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RELATED CORRESPONDENCE
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

July 15 1994
DOCKETED
USNRC

'94 JUL 18 P3:58

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING SERVICE

In the Matter of)	
)	Docket Nos. 50-424-OLA-3
GEORGIA POWER COMPANY, <i>et al.</i>)	50-425-OLA-3
)	
(Vogtle Electric Generating Plant)	Re: Licensee Amendment
Units 1 and 2))	(Transfer to Southern Nuclear)
)	

NRC STAFF RESPONSE TO INTERVENOR'S
MAY 17, 1994, FIRST REQUEST FOR ADMISSIONS TO NRC STAFF

The NRC Staff objects to the form and to the substance of Intervenor's request for admissions.

BACKGROUND

The Intervenor has served upon the staff a copy of Office of Investigations' Report 2-90-020R, December 17, 1993, "Vogtle Electric Generating Plant: Alleged False Statements Regarding Test Results on Emergency Diesel Generators," requesting of the staff an admission that "3) Each sentence and/or statement in the document identified in Admission No. 1 (i.e., the NRC OI ROI is true and correct." The Intervenor's request continues "7) In regard to the attached NRC OI ROI, please review page 19, under the subheading of "Evidence." Under this subheading follows 220 numbered . . . paragraphs run consecutively . . . Admit that each statement of fact in numbered paragraphs 1-220 (contained in pages 19-42 of the NRC OI ROI) identified above are true and accurate."

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Admission are addressed in 10 CFR § 2742(a) which states, in pertinent part that a party may have a written request for "for the admission of the truth of any specified relevant matter of fact." The comparable rule for the Federal District Courts is rule 36. The purpose of the rule is well defined by the Advisory Committee Note of 1970 to amend Rule 36.

Rule 36 serves two vital purposes, both, which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be"

Moore's Federal Practice ¶30.01[5].

A more recent, but equally applicable explanation of the purpose of Rule 36 is found in *Keen v. Detroit Diesel Allison*, 569 F.2d, 547, 554, (10th Cir. 1978):

"The purpose of ... Rule 36...was promulgated in order to expedite trials by establishing as true certain material facts of a case without the necessity of formal proof at trial"

The OI Report is a summary and conclusion of OI's investigation of reporting starts of the diesel generators following the March 20, 1990 site emergency at the Vogtle Facility. That Report is premised upon the "facts" contained in the exhibits cited in that report and itemized on pages 105-111. Any attempt by the Staff to admit or deny each sentence or numbered paragraph in the OI Report would not serve the purpose for which the rule is intended, i.e., it would not establish as true certain material facts of this case without formal proof at trial. See *Keen v. Detroit Diesel* cited above. All such admissions would do, if attempted or if possible, is to check the accuracy of the citations

in the OI Report to the supporting exhibits. Intervenor is equally capable of doing this. See Rule 401 of the Federal Rule of Evidence for a definition of "relevant."

Admissions by the Staff of the Investigator's numbered summaries of the exhibits, if possible, also would establish as true no relevant facts upon which the allegations in this proceeding are premised. They would only establish that the investigator was accurate or not in his summarizing of the underlying exhibits, which themselves need to be proved at trial.

In *Kosta v. Connelly* 709 F Supp. 592, 594 (E.D.Pa. 1989), the court stated "the purpose of F.R. Civ. P. 36(a) is to expedite trial by eliminating the necessity of proving undisputed and peripheral issues. . . . We do not employ the rule to establish facts which are obviously in dispute. . . . Some of the statement summaries in the OI Report relate to fifty seven of the Mosbaugh tapes and transcriptions of them (OI Exhibits 33-36 and 57-111). A great deal of the material in the transcriptions and the tapes themselves is in dispute among the parties. Affirming that the NRC investigators accurately summarized disputed tape material would not establish as true "facts" for trial for any party. It would not expedite trial, rather it would delay and prolong trial while attorneys argued about the quality of the investigator's summaries and what the tapes and transcripts say and loose sight of the "facts" at issue. So called admission of most of the numbered paragraphs of the OI Report by the NRC would profit no party and prolong the proceeding.

In Goldberg v. International Testing Corp., 30 FRD 367, 368 (S.D. Calif. 1962)

the courts uses language that is most appropriate here:

[2] In spite of all the so-called advances in pleading, we have not yet reached the point where courts are to completely destroy the fundamental principle that the party asserting an issue has the burden of proving it, and substituting instead, the proposition that plaintiff can, by merely making "claim for relief" compel defendant to go out and gather evidence at defendant's expense to prove plaintiff's claim. Simplified pleading and discovery does not discard either the proposition that a plaintiff must have some merit to his case before he hauls a defendant into court, or that he must at least know enough about the facts to make a prima facie case.

[3] What the plaintiff did here was to request defendants to admit that 21 different companies or organizations were engaged in interstate commerce. The answer of defendants is a proper one. If it cost the plaintiff \$421.81 to get the information, then it certainly would have cost defendants that amount of money. If a lawsuit is merely to be a game wherein somebody comes in and makes a complaint, and compels the defendant to go out and interview witnesses and persons who are not parties to the action in order to prove plaintiff's case, some other court than this one is going to have to say so.

Mr. Mosbaugh's allegations basically come down to asserting that Georgia Power Company deliberately and intentionally lied to the NRC about the number of starts of the Vogtle diesel generators following the site emergency in 1990. Mr. Mosbaugh will in this proceeding have to prove his case. He will have to introduce and provide other evidence of facts to support his allegations. The difficulties of dealing with the tapes in this proceeding are large. For example, the Mosbaugh tapes, tapes 57 and 58, are deemed to be important by both Mr. Mosbaugh and the licensee. The licensee proposed that the parties stipulate to a transcription of these two tapes which had already been transcribed by OI. A great deal of effort by the NRC staff was invested into re-listening, changing, and correcting transcriptions of tapes 57 and 58 and then the three parties spent

additional hours discussing together resolving differences concerning the tapes. The finished product is only a best-efforts transcription of the tapes, still subject to some disputes. At the prehearing conference held in Bethesda, MD on June 23, 1994, Judge Bloch asked "Is Mr. Mosbaugh's counsel satisfied with progress on this issue?" [An agreed transcription of Mosbaugh tape 58] Tr. 36. Mr. Michael Kohn replied "I note that tape 57 still needs to be reviewed by Intervenor's Counsel" (Tr. 35). And this is after Counsel for Georgia Power Company first proposed working on tapes 57 and 58 on August 31, 1993, eleven months ago! Certainly at this time, the Staff is not able to admit or deny the truth of either the OI Investigator's summaries of certain Mosbaugh tapes, the transcriptions of these tapes, or the underlying truth of the tapes themselves¹.

There is no way that a request for admissions involving Mosbaugh tape recording material can be meaningfully responded to at this time. The Licensing Board itself will ultimately decide what the tapes say based upon the best evidence rule. There is no practical or efficacious way that the Staff could come up with an admission of

¹The Staff's objections should be read in conjunction with the legal position of the Intervenor as set forth on pages 1 and 2 of Intervenor's Response to Licensee's Request for Admissions dated July 7, 1994. The law which Intervenor applies to the other parties in this proceeding must equally be applied to Intervenor. Intervenor fundamentally asserts that the Mosbaugh tape recordings may not be relied upon to justify the factual assertions contained therein.

"Intervenor objects to Licensee's use of tape transcripts as evidence of events to which Mr. Mosbaugh has no first hand knowledge. Intervenor has no way to attest to the accuracy of the statements made to him or in his presence."

"undisputed facts" as to the fifty seven Mosbaugh tapes and transcriptions cited in the exhibit list to OI Report 2-90-020R which Intervenor's seeks.

The OI Report was also discussed by Stephen Kohn at the June 23, 1994 prehearing conference. In regard to the OI Report Mr. Kohn wanted to "know which of these findings" the Staff is in agreement with (Tr.42). "I think that there might be a difference of opinion on some of these facts [OI Report] and it's hard for Intervenor to focus on which ones until we get the NRC Staff response" (Tr.42). Staff Counsel stated, "The Coordinating Group's Report is the Staff's position... It's also made clear by the fact that the Commission, in issuing the NOV, largely adapted the Coordinating Group's view," (Tr. 42). That Coordinating Group's Analysis gives Mr. Stephen Kohn the information he seeks, it is the staff position.

The first request by Mr. Kohn is that the attached OI Report is an authentic copy. To the degree that it has first hand knowledge, the staff will stipulate to authenticity of Staff generated documents such as the OI Report, transcriptions of OI reported interviews, NRC inspection reports and other NRC generated documents. On the other hand, Georgia Power Company is the appropriate part to stipulate as consent with respect to authenticity of Georgia Power Company generated documents. Mr. Mosbaugh tape recordings has the responsibility to establish this authenticity.² Staff Counsel hereby

²The Staff's objections should be read in conjunction with the legal position of the Intervenor as set forth on pages 1 and 2 of Intervenor's Response to Licensee's Request for Admissions dated July 7, 1994. The law which Intervenor applies to the other parties in this proceeding must equally be applied to Intervenor. Intervenor fundamentally asserts that the Mosbaugh tape recordings may not be relied upon to justify the factual assertions contained therein.

(continued...)

stipulates that OI Report 2-90-020R, December 17, 1993 provided by the staff to the Intervenor on May 11, 1994, is a true copy of the original, except that it lacks pages 105 through 111. The authenticity of the OI Report which Staff Counsel sent to Mr. Kohn is not a factual matter in dispute among the parties.

CONCLUSION

For all of the above reasons, the staff objects to the Intervenor's Request for Admissions dated May 17, 1994, which request relates to OI Report 2-90-020R.

Respectfully submitted,



Charles A. Barth
Counsel for NRC Staff

Dated at Rockville, Maryland
this 15th day of July 1994

²(...continued)

"Intervenor objects to Licensee's use of tape transcripts as evidence of events to which Mr. Mosbaugh has no first hand knowledge. Intervenor has no way to attest to the accuracy of the statements made to him or in his presence."

Given the law as set forth by Intervenor, the NRC, which was not even present at the time the tape recordings were made, cannot admit or deny any part of the tape recordings or transcripts thereof. We shall return to this when we reply to Intervenor's further discover regarding the tape recordings and transcripts. This footnote cannot in any way be construed even to suggest that the Intervenor has correctly stated the applicable law of evidence.

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DOCKETING & SERVICE
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In the Matter of)
) Docket Nos. 50-424-OLA-3
GEORGIA POWER COMPANY, *et al.*) 50-425-OLA-3
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(Vogtle Electric Generating Plant) Re: License Amendment
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)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVERNOR'S MAY 17, 1994, FIRST REQUEST FOR ADMISSIONS TO NRC STAFF" as stated in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system this 15th day of July 1994.

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