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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Morton B. Margulies, Chairman
Gustave A. Linenberger, Jr.
Dr. Oscar H. Paris

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In the Matter of	Docket Nos. 50-424-OL 50-425-OL
GEORGIA POWER COMPANY, et al.	
(Vogtle Electric Generating Plants, Units 1 and 2)	June 7, 1985

SERVED JUN 11 1985

MEMORANDUM AND ORDER
(Ruling On Applicants' Motion To Compel And
Joint Intervenors' Motion For A Protective Order)

On March 22, 1985, Applicants filed a motion to compel Tim Johnson, the Executive Director of Intervenor, Campaign for a Prosperous Georgia, who was deposed by Applicants on March 12, 1985, to reappear and be deposed on questions to which objections had been raised and remained unanswered.

Joint Intervenors, Campaign for a Prosperous Georgia (CPG) and Georgians Against Nuclear Energy (GANE), thereupon on April 1, 1985, filed a response to Applicants' motion to compel along with a motion for a protective order. Intervenors requested that the Board deny Applicants' motion to compel and to grant their motion for a protective order.

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On April 1, 1985 NRC Staff notified the Board that it took no position on the discovery dispute between the other parties. The Staff then on April 11, 1985 called the Board's attention to cases uncited by the other parties, in their presentations.

Applicants on April 15, 1985, filed an answer to Joint Intervenors' motion for a protective order. They took the position that should the Board consider Joint Intervenors' motion for a protective order to be no more than a response to Applicants' motion to compel, Applicants would then move for leave to file a reply.

On April 19, 1985, Joint Intervenors filed an objection to Applicants' answer to the motion for a protective order on the ground that it was untimely filed, because 10 CFR 2.730(c) requires that answers to motions be filed within ten days after service of a written motion.

For resolution of the issues, the Board will consider all of the substantive submissions. There is no objection to Applicants' filing of an answer to Joint Intervenors' motion for a protective order, other than on the ground it is untimely. The opposition to the filing is without merit for although ten days is set as the time limit under 10 CFR 2.730(c) within which to answer, 10 CFR 2.710 allows five days to be added to the prescribed period because of the use of the mails. Thus the April 15, 1985 filing was timely made and the objection is therefore overruled.

Evolution Of The Disputes

On March 12, 1985, Applicants deposed Tim Johnson, the Executive Director and sole employee of CPG. Previously he had provided information used in developing the bases for contentions accepted for litigation and for use in responses to interrogatories. As part of the deposition he stated outright that he considers himself an opponent of Plant Vogtle, as well as current lightwater reactor technology and that nuclear plants should not be presently licensed (Tr. 111-112). At the time of the deposition Mr. Johnson was being considered by Joint Intervenors as a possible witness on Contention 14. In its motion for a protective order Joint Intervenors stated they do not plan to call him as a witness for any of the contentions admitted so far. The matter of several possible additional contentions is still pending.

In an unpublished Memorandum and Order of March 9, 1984, the Board found that Joint Intervenors, CPG and GANE, had fulfilled the requirements of 10 CFR 2.714, establishing their respective representational interest to participate as intervenors in an adjudicatory hearing conditioned upon each submitting a litigable contention. On February 10, 1984, Applicants in their answer to the petitions for leave to intervene, stated that they had no objection to the status of the subject petitioners.

On September 5, 1984, in an unpublished Memorandum and Order following the special prehearing conference, held pursuant to 10 CFR 2.715a, the Board admitted both CPG and GANE as party intervenors upon their submission of litigable contentions. No questions had been raised

as to their standing and standing was never a matter in controversy to be identified in the prehearing order entered at the conclusion of the prehearing conference.

CPG described itself in its petition for leave to intervene as 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 electrical utilities operating in Georgia. Its participation was based on representational standing stemming from the interest of several members, whose interests were set forth in affidavits. Joint Intervenor GANE described itself as a non-profit citizen group, organized in 1978, that is the largest and most active anti-nuclear organization in Georgia. Both Intervenors have consolidated their efforts and the contentions are joint contentions.

During the course of deposing Mr. Johnson on March 12, 1985, inquiry was made of Mr. Johnson relating to CPG's past and present memberships, CPG's finances, Mr. Johnson's sources of income, and CPG's relationship to Educational Campaign for a Prosperous Georgia and Southern Regional Council.

Mr. Johnson was represented by individual counsel. Also attending was counsel for CPG. It was Mr. Johnson's personal counsel who objected to questions in the above areas as irrelevant and instructed the deponent not to answer. Counsel for CPG did not raise objections during the course of the taking of the deposition.

Applicants contend that the relevance objection made by counsel for Mr. Johnson was without merit, that it did not relieve deponent of the duty to respond and that it was not Mr. Johnson's objection to make.

Joint Intervenors responded that the matters are inappropriate for discovery, because they are irrevelant to the proceeding and are privileged matters. It was further contended that it would have been inappropriate for the Joint Intervenors to have objected to any questions at the deposing of Mr. Johnson. They rely on 10 CFR 2.740a(d) for the proposition that the appropriate time to object is when the information sought is to be used, i.e., in response to Applicants' motion to compel. Additionally cited in support is Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 322-23 (1980).

The situation under consideration is not very much unlike that where Applicants did not provide answers to Joint Intervenors' interrogatories but replied by way of written objection. Joint Intervenors filed a motion to compel; and because Applicants had not applied for a protective order under 10 CFR 2.740(f)(1), they would have barred the latter from having their objections heard. In an unpublished Memorandum and Order, of June 4, 1985, we found it would be the better practice to decide the discovery disputes on a record made by both sides, which constitutes fundamental fairness. The highly technical nature of Applicants' objections to the practice engaged in at the taking of the subject deposition, if approved, could result in elevating form over substance in this administrative proceeding and be detrimental

to arriving at a just decision. We will follow our prior practice in the case and consider the arguments of both sides as to whether the inquiries were proper, and if a protective order should issue.

Inquiries Relating To
CPG's Past And Present Memberships

Applicants asked a series of questions relating to CPG's past and present memberships. Inquiry was made of what consumer groups are members of CPG. Deponent refused to answer questions relating to membership. Mr. Johnson then indicated that CPG in the fall of 1984 changed from an unincorporated membership organization to a corporation. Mr. Johnson did not answer Applicants' question as to who owns stock in CPG. He further testified that none of the affiants supporting CPG's petition for leave to intervene presently was a CPG shareholder, but one was a director of the corporation (Tr. 62-65).

Applicants stated the membership questions are relevant on several grounds. It was asserted that CPG's and hence Mr. Johnson's affiliation with consumer groups may indicate bias. Further, inaccurate or misleading statements on membership in CPG's petition for leave to intervene might reflect on the creditability of Mr. Johnson, CPG's chief executive officer. It was further contended the questions are germane to whether CPG in fact had standing to intervene at the time of its original petition or continues to have standing.

In response, Intervenors assert that Georgia Power Company is known to have an intrusive security system and the news media have reported serious incidents of harassment of critics of the utility including

members of CPG and GANE. (Applicants note that an 8-year old newspaper article was the basis of the claim and that the outcome of related lawsuits exonerated Georgia Power Company.) Business supporters of Joint Intervenors were reported to have expressed fear that Georgia Power Company will push them into a higher rate bracket, if they are identified. It is asserted that disclosure of the membership list of CPG or GANE would have a chilling effect on the enrollment and membership of the organizations. Moreover, membership is irrelevant given that both organizations have been adjudged parties to this proceeding.

Applicants' inquiry into CPG's past and present memberships to determine whether intervenor meets the Commission's requirements on standing is not the proper subject of discovery at this time.

As pertinent, 10 CFR 2.740(b)(1) provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding ... and shall relate to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order entered at the conclusion of that prehearing conference [provided for in 2.751a] ...

The Board found on September 5, 1984, without opposition, that CPG qualified to be a party intervenor in the proceeding. CPG's standing was never a matter of controversy in this proceeding and thus it did not become an issue to be litigated, as reflected in the Board's prehearing order entered at the conclusion of the prehearing conference held pursuant to 10 CFR 2.751a. The subject of standing clearly is not discoverable at this time under the above cited rule. The Board denies

the motion to compel insofar as Applicants seek information on the issue of standing.

As to Applicants' seeking information on prior and past memberships in CPG to ultimately establish bias on the part of Mr. Johnson, we view the request as unwarranted and unnecessary. CPG's and Mr. Johnson's opposition to the licensing of the plant are well known. For example, as Executive Director of CPG, Mr. Johnson submitted an affidavit of May 25, 1984, in support of a May 27, 1984 CPG "Request for a Waiver of 10 C.F.R. 51.53(c) Pursuant to 10 C.F.R. 2.758" in which he spelled out their preference for conservation, solar energy and cogeneration over the licensing of Plant Vogtle.

As part of the subject deposition, Mr. Johnson testified he was an outright opponent of Plant Vogtle and current lightwater technology and that no license should be granted. In light of this, why is information on prior and present memberships needed to establish Mr. Johnson's animus on the licensing of Plant Vogtle? We find no justification for it. The law does not require the doing of vain things. Applicants' motion to compel the disclosure of the requested information is therefore denied.

As to the claim of needing the information to test Mr. Johnson's credibility on the petition for leave to intervene, we view the approach as specious and believe it will produce nothing useful.

The significant factor in a petition for leave to intervene of an organization seeking representational standing is that there be a member's statement showing an interest that may be affected by the

facility and that the member had authorized the organization to represent the member in the proceeding. Only one member need be identified and sufficient specificity provided so that the matters stated can be independently verified. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station), ALAB-535, 9 NRC 377, 393 (1979).

Applicants' inquiry of the deponent did not relate to the individual members that provided affidavits upon which representational standing was established and was necessary for CPG's participation. Applicants' inquiry focused on the identity of consumer group members, who were mentioned but played no role in the acceptance of CPG as a party. Their identities are not a fact of consequence to this proceeding. Applicants' inquiry about them is not in an area of any significance so as to meaningfully involve deponent's credibility. A legitimate purpose of discovery will not be achieved and the motion to compel should be denied.

It should be noted that in NRC licensing proceedings the evidence is basically scientific and technical. Testimony given on contested issues usually requires specialized knowledge and is presented by experts. Evaluation of the expert testimony basically determines those matters in controversy. The decisions seldom turn on the credibility of a witness, as that term is used in ordinary litigation.

We deny Applicants' motion to compel deponent to respond to the inquiries relating to CPG's past and present memberships and to the latter's standing to participate as a party in the proceeding.

Inquiries Relating To
CPG's and Tim Johnson's Finances

Applicants inquired at the deposition taking whether CPG receives contributions, financial assistance or grants from organizations. The questions were objected to as being irrelevant in that they did not address evidence admissible in the proceeding. Mr. Johnson was asked if he received a paycheck from CPG, to which an objection was raised. The questions went unanswered.

Applicants assert that the questions are relevant to the credibility of Mr. Johnson. They claim they are entitled to explore whether CPG has a financial stake in the outcome or pursuit of the Vogtle licensing proceeding, a stake that can be imputed to Mr. Johnson, CPG's sole employee and chief executive officer. As to the inquiry whether Tim Johnson received a paycheck from CPG, it was stated that it was to determine whether he had a financial interest that might bias his testimony.

Intervenors' response is that the Board has ruled that the financial qualifications of the Applicants are irrelevant to the proceeding and they cannot see why the financial resources of the Intervenors have any relevance. Moreover, assuming that CPG's finances are relevant to the proceeding, Joint Intervenors object to the questions on the basis of privilege and that the information is proprietary. Intervenors also seek to protect the identity of donors because disclosure may preclude future donations.

The Board finds the line of inquiry on finances will serve no useful purpose in this proceeding and therefore denies the motion to compel as to it. This is not because of existence of a reason corresponding to our finding that Applicants' finances are irrelevant. That finding was on the basis of a Commission rule that presumes that an electric utility is financially qualified to operate a nuclear plant. It has no application to the Intervenors.

We find the inquiry unnecessary, as we did with the disputed inquiry dealing with CPG's past and present memberships to establish bias. CPG's and Mr. Johnson's opposition to the licensing of the plant have been repeatedly professed and are known. There is no need to now start to seek out clues to again establish their opposition to the plant. Further, CPG is participating in the proceeding to protect an established interest of one of its members. The motive for the organization and its executive director for so doing is not of concern to the Board under law or regulation. We rule against carrying the inquiry as to finances any further.

Intervenors have provided insufficient information to establish their claim that the information on finances was privileged or proprietary and therefore these defenses to the discovery must fail. Irrespective of this, Intervenors prevail on this dispute.

Inquiries Relating To
Educational Campaign For A Prosperous
Georgia and the Southern Regional Council

Applicants attempted to ascertain the relationship between CPG and Educational Campaign for a Prosperous Georgia (ECPG) and Southern

Regional Council (SRC). Tim Johnson is the executive director for CPG and ECPG. The latter organization is described in its newsletter as a "nonprofit, nonlobbying organization concerned about the economic and environmental impacts of electric utilities" (Exhibit No. 3 to Applicants' Deposition). Mr. Johnson described SRC as a civil rights organization, headquartered in Atlanta (Tr. 59). CPG has sometimes submitted pleadings on ECPG stationary in this proceeding. The referenced ECPG newsletter indicates that a contribution to CPG could be made tax deductible, if the check is made payable to 'ECPG/SR'. Deponent stated this was done because contributions to CPG were not tax deductible (Tr. 96).

Mr. Johnson would not respond when asked when ECPG was formed. Applicants had intended to follow up with questions on the distinction between CPG and ECPG; Mr. Johnson's association with ECPG; the activities of ECPG; its status as a nonprofit organization; its employees; its activities relating to actions by Georgia Power Company or other utilities; its lobbying; its involvement before State or federal agencies and in lawsuits; and the financing of ECPG.

Mr. Johnson was asked about the involvement between CPG and SRC and whether he is involved in SRC or any projects that it is sponsoring. Inquiry was made as to whether SRC provides any assistance in any form to CPG. Objections were raised and no answers were furnished.

Applicants state the inquiries were intended to elicit testimony bearing on Mr. Johnson's credibility or bias, and as such they were generally relevant. The questions were to uncover hidden interests or

prejudices. It was thought that if CPG and ECPG are in fact the same entity, a statement by ECPG may be an admission by CPG.

Intervenors responded by stating that Applicants have made no showing as to how the three organizations have anything to do with any testimony of Mr. Johnson relating to contentions in the proceeding. They assert ECPG and SRC have nothing to do with the proceeding and that the relationship is irrelevant to the contentions.

The Board makes the same findings with respect to the last line of questioning as it did with the others. The motion to compel should be denied for the same reasons. CPG's and Mr. Johnson's positions for not licensing Plant Vogtle are well known. The inquiries that are made as to the other organizations do not involve facts of consequence to this proceeding. Applicants' inquiry about them is not in an area of significance so as to meaningfully involve deponent's credibility. A legitimate purpose of discovery will not be achieved and the motion to compel shall be denied.

The purposes of discovery are to enable the parties to ascertain the facts in complex litigation, to refine the issues, to eliminate surprise and prepare adequately for a more expeditious hearing. Our evaluation of the lines of inquiry are that they will not promote the accomplishment of these purposes. We cannot find that realistically they will contribute to the resolution of the contentions and help determine the issues of public health and safety.

ORDER

Upon consideration of all of the foregoing, it is hereby ORDERED:

1. Applicants' motion of March 22, 1985, to compel deponent, Tim Johnson to reappear and be disposed on questions to which objections had been raised on March 12, 1985, and were unanswered, is denied; and

2. Intervenors' motion of April 1, 1985, for a protective order against the further recalling of deponent Tim Johnson to be deposed on questions to which objections had been raised on March 12, 1985, and were unanswered, is granted.

THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies

Morton B. Margulies, Chairman
ADMINISTRATIVE LAW JUDGE

G.A. Linenberger

Gustave A. Linenberger, Jr.
ADMINISTRATIVE JUDGE

Oscar H. Paris

Dr. Oscar H. Paris
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 7th day of June, 1985.