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RELATED CORRESPONDENCE

July 15, 1994
DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'94 JUL 18 P4:59

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE

In the Matter of)	Docket Nos.	50-424-OLA-3
)		50-425-OLA-3
GEORGIA POWER COMPANY)		
<i>et al.</i>)	Re: License Amendment	
)	(Transfer to Southern Nuclear)	
(Vogtle Electric Generating Plant,)		
Units 1 and 2))		

NRC STAFF RESPONSE TO INTERVENOR'S
SECOND SET OF INTERROGATORIES
AND REQUEST FOR PRODUCTION OF DOCUMENTS

At the prehearing conference held June 23, 1994, the Staff indicated that it would voluntarily respond to "Intervenor's Second Set of Interrogatories and Request for Documents to the Staff of the Nuclear Regulatory Commission," dated May 17, 1994, without requiring that interrogatories be first served on the presiding officer for his determination under 10 C.F.R. § 2.720(h) or that document requests be served upon the Executive Director for Operation, as required by § 2.744(a). See Tr. 38-39. In doing so, the Staff did not waive its substantive rights under the Commission's regulations to have the Intervenor demonstrate that each document sought is relevant to the issues admitted in this proceeding and that interrogatories be directed to information necessary to a proper decision in this proceeding and not otherwise reasonably available.

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By filing this response to the instant discovery request, the Staff does not waive its rights in the future to require that the appropriate procedures be followed and that the required findings be made, pursuant to 10 C.F.R. § 2.720(h)(2)(ii)¹ and 10 C.F.R. § 2.744(c) and (d),² before responding to any future discovery requests. The Staff objects to interrogatories and document requests that seek disclosure of information that is not relevant to the issues admitted in this proceeding or is not reasonably calculated to lead to information that is relevant to admitted issues.³

Reduced to its bare essentials, the admitted diesel generator issue is that Georgia Power Company personnel deliberately and intentionally lied in correspondence and reports to the NRC about the number of diesel generator starts subsequent to the March 20, 1990 site area emergency. See LBP-93-5, 37 NRC 96, 104-05 (1993). Consequently, the Staff has objected to each interrogatory and document request that

¹ 10 C.F.R. § 2.720(h)(2)(ii) provides that [u]pon a finding by the presiding officer that answers to the interrogatories are necessary to a proper decision in the proceeding and that answers to the interrogatories are not reasonably obtainable for any other source, the presiding officer may require that the Staff answer the interrogatories."

² 10 C.F.R. § 2.744 (c) provides that the Executive Director for Operations (EDO) objects to producing a record or document, the requesting party must make written application to the presiding officer to compel production, and the document is then to be reviewed *in camera* by the presiding officer. Under 10 C.F.R. § 2.744(d), the EDO may not be required to produce the document unless the presiding officer determines that (1) the document or record is relevant, (2) its production is not exempt from disclosure under § 2.790, or if exempt, that its disclosure is necessary to a proper decision in the proceeding; and (3) the information contained in the record or document is not reasonably obtainable from another source.

³Rule 401 of the Federal Rules of Evidence states, "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

seeks information that does not tend to increase or decrease the probability that Georgia Power Company deliberately lied to the NRC about the number of diesel generator starts. The requirements of the NRC regulations must be literally enforced. *See Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245 (1982). *See also Consumers Power Co.* (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117 (1980) (analysis of §§ 2.744; 2.720 and 2.790 in relation to discovery and each other). In *Palisades*, 12 NRC at 119, the Board noted that § 2.720 invokes a standard of "necessary to a proper decision" which is higher than the traditional standard of relevant-unless-privileged.

The Staff also objects to information sought that is available from another source, and the production of draft agency documents, predecisional enforcement materials, personal privacy information, attorney-client or work product documents, or other information that is exempt from disclosure under the Commission's regulations and NRC case law. *See* 10 C.F.R. § 2.790(a)(5), (C.G. 7); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2) CLI-94-5, 39 NRC 190, 196-98 (1994). In addition, the Staff objects to interrogatories that are ambiguous, burdensome, and overly broad. In short, as shown below, the Board should reject the instant discovery request as a fishing expedition by Intervenor into the operation of the NRC which is not permitted by the regulations or warranted by the admitted diesel generator issue in this proceeding.⁴

⁴ Instructions D.1 and D.2, E.2, and F.2 and good examples of how unreasonably broad and unfocused Intervenor has been in this discovery request.

See generally, Memorandum and Order (Scope of Discovery), dated June 2, 1994 (unpublished).

The Staff addresses each request as set forth by the Intervenor individually below.

INTERROGATORY 1

While Ken McCoy was stationed at the Grand Gulf facility, state whether Mr. McCoy (or as a result of anything attributed to Mr. McCoy, the licensee of the Grand Gulf facility) has ever been the subject of a NRC investigation for any act or omission involving Mr. McCoy that in any way relates or related to a potential or actual incident that in any way indicated that Mr. McCoy did not or may not have the requisite character, competence, integrity or honesty to continue in a management role at the Grand Gulf facility. If the answer is yes:

- a. Identify all past or current NRC employees involved with the incident (s);
- b. provide a written statement of all material and pertinent facts surrounding any such incident(s);
- c. state whether the investigation or inquiry was terminated as a result of Mr. McCoy's voluntary departure from that facility, or otherwise explain the current status and the reason for not commencing, terminating or concluding any such investigation.
- d. produce all documents that in any way relate to this inquiry or investigation, including any and drafts of any memorandum, investigative notes, personal records, investigative summaries, compilation of materials, letters from individuals or any other documents of any sort related to Ken McCoy or NRC's investigation/inquiry of Mr. McCoy (on the licensee of the Grand Gulf facility).

OBJECTION

The information sought is beyond the scope of the admitted issues in this proceeding, not relevant, and not necessary to proper decision in this proceeding. Mr. McCoy was employed at the Grand Gulf Nuclear Station. An investigation was made of activities at Grand Gulf while Mr. McCoy was employed there. Information about that investigation does not show that it is more or less probable that GPC persons

"lied" to the NRC about diesel generator starts in 1990. It is not relevant to Mr. Mosbaugh's allegations. Similarly, this information is not necessary to a proper determination in this proceeding as required by § 2.720(h)(2)ii). If the Intervenor is interested in discerning information about Mr. McCoy at Grand Gulf, Intervenor should do the work called upon to find out those facts -- not ask the NRC Staff to do his work for him. Moreover, the information Intervenor seeks is reasonably available from another source. Staff counsel informed the parties at the June 23, 1994 Prehearing Conference that there are some 600 pages of documents related to the Grand Gulf investigation that are in the Commission's Public Document Room, filed under accession number 8508080034. Tr. 38. The Staff is not obliged to provide Intervenor with information that is otherwise publicly available.

Intervenor has not shown that the need to learn the identity of the NRC employees involved with the Grand Gulf investigation is relevant to this proceeding are necessary for a proper decision as required by 10 C.F.R. §§ 2.720 and 2.744. (*See* Interrogatory 1a.) The names of the NRC employees involved in the 1983 investigation of Grand Gulf will not have any tendency to make more probable or less probable Mr. Mosbaugh's assertion that GPC personnel lied to the NRC about diesel starts in 1990. It is an attempt to explore matters unrelated to the admitted contention basis.

Interrogatory 1.d asks for the production of "all documents that in any way relate to this inquiry." Again, Intervenor's filing shows no modicum of effort to comply with the specific and stringent requirements of § 2.744(a), which requires a statement of reasonable particularity as to why the document requested is relevant to the proceeding.

This shotgun approach does not comply with Commission requirements and must be rejected throughout this discovery request.

INTERROGATORY 2

Answer in detail the following pertaining to the Vogtle Coordinating Group:

- a. the purpose of the Vogtle Coordinating Group;
- b. name all persons who are or have been members of the Vogtle Coordinating Group;
- c. when was the need for the Vogtle Coordinating Group determined and why;
- d. when was it created;
- e. produce the following documents and all documents, directly or indirectly, related to them:
 - i) all documents pertaining to the January 4, 1994 Vogtle Coordinating Group presentation to the NRC management;
 - ii) all documents pertaining to the February 2, 1994 meeting with the EDO;
 - iii) the Group Charter of September 16, 1993;
 - iv) the Group's Memorandum of December 17, 1993;
 - v) all drafts of the February 9, 1994 Vogtle Coordinating Group Analysis;
 - vi) all drafts of the documents listed in i-v.

OBJECTION

The Staff objects to this interrogatory in that it seeks information that is not relevant to the admitted basis for Intervenor's contention and is not necessary for a proper decision in this proceeding. Without waiving its objection, however, the Staff states that the Vogtle Coordinating Group was a vehicle to coordinate the activities relating to Vogtle by various NRC offices. Having revealed these facts in response to the Intervenor's interrogatory, it is clear that this information is not necessary to a proper decision in resolving the admitted contention. The Vogtle Coordinating Group is not at issue in this proceeding. If this information were a part of a response, it would have

been provided by sworn affidavit.

Interrogatory 2.b. seeks the names of persons on that Coordinating Group. The names of those persons will not tend to prove or disprove that GPC persons lied to the NRC in 1990 regarding diesel starts. These interrogatories only seek to fish about into the internal operations and deliberative of the NRC and have nothing to do with the Mosbaugh allegations in this proceeding.

Interrogatory 2.e(v) and (vi) seek drafts of papers produced by the Coordinating Group. The predecisional drafts of the Coordinating Group, and other NRC employees, are exempt from disclosure even if they were relevant to the admitted diesel generator issue or necessary to a proper decision. *See Palisades*, 12 NRC at 121. Intervenor cannot demonstrate an overriding need warranting the production of draft documents involved in or resulting from the Coordinating Group's work or that would disclose the Commission's deliberative process. *See Palisades* cited *supra*.

Intervenor makes no showing that preliminary Staff opinions are relevant to Intervenor's case. Such opinions are not probative as to whether there is sufficient factual evidence that GPC persons deliberately "lied" to the NRC in 1990 regarding diesel starts.

INTERROGATORY 3

Intervenor's filing does not contain an Interrogatory 3.

INTERROGATORY 4

Answer in detail the following pertaining to the OI Report, Case No. 2-90-020R:

- a. list all persons involved in its creation and the extent of their involvement;
- b. produce all documents used in its creation or which resulted from its creation.

OBJECTION

A list of names of the persons involved in the creation of the OI Report 2-90-020R will not tend to prove or disprove a lead to information that GPC persons lied to the NRC in 1990. Documents used to complete the OI report are cited in the document and those exhibits have already been provided to Intervenor. Intervenor does not show that the information sought is relevant to the issues, or important or necessary for a proper decision in this proceeding. Therefore, the request should be rejected.

INTERROGATORY 5

Answer in detail the following pertaining to the Notice of Violation:

- a. list all persons involved in its creation and the extent of their involvement;
- b. produce all documents used in its creation or which resulted from its creation;
- c. produce all information reviewed by any member of the Commission or the Commission's staff prior to the issuance of the Notice of Violation;
- d. list every contact made pertaining to the Notice of Violation, the subject of each such contact(s) and produce all documents, including drafts, pertaining to such contact(s).

OBJECTION

The Notice of Violation was issued approximately four years after the alleged wrongdoing by GPC employees occurred. The names of the persons involved in the creation of the NOV will not tend to prove or disprove a lead to information that GPC persons lied or did not lie to the NRC in 1990. Such information is unrelated to

Intervenor's admitted diesel generator issue and certainly is not necessary to a proper decision in this proceeding. Drafts and other enforcement materials should not be produced because they are predecisional. *See Palisades, supra*; 10 C.F.R. § 2.790(a)(5), (7).

The interrogatory also asks for information reviewed by the Commission or its Staff prior to the issuance of the NOV. First, it is questionable whether materials the Commissioners reviewed will or will not tend to prove or to disprove that GPC persons lied to the NRC in 1990. Second, the deliberative process of each Commissioner is not open to public scrutiny. *See Palisades, supra*. Without waiving its objection, the Staff reminds Intervenor that the NRC has already published the SECY paper forwarding the Staff's enforcement proposal and the Vogtle Coordinating Group Analysis which was used to develop that proposal. Letter dated May 11, 1994 to Messrs. Lamberski and Kohn. That document cites the evidence on which the group relied. Intervenor does not show that the additional information sought is either relevant or necessary for a proper decision in this proceeding as required by 10 C.F.R. §§ 2.720(h) and 2.744(d).

INTERROGATORY 6

State what regulatory authority or authorities the NRC relied on to create the Vogtle Coordinating Group.

OBJECTION

This interrogatory is objectionable on several grounds. First, it seeks a legal conclusion upon facts that are not at issue in this proceeding -- the authority to create a Vogtle Coordinating Group. Second, the answer to the interrogatory is not necessary to

a proper determination in this proceeding. And third, citation to statutory authority would not tend to prove or to disprove Intervenor's admitted issue that GPC lied to the NRC in 1990.

INTERROGATORY 7

State in detail when the NRC Commission was first notified about the proposed findings of the Office of Investigations.

OBJECTION

This Interrogatory should be rejected because it seeks information that is not relevant to the admitted issue in this proceeding and is not necessary for a proper decision. See 10 C.F.R. §§ 2.720(h), 2.744(d). Without waiving its objection, the Staff states that no employee from the Office of Investigations (OI) can recall notifying the Commissioners "about the proposed findings of the Office of Investigations." When a briefing of the Commissioners was held on February 5, 1992, there were no "preliminary findings" by OI. Those present recollect that, at that time, OI had sufficient grounds to refer the matter to the Department of Justice for their consideration in 1992. Regardless, neither this interrogatory nor its answer are probative as to whether GPC persons lied to NRC in 1990. If the facts set forth above were given as a response, they would have been presented in a sworn affidavit.

INTERROGATORY 8

Provide all internal memorandum concerning the legality of creating the Vogtle Coordinating Group or any prior similar entity.

OBJECTION

Again, this interrogatory seeks information about facts that are not at issue in this proceeding -- the circumstances surrounding the creation of the Vogtle Coordinating Group or any similar entity. This requests for irrelevant information is far beyond the permissible scope of discovery as defined by the Commission's regulations and by the Board Order of June 2, 1994. It does not call for factual information that would tend to make it more or less probable that GPC persons lied to the NRC in 1990 regarding diesel starts and therefore is not proper under the Commission's rules. See 10 C.F.R. §§ 2.720(h)(2)(ii), 2.744(d).

INTERROGATORY 9

State in detail whether at the time the NRC Staff created the Vogtle Coordinating Group, the NRC Staff had been advised of the Office of Investigation[s] findings.

OBJECTION

This has the same flaws as Interrogatory 7. Who, if anyone, and when NRC persons were informed of the OI findings, is not relevant to whether GPC lied to the NRC in 1990 regarding starts of diesel generators or necessary for a proper decision in this proceeding. The Interrogatory is not proper under the Commission's rules and case law previously cited.

INTERROGATORY 10

State what regulatory authority empowered the Vogtle Coordinating Group, or any other organization of the NRC Staff to negate a finding of the Office of Investigation[s]. Identify and produce all contacts and documents used and created in answering this interrogatory.

OBJECTION

First, it seeks a legal conclusion upon misstated facts that are not at issue in this proceeding. Second, the answer to the interrogatory is not necessary to a proper determination in this proceeding. And third, citation to statutory authority would not tend to prove or to disprove Intervenor's admitted issue that GPC lied to the NRC in 1990.

Insofar as the Interrogatory seeks to discover the internal decision making process of the NRC, it is improper. *See* 10 C.F.R. §§ 2.790(a)(5),(7).

INTERROGATORY 11

State in detail when the NRC Commission was first notified that senior officers of Georgia Power Company may be incriminated by the OI investigation. Answer in detail the following:

- a. who gave the notification;
- b. why was the notification given;
- c. produce all documents directly or indirectly related to the notification.

OBJECTION

This Interrogatory suffers some of the same flaws that Interrogatory 7 and also contains erroneous premises or is too vague to elicit a response. Without waving relevancy and other objections, the Staff is informed that participants in the February 5, 1992 briefing of the Commissioners do not recall use of the term "incriminated." Again, if these facts were given as a response, they would have been represented in a sworn affidavit. Intervenor is aware that the matter was referred to the Department of Justice which later declined prosecution. Assuming, for purposes of argument only, that a factual answer should have been given to this interrogatory, the name of the person who gave the notice to the Commissioners is not relevant to Mr. Mosbaugh's admitted issue

concerning diesel generator starts and disclosure of names and the notification is not necessary to a proper decision in this proceeding nor would such disclosure tend to make Mr. Mosbaugh's allegations more or less true (FRCP 401). See 10 C.F.R. §§ 2.720(h)(2)(ii) and 2.7449(d). This interrogatory is ill-founded and improper and should be rejected.

INTERROGATORY 12

State in detail all contacts between the NRC and GPC related to the OI Report. With respect to each contact identified answer in detail the following:

- a. with whom was the contact made;
- b. when did the contact take place;
- c. what was the reason for the contact;
- d. where did the contact take place;
- e. how did the contact take place.

OBJECTION

This Interrogatory does not seeks information which, if available, would tend to either prove or disprove Mr. Mosbaugh's admitted issue that GPC persons lied to the NRC on in 1990. The OI report was issued almost four years after the events at issue occurred. Whether and when GPC inquired at to the status of the OI Investigation and to get copies of the report is not probative. In addition, such four-years-after-the-fact conversation are not relevant or necessary to a proper decision in this proceeding as required by 10 C.F.R. §§ 2.720(h)(2)(ii) and 2.744(d). Moreover, the Staff has distributed the OI Report to the parties, including the exhibits that identify who was interviewed and when it occurred.

INTERROGATORY 13

With respect to each contact identified in interrogatory 12 above, if a written communication, in addition to the information required by Instruction II. D, identify all persons who received a copy and produce a copy of each such communication, including drafts.

OBJECTION

See the response to Interrogatory 12 above.

INTERROGATORY 14

With respect to each contact identified in interrogatory 12 above, identify other documents which in any manner discuss or relate to such communications and produce a copy of each document, including drafts.

OBJECTION

See response to Interrogatory 12 above.

INTERROGATORY 15

State the date each of the Mosbaugh tapes in NRC's possession was released to GPC. For each such tape released:

- a. Identify the corresponding NRC tape number;
- b. produce all communications to and from GPC concerning the release of these tapes.

OBJECTION

The Interrogatory is improper in that it seeks information which is not relevant to Mr. Mosbaugh's admitted diesel generator start issue, seeks information which is not necessary to a proper decision in this proceeding, and requests information that is reasonably obtainable from another source -- GPC. *See* June 2, 1994 Order; 10 C.F.R.

§§ 2.720(h)(2)(ii), 2.744(d). INTERROGATORY 16

State the date each of the Mosbaugh tapes was in NRC's possession were released to Intervenor. For each such tape released:

- a. Identify the NRC tape number of the tape;
- b. produce all communications to and from GPC concerning the release of these tapes.
- c. If all of the tapes in NRC's possession have not been released to Intervenor, state why.

OBJECTION

This interrogatory seeks information that is not relevant to the admitted diesel generator issue in this proceeding, is not probative on whether Intervenor's allegation is correct, and is not necessary for a proper decision. *See* June 2, 1994 Order; 10 C.F.R. §§ 2.720(h)(2)(ii), 2.744(d). Moreover, it seeks information that is reasonably obtainable from another source -- the Intervenor himself. Intervenor knows better than anyone else what Mosbaugh tapes he has and when they were released to him. Such information has nothing to do with whether GPC lied to the NRC regarding the number of diesel starts following the March 20, 1990 site emergency.

CONCLUSION

For all of the above reasons, the Staff objects to Intervenor's May 17, 1994 Interrogatories and Requests For Documents in its entirety. None of the requests

complies with the substantive requirements of 10 C.F.R. §§ 2.744, 2.720, 2.790 or Commission case law as expressed in *Palisades, supra*.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles A. Barth". The signature is written in a cursive, slightly slanted style.

Charles A. Barth
Counsel for NRC Staff

Dated at Rockville, Maryland
this 15th day of July 1994

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'94 JUL 18 P4:59

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
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In the Matter of)
GEORGIA POWER COMPANY, *et al.*) Docket Nos. 50-424-OLA-3
) 50-425-OLA-3
)
(Vogtle Electric Generating Plant) Re: License Amendment
Units 1 and 2) (Transfer to Southern Nuclear)
)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENOR'S SECOND SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS" as stated in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system this 15th day of July 1994.

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