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April 15, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' ANSWER TO
JOINT INTERVENORS' MOTION
FOR A PROTECTIVE ORDER

I. Background

On March 12, 1985, Applicants deposed Mr. Tim Johnson, the Executive Director and sole employee of Intervenor Campaign for a Prosperous Georgia (CPG). During the course of the deposition, Mr. Johnson's personal counsel instructed Mr. Johnson not to answer questions on a number of topics: (1) CPG's financing; (2) Mr. Johnson's sources of income; (3) Educational Campaign for a Prosperous Georgia (ECPG); (4) CPG's relationship with ECPG and Southern Regional Council (SRC); and (5) CPG's past and present membership. Mr. Johnson's

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attorney objected to questions on these topics solely on the grounds of relevance. Counsel for Joint Intervenors only joined in objecting to questions concerning ECPG.

On March 22, Applicants filed "Applicants' Motion to Compel Answers to Deposition Questions" (hereinafter Applicants' Motion to Compel). Therein, Applicants addressed Mr. Johnson's objections and the impropriety of his refusal to respond. Applicants explained that their questions were designed to elicit information relevant to Mr. Johnson's credibility. Mr. Johnson had been designated by Joint Intervenors as a potential witness in this proceeding. Johnson deposition, Tr. at 6-7. See also Letter from B. Churchill to L. Fowler (March 5, 1985). Applicants' questions were also asked to ascertain the identity of CPG, to explore the factual basis for statements in CPG's Petiton for Leave to Intervene, and to determine whether CPG had standing to intervene in this proceeding. All of Applicants' questions were generally relevant to the subject matter of the proceeding. See Applicants' Motion to Compel at 4-10.

On April 1, 1985, Joint Intervenors filed "Intervenors' Motion for a Protective Order in Opposition to Applicants' Motion to Compel Answers" and "Intervenors' Brief in Support of Motion for Protective Order and Response to Applicants' Motion to Compel" (hereinafter Joint Intervenors' Brief). In their Brief, Joint Intervenors raised new objections and

arguments. Applicants now respond and submit that Joint Intervenors' Motion for a Protective Order should be denied.[1/]

II. CPG's Relevance Arguments

Although Joint Intervenors only joined in objecting during the deposition to questions concerning ECPG, Joint Intervenors now join in all of Mr. Johnson's attorney's relevance objections. Joint Intervenors' Brief at 3. However, Joint Intervenors do not deny that a relevance objection was an improper basis for refusal to respond to deposition questions. See Applicants' Motion to Compel at 4. Applicants submit that the grant of Joint Intervenors' Motion for Protective Order on the basis of relevance objections would sanction an improper refusal to respond at the time of the deposition and would permit circumvention of the rules of practice. Nevertheless, Applicants address each of Joint Intervenors' relevance arguments below.

1/ Since Joint Intervenors' Motion for Protective Order is a new motion based on new objections and arguments, Applicants believe that an answer is permitted by 10 C.F.R. § 2.730(c). However, if the Board considers Joint Intervenors' Motion to in fact be no more than a response to Applicants' motion to compel, Applicants would move for leave to file a reply. Joint Intervenors' having filed a motion and having raised new objections constitute good cause for such reply.

A. Questions Concerning Membership

During Mr. Johnson's deposition, Counsel for Joint Intervenors specifically stated that it was not her position that questions concerning membership should not be answered. Johnson deposition, Tr. at 48. Nevertheless, Joint Intervenors now argue in support of their Motion for Protective Order that questions concerning membership are irrelevant because CPG has already been "adjudged" a party. Joint Intervenors' Brief at 6.

The Board's Prehearing Conference Order should not foreclose discovery on the subject of standing. The Board's rulings on standing were for all practical purposes no more than rulings on the sufficiency of pleadings. Applicants were not entitled to conduct discovery prior to the Board's prehearing conference (10 C.F.R. § 2.740(b)) and thus had no opportunity to explore the factual bases of Joint Intervenors' claims regarding standing. The factual bases of Joint Intervenors' claims regarding standing have not been "adjudged."

Moreover, since then, new information -- coupled with Mr. Johnson's curious reluctance to discuss the new information -- has raised questions about the accuracy and continued validity of information contained in CPG's Petition for Leave to Intervene. For example, the petition stated that CPG was

formed by a coalition of consumer groups, environmental organizations, and individuals; but Mr. Johnson testified that this statement merely meant that representatives of the organizations took part in the formation of CPG. Johnson deposition, Tr. at 46. Mr. Johnson further testified that CPG is now a corporation (Tr. at 46-47), and suggested that the affiants who claimed membership in support of CPG's Petition for Leave to Intervene have no closer relationship to CPG than that relationship any and every citizen in Georgia has to CPG. Tr. at 64-65. Mr. Johnson nevertheless has refused to discuss how membership was determined at the time CPG filed its petition or whether CPG currently has any members. Tr. at 61, 183-84.

Applicants should not now be denied the only meaningful opportunity (discovery) they have to evaluate the accuracy of the claims in CPG's Petition for Leave to Intervene. The inquiry is necessary not only to preserve Applicants' procedural rights but also to protect the integrity of the licensing process. CPG's claim to standing has been compromised by both the statements Mr. Johnson has made and those he refused to make. The Board should not ignore the possibility that CPG's claim was inaccurate and that the Board's jurisdiction has been improperly invoked.

In addition, questions concerning membership are relevant apart from standing -- a fact Joint Intervenors ignore.

In order to explore potential bias stemming from affiliation with certain organizations, Applicants sought the factual basis for the statement in CPG's Petition that CPG was a coalition formed by consumer groups and environmental organizations. Moreover, Mr. Johnson's partial responses raised the possibility that CPG's Petition for Leave to Intervene was inaccurate -- a fact that would also reflect adversely on CPG's and Mr. Johnson's credibility. Applicants' Motion to Compel at 9, 10.

B. Questions Concerning Mr. Johnson's Sources of Income, ECPG, AND SRC

Joint Intervenors do not deny that questions concerning the credibility of Mr. Johnson, whom Joint Intervenors had designated as a potential witness, were proper. Instead, Joint Intervenors now announce: "[a]t the present time, joint intervenors do not plan to call Mr. Johnson as a witness for any of the contentions admitted thus far."[2/] Joint Intervenors' Brief at 2. Having thus purported to withdraw Mr. Johnson as a witness (at least for the time being), Joint Intervenors argue that Mr. Johnson's credibility is no longer at issue. Based on this argument, Joint Intervenors claim

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2/ Joint Intervenors further remark that "Mr. Johnson has not submitted direct testimony." Joint Intervenors' Brief at 8.

that Applicants' questions concerning Mr. Johnson's sources of income, ECPG, and SRC are no longer relevant. Joint Intervenors' Brief at 8.

The Board should not countenance such legerdemain. First, Mr. Johnson was designated as a potential witness at the time of the deposition, and Joint Intervenors' carefully-worded announcement intimates that he may again be proposed as a witness.

Second, even if Mr. Johnson were unequivocally withdrawn as a witness, his credibility would remain relevant. Joint Intervenors have also identified Mr. Johnson as an individual upon whom they relied to substantiate their contentions. CPG/GANE's Response to NRC Staff's Interrogatories (Dec. 10, 1984) at 2-3. Joint Intervenors identified Mr. Johnson as an individual who had knowledge about "each of those [contentions] accepted by the ASLB," who provided information used in developing the basis for "all of those [contentions] accepted by the ASLB," and who provided information used in responding to "all" the interrogatories. Intervenors Campaign for a Prosperous Georgia and Georgians Against Nuclear Energy Response to Applicants' Third Set of Interrogatories and Request for Production of Documents (Feb. 5, 1985) at 8. Mr. Johnson has also provided attestation to interrogatory answers. Applicants are entitled to probe the accuracy and validity both of the bases for admitted contentions and of

interrogatory answers. The qualifications and credibility of the individual sponsoring such information is an integral part of this inquiry.

Applicants are also entitled to ascertain the identity of intervening parties. This information has direct bearing on the issues in this proceeding. For example, Joint Intervenors' contentions and CPG's intervention have been discussed in ECPG newsletters. If ECPG and CPG are the same entity, statements in the ECPG newsletters might be admissions. CPG has in fact used ECPG letterhead in filings in this very proceeding.

Accordingly, despite Joint Intervenors' "present" plan not to offer Mr. Johnson as a witness, Applicants' deposition questions concerning Mr. Johnson's sources of income and CPG's affiliation with ECPG and SRC are generally relevant and should be answered.

C. Questions Concerning CPG's Financing

Joint Intervenors also object to questions concerning the sources of CPG's financial support as irrelevant. Joint Intervenors' argument is that because the Board "has ruled that the financial qualifications of applicants are irrelevant . . . [i]t is hard to see why the financial resources of the intervenors have any relevance." Joint Intervenors' Brief at 7.

Joint Intervenors' argument not only is illogical but also misinterprets the Board's ruling. The Board ruled that CPG had failed to justify a waiver of the Commission's financial qualifications rule -- a rule that presumes that an electric utility is financially qualified to operate a nuclear power plant. This ruling cannot be construed to suggest that financial interests are irrelevant to matters of credibility. Applicants' questions were asked to determine the nature and character of CPG, including whether CPG has a financial stake in the outcome or pursuit of the Vogtle licensing proceeding, a stake that could also be imputed to Mr. Johnson, CPG's sole employee and chief executive officer.

III. Joint Intervenors' "Privilege" Arguments

Joint Intervenors also claim that the information Applicants seek is privileged for various reasons. Joint Intervenors, however, never raised privilege objections during Mr. Johnson's deposition. Such objections are untimely and have been waived.

Joint Intervenors state that 10 C.F.R. § 2.740a(d) "suggests" that it would have been inappropriate for them to have objected to any questions at the deposition. Joint Intervenors' Brief at 3. Joint Intervenors misconstrue 10 C.F.R. § 2.740a(d), which clearly contemplates just the opposite -- that "objections on questions of evidence shall be noted in

short form without the arguments." Moreover, certain objections if not raised are waived. 10 C.F.R. § 2.740a(d) states: "Objections on questions of evidence not made before the officer shall not be deemed waived unless the ground of the objection is one which might have been obviated or removed if presented at that time." From examination of the Federal Rules, it is evident that only objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are preserved. See Fed. R. Civ. P. 32(d)(3)(A). Claims of privilege are not. Accordingly, a claim of privilege should be raised when the deposition is taken or not at all.[3/] 4A J. Moore, Moore's Federal Practice ¶ 30.59 at 30-139 (2d ed. 1984). See Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 459 (N.D.Cal. 1978) (by failing to make a timely objection, party waived any privilege that existed); Shapiro v. Freeman, 38 F.R.D. 308, 311-12 (S.D.N.Y. 1965) (if attorney believed that information sought was privileged, he should have halted the examination and immediately applied for a protective order).

3/ By failing to raise privilege objections, Joint Intervenors denied Applicants the opportunity to establish by questions during the depositions the applicability or inapplicability of the privilege. Such questioning would have been permissible. In re Treacher's Franchise Litigation, 92 F.R.D. 429 (E.D.Pa. 1981). Joint Intervenors' failure to raise privilege objections also denied Applicants the opportunity of phrasing questions that avoided or minimized inquiry into matter claimed to be privileged.

Applicants also submit that Joint Intervenors' privilege objections are unfounded in law and fact. In this respect, Joint Intervenors, as the party asserting privilege, have the burden to establish the existence of the privilege. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 N.R.C. 490, 495 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit No. 1), LBP-82-82, 16 N.R.C. 1144, 1153 (1982); Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 N.R.C. 579, 583 (1975).

Joint Intervenors claim that Applicants are seeking to identify the past and present membership of CPG. CPG cites Bates v. City of Little Rock, 361 U.S. 516, 524 (1960), for the proposition that discovery of membership lists has been disallowed. Bates, however, did not involve a discovery dispute, but rather addressed the constitutionality of a municipal law that required disclosure of the identity of members of a local NAACP branch. The Bates Court, finding that the record of the case established that NAACP members had been harassed and threatened, concluded that compulsory disclosure of membership lists of local NAACP branches would work a significant interference with the freedom of association of NAACP members. 361 U.S. at 523-24. The Court then considered whether such interference was justified. Finding no compelling justification, the Court concluded that the disclosure

could not constitutionally be required. 361 U.S. at 524-27. The holding in Bates is essentially the same as reached in the more celebrated case, NAACP v. Alabama, 357 U.S. 449 (1958).

The Bates and NAACP decisions are significantly dissimilar from the case at bar and hence do not support CPG's motion for protective order. First, Applicants are not seeking a membership list -- the identity of all CPG members. Rather, Applicants are only inquiring (1) about membership as it pertains to CPG's standing to intervene and (2) about the identity of consumer groups and environmental organizations that are or were CPG members.[4/] With respect to standing, Applicants wish to know whether the "membership" of the affiants who supported CPG's petition for leave to intervene (individuals whose identity has already been disclosed and is therefore not privileged) is legally sufficient to support CPG's standing. In this regard, Applicants would ask when these individuals became "members," what constituted "membership," did CPG have any other "members," and did CPG know at the time it filed its petition that it was shortly going to change to a non-membership organization. Applicants would

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4/ Consumer groups are not entities that shun publicity or are likely to feel intimidated, and Mr. Johnson has in fact disclosed the names of several organizations that might be or have been CPG members. Tr. at 45-46.

also inquire whether CPG today as a non-profit corporation has anybody it considers to be a "member;" and if so, Applicants would inquire what today constitutes membership and whether CPG today has standing. Applicants are only interested in the names of individuals upon whose membership CPG bases its claim to standing.

Second, NAACP and Bates are distinguishable from the present controversy by the frivolous and unfounded nature of Joint Intervenors' claim of potential harassment. Joint Intervenors attach an eight-year-old Atlanta Journal article (Sept. 9, 1977), which reported charges two Georgia Power security department employees made after they had been discharged and several subsequent news clippings that repeated the charges. Joint Intervenors conveniently omit describing the outcome of lawsuits that arose from or were related to the charges -- lawsuits whose outcome exhonerated Georgia Power Company.

The former Georgia Power Company security department employees were William D. Lovin and John H. Taylor. Each filed a lawsuit against Georgia Power in which their claims were based, in part, on the charges of improper information gathering by Georgia Power Company which had appeared in the articles Joint Intervenors attach to their motion. When provided with opportunities to verify their charges under oath neither was able to support any charge of harassment of private individuals.

Mr. Lovin's lawsuit was dismissed on the merits on Georgia Power's Motion for Summary Judgment. In its order, the Court made the specific finding that Lovin had failed to identify any specific criminal activity and had failed to place any evidence in the record that Georgia Power engaged in any criminal conduct. (William D. Lovin v. Georgia Power Company, In The Superior Court of Monroe County, Georgia, Civil Action No. 8961, Order dated March 10, 1978). Mr. Lovin's subsequent appeal was dismissed. (Action No. 8961, Order dated January 4, 1979). A similar summary judgment order in a companion case was affirmed by the Georgia Court of Appeals. Goodroe v. Georgia Power Company, 148 Ga. App. 193, 251 S.E.2d 51 (1978).

Mr. Taylor's lawsuit is of special significance because he was identified as a main source for the original Atlanta Journal article in question, because he provided the list of file categories maintained by Georgia Power and because he made the statement that a "subversive" was "anyone who spoke out against Georgia Power." (See Deposition of Atlanta Journal reporter Thomas R. Baxter, Jr., taken on October 13, 1978, p. 31, in John H. Taylor v. Georgia Power Company, In the Superior Court For the County of DeKalb, State of Georgia, Civil Action File No. 77-3246.)

When placed under oath and questioned extensively about the basis for his claims that Georgia Power harassed

opponents or conducted improper information gathering, Mr. Taylor was unable to support a single charge. (See Deposition of John H. Taylor in Civil Action No. 77-3246.) He admitted that many of his claims were based on information he had received from Mr. Lovin. Mr. Taylor's lawsuit was dismissed for failure to prosecute.

Joint Intervenors also attach an affidavit of Tim Johnson who claims that some CPG supporters have stated they fear being pushed into a higher rate bracket if they are identified with CPG. This affidavit is hearsay and rank speculation. Joint Intervenors make no showing that such retaliatory action has ever occurred or even could occur under Georgia law and the regulation of the Georgia Public Service Commission. Mr. Johnson's affidavit falls far short of establishing even a possibility of harassment. Compare Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 N.R.C. 377, 399 (1977).

These two distinguishing factors, the very limited nature of Applicants' inquiry concerning CPG's membership and Joint Intervenors' failure to demonstrate that the inquiry would result in repression, are dispositive. They belie any claim that disclosure would invade the right of association of CPG's members. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 N.R.C. 377, 398-400 (1977).

Even if there were a possibility that disclosure would invade the right of association of CPG members, Bates and NAACP are further distinguished by the absence in those cases of justification for such invasion. Here, the need to ascertain whether an intervening party has standing (a statutory requisite) provides compelling justification for the limited inquiry. Cf. Houston Lighting and Power Co. (Allens Creek Nuclear Generating station, Unit 1), ALAB-535, 9 N.R.C. 377, 398-400 (1977). In federal practice, courts recognize the needs of litigants and permit discovery of a party's membership where such inquiry relates to specific allegations in that party's complaint. Savala v. Webster, 644 F.2d 743, 747 (8th Cir. 1981); Grinnell Corp. v. Hackett, 20 Fed. R. Serv. 2d 668 (D.R.I. 1974), appeal dismissed, 519 F.2d 595 (1st Cir. 1975), cert. denied sub nom., Chamber of Commerce v. United Steelworkers of America, 423 U.S.1033 (1975) (where plaintiff had alleged injury to its members, defendant could inquire into such injury and plaintiff's membership was discoverable); Dow Chemical Co. v. Taylor, 20 Fed. R. Serv. 2d 673 (E.D.Mich. 1974), appeal dismissed, 579 F.2d 352 (6th Cir. 1975), cert. denied sub nom., Chamber of Commerce v. United Steelworkers of America, 423 U.S. 1033 (1975) (where plaintiff had sued only on behalf of its members, identity of its members was discoverable). In the same vein, Applicants' need to explore questions of credibility provides

justification for inquiry into CPG's affiliation with consumer groups and environmental organizations, and the concomitant accuracy of CPG's petition.

Joint Intervenors also object to questions concerning CPG's finances on the ground that the information is proprietary. Joint Intervenors' Brief at 7. Joint Intervenors, however, make no effort to address the factors necessary to establish entitlement to protection. See Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 N.R.C. 408, 416-17 (1976).[5/] Joint Intervenors offer no affidavits to establish that the information sought is proprietary. See Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 N.R.C. 23, 27-28 (1979). Instead, they merely make vague speculation that "other individuals may solicit [CPG and GANE] donors to the detriment of the joint intervenors." Joint Intervenors' Brief at 7. Joint Intervenors have not satisfied their burden to establish entitlement to protection.

5/ To establish that information is confidential commercial information subject to protection, Joint Intervenors are required to demonstrate that (1) the information in question was of a type customarily held in confidence by its originator; (2) there is a rational basis for having customarily held it in confidence; (3) it has, in fact, been kept in confidence; and (4) it is not found in public sources. Wolf Creek, ALAB-327 supra, 3 N.R.C. at 416-17.

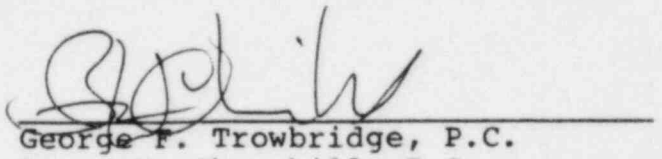
Finally, Joint Intervenors claim that information concerning Mr. Johnson's finances is "privileged," presumably because of an "expectation of privacy." See Joint Intervenors' Brief at 7-8. How Joint Intervenors can argue that Mr. Johnson has an expectation of privacy in this respect is unfathomable. In a recent motion to compel signed and filed by Mr. Johnson, Mr. Johnson stated that financial ties of persons who provide information used in responding to interrogatories "are very relevant because . . . it can skew the results [of their judgment]." Intervenors Campaign for a Prosperous Georgia/Georgians Against Nuclear Energy Motion to Compel Applicants' Response to Interrogatories and Requests to Produce Documents (March 1, 1985) at 2-3. With this philosophy, Mr. Johnson, who also provided information used in answering interrogatories in addition to having been designated as a witness, could not reasonably have believed his financial ties would be immune from disclosure.6/

6/ New York Stock Exchange, Inc. Sloan, 22 Fed. R. Serv. 2d 500 (S.D.N.Y. 1976), which Joint Intervenors cite, is readily distinguishable. That case involved the privacy rights of non-litigants and its result was based on public policy that disclosure of the performance evaluations of accountants would deter candid evaluation to the detriment of that profession.

IV. Conclusion

For all the reasons discussed above, Joint Intervenors' new arguments and objections should be rejected, and their motion for protective order should be denied.

Respectfully submitted,



George F. Trowbridge, P.C.
Bruce W. Churchill, P.C.
David R. Lewis
SHAW, PITTMAN, POTTS & TROWBRIDGE

James E. Joiner, P.C.
Charles W. Whitney
Kevin C. Greene
Hugh M. Davenport
TROUTMAN, SANDERS, LOCKERMAN
& ASHMORE

Counsel for Applicants

Dated: April 15, 1985

April 15, 1985

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer to Joint Intervenors' Motion for a Protective Order," dated April 15, 1985, were served upon those persons on the attached Service List by deposit in the United States mail, postage prepaid, this 15th day of April, 1985.

Bruce W. Churchill, P.C.

Dated: April 15, 1985

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NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
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GEORGIA POWER COMPANY, et al.	)	Docket No. 50-424
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(Vogtle Electric Generating Plant, Units 1 and 2)	)	

SERVICE LIST

Morton B. Margulies, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Gustave A. Linenberger
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Oscar H. Paris
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Bernard M. Bordenick, Esq.
Office of Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Gary Flack, Esq.
1515 Healey Building
57 Forsyth Street
Atlanta, GA 30303

Douglas C. Teper
1253 Lenox Circle
Atlanta, GA 30306

Laurie Fowler & Vicki Breman
Legal Environmental Assistance
Foundation
1102 Healey Building
Atlanta, GA 30303

Tim Johnson
Campaign for a Prosperous
Georgia
175 Trinity Avenue, S.W.
Atlanta, GA 30303

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Bradley Jones, Esquire
Regional Counsel
U.S. Nuclear Regulatory
Commission
Suite 3100
101 Marietta Street
Atlanta, GA 30303