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LCV-1009-D

July 25, 1997

Docket No. 50-424
50-425

U. S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, D. C. 20555

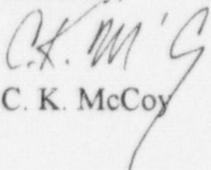
Ladies and Gentlemen:

**VOGTLÉ ELECTRIC GENERATING PLANT
REPLY TO A NOTICE OF VIOLATION**

Pursuant to 10 CFR 2.201, Southern Nuclear Operating Company (SNC) submits the enclosed information for Vogtle Electric Generating Plant (VEGP) in response to enforcement action EA 97-208, for two violations cited in Notice of Violation dated June 25, 1997, and originally categorized as Unresolved Items (URI) 50-424;425 / 97-03-01, -02, in Nuclear Regulatory Commission (NRC) Inspection Report Nos. 50-424; 425/97-03, dated April 4, 1997, identified during an inspection conducted from March 3-7, 1997. In the enclosure, a transcription of the violation precedes SNC's response.

Should you have any questions feel free to contact this office.

Sincerely,


C. K. McCoy

CKM/AFS

Enclosure: Reply to NOV 50-424;425/ 97-03 (EA. 97-208-01014, 02014)

cc: Southern Nuclear Operating Company

Mr. J. B. Beasley, Jr.
Mr. M. Sheibani
Mr. J. W. Averett
NORMS

U. S. Nuclear Regulatory Commission
Mr. L. A. Reyes, Regional Administrator
Mr. L. L. Wheeler, Senior Project Manager, NRR
Mr. C. R. Ogle, Senior Resident Inspector, Vogtle



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ENCLOSURE

**VOGTLE ELECTRIC GENERATING PLANT - UNITS 1 & 2
REPLY TO NOTICE OF VIOLATION
NRC INSPECTION REPORT 50-424;425/ 97-03 (EA 97-208)**

VIOLATION A. (EA 97-208-01014)

The following is a transcription of violation A as cited in the Notice of Violation (NOV):

"During a NRC inspection conducted on March 3 - 7, 1997, violations of NRC requirements were identified. In accordance with the "General Statement of Policy and Procedures for NRC Enforcement Actions," NUREG-1600, the violations are listed below:

- A. 10 CFR 26.24(d)(1) states, in part, that access to the results of preliminary tests must be limited to the licensee's testing staff, the Medical Review Officer, the Fitness-For-Duty Program Manager, and the employee assistance program staff, when appropriate.

Contrary to the above, on or before February 27, 1997, an individual's preliminary positive chemical test result was discussed with individuals other than the licensee's testing staff, the Medical Review Officer (MRO), the Fitness-For-Duty Program Manager, and the employee assistance program staff. (01014)

This is a Severity Level IV violation (Supplement III)."

RESPONSE TO VIOLATION A. (EA 97-208-01014)

Admission or Denial of the Violation:

The violation occurred as stated in the notice of the violation.

Reason for the Violation:

The information concerning chemical test results communicated on February 27 was based on Southern Nuclear's interpretation of 10 CFR 26.29(b). Southern Nuclear disclosed "personal information" to licensee representatives who had responsibility to ensure the subject employee's compliance with disciplinary action and with a related contract by which the subject employee committed not to take any drugs (legal or illegal) without explicit permission of the employee assistance provider. As explained in our letter LCV-1012, dated April 22, 1997, a preliminary positive test, known to not be confirmed by confirmation testing was some evidence of non-compliance with the employee assistance program (EAP) commitments. As a result of the subject NOV, Southern Nuclear now understands the position of the Nuclear Regulatory Commission that the specific restrictions of 10 CFR 26.24(d)(1) (regarding preliminary results of chemical testing) control the more general statement of 10 CFR 26.29(b) (regarding personal information) to prohibit such communication.

ENCLOSURE

**VOGTLE ELECTRIC GENERATING PLANT - UNITS 1 & 2
REPLY TO NOTICE OF VIOLATION
NRC INSPECTION REPORT 50-424;425/ 97-03 (EA 97-208)**

Corrective steps which have been taken and the results achieved:

The requirements of 10 CFR 26.24(d)(1) have been reaffirmed by letter to the fitness for duty testing staff of the licensee, as well as to licensee management.

Corrective steps which will be taken to avoid further violations:

No additional corrective actions are planned at this time.

Date when full compliance will be achieved:

The licensee is currently in full compliance with the requirements of 10 CFR 26.24(d), and the protection of confidentiality.

VIOLATION B, (EA 97-208-02014)

The following is a transcription of violation B as cited in the Notice of Violation (NOV):

- B. "10 CFR 26.29(b) specifically states, in part, that the licensee shall not disclose personal information collected and maintained to persons other than assigned MROs, other licensees, or their authorized representatives legitimately seeking the information as required by this part for unescorted access decisions.

Contrary to the above, on December 30, 1996, the licensee discussed personal information collected and maintained with a union representative, a person other than an assigned MRO, another licensee, or their authorized representatives legitimately seeking the information as required by 10 CFR Part 26 for unescorted access decisions.
(02014)

This is a Severity Level IV violation (Supplement III)."

RESPONSE TO VIOLATION B, (EA 97-208-02014)

Admission or Denial of the Violation:

Southern Nuclear denies that a violation of regulatory requirements occurred as stated in Violation B.

ENCLOSURE

VOGTLE ELECTRIC GENERATING PLANT - UNITS 1 & 2 REPLY TO NOTICE OF VIOLATION NRC INSPECTION REPORT 50-424;425/ 97-03 (EA 97-208)

Basis for Denial of the Violation:

Violation B implies that "personal information" collected to carry out the fitness for duty rule can be disclosed only to persons making unescorted access decisions. The portion of 10 CFR 26.29(b) quoted in Violation B omits reference to permitted disclosures to licensee representatives who have a need to have access to the information in performing assigned duties and disclosures to the employee's representative. The language of Violation B consequently appears to misconstrue 10 CFR 26.29(b). Moreover, Violation B cannot be reconciled with the obligations imposed on Southern Nuclear by the National Labor Relations Act.

The assigned responsibilities of licensee labor relations staff include the duty to respond to appropriate information requests from a collective bargaining representative, and the proper performance of those duties appears to conflict directly with Violation B's interpretation that "the licensee shall not disclose personal information collected and maintained to persons other than assigned MROs, other licensees, or their authorized representatives legitimately seeking the information as required by this part for unescorted access decisions".

The interpretation of 10 CFR 26.29(b) implicit in the Notice of Violation is that "personal information" may not be communicated to licensee representatives except "for unescorted access decisions". The NOV does not address whether such information can be properly communicated to labor relations staff with assigned responsibility, or to an employee's union representative. Southern Nuclear occasionally has grievances from represented employees that may culminate in arbitration. During the grievance procedure, and in arbitration hearings which may result from the grievance procedures, an employer could neither explain its position nor defend its decision if 10 CFR 26.29(b) does not permit disclosure of "personal information" to labor relations staff or to union representatives in appropriate circumstances.

Such a limitation is inconsistent with the language of 10 CFR 26.29(b), which permits disclosure to the employee's representatives and to licensee representatives with assigned duties requiring such information. The full text of 10 CFR 26.29(b) is as follows:

"(b) Licensees, contractors, and vendors shall not disclose the personal information collected and maintained to persons other than assigned Medical Review Officers, other licensees or their authorized representatives legitimately seeking the information as required by this Part for unescorted access decisions and who have obtained a release from current or prospective employees or contractor personnel, NRC representatives, appropriate law enforcement officials under court order, the subject individual or his or her representative, or to those licensee representatives who have a need to have access to the information in performing assigned duties,

ENCLOSURE

VOGTLE ELECTRIC GENERATING PLANT - UNITS 1 & 2 REPLY TO NOTICE OF VIOLATION NRC INSPECTION REPORT 50-424;425/ 97-03 (EA 97-208)

including audits of licensee's, contractor's, and vendor's programs, to persons deciding matters on review or appeal, and to other persons pursuant to court order. This section does not authorize the licensee, contractor, or vendor to withhold evidence of criminal conduct from law enforcement officials." [emphasis supplied]

When the NRC first proposed 10 CFR 26.29, the NRC stated that the section requires licensees to ensure that personal privacy is to be protected to the extent possible, consistent with the need to carry out the FFD program. Accordingly, "specific exemptions to the disclosure prohibition are provided. This list of exceptions is considered to be inclusive and no other disclosures should be made. If disclosure of the information is necessary for emergency medical purposes, it is assumed that the individual, or his/her representative, can provide the basis for such release..."¹ The list of exemptions then included "...NRC representatives, appropriate law enforcement officials, the subject individual or his or her representative...."

In developing a final rule, the NRC considered comments about disclosure of the information to local police and to arbitrators and the affected individual. In response to these comments, the NRC modified 10 CFR 26.29.² The NRC concluded that local police should only obtain the information "under court order," that the individual to whom the information pertains should have access, and that an arbitrator or other adjudicator who is being asked to resolve a fitness for duty dispute should have access. Clearly, then, the history of this provision shows the NRC's desire for the subject individual and his/her representative to have access, and to accommodate access to resolve fitness disputes. In short, the exemptions encompass the disclosures that are the subject of Violation B.

The disclosure of personal information cited in Violation B occurred after the subject employee had failed to attend required meetings with the employee assistance staff, and the status of his continued employment was questioned as explained in our letter LCV-1012, dated April 22, 1997. Labor relations staff had received inquiries from union representatives as to the reason that the employee's attendance with the employee assistance provider was required. In these circumstances, disclosure of personal information to labor relations staff regarding the subject employee was consistent with 10 CFR 26.29, as was the disclosure to the union representative of the employee.

The subject employee was at that time represented by a union as a collective bargaining representative, a legal status established by the National Labor Relations Act. The function of a union is to deal with the employer on behalf of employees for purposes of collective bargaining and the adjustment of grievances. Precedent makes clear that the unions have

¹ 53 Fed. Reg. 36795 September 22, 1988, Section by Section Analysis.

² 54 Fed. Reg. 24468, June 7, 1989, Response 18.2.5.

ENCLOSURE

**VOGTLE ELECTRIC GENERATING PLANT - UNITS 1 & 2
REPLY TO NOTICE OF VIOLATION
NRC INSPECTION REPORT 50-424;425/ 97-03 (EA 97-208)**

authority to request information necessary to decide whether to pursue grievances on behalf of employees, and an employer may commit an unfair labor practice by withholding relevant information. See, for example, *National Labor Relations Board v. Acme Industrial Co.*, 385 U.S. 432 (1967) (upholding a National Labor Relations Board order that an employer violated the NLRA by withholding information that would allow a union to decide whether to process a grievance).

The disclosure which is the subject of Violation B took place in the context of the series of discussions of labor management issues; and in the circumstances, Southern Nuclear labor relations staff had "a need to have access to the information in performing assigned duties" under 10 CFR 26.29(b), and properly considered the union to be the subject employee's representative who was authorized to receive information concerning the basis on which action had been taken,³ in order to determine whether to file a grievance on behalf of the subject employee. A grievance was filed on behalf of the subject employee in early January, 1997.

³ There was an inadvertent and regrettable error in communication regarding the subject employee. However the error concerned the mistaken belief that there had been a positive result on a drug screen by the employee assistance provider, and did not concern results of chemical testing under the FFD rule.