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USNRC
October 13, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

OFFICE 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 Nuclear)
(Vogtle Electric Generating Plant,)	
Units 1 and 2))	ASLBP No. 93-671-01-OLA-3

GEORGIA POWER COMPANY'S POSITION ON
THE EFFECT OF
DEPARTMENT OF LABOR CASE NO. 90-ERA-30

Pursuant to the Board's October 3, 1995 Memorandum and Order (Effect of Department of Labor Case No. 90-ERA-30), Georgia Power Company ("Georgia Power") hereby submits this position concerning the effect, if any, on this case of the August 4, 1995, decision and remand order of the Secretary of Labor in Department of Labor (DOL) Case No. 90-ERA-30. Because the issue of discrimination raised in DOL Case No. 90-ERA-30 was never included in the contentions pleaded in this proceeding, it is outside the scope of this case, and consequently should not be considered by the Board in this matter. Moreover, the complaint of discrimination involved in 90-ERA-30 is still in dispute and will be appealed by Georgia Power Company. Consequently, it would be inappropriate to give any effect in this proceeding to the Secretary of Labor's determination.

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Background

On September 25, 1995, the NRC Staff issued Board Notification 95-16, informing the Board that on August 4, 1995 the Secretary of Labor issued a Decision and Remand Order in DOL Case No. 90-ERA-30. The Board Notification indicated that

[t]he Secretary found that senior GPC managers discriminated against one of their employees, Mr. Marvin Hobby. This is an apparent violation of 10 CFR 50.7, Employee Protection, which prohibits discrimination against an employee for engaging in protected activities.

Board Notification 95-16 at 1. The Staff also noted that "[o]n September 1, 1995, the NRC Staff issued a letter to GPC informing them that this issue is being considered for escalated enforcement action and that there would be a predecisional enforcement conference in the NRC Region II offices in Atlanta, Georgia" *Id.* On October 3, 1995, the Board issued its Memorandum and Order (Effect of Department of Labor Case No. 90-ERA-30) giving the parties to this proceeding an opportunity to file briefs concerning the effect, if any, on this case of the Secretary of Labor's August 4, 1995 decision and remand order in DOL Case No. 90-ERA-30.

Discussion

The Issues Involved in DOL Case No. 90-ERA-30 Have Not Been Raised Before the Licensing Board Here

The Secretary of Labor's Decision and Remand Order in 90-ERA-30 should have no effect on these proceedings. At issue in the DOL case were allegations by Marvin Hobby, former General Manager of Georgia Power's Nuclear Operations Contract Administration (NOCA), that his job had been eliminated because he purportedly had engaged in protected activity. Secretary of Labor's Decision and Remand Order, DOL Case No. 90-ERA-30 at 5-6.

This allegation has never been a part of this proceeding. Indeed, even when Mr. Hobby was still a co-petitioner in this matter with Mr. Mosbaugh, before the Board denied Mr. Hobby standing to intervene, neither Intervenor nor Mr. Hobby made any attempt to raise the alleged discrimination as a contention in this matter. See Petition to Intervene and Request for Hearing of Allen L. Mosbaugh and Marvin B. Hobby (October 22, 1992); Memorandum and Order (Pre-hearing Conference; Filing Schedule), LBP-92-32 (November 17, 1992) (denying Mr. Hobby standing to intervene)¹⁴. In short, both Mr. Hobby and Intervenor were aware of the Department of Labor complaint and decided not to introduce this subject matter into controversy as a basis for the contention. Because Intervenor knew about and failed to raise this matter as a basis for his contention, Mr. Hobby's Department of Labor complaint is beyond the scope of the admitted issues in this proceeding. As the Board ruled in its Memorandum and Order (Georgia Power Motion to Reconsider Scope of Proceeding), dated September 24, 1993, Intervenor has voluntarily excluded allegations that were not specifically discussed in his Amended Petition in this proceeding. LBP-93-21, 38 N.R.C. 143, 148 (1993). In this Memorandum and Order, the Board ruled that Intervenor had incorporated into his Amended Petition by reference only those portions of his section 2.206 petition which "were relevant to [Intervenor's] discussions of his contention in his Amended Petition." Id. at 150.

Attempts to Raise a New Issue Now Would Be Untimely

The Board's September 24, 1993 Memorandum and Order does not preclude Intervenor from moving to add additional matters as bases for his contentions, but requires a demonstration

¹⁴ The Board's Memorandum and Order (Prehearing Conference; Filing Schedule), an unpublished decision, may have been numbered incorrectly, as there exists another, published decision with the same number (Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-32, 36 N.R.C. 269 (1992)).

that the additional matters are relevant and newly discovered. Here, such a showing is not possible. First, Intervenor has known of the Department of Labor complaint since it was filed and yet has never sought to introduce the subject matter into this proceeding. Even after the Secretary of Labor issued its Decision and Remand Order, now over two months ago, Intervenor has taken no action to raise this matter. Given Intervenor's inaction and the current posture of this NRC proceeding now nearing completion, it would be unreasonable to inject a whole new issue into the case at this very late date.

DOL Case No. 90-ERA-30 Is Still Being Contested

Finally, even if the issues in 90-ERA-30 and this proceeding were identical -- as, discussed above, they are not -- it would be premature for the Board to give any effect to 90-ERA-30, for it is still being contested by Georgia Power, and the Secretary's decision may not be the final determination in the matter. The Secretary of Labor's decision is not yet final agency action; until completion of the remanded proceeding, it is not a final order and not yet subject to judicial review. Carolina Power & Light Co. v. U.S. Dep't of Labor, 43 F.3d 912, 915 (4th Cir. 1995); Sun Shipbuilding & Dry Dock Co. v. Benefits Review Board, 535 F.2d 758, 760 (3d Cir. 1976); Washington Metropolitan Area Transit Auth. v. Office of Workers' Compensation Programs, 824 F.2d 94, 95-6 (D.C. Cir. 1987). See generally Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 744 (1976) (judgments have never been considered final where assessments of damages or awarding of other relief remains to be resolved).

When a final order is issued after the remanded proceeding, Georgia Power fully intends to pursue an appeal upon judicial review. The Secretary's decision in effect reversed administrative law judge determinations as to credibility, a matter recognized to be wholly within the

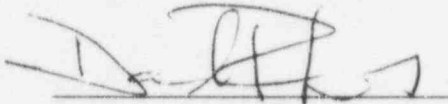
province of the trier-of-fact who views the presentation of the evidence first-hand. Georgia Power believes its arguments are meritorious and will prevail on appeal.

Accordingly, because the Secretary's decision and remand order in 90-ERA-30 is not final (and the allegation it considered is not identical to the specific issues raised in this proceeding), it would be inappropriate for the Board to give any effect to the Secretary's decision in 90-ERA-30.

Conclusion

For all the above reasons, the Board should refrain from considering or giving any effect to the Secretary of Labor's determination in 90-ERA-30. In the event Intervenor moves to raise the subject matter of 90-ERA-30 as a new contention in this proceeding, Georgia Power reserves its right to respond to the specific arguments that Intervenor might advance.

Respectfully submitted,



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Dated: October 13, 1995

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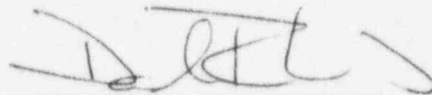
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Georgia Power Company's Position on the Effect of Department of Labor Case No. 90-ERA-30" dated October 13, 1995, were served upon the persons listed on the attached service list by deposit in the U.S. Mail, first class, postage prepaid, or where indicated by an asterisk by hand delivery, this 13th day of October, 1995.



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