

RELATED CORRESPONDENCE

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March 22, 1985

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20545

Before the Atomic Safety and Licensing Board

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

APPLICANTS' MOTION TO COMPEL ANSWERS  
TO DEPOSITION QUESTIONS

I. Introduction

On March 12, 1985, Applicants deposed Mr. Tim Johnson, the Executive Director of Campaign for a Prosperous Georgia, whom Joint Intervenors had designated as a potential witness. A copy of the deposition transcript is attached.<sup>1/</sup> The deposition was attended by Counsel for Intervenor Campaign for a Prosperous Georgia (CPG) and also by separate counsel representing Mr. Johnson individually. During the course of the deposition, Mr. Johnson's personal counsel objected to a number of questions as irrelevant and instructed Mr. Johnson not to

<sup>1/</sup> With the consent of Joint Intervenors' counsel, Applicants have not provided copies of the deposition transcript to all the intervenor addressees on the Service List. Instead, Applicants provided one copy to counsel for Joint Intervenors and one copy to counsel for Mr. Johnson.

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answer. As discussed below, Applicants submit that their questions were relevant and, pursuant to 10 C.F.R. § 2.740(f), move the Board to compel answers.

## II. Legal Standards

Discovery in NRC proceedings is governed by 10 C.F.R. §§ 2.740-2.742. These discovery rules are patterned after the Federal Rules of Civil Procedure. For this reason, it is generally appropriate to interpret the Commission's discovery rules by reference to judicial interpretation of the Federal Rules. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 N.R.C. 575, 581 (1978).

In modern administrative and legal practice, pretrial discovery is liberally granted to enable the parties to ascertain the facts in complex litigation, refine the issues, and prepare adequately for a more expeditious hearing or trial.

Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 N.R.C. 317, 322 (1980), quoting Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 N.R.C. 1038, 1040 (1978). An important reason for discovery is to eliminate the element of surprise in modern litigation. The process shortens the actual hearing, with its attendant expense and inconvenience, and increases the ability of the parties to develop a complete record.

Susquehanna, supra, ALAB-613, 12 N.R.C. at 322. In accordance with this principle, the discovery rules are liberally

construed. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-196, 7 A.E.C. 457, 462 (1974).

The scope of discovery in NRC proceedings is defined in 10 C.F.R. § 2.740(a)(1), which provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. . . ." This provision is derived from the identical provision in Fed. R. Civ. P. 26(b)(1).

The test as to whether particular matters are discoverable is one of "general relevancy." This test is easily satisfied unless it is clear that the evidence sought can have no possible bearing on the issues. Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-196, 7 A.E.C. 457, 462 (1974).

The phrase "relevant to the subject matter" has been broadly construed and extends to information beyond the merits. 4 J. Moore, Moore's Federal Practice ¶ 26.56[1] at 26-101 (2d ed. 1984). Matters that affect the credibility of a deponent or witness are discoverable. U.S. v. IBM Corp., 66 F.R.D. 215, 218-19 (S.D.N.Y. 1974); Broadway & Ninety-Sixth St. Realty Co. v. Loew's, Inc., 21 F.R.D. 347, 360 (S.D.N.Y. 1968). Matters pertaining to jurisdiction are also discoverable. Davis v. Asano Bussan Co., 212 F.2d 558, 564-65 (5th Cir. 1954) (a party has a right to inquire into the relationship between alleged principal and agent in order to permit jurisdictional

determination). Discovery may also be had to ascertain whether certain persons are proper parties to an action. 4 J. Moore Moore's Federal Practice ¶ 26.56[1] at 26-102 (2d ed. 1984), citing, inter alia, Schwartz v. Broadcast Music Inc., 16 F.R.D. 31 (S.D.N.Y. 1954).

10 C.F.R. § 2.740a governs the taking of depositions. 10 C.F.R. § 2.740a(d) provides that the officer before whom the deposition is given "shall not decide on the competency, materiality, or relevance of evidence but shall record the evidence subject to objection." This provision is similar to Fed. R. Civ. P. 30(c) which provides in pertinent part, "evidence objected to shall be taken subject to objections." Rule 30(c) has been interpreted as requiring response despite objections, except where some serious harm is likely to result (for example where a privilege would be destroyed). Objections based merely on an assertion of irrelevance do not invoke the exception, and response is required. International Union of Electrical, Radio, and Machine Workers, AFL-CIO v. Westinghouse Electric Corp. 91 F.R.D. 277, 279-30 (D.D.C. 1981). The Commission's rule should be similarly construed.

### III. Applicants' Questions

During the course of Mr. Johnson's deposition, Applicants asked several questions relating to the finances of CPG. Applicants asked how CPG was financed (Tr. at 24, lines 21-22), whether CPG receives private contributions (Tr. at 27, lines

5-7), whether CPG receives grants from any organizations (Tr. at 27, lines 12-14), and whether CPG receives financial assistance from any other organizations (Tr. at 27, lines 17-19). Counsel for Mr. Johnson objected to each of these questions as irrelevant, arguing that the questions did not address evidence admissible in the proceeding. Tr. at 24-28. In each case, Counsel for Mr. Johnson instructed Mr. Johnson not to answer the questions. Id. Counsel for CPG did not object to the questions.

These questions are relevant to the credibility of Mr. Johnson, whom Joint Intervenors designated as a potential witness, and are therefore within the scope of permissible discovery as discussed above. Applicants are entitled to explore whether CPG has a financial stake in the outcome or pursuit of the Vogtle licensing proceeding -- a stake that could be imputed to Mr. Johnson, CPG's sole employee and chief executive officer. See Tr. at 12, 17. If such a financial stake exists, it would tend to establish bias. Furthermore, as discussed above, a relevance objection was not proper grounds for a refusal to respond. Finally, any relevance objection belonged to CPG and not to Mr. Johnson individually.<sup>2/</sup>

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<sup>2/</sup> Traditionally, federal courts have been reluctant to permit a non-party to object to discovery on relevance grounds because a non-party presumably lacks an interest in the outcome of the case. See e.g. Benetz v. Photon, Inc., 21 Fed. R. Serv. 2d 791 (D. Mass. 1975). However, some courts have permitted such objection, considering

(Continued next page)

In the same vein, Applicants inquired whether Mr. Johnson received a paycheck from CPG. Tr. at 32, lines 22-24. Counsel for Mr. Johnson then objected to any questions about the financial affairs of the witness and instructed Mr. Johnson not to answer. Tr. at 32-35. CPG did not join in the objection.

Again, Applicants' question was relevant to the credibility of a designated witness. The question sought to determine whether Mr. Johnson had a financial interest that might bias his testimony. Again, a relevance objection was insufficient to exempt the question from the prescription that evidence objected to shall be taken subject to objection; and Mr. Johnson did not even have standing to make a relevance objection on his own behalf.

Applicants also attempted to ascertain the relationship between CPG and two other organizations -- Educational Campaign for a Prosperous Georgia (ECPG) and Southern Regional Council. Mr. Johnson is also Chief Executive Officer of ECPG; CPG has sometimes submitted pleadings on ECPG stationery; and an ECPG newsletter suggests that a contribution to CPG can be made tax deductible by addressing it to ECPG or the Southern Regional

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(Continued)

relevance to be adjunct to burdensomeness. See, e.g., In Re Agent Orange Product Liability Litigation, 97 F.R.D. 427, 432-433 (E.D.N.Y. 1983). In the case at bar, Counsel for Mr. Johnson did not raise burdensomeness as an objection, and indeed the questions could have been answered effortlessly. Accordingly, the traditional rule should be applied.

Council. See Applicants' Exhibit 2 to Johnson Deposition (footnote at the bottom of fifth page). See also Tr. at 94-96.

When Applicants asked when ECPG was formed (Tr. at 29, lines 1-2), however, Counsel for Mr. Johnson objected to and instructed Mr. Johnson not to answer any questions relating to ECPG. Tr. at 29. Counsel for CPG joined in this objection. At this point, Applicants noted on the record that they had intended to ask Mr. Johnson about the distinction between ECPG and CPG, about the activities of ECPG, about Mr. Johnson's association with ECPG, about its status as a nonprofit organization, about its employees, about its activities relating to actions by Georgia Power Company or other utilities, about its activities in the form of lobbying, about its involvement in proceedings before State or federal agencies or in a lawsuit, and about the financing of ECPG. Tr. at 31-32. Mr. Johnson also refused to answer whether ECPG has participated in any way with the activities of CPG in this proceeding. Tr. at 163, lines 10-13. See Tr. at 163-64.

Similarly, Applicants asked Mr. Johnson whether the Southern Regional Council provides any assistance in any form to Campaign for a Prosperous Georgia (Tr. at 59, lines 4-6), whether there is any relationship currently between Southern Regional Council and CPG (Tr. at 68, lines 4-6), whether Mr. Johnson has any involvement in Southern Regional Council or any projects that it is sponsoring (Tr. at 86, lines 15-18), and what is the involvement between Southern Regional Council and

CPG (Tr. at 96, lines 10-11). Counsel for Mr. Johnson objected to each of these questions as irrelevant and instructed Mr. Johnson not to answer. Counsel for CPG remained silent.

Applicants' questions concerning ECPG and Southern Regional Council were intended to elicit information bearing on Mr. Johnson's credibility or bias, and as such they were generally relevant. Only by inquiring into the interrelationship between these organizations can Applicants expose hidden interests or prejudices. Moreover, if CPG and ECPG are in fact the same entity, a statement by ECPG may be an admission by CPG. Applicants are entitled to determine the identity of CPG. Applicants are also entitled to determine the interests of other organizations with which a witness (Mr. Johnson) is affiliated. Accordingly, the relevance objection made by counsel for Mr. Johnson was without merit. Moreover, it did not relieve Johnson of the duty to respond, and it was not an appropriate objection to be made on Mr. Johnson's individual behalf.

Finally, during the deposition, Applicants asked a series of questions relating to CPG's present and prior membership. Applicants first referred to CPG's Petition for Leave to Intervene, wherein CPG had stated: "The Campaign for a Prosperous Georgia is a membership organization formed in early 1983 by a coalition of consumer groups, environmental organizations, business operators, labor activists, government officials and other citizens concerned about the economic and environmental impacts of electric utilities operating in Georgia." See

Applicants' Exhibit 1 to Johnson Deposition, at 1. Applicants then asked what consumer groups are members of CPG (Tr. at 45, lines 18-20), a question once again reasonably calculated to explore potential bias on the part of CPG and its chief executive officer, Mr. Johnson. Mr. Johnson responded that the Petition did not mean that consumer groups are members of CPG, and upon instruction from his counsel refused to answer questions relating to membership. Tr. at 46. Mr. Johnson indicated, however, that CPG had in the fall of 1984 changed from an unincorporated membership organization to a corporation. Tr. at 46-47. This statement suggests that CPG no longer has members to represent, and it brings into question CPG's standing to participate in this proceeding.

Applicants next asked what consumer groups were members of CPG prior to CPG's incorporation. Tr. at 47, lines 11-13. Counsel for Mr. Johnson objected to any questions regarding the constituent members of CPG prior to its incorporation. Tr. at 47. Counsel for Mr. Johnson asserted that the question was irrelevant and instructed Mr. Johnson not to answer. Tr. at 47-48.<sup>3/</sup> Similarly, Mr. Johnson's counsel instructed Mr. Johnson not to respond to Applicants' question whether any groups or organizations were members of CPG at the time CPG filed its Petition for Leave to Intervene. Tr. at 53, lines 3-7. See Tr. at 53-58.

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<sup>3/</sup> Counsel for CPG did not join in the objection.

Applicants attempted in vain to pursue this line of questioning. Mr. Johnson indicated that although CPG is now incorporated, there are still people he refers to as members. Tr. at 61. Mr. Johnson, however, was instructed not to answer Applicants' question whether consumer groups are today members of CPG as Mr. Johnson uses the word membership. Tr. at 61, lines 16-18. Mr. Johnson similarly was instructed not to answer Applicants' question who owns stock in CPG (Tr. at 62, lines 5-6), but did respond that none of the affiants supporting CPG's Petition for Leave to Intervene were CPG shareholders. Tr. at 62-64. Mr. Johnson also characterized the present relationship of the two affiants who had claimed membership in CPG as being nothing more than the relationship that everybody in Georgia has to CPG. Tr. at 64-65. Mr. Johnson refused, however, to answer what constituted membership in CPG at the time CPG filed its Petition for Leave to Intervene. Tr. at 183, line 24, to Tr. at 184, line 2.

Applicants' questions concerning membership are relevant on several grounds. First, CPG's and hence Mr. Johnson's affiliation with consumer groups may indicate bias. Second, inaccurate or misleading statements in CPG's Petition for Leave to Intervene might reflect on the credibility of Mr. Johnson, CPG's chief executive officer. Last, and by no means least, the questions are germane to whether CPG in fact had standing to intervene at the time of its Petition or continues to have standing. The integrity of the licensing process demands that

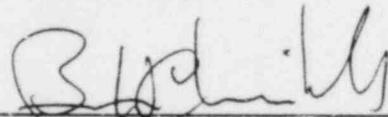
such inquiry not be foreclosed. The relevance objection made by Counsel for Mr. Johnson was without merit, did not relieve Mr. Johnson of the duty to respond, and was not Mr. Johnson's objection to make.

#### IV. Conclusion

For the reasons discussed above, Applicants submit that the Board should compel Mr. Johnson to reappear to be deposed by Applicants concerning:

- (1) CPG's financing
- (2) Mr. Johnson's sources of income
- (3) ECPG
- (4) CPG's relationship to ECPG and  
Southern Regional Council
- (5) CPG's past and present membership.

Respectfully submitted,



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Dated: March 22, 1985

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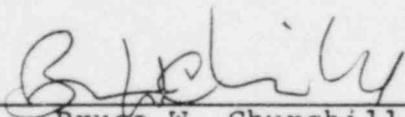
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	)	50-425
(Vogtle Electric Generating Plant,	)	(OL)
Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Motion to Compel Answers to Deposition Questions," dated March 22, 1985, were served upon those persons on the attached Service List by deposit in the United States mail, postage prepaid, this 22nd day of March, 1985; and that copies of the transcript of the deposition of Mr. Tim Johnson, conducted in this proceeding on March 12, 1985, were served upon those parties indicated by asterisk on the attached Service List by deposit in the United States mail, postage prepaid, this 22nd day of March, 1985.

  
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Bruce W. Churchill, P.C.

Dated: March 22, 1985

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Before the Atomic Safety and Licensing Board

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GEORGIA POWER COMPANY, et al. ) Docket No. 50-424  
 ) 50-425  
(Vogtle Electric Generating Plant, )  
Units 1 and 2) )

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