Judge James H. Carpenter  
Administrative Judge Thomas D. Murphy  
Atomic Safety and Licensing Board (Georgia Power)  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

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

Dear Sirs:

During the May 20, 1994 telephone conference, there was some discussion of the likelihood that, during the upcoming depositions, there would be disagreement among the parties concerning the scope of discovery. It was decided that counsel for Georgia Power Company ("GPC") would provide to the Board and the parties a discussion of the issue to enable this matter to be addressed by the parties and resolved by the Board during the depositions, if necessary. I begin with a history of the Board's prior rulings.

Prior Rulings of the Licensing Board Concerning Scope of the Proceeding.

The Board's Memorandum and Order (Case Management), LBP-93-15, 38 N.R.C. 20 (July 21, 1993), ruled that this proceeding would be divided into phases. "Under this concept, the Phase I discovery and hearing is restricted to matters related to the bases for the admitted contention." 38 N.R.C. at 22. Subsequently, the parties expressed differing views of what were the "bases for the admitted contention."

On August 12, 1993, the Board issued its Memorandum and Order (Clarification of the Scope of Discovery). That order stated, at 4: "The scope of discovery in Phase I of this proceeding shall be limited to the scope of the admitted contention but shall extend to all bases advanced by Mr. Allen L. Mosbaugh in his [December 9, 1992] amended petition." The "bases" referred to by the Board's order included Intervenor's Section 2.206 petition which Intervenor had cited by reference in its Amended Petition. The Board declined to limit the scope of Phase I to the issues of illegal license transfer and the alleged false

9406020184 940523  
PDR ADCK 05000424  
PDR

DS03

Atomic Safety and  
Licensing Board  
May 23, 1994  
Page 2

statements about diesel starts in LER 90-006, as GPC and the NRC Staff had urged. Board Order at 3.

In order to give the Board the benefit of a full briefing on the issue of the scope of Phase I (which, as GPC then noted, has the potential to dramatically expand the breadth of this proceeding), GPC filed a Motion for Reconsideration of the Board's August 12, 1993 Order, dated August 23, 1993 ("GPC's Motion"). GPC argued that "the factual bases and the scope of Phase I of this proceeding should be limited to those matters that were explicitly identified and discussed by Intervenor when he pleaded his contentions." GPC's Motion at 2-3. GPC's Motion recited the allegations in Intervenor's Amended Petition and, with respect to the LER 90-006 issue, it stated:

With respect to Contentions 2, 3, and 4, Intervenor asserted that Southern Nuclear's management, knowing that LER 90-006 contained material false statements, conspired to submit materially false information to the NRC that was significant to the regulatory process. [Amended Petition] at 15-16. Intervenor identified tape recordings and an Office of Investigations ("OI") investigation as evidence purportedly supporting this assertion.

Intervenor further asserted, as a basis for Contentions 2, 3, and 4, that Southern Nuclear's management had conspired to submit materially false information to the NRC Staff to derail the on-going OI investigation. *Id.* at 16-19. Intervenor explained that he had submitted a 2.206 petition on September 11, 1990, and he incorporated the 2.206 petition as an exhibit. *Id.* at 16 and n. 11. Intervenor then identified an April 1, 1991 response to the 2.206 petition signed by GPC's Mr. McDonald and asserted that information (*i.e.*, tapes) in the possession of OI would demonstrate numerous material false statements. *Id.* at 17. Intervenor further stated:

In addition to the documentation in the possession of NRC-OI (which petitioner incorporates by reference herein), petitioners incorporates [sic] by reference the entirety of their July 8, 1991 10 C.F.R. 2.206 petition, in particular: Section I.1 (relating to McDonald's submission of material false statements to the NRC when responding to allegations raised by Petitioners in their September 11, 1990 Petition);<sup>14/</sup> and Section I.2 (relating to false statement as to when Mr. Mosbaugh alerted SONOPCO management about false statements contained in LER 90-006).<sup>15/</sup>

*Id.* at 18.

Footnote 14 of the Amended Petition indicated that section I.1 of the July 8, 1991 2.206 petition relates specifically to Mr. McDonald's statement that Mr. Hairston had not participated in an April 19, 1990 conference call and to Mr. McDonald's first-hand knowledge of diesel generator start information discussed in LER 90-006. Footnote 15 indicated that section I.2 of the 2.206 July 8, 1991 petition relates to Mr. McDonald's response regarding when Intervenor first alerted his management to inaccuracies in the diesel generator start data contained in the LER.

Intervenor concluded his discussion of the bases for Contentions 2, 3, and 4 by asserting:

The totality of documentation in the possession of NRC-OI relating to the conspiracy to submit and the ultimate submission of material false information to the NRC in LER 90-006 demonstrates that SONOPCO's management does not have the requisite character, competence, integrity, candor, truthfulness and willingness to abide by regulatory requirements needed before an amendment to the plant Vogtle license listing SONOPCO as the licensed operator of plant Vogtle may be granted.

Id. at 19. Intervenor referred to no matter other than the allegations relating to the submittal of LER 90-006.

GPC's Motion at 4-5.

After recounting the history of the proceeding, GPC's Motion argued with respect to the diesel starts issue that

discussion of Contentions 2, 3, and 4 in the Amended Petition was limited to allegations concerning the preparation and submission of LER 90-006, and certain subsequent statements by Mr. McDonald related to the preparation of the LER. In the Amended Petition's footnote 11, the September 11, 1990 2.206 petition is incorporated as an "exhibit" reflecting the allegations that Mr. McDonald addressed. The Amended Petition then incorporates both 2.206 petitions by reference to support allegations that Mr. McDonald's responses were inaccurate. The Amended Petition refers specifically to two sections of the July 8, 1991 supplemental 2.206 petition (relating and limited to (1) whether Mr. Hairston had participated in a conference call and the extent of Mr. McDonald's knowledge of diesel generator starts information contained in LER 90-006 and (2) when Intervenor first alerted management concerning inaccuracies in the diesel generator start data contained in the LER).

Atomic Safety and  
Licensing Board  
May 23, 1994  
Page 4

GPC's Motion at 14-15. GPC concluded its argument as follows:

In summary, the scope of the factual bases for the admitted contention, and accordingly the scope of Phase I of this proceeding, should be limited to the allegations pleaded with reasonable specificity in the Amended Petition, *i.e.*, Intervenor's allegations that (1) during 1988-90 GPC illegally transferred the operating licenses for Plant Vogtle, and (2) GPC officials conspired to and knowingly submitted material false statements to the NRC with respect to the number of diesel starts reported in GPC's LER 90-006, dated April 19, 1990.

GPC's Motion at 24-25.

Intervenor responded to GPC's Motion on September 3, 1993 but did not discuss its specific statements in the Amended Petition respecting the diesel starts issue. The NRC Staff filed a response to GPC's Motion on August 26, 1993 which supported GPC's arguments except with respect to GPC's alternative motion for certification.

The Board's Memorandum and Order (Georgia Power Motion to Reconsider Scope of Proceeding), LBP-93-21, 38 N.R.C. 143, 145 (September 24, 1993) stated: "Our review of the Amended Petition persuades us that the main text of that Petition clearly delineates the major issues that support the contention." The Board was persuaded by GPC's argument that Intervenor's Amended Petition did not specify any issues other than the alleged illegal license transfer and the alleged false statements relating to LER 90-006." *Id.* In connection with the LER 90-006 issue, the following findings of the Board are instructive:

We are persuaded that the scope of the contention should be determined by interpreting it in light of the entire Amended Petition. We admit that after re-reading that document in light of the [GPC] Motion for Reconsideration, we conclude that we erroneously accepted Intervenor's argument and interpreted passages out of context. We also conclude that Intervenor's references to the section 2.206 petition were intended only to supply additional material in support of the basic facts that were supplied in the petition. [footnote omitted] A careful examination of the Amended Petition will show this to be so.

. . . .  
The Amended Petition contains the same general pattern that we have just discussed [with respect to Contention 1, the illegal license transfer issue] in subsequent references to the petition contained in its discussion of the factual basis of Contentions 2, 3, and 4. At the bottom of page 14 of the petition, Intervenor states, "The factors demonstrating that SONOPCO management does not have the candor, truthfulness and

Atomic Safety and  
Licensing Board  
May 23, 1994  
Page 5

willingness to abide by regulatory requirements necessary to operate a nuclear facility follows." The Amended Petition then focuses on an alleged conspiracy to submit materially false information in two different arenas [i.e., LER 90-006 and the April 1, 1991 McDonald letter]. Near the end of the discussion of Contentions 2, 3, and 4, on page 16, in footnote 11, there is general language reminiscent of the language we have discussed in the text above. The footnote "incorporates the petition." We conclude, however, that this reference is solely for the purpose of buttressing other bases for the existence of the alleged conspiracy to submit false information.

Similarly, on page 18, Intervenor "incorporates by reference the entirety of his July 8, 1991 ... petition" but then specifically mentions two sections [i.e., Sections I.1 and I.2] related to false statements. We also interpret this general language as a careful, lawyerly device to preserve the right to use material contained in the petitions that supports the allegation of a conspiracy to submit false information.

38 N.R.C. at 147-48 (emphasis supplied). The Board concluded as follows:

To the extent that the cited reference material falls within the argued contentions, the references are effective to incorporate referenced material that may be the basis for further discovery. But the references do not raise new points not argued in the Amended Petition. . . .

Since Intervenor knew of the other allegations in the section 2.206 petition at the time it filed the contention, we conclude that it included by reference only those portions of the section 2.206 petition that were relevant to its discussion of its contention in its Amended Petition. It voluntarily excluded the non-discussed matters from the scope of its petition. Hence, those non-discussed matters may not be included in this proceeding at this time. [footnote omitted]

Intervenor is not precluded from moving to add additional matters as bases to its contention, but the ground for this motion must be that the additional matters are relevant and newly discovered.

38 N.R.C. at 148.

Atomic Safety and  
Licensing Board  
May 23, 1994  
Page 6

Discussion.

GPC has interpreted LBP-93-21 to mean that, other than the illegal license transfer issue, there are only three specific areas of inquiry, among the matters of which Intervenor was aware at the time of filing his Amended Petition, which are within the scope of this proceeding. They are (1) whether Southern Nuclear's management, knowing that LER 90-006 contained material false statements, conspired to submit materially false information to the NRC that was significant to the regulatory process, (2) Section I.1 of the July 8, 1991 2.206 petition relating specifically to Mr. McDonald's statement that Mr. Hairston had not participated in an April 19, 1990 conference call and to Mr. McDonald's first-hand knowledge of diesel generator start information discussed in LER 90-006, and (3) Section I.2 of the July 8, 1991 2.206 petition relating specifically to Mr. McDonald's response regarding when Intervenor first alerted his management to inaccuracies in the diesel generator start data contained in the LER. These are the only matters explicitly identified in Intervenor's Amended Petition.

During the May 20, 1994 telephone conference there was brief discussion of whether the matters addressed by the NRC's May 9, 1994 Notice of Violation ("NOV") were within the scope of the discovery which Intervenor plans to conduct on the LER 90-006 issue. A close reading of the NOV reveals that a number of matters addressed therein are separate and distinct from the three specific areas of inquiry concerning LER 90-006 discussed above. The NOV addresses five separate and distinct matters: (1) the accuracy of GPC statements respecting diesel starts during an April 9, 1990 presentation to NRC and in an April 9, 1990 letter to NRC, (2) the completeness of a GPC statement in the April 9, 1990 letter to NRC concerning the air quality of the diesel instrument air system, (3) the accuracy of a statement concerning diesel starts in GPC's April 19, 1990 LER, (4) the accuracy and completeness of a GPC statement in a June 29, 1990 letter to NRC concerning GPC's April 9 letter and April 19 LER, and (5) the accuracy and completeness of a GPC statement in an August 30, 1990 letter to NRC concerning GPC's April 9 letter to NRC.

Nowhere in the Amended Petition did Intervenor discuss GPC's April 9, 1990 presentation or letter. Significantly, the diesel starts statements made in the April 9 presentation and in the April 9 letter are different from the diesel starts statement made in the April 19 LER. Further, while Mr. Mosbaugh has personal knowledge concerning the preparation and submission of the April 19 LER, he has no such knowledge respecting the

Atomic Safety and  
Licencing Board  
May 23, 1994  
Page 7

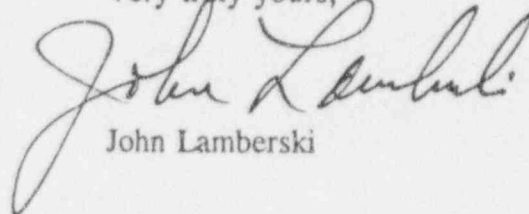
April 9 presentation or letter.<sup>1</sup> Similarly, nowhere in the Amended Petition did Intervenor mention GPC's June 29, 1990 letter or GPC's August 30, 1990 letter. Intervenor was aware of both these letters when he filed his Amended Petition but voluntarily chose to lead to focus his allegations on the April 19 LER and two subsequent statements made by GPC in 1991.

Finally, nowhere in the Amended Petition did Intervenor discuss the issue of air quality (high dew point readings). Contrary to Intervenor's counsel's representation to Judge Bloch during the May 20 conference call, the April 19 LER does not contain any statement concerning diesel generator air quality. Those statements are contained only in the April 9 letter. In fact, the only matter discussed in the Amended Petition which is also addressed in the NOV is the issue of the accuracy of the diesel starts statement contained in the April 19, 1990 LER.

Prior to the filing of his Amended Petition, Intervenor was aware of all the issues addressed in the NOV, as evidenced by his surreptitious tape recordings and the written allegations he submitted to OI. Intervenor voluntarily chose to exclude those matters, other than LER 90-006, from his Amended Petition. GPC surmises that Intervenor made an affirmative tactical decision to base his case on only certain allegations which he believed would maximize his chances of success and would enable him to conserve his limited resources. Intervenor should not be permitted to raise other issues now.

The foregoing is a summary discussion due to the limited time available to GPC's counsel. Also, it is addressed to the specific issue at hand -- the depositions of Messrs. Majors, Burr and Frederick. GPC necessarily will more fully brief this matter in responding to Intervenor's outstanding discovery requests.

Very truly yours,

  
John Lamberski

cc: Service List

---

<sup>1</sup> GPC suspects that Intervenor intentionally focused his Amended Petition on LER 90-006, and not on the April 9 presentation or letter, because of his personal knowledge.