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December 2, 1994

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBefore the CommissionOFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

GEORGIA POWER COMPANY'S ANSWER OPPOSING INTERVENOR'S
PETITION FOR APPEAL OF THE LICENSING BOARD'S DECISION
TO GRANT PARTIAL SUMMARY DISPOSITION

Georgia Power Company ("Georgia Power") hereby answers and opposes Intervenor's Petition for Appeal of the Licensing Board's Decision to Grant Partial Summary Disposition of the Illegal License Transfer Issue, dated November 21, 1994 ("Intervenor's Petition for Appeal"). Intervenor's Petition for Appeal should be denied for the following reasons. First, the Licensing Board's rulings of which Intervenor complains reach the correct result. Second, Intervenor's Petition for Appeal is a request for discretionary review of an interlocutory Board order which does not satisfy the Commission's standard for granting such discretionary review. The Commission has recently held that it will not take the unusual step of granting interlocutory review except in extraordinary situations. In this case, the Board's ruling does not affect the structure of the proceeding in a pervasive or unusual manner. Further, there is a good possibility

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that this matter will be mooted by intervening events prior to the Board's final decision. Moreover, even if the issue is not resolved before the Board reaches a final decision, Intervenor has not explained why this matter cannot await final appellate review.

Finally, Intervenor's actions belie its position that the Board's Order has a pervasive effect on the structure of the proceeding. Prior to the filing of his Petition for Appeal, Intervenor did not raise this issue in a motion for reconsideration, did not seek a stay of the Board's Order, and did not raise the Board's Order as an issue he wished to discuss at the November 17, 1994 prehearing conference.

I. FACTUAL BACKGROUND.

On February 13, 1993, the Licensing Board admitted Intervenor Allen Mosbaugh as a party to the proceeding and also admitted the following single, consolidated contention:

The License to operate the Vogtle Electric Generating Plant, Units 1 and 2, should not be transferred to Southern Nuclear Operating Company, Inc., because it lacks the requisite character, competence, and integrity, as well as the necessary candor, truthfulness, and willingness to abide by regulatory requirements.

Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-5, 37 N.R.C. 96, 110 (1993).

The consolidated contention is founded on (and limited to¹) two bases specified in Intervenor's Amended Petition, dated December 9, 1992. The first basis alleges that

¹ See Memorandum and Order (Georgia Power Motion to Reconsider Scope of Proceeding), LBP-93-21, dated September 24, 1993, (unpublished) at 9, 11-12.

the NRC's non-alienation and reporting requirements were violated by virtue of a transfer of control of the Vogtle licenses. Amended Petition at 4. The second basis alleges that Georgia Power made false statements to the NRC concerning the Vogtle diesel generators. Id.

In its Memorandum and Order admitting the consolidated contention, the Board also summarized allegations which Intervenor had asserted in a Department of Labor action against Georgia Power as follows:

Mr. Mosbaugh concluded that the organization of SONOPCO marked a change from a "conservative" to a more "risk taking" attitude in the operation of Vogtle.⁷ He was particularly concerned that SONOPCO seemed less concerned about NRC reporting requirements.⁸ Mr. Mosbaugh alleges that, subsequent to the time that SONOPCO began to have influence, Georgia Power filed false and misleading reports with the NRC and its officials filed material false statements in response to NRC questions.

⁷ Mosbaugh Labor Case at 6. We consider that this information, submitted by Georgia Power, places the allegations in context.

⁸ Id.

LBP-93-5, supra, 37 N.R.C. at 100 (footnotes in original, footnote 9 omitted).

With respect to Intervenor's first basis, the Licensing Board specifically found that Intervenor had adequately alleged that

the formation of Southern Nuclear's relationship to Vogtle violated NRC regulations, evidencing a lack of a trustworthy character in Southern Nuclear. If this contention were sustained, we might direct that the license amendment be denied or conditioned on changes in the structure and personnel of Southern Nuclear.

LBP-93-5, supra, 37 N.R.C. at 103.

On November 8, 1994, the Board ruled on Georgia Power's Motion for Summary Disposition of Intervenor's Illegal Transfer of License Allegations, dated August 24, 1994. Memorandum and Order (Summary Disposition: Illegal Transfer Allegation), LBP-94-37 ("Board's Order"). The Order first found that Georgia Power's Motion viewed alone made a proper showing for summary disposition that an illegal transfer did not occur. *Id.* at 2. The Board then considered Intervenor's Response to Georgia Power's Motion (October 4, 1994) and accepted, solely for the purpose of ruling on the motion for summary disposition, inferences that there had been an indirect transfer of control without NRC consent. *Id.* at 3-4. The Board held, however, that an illegal transfer, without more, would not cause it to deny the requested license amendment. *Id.* Based on Intervenor's allegations, the Board concluded that relief would be warranted only if Intervenor established that Georgia Power had misrepresented to the NRC facts concerning the corporate relationships and control. *Id.* at 3, 5.

The Board also considered whether an illegal transfer of control might have caused a change in the safety consciousness at the plant. *Id.* at 4-5. However, there was no such allegation in Intervenor's Response and the Board ruled that any such aspect of the contention had been abandoned. *Id.* (citing LBP-93-5, *supra.*, 37 N.R.C. at 100).

Intervenor's Petition for Appeal essentially seeks review of the following two rulings of the Board:

1. That there is no relief available to Intervenor even if Georgia Power illegally transferred control of its operating license, and

2. That Intervenor abandoned his claim that the illegal license transfer adversely impacted management's attitude toward safety.

Intervenor's Petition for Appeal at 3. Reduced to its essence, Intervenor's complaint is that the Board has foreclosed him from litigating at the hearing the issue of whether Georgia Power illegally transferred control of the Vogtle license. Id. at 4-5.

II. ARGUMENT.

- A. THE BOARD'S RULINGS WERE REASONABLE AND SUPPORTED, AND PROPERLY LIMITED ISSUES TO MATTERS SHOWN TO BE MATERIAL.

The Licensing Board's rulings were reasonable and proper. Intervenor simply mischaracterizes those rulings.

With respect to the first ruling of which Intervenor complains, the Board's Order correctly ruled that a mere conclusion (in hindsight) that an indirect transfer of control occurred would not be sufficient to warrant denial or condition of the license transfer sought in this proceeding. Such a conclusion by itself would not be sufficient to establish Intervenor's contention that Southern Nuclear lacks the character to operate a nuclear plant. Rather, to impugn the character of the Company, Intervenor must somehow show that the Company has acted in bad faith, i.e., misled the NRC about the facts which Intervenor asserts demonstrate an illegal transfer. In other words, even if in hindsight an indirect transfer of control were ultimately found to have occurred, no remedy for this violation should be granted in this proceeding if the Company proceeded openly and honestly. The character of the Company is simply not called into question if the

Company believed, after advising the NRC of the proposed organization, that such organization was acceptable to the NRC and in accordance with the law. This is true even if the organizational change were later ruled a violation.

With respect to the second ruling of the Board at issue (that any claim of a change in safety consciousness had been abandoned), the Board also reached the correct result. Intervenor never asserted, either in its Amended Petition or in summary disposition, that the alleged transfer of control resulted in a lack of safety consciousness. When the Board originally admitted Intervenor's contention, it merely identified this issue as a concern that had been previously expressed in Intervenor's Department of Labor case. Since Intervenor has not pursued this issue in this proceeding, the Board cannot be faulted for considering it abandoned.

B. INTERVENOR'S PETITION FOR APPEAL DOES NOT SATISFY THE COMMISSION'S STANDARD FOR GRANTING DISCRETIONARY REVIEW OF AN INTERLOCUTORY BOARD ORDER.

An interlocutory appeal, such as is sought here, is generally prohibited under the NRC's rules of practice. 10 C.F.R. § 2.730(f). While the rules do permit a certified question or referred ruling, such review is permitted only under extraordinary and exceptional circumstances. Intervenor does not demonstrate the existence of such circumstances warranting review.

The Commission has recently explained the standards for granting discretionary review of an interlocutory order.

Although interlocutory review is disfavored and generally is not allowed as of right under our rules of practice (see 10 C.F.R. § 2.730(f)), the criteria in section 2.786(g) reflect the limited circumstances in which interlocutory review may be appropriate in a proceeding. These criteria are a codification of the case-law standard that the Atomic Safety and Licensing Appeal Board developed under our former appellate structure. The Appeal Board applied these criteria in deciding as a matter of discretion whether to review interlocutory orders in response either to a presiding officer's referral of a ruling or certified question or to a party's motion for "directed certification." See Safety Light Corp., (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992). Under our present appellate system, we have entertained petitions for review of an otherwise interlocutory order--akin to a motion for directed certification--if the petitioner can satisfy one of the criteria under section 2.786(g). See Oncology Services Corp., CLI-93-13, 37 NRC 419, 420-21 (1993).

Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 N.R.C. 91, 93 (1994). Under 10 C.F.R. § 2.786(g), a petitioner seeking interlocutory review must show that the certified question or referred ruling either

- (1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
- (2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

10 C.F.R. § 2.786(g).

Intervenor's Petition for Appeal does not argue the first standard under Section 2.786(g) -- irreparable harm that cannot be alleviated through appellate review of the Board's final decision. Intervenor only argues the second standard under Section 2.786(g), i.e., that the Board's Order pervasively affects the basic structure of the proceeding. Intervenor's Petition for Appeal at 4. Therefore, the Commission's decision on this matter should be based solely on whether or not the second standard of Section

2.786(g) has been met. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 N.R.C. 1579, 1582 n.7 (1984).

The Commission's decision in Rancho Seco, *supra*, provides firm guidance indicating that the Board's rulings of which Intervenor complains have not affected the basic structure of the case in a pervasive or unusual manner. In Rancho Seco, *supra*, SMUD sought Commission review of a licensing board order which admitted six factual bases for a contention. SMUD objected to the acceptance of five of the six factual bases. The Commission held that SMUD failed to demonstrate that review was necessary at that time and stated:

The mere expansion of issues rarely, if ever, has been found to affect the basic structure of a proceeding in a pervasive or unusual manner so as to warrant interlocutory review. Safety Light Corp., 35 NRC at 159 (citations omitted). Although SMUD argues that the Licensing Board failed to apply the proper criteria for admissibility of contentions and incorrectly interpreted Commission regulations, these reasons have not been adequate in practice to demonstrate that the structure of a proceeding has been affected in a pervasive or unusual way, where the ultimate result is that the Licensing Board simply admits or rejects particular issues for consideration. In discussing the standards for granting interlocutory review, the Appeal Board stated:

The basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy, or Commission regulations....

Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987) (citations omitted).

CLI-94-2, 39 N.R.C. at 93-94.

The Commission's decision was largely influenced by its reluctance to take interlocutory review except in extraordinary situations. Id. at 94. The Commission concluded by noting that neither SMUD nor the NRC Staff had adequately explained why the matter could not await final appellate review. Id.

In the instant case, Intervenor's Petition for Appeal argues that the Board's Order erroneously forecloses him from litigating at the hearing his allegation that Georgia Power illegally transferred control of the Vogtle license. However, Intervenor misconstrues the Board's order, which merely focusses the litigation on actions of the Company determined to be material to the character of Southern Nuclear. These reasonable rulings certainly do not have a pervasive or unusual effect on the proceeding.² Intervenor has not been foreclosed from litigating the aspect of his factual basis on illegal license transfer which bears on character -- whether Southern Nuclear's communications with NRC misled the NRC concerning who was in control of licensed activities at Vogtle. Further, Intervenor has not been foreclosed from litigating the other basis for the admitted contention, i.e., whether Georgia Power made willful false statements to the NRC in reports concerning the Vogtle diesel generators. Until these matters are litigated, it is unknown whether there is even a need for Commission review of the Board's Order.

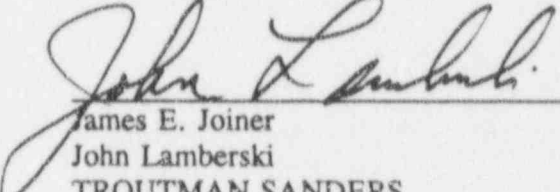
² The possibility of legal error alone does not justify interlocutory appellate review given the longstanding Commission policy disfavoring such review. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 N.R.C. 309, 310-11 (1981) citing 10 C.F.R. § 2.730(f).

Moreover, there is no reason why any harm to Intervenor from an erroneous Board ruling, which persists after the Board's final decision, cannot be addressed in an appellate review of the final decision. This is not a case where the rulings for which review is sought must be reviewed now or not at all. Cf. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 N.R.C. 408, 413 (1976).

III. CONCLUSION.

For all the above reasons, Intervenor's Petition for Appeal is unjustified and should be denied.

Respectfully submitted,


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Dated: December 2, 1994

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NUCLEAR REGULATORY COMMISSION

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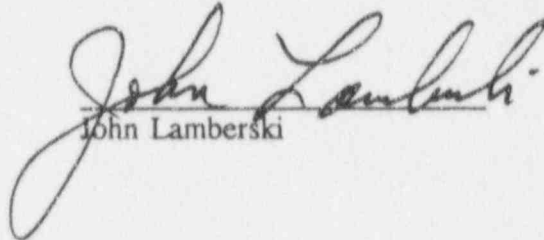
Before the Commission

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DOCKET NO. 50-425-OLA-3
SECRETARY
DOCKETING & SERVICE
BRANCH
Re: License Amendment
(Transfer to Southern
Nuclear)

CERTIFICATE OF SERVICE

I hereby certify that copies of "Georgia Power Company's Answer Opposing Intervenor's Petition for Appeal of the Licensing Board's Decision to Grant Partial Summary Disposition," dated December 2, 1994, were served by deposit with an express mail delivery service upon the persons listed on the attached service list, this 2nd day of December, 1994.


John Lamberski

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

In the Matter of

GEORGIA POWER COMPANY, * Docket Nos. 50-424-OLA-3
et al. * 50-425-OLA-3
*
*

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