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May 2, 1994

Hon. Peter B. Bloch, Chair
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Hon. James H. Carpenter
933 Green Point Drive
Oyster Point
Sunset Beach, NC 28468

Hon. Thomas D. Murphy
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: In the Matter of Georgia Power Company, et.al. (Vogtle Electric Generating Plant, Units 1 and 2) Dockets Nos. 50-424-OLA-3 & 50-425-OLA-3, ASLBP No. 93-671-01-OLA-3

Dear Honorable Judges:

This letter is in response to the portion of the April 22, 1994 conference call pertaining to Intervenor's decision not to immediately transcribe depositions conducted in Atlanta, Georgia and Birmingham, Alabama, during a two week period. During the conference call, NRC Staff indicated a need to obtain transcripts of depositions and seeks to have the Board order Intervenor to bare the cost of transcription where Intervenor has not requested the depositions to be transcribed.

The rules governing this proceeding indicate that the party who requests that a deposition be transcribed or who wishes to use a portion of the deposition testimony as evidence in this proceeding should bare the cost of transcription. In this respect, the applicable regulations under 10 C.F.R. Part 2 begins with § 2.740a(e), which already contemplates that a party has had a deposition fully transcribed. Specifically 10 C.F.R. §2.740a(e) states in relevant part: "When the testimony is fully transcribed..." Thus, the regulations do not address who is to bare the cost of transcribing a deposition or whether a party has the right to insist that another party bare the cost of

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transcription where the other party does not have an immediate need for the transcript and may not wish to obtain a transcript.[1]

The Federal Rules of Civil Procedure "are silent as to who shall pay the expenses of transcription of the deposition in the first instance," Melton v. McCormick, 94 F.R.D. 344 (1982)(citing Vol. 4A Moore's Federal Practice, ¶ 30.63[3]), but the case law interpreting the federal rules demonstrates that the party taking a deposition is not required to pay the expenses of transcription when the transcript is requested by another party. See Melton, supra.

The applicable Federal Rules of Civil Procedure are Rule 30(e) and Rule 30(f)(2).[2]

In Melton, the plaintiffs decided not to order the transcript after the deposition was completed because of their limited resources. 94 F.R.D. at 345-46. In denying the defendant's application for an order requiring the plaintiffs to have the depositions transcribed, the court noted the financial disparity which existed between plaintiffs and the defendants. 94 F.R.D. at 346. The court also cited to the case of Brown v. University of Rochester Strong Memorial Hospital, (citation omitted) and found that there was a danger that plaintiffs would be precluded or discouraged from making use of pretrial discovery devices due to the cost associated with transcription and that requiring the plaintiffs to pay to have depositions transcribed would interfere with a party's opportunity to obtain the relevant evidence thereby frustrating the fundamental purpose of the discovery.

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[1] The regulations further note that a deposition transcript is not apart of the record and, when transcripted, copies are to be filed with the Commission rather than the Board. See 10 C.F.R. §2.740a(g)(deposition transcript "will not become a part of the record" unless offered into evidence by one of the parties); and 10 C.F.R. § 2.740a(e)(deposition transcripts to be filed with "the Commission").

[2] A comparison of the Federal Rules to the code of federal regulations governing this proceeding demonstrate that the code is far more abbreviated and narrow than that of its counterpart in the Federal Rules of Civil Procedure.

In a similar case, Dall v. Pearson, 34 F.R.D. 511, 512 (1963), the court stated that it could conceive of many circumstances where a person would take and deposition the results of which would be futile. The court went on to state that it would penalize litigants and obstruct rather than facilitate the deposition process to require under all circumstances that the party must have the depositions transcribed at its own cost. Id. The Dall court asserted that the decision should be left to the discretion of the court. Id. In doing so the court reasoned that "[a] rigid, inflexible rule might at times prevent worthy parties from taking depositions, and from obtaining discovery." Id.

Moreover, requiring Intervenor to essentially cover transcription costs for the other parties runs counter to the "American Rule" which requires each litigant to bare costs unless some contractual provision or egregious action justifies otherwise. See In re Trinity Plastics, Inc., v. Bruck Plastics Co., 129 B.R. 141, 142 (S.D. Ohio 1991)("The necessity for the taking of a deposition and other discovery procedures by the plaintiff" should not require the plaintiff to pay another party's "expenses of acquiring the information"). In this respect, there is nothing in the regulations which would seem to allow for the Board to assess costs against a party even if the party's participation was deemed to be vexations or egregious. Just as this Board does not have the statutory authority to require the licensee to pay the attorney fees to the intervenor even if it were shown that the licensee's defense was without merit and egregious, so too this Board is not empowered to require Intervenor to cover transcription costs for any opposing party.

This licensing matter is, by all accounts, a major undertaking. Of all the parties, Intervenor is least able to afford litigation and by a large margin is least able to cover transcription costs. To require the transcription of all depositions (including those which may not be of immediate use to the Intervenor) will preclude Intervenor from making use of pretrial discovery devices and frustrate Intervenor's ability to obtain relevant evidence.

Intervenor's counsel should be allowed to decide which depositions contain information which will be useful in presenting his case. If another parties decide that any depositi n which has not been transcribed is pertinent to their presentation or they desire to obtain an advance copy, then that party should bare the expense of transcription. Also, Intervenor should not be required to have all of the depositions he wishes to use transcribed at the same time because he may not have all of the economic resources immediately available to do so, and as more depositions are concluded he may opt to allocate resources for the depositions that most help his case.

This Licensing Board has the complete discretion not to require Intervenor to bare the expense of transcribing depositions the other parties desire to obtain at this time. It would frustrate the purpose of this proceeding for the parties with the greatest resources to dictate to the party with the least amount of resources how it allotted its limited resources.

Respectfully,

Michael D. Kohn /mgw

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cc: Licensing Service List

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