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January 15, 1993

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

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Before Administrative Judges:
Peter B. Bloch, Chair
Dr. James H. Carpenter
Thomas D. Murphy

In the matter of

GEORGIA POWER COMPANY,
et al.

(Vogtle Electric Generating
Plant, Units 1 and 2)

Docket Nos. 50-424-OLA-3
50-425-OLA-3

Re: License Amendment
(Transfer to Southern
Nuclear)

ASLBP No. 93-671-01-OLA-3

MEMORANDUM AND ORDER
(Request for Information, Briefs)

In our order of December 29, 1992, we expressed our concern that we be informed:

precisely: (1) what the present license provides about the structure and management of the operating company, and (2) how that will be changed by the proposed amendment. If the letter of the present license is being complied with, that is all we may need to know. If there is some deviation from the letter of the current license, we may need to know what that deviation is and how it will be affected by the amendment.

After the prehearing conference held January 12, 1993, in Augusta, Georgia, we find that our concern was not directly addressed. Accordingly, we continue to be concerned about

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- 2 -

the specific language of the license that is being amended so that we will know the effect on that license of the amendment that is being sought. Consequently, we shall order the Applicant/Licensee to provide the applicable language of the current license and the amendment, and we shall authorize the parties to file simultaneous briefs concerning the legal effect of the change that is being sought. That is:

What is authorized by the current license or included in the updated safety analysis report, with respect to whether the organizational structure for the operation of Vogtle may include, directly or indirectly, SONOPCO or Southern Nuclear?¹

How do NRC regulations² and practices affect the interpretation of the license and/or the updated safety analysis report?

To what extent, if any, is the character or competence of individuals already jointly employed by Georgia Power and Southern Nuclear in the management of Vogtle relevant to the approval of the requested license amendment?³

¹The Staff of the Nuclear Regulatory Commission has told us that it "does not now have an opinion as to whether Georgia Power Company is operating the plant and conforming with its operating license and its technical specifications." Tr. 70. We have also been told, by Georgia Power Company, that its license makes no reference to Southern Nuclear Operating Company (Tr. 74), which currently writes the paycheck to Georgia Power's Executive Vice President (subject to partial reimbursement by Georgia Power). Tr. 76.

²See 10 CFR § 50.34(b)(6)(i).

³Staff tells us that character is relevant in connection with the licensee, but it does not cite regulations or precedent. Tr. 90, 94 (character of people already managing the plant is important), 98. Licensee, on the other hand, tells us that the character and competence of individuals
(continued...)

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is this 15th day of January, 1993, ORDERED, that:

1. Georgia Power, Inc. shall file the relevant provisions of its license and the amendment that it is seeking.

2. The parties may file briefs addressing the questions asked by the Board in the accompanying memorandum. Such briefs shall be sent so that the Board would reasonably be expected to receive them on or before January 29, 1993.

FOR THE ATOMIC SAFETY AND LICENSING BOARD

James H. Carpenter
James H. Carpenter
Administrative Judge

Thomas D. Murphy
Thomas D. Murphy
Administrative Judge

Peter B. Bloch
Peter B. Bloch
Chair

Bethesda, Maryland

³(...continued)
who already have management duties, and will continue to have management duties, is not relevant to the issuance of the license amendment. Tr. 97.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

GEORGIA POWER COMPANY, ET AL.

(Vogtle Electric Generating Plant,
Units 1 and 2)

Docket No.(s) 50-424/425-OLA-3

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (REQUEST FOR INFO...) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Peter B. Bloch, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
James H. Carpenter
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Thomas D. Murphy
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

John Lamberski, Esq.
Counsel for Georgia Power Company
Troutman Sanders
Suite 5200, 600 Peachtree Street, N.E.
Atlanta, GA 30308

Ernest L. Blake, Jr., Esq.
David R. Lewis, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, DC 20037

Michael D. Kohn, Esq.
Stephen M. Kohn, Esq.
Kohn, Kohn & Colapinto, P. C.
517 Florida Avenue, N.W.
Washington, DC 20001

Docket No.(s)50-424/425-OLA-3
LB M&O (REQUEST FOR INFO...)

C. K. McCoy
V. President Nuclear, Vogtle Project
Georgia Power Company
Post Office Box 1295
Birmingham, AL 35201

Dated at Rockville, Md. this
15 day of January 1993

Kris Cater
Office of the Secretary of the Commission

Peak Steam Electric Station (CPSES) Unit 2 construction permit extension proceeding, and noted that pursuant to 10 C.F.R. § 2.714a(b), Petitioners had ten days to appeal the Order to the Commission. Because the ASLB served its Order by mail, five days were added to this period, and Thursday, December 31, 1992, became the filing deadline for notices of appeal.

Instead of filing a notice of appeal with the Commission, on December 28, 1992, three days prior to the Commission's deadline, the Dows filed a Petition For Review Of Administrative Order with the United States Court of Appeals for the District of Columbia Circuit, requesting that the court review the ASLB December 15, 1992 Order.

DISCUSSION

The Commission should deny the Dows' Motion on the ground that the Dows' unsubstantiated allegations, used to justify their failure to file a timely notice of appeal with the Commission, lack credibility and are inconsistent with the facts. The Dows' claims, even were they true, do not constitute good cause for their delay, for under well-established Commission practice, time limits regarding appeals are construed strictly and untimely appeals are not accepted absent "extraordinary and unanticipated circumstances." Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-684, 16 NRC 162, 165 n.3 (1982).

It is clear that the Dows' own negligence, not events beyond their control, caused them to forsake filing a timely notice of appeal with the Commission.

The Dows allege that the "Order . . . did not reach them until well after the ten day period for the filing of a Notice of Appeal had lapsed," and consequently, they were "prevented . . . from receiving the order in time to file a notice of appeal with the Commission." (Motion at 1-2.) The Dows' unsubstantiated allegation is contrary to the actual facts. According to the Dows, the ASLB Order was delayed in reaching them because of the U.S. Postal Service's lengthy mail forwarding procedures, necessitated by the Dows' change in residence from Pennsylvania to Austin, Texas. (Motion at 1-2.) However, the ASLB Order's Certificate of Service clearly indicates that the Order was served upon the Dows via first class mail, on December 16, 1992, at their present Austin, Texas address, not their former Pennsylvania address as they allege. Thus the Dows' clearly received the Board's Order long before the time for filing an appeal with the Commission lapsed. The Dows' Motion simply misrepresents the actual facts in an effort to justify their late filing.

The Dows' Motion demonstrates their pattern of providing the NRC with unsubstantiated assertions that are shown to be inconsistent with the facts, and lacking in all credibility. As the ASLB recognized in their December 15 Order

in denying inter alia, a Dow motion requesting an extension of time to file a contention:

The Dow motion . . . along with the attached unverified statement of Mr. Dow only confirms our October 19, 1992 finding that the original motion lacked credibility, was unsupported by probative evidence and failed to provide good cause for the requested extension. (Order at 48.)

Even if the Commission accepts the Dows' allegations regarding the cause of their failure to file a timely appeal, the Dows' Motion demonstrates only that they negligently failed to examine the Commission's regulations governing the calculation of time relating to filing deadlines. 10 C.F.R. § 2.710 provides that when a paper is served by mail, five days are added to the prescribed period available for responding. Thus the Dows' appeal was required to be filed on December 31, 1992. Because the Dows received the Order in time to file with the D.C. Circuit on December 28, 1992, but believed this was "well after the ten day period for the filing of a Notice of Appeal had lapsed," they negligently failed to take sufficient notice of 10 C.F.R. § 2.710. Hence, the Dows' own pleading conclusively establishes that they received the Board's Order in sufficient time to file a timely appeal with the Commission, and failed to do so due to their own negligence. Because negligence unquestionably does not constitute good cause for filing out of time, the Motion should be denied.

The Dows further assert that they filed the petition for review of the ASLB Order with the D.C. Circuit after assuming that "their only remaining course of action was to make direct approach to the U.S. Court of Appeals." (Motion at 2.) The Dows claim that their inexperience was responsible for this error. However, the ASLB Order expressly stated that Petitioners had the right to appeal the Order to the Commission. (Order at 50-51, emphasis added.) ^{2/} Therefore, inexperience aside, the Dows merely had to follow the ASLB's instructions. The Dows' voluntary decision to forego an appeal with the Commission and petition the D.C. Circuit before exhausting their administrative remedies is clearly not an "extraordinary and unanticipated circumstance," in light of the ASLB's instructions. For these reasons, the Dows' error is not a basis for the Commission to permit the Dows' late appeal of the ASLB Order.

Finally, the Dows' Motion, on its face, confirms the ASLB's conclusion that the Dows did not establish the requisite interest for standing under 10 C.F.R. § 2.714, and that their Petition to Intervene was correctly denied. In two recent pleadings, the Dows assert that their legal residence is Austin, Texas, which is located significantly further than 50 miles from CPSES Unit 2. First, the Dows filed a change of address notice with the NRC and the D.C. Circuit indicating their new domicile.

^{2/} The ASLB also indicated that the time limit for filing a notice of appeal with the Commission was governed by 10 C.F.R. § 2.714a(b). (Order at 51.)

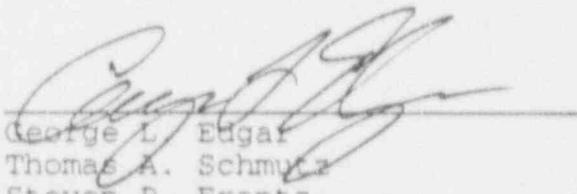
Second, Mr. Dow recently filed a complaint in the United States District Court for the Western District of Texas, Austin Division, in which he avers, under oath, that he resides in Austin, Texas. ^{3/} These two admissions demonstrate conclusively that the Commission should summarily affirm the ASLB's December 15, 1992 Order denying the Dows' Petition To Intervene and Request For Hearing.

CONCLUSION

For the reasons set forth above, TU Electric respectfully requests the Commission to deny Petitioners Motion For Leave To File Out Of Time, and summarily affirm the ASLB's December 15, 1992 Memorandum and Order denying the Dows' Petition To Intervene and Request For Hearing.

Respectfully submitted,

Robert A. Wooldridge, Esq.
Worsham, Forsythe, Sampels &
Wooldridge
2001 Bryan Tower
Suite 3200
Dallas, TX 75201
(214) 979-3000


George L. Edgar
Thomas A. Schmutz
Steven P. Frantz
Paul J. Zaffuts
Newman & Holtzinger, P.C.
Suite 1000
1615 L Street, N.W.
Washington, D.C. 20036
(202) 955-6600

Attorneys for TU Electric

January 12, 1993

^{3/} See R. Micky Dow v. Texas Utilities Electric Company, Civil Action No. A-92-CA-741-JN, p. 1, (January 6, 1993, W.D. Texas), provided as Attachment A to this Opposition.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAN 6 3 22 PM '93

U.S. COURT HOUSE
BY DEPUTY

R. MICKY DOW, ()
Plaintiff, ()

vs. ()

No. A-92-CA-741-JN

TEXAS UTILITIES ELECTRIC COMPANY, ()
Defendant. ()

COPY

PLAINTIFF'S PETITION FOR TEMPORARY INJUNCTION

TO THE HONORABLE JUDGE OF THIS COURT:

Now comes, R. Micky Dow, hereinafter plaintiff, and complains of Texas Utilities Electric Company, and for cause of action shows:

I.

Plaintiff is a Native-American Tribal Advocate, who is domiciled in the State of Texas, in the Western District of Texas, and resides at Number 368, P.O. Box 19400, Austin, Texas 78760-9400.

Plaintiff has family members and friends who reside in Hood County, Texas, the location of the landmark of Comanche Peak.

II.

Defendant is Texas Utilities Electric Company, a corporation incorporated under the laws of the State of Texas, with its principal offices and place of business located at 2001 Bryan Tower, in the City of Dallas, Texas, in the Northern District of Texas.

Defendant owns and operates a subsidiary installation known as the Comanche Peak Steam Electric Station, which is a nuclear-powered electricity generation station, located in Glen Rose, Somervell County, Texas, and the subject of this petition.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

UNRECORDED
USNRC

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_____)	
In the Matter of)	
TEXAS UTILITIES ELECTRIC)	
COMPANY)	
(Comanche Peak Steam Electric)	Docket No. 50-446-CPA
Station, Unit 2))	(Construction Permit
_____)	Amendment)

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of Opposition of TU Electric To Motion For Leave To File Out Of Time And Request For Extension Of Time To File Brief By Sandra Long Dow dba Disposable Workers Of Comanche Peak Steam Electric Station And R. Micky Dow were served upon the following persons by deposit in the United States Mail (except as indicated below), postage prepaid and properly addressed, on the date shown below:

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Secretary*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Chief, Docketing
and Service Section
(Original Plus Two Copies)

Janice E. Moore
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

* Served By Hand

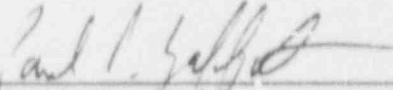
Marian L. Zobler
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Michael H. Finkelstein
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

R. Micky Dow
Sandra Long Dow
Department 368
P.O. Box 19400
Austin, Texas 78760-9400

Michael D. Kohn
Stephen M. Kohn
Kohn, Kohn and Colapinto, P.C.
517 Florida Ave., N.W.
Washington, D.C. 20001

Dated this 12th day of January, 1993.



Paul J. Daffuts
Newman & Holtzinger, P.C.
Suite 1000
1615 L Street, N.W.
Washington, D.C. 20036
(202) 955-6600