

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SOUTHERN ALLIANCE FOR CLEAN ENERGY,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 10-1335 (RCL)
)	
UNITED STATES DEPARTMENT OF ENERGY)	
)	
Defendant.)	
)	

**STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE
AND RESPONSE TO DEFENDANT’S
STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE**

Pursuant to Local Civil Rule 7(h)(1), Plaintiff Southern Alliance for Clean Energy (“SACE”) hereby submits this Statement of Material Facts Not in Genuine Dispute and responds to Defendant’s Statement of Material Facts Not in Genuine Dispute.

I. PLAINTIFF’S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

1. On February 16, 2010, President Obama announced that the Department of Energy (“DOE”) had offered conditional commitments for a total of \$8.33 billion in loan guarantees for the construction and operation of two nuclear reactors at Vogtle Electric Generating Plant in Burke County, Georgia (the “Loan Guarantees”). DOE Announcement (ECF No. 11-1).

2. On March 25, 2010, SACE submitted a Freedom of Information Act (“FOIA”) request, via U.S. mail and facsimile, to DOE for records pertaining to the Loan Guarantees. SACE FOIA Request (March 25, 2010) (“FOIA Request” [ECF No. 11-2]).

Response to the FOIA Request

3. On May 27, 2010, well past the twenty-day agency response deadline imposed by FOIA, SACE sent a letter to DOE's Office of Hearings and Appeals ("OHA"), requesting a response to its FOIA request. *See* Exhibit A. On June 1, 2010, OHA sent SACE a letter, explaining it did not have jurisdiction to address DOE's failure to respond. *See* Exhibit B.

4. Then, on July 6, 2010, DOE sent SACE a determination letter providing a "partial response" to paragraph 6 of the FOIA request. With the determination letter, DOE released three heavily redacted loan guarantee term sheets to SACE. DOE asserted FOIA Exemption 4 as the legal basis for withholding certain information from release. DOE Partial Response (July 6, 2010) (ECF No.11-4).

5. Over the course of the next seventeen (17) months, DOE provided sixteen (16) partial responses. Each response contained documents with numerous redactions purportedly justified under Exemptions 4, 5, and/or 6. *See* Declaration of Wendy Pulliam (ECF No. 12-2) and Supplemental Declaration of Wendy Pulliam ("Supp. Pull. Dec." [ECF No. 29-5]) ¶ 17.

6. Pursuant to the parties' agreement, this Court ordered a final response deadline of September 14, 2011. Nevertheless, DOE later released several additional documents on November 9 and December 8. *See* Supp. Pull. Dec. ¶ 17.

Administrative Appeals

7. Over the course of DOE's seventeen (17) month production, SACE filed two administrative appeals.

8. First, pursuant to 10 C.F.R. § 1004.8, on July 16, 2010, SACE submitted to OHA an administrative appeal of the July 6, 2010 determination letter. The appeal challenged DOE's

application of FOIA Exemption 4 to the loan guarantee term sheets and sought their release in unredacted form. SACE Administrative Appeal (July 16, 2010) (ECF 11-5).

9. On August 11, 2010, OHA issued a Decision and Order granting SACE's administrative appeal. According to the OHA Order, the "appeal, if granted, would require [the Loan Guarantee Program Office] to release the withheld information to SACE." OHA Decision and Order Granting Appeal (Aug. 11, 2010) (ECF 11-6) at 2. Notwithstanding this statement, OHA did not order release of the withheld information, but rather remanded the matter to DOE's Loan Guarantee Program Office (the "LPO") for further explanation. *Id.* at 5.

10. Pursuant to 10 C.F.R. § 1004.8, on October 25, 2010 SACE filed another administrative appeal to DOE's OHA concerning correspondence records released in a September 24, 2010 "partial response" and the adequacy of the search. *See* Exhibit C.

11. On November 10, 2010, The Office of Hearings and Appeals dismissed the appeal as premature, claiming that the LPO had not completed its search of correspondence records. *See* Exhibit D.

12. Nine days *after* the dismissal, DOE sent a letter informing SACE that it was continuing its search for responsive correspondence records. *See* Exhibit E.

Narrowing the Issues

13. Throughout the FOIA process, SACE worked with DOE to narrow the FOIA request.

14. First, in October and November 2010, after the resolution of the administrative appeals and filing of this action, the parties engaged in discussions to narrow the terms of paragraph 2 of the FOIA request to searches for credit review board documents and correspondence that post-dated September 2009 between LPO and the Georgia Power Company,

and to production of final versions of draft documents.

15. In an effort to again ease DOE's burden, both parties agreed to narrow outstanding issues in this action to (1) DOE's application of Exemption 4 to letters to Georgia Power Company, Municipal Electric Authority of Georgia, and Oglethorpe Power Corporation, concerning the credit subsidy cost estimates relating to the Vogtle Project; and (2) DOE's application of Exemptions 4, 5, and 6 to specific records and groups of records identified by SACE on November 16, 2011.

16. In total, there are 133 heavily redacted documents, together with attachments, at issue. *Vaughn* Index (ECF 29-5) at 23-65.

II. PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE.

As set forth below, the purportedly material facts included in Defendant's Statement of Material Facts Not in Genuine Dispute do not entitle Defendant to summary judgment. Plaintiff refers to its above Statement of Material Facts Not in Genuine Dispute for an identification of additional facts that are material to the resolution of the parties' cross-motions for summary judgment.

1. Not disputed.
2. Not disputed but not material to the resolution of the parties' cross-motions for summary judgment.
3. Not disputed but not material.
4. Not disputed.
5. Not disputed.
6. Not disputed.
7. Not disputed.

8. Not disputed.

9. Not disputed.

10. Not disputed but not material. Applications for loan guarantees are not at issue in the parties' cross-motions for summary judgment.

11. Not disputed but not material.

12. Not disputed but not material.

13. Plaintiff does not dispute that the loan guarantee application process involved negotiations between DOE and each Applicant. Whether the final terms and conditions of the loan guarantees were obtained from DOE is a question of law to be decided by this Court.

14. Not disputed but not material.

15. Not disputed.

16. Plaintiff does not dispute that there were numerous term sheet revisions and that the final term sheets were executed by the Applicants. Draft term sheets, however, are not at issue in the parties' cross-motions for summary judgment. The terms and conditions of the final term sheet are the subject of the parties' cross-motions for partial summary judgment. *See* ECF Nos. 11-16, 19. As noted in those filings, Plaintiff asserts that the terms sheets represent DOE's offer to the Applicants.

17. Not disputed but not material. Applications for loan guarantees are not at issue in the parties' cross-motions for summary judgment.

18. Not disputed.

19. Not disputed.

20. Disputed. Each term sheet expressly states that it contains "the terms and conditions of DOE's offer" to provide a loan guarantee. The documents themselves thus set forth

that the terms and conditions are DOE's, not the Applicants. DOE Term Sheets (ECF 11-9,10, 11) at 1.

21. Disputed. When issued by DOE, each term sheet was simply an offer. As stated in the letters accompanying each term sheet, a conditional commitment was made “[u]pon the due execution and delivery of this Term Sheet by the Company and payment of the portion of the ‘Loan Facility Fee’ that is due and payable upon such execution and delivery” *Id.*

22. Not disputed.

23. Not disputed.

24. Not disputed.

25. Not disputed.

26. Not disputed.

27. Not disputed.

28. Not disputed.

29. Plaintiff does not dispute that DOE made such a determination. The validity of this determination is the subject of the parties' cross motions for summary judgment and is thus in dispute.

30. Not disputed.

31. Not disputed.

32. Plaintiff does not dispute that DOE made such a determination. The validity of this determination is the subject of the parties' cross motions for summary judgment and is thus in dispute.

33. Plaintiff does not dispute that the DOE's FOIA team conducted a review of the documents. However, the statement that the team “ensure[d] that the FOIA exemptions were

applied appropriately and that all non-exempt portions were segregated and produced,” consists of arguments or characterizations that go to the ultimate legal issue to be decided by this Court.

34. Disputed. The statement consists of arguments or characterizations that go to the ultimate legal issue to be decided by this Court.

35. Disputed. The statement consists of arguments or characterizations that go to the ultimate legal issue to be decided by this Court.

Dated: January 27, 2012

Respectfully submitted,

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