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September 19, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair
Dr. James H. Carpenter
Thomas D. Murphy

SERVER SEP 20 1994

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

(Georgia Power's Request to Depose Staff Witnesses)

On August 26, 1994, Georgia Power Company filed a Motion to Depose NRC Personnel (Motion). The Staff of the Nuclear Regulatory Commission filed a Motion for Leave to File Attached Response Out of Time (Petition) and a Response in Opposition to Licensee's Motion to Depose NRC Personnel, September 15, 1994 (Response).

The Staff's Petition claimed that Staff's lateness was due to administrative oversight. Petition at 1. We have decided to grant the Petition. However, we have taken a dim view of Mr. Mosbaugh's untimeliness and we do not expect to make repeated allowances for Staff untimeliness. There are

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multiple Staff attorneys and each is responsible for the timeliness of Staff responses.

I. Legal Standard

This motion is controlled by 10 CFR § 2.720(h)(2)(i), which states:

In a proceeding in which the NRC is a party, the NRC staff will make available one or more witnesses designated by the Executive Director for Operations for oral examination at the hearing or on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding. The attendance and testimony of the Commissioners and named NRC personnel at a hearing or on deposition may not be required by the presiding officer, by subpoena or otherwise: Provided, that the presiding officer may, upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations require the attendance and testimony of named NRC personnel.

II. The Arguments

A. Fact Witnesses Concerning Diesel Generators

The Atomic Safety and Licensing Board is aware that one of Georgia Power's primary defenses in this proceeding is that it dealt openly and intensely with the NRC Staff and that it did not mislead them. It is important both to Georgia Power and to the Board, that we learn what information was communicated to key Staff personnel and whether or not those personnel were mislead.

Georgia Power argues that it should be able to depose Messrs. Ebnetter, Brockman, Chaffee, Hunt, and Taylor because:

In a case where Georgia Power¹ and its employees are accused of having concealed information and misled the NRC, Georgia Power must be granted a full opportunity to demonstrate the extensive information that the NRC received from GPC and the NRC's resulting awareness of the diesel generator test results and implications. Thus, it is essential that GPC be permitted to depose these individuals. A panel of witnesses who were not personally involved in the flow of information is no substitute.

In addition to this general statement, Georgia Power puts forth detailed reasons for its belief that each of these Staff people has important direct information concerning the evidentiary facts of this case. Those facts are set forth in the Motion at 7-11.

Georgia Power's specific allegations are not directly answered in the Staff's Response. For example, Georgia Power wants to depose Mr. Ebnetter as to whether he was misled by Georgia Power. Staff states, in its Response at p. 8, that Georgia Power could have used interrogatories to obtain that information. However, Georgia Power is free to use the discovery device it wants to use; and the Staff does not deny that Mr. Ebnetter knows specific relevant facts.

Similarly, with respect to Mr. Hunt, Mr. Taylor and Mr. Chaffee, Georgia Power asserts that these individuals were

¹Georgia Power uses GPC as its preferred abbreviation. We insert our own preference, Georgia Power, in place of GPC in quoting this passage.

part of the Incident Investigation Team that reviewed the site area emergency and that they "knew or should have known of the general extent of the diesel testing." This is relevant because Georgia Power is accused of misleading the NRC by withholding information about diesel testing.

We note that we are in agreement with the following statement made by the Staff at page 8 of its Response:

[T]he issue is whether the Staff was misled, not just Mr. Ebnetter personally.

Because the issue is whether the Staff was misled, it is necessary that Georgia Power be permitted to discover information from a variety of Staff people who represented the NRC at the time of the diesel generator incident.

B. Fact Witnesses Concerning the OI Investigation

Georgia Power states that:

The depositions of Messrs. Hayes and Robinson are necessary if the OI report will be introduced into evidence. Mr. Robinson drafted the report and Mr. Hayes reviewed and approved it. GPC disputes many of the findings and conclusions in that report and, if it is to be introduced into evidence, must be afforded a meaningful opportunity to cross-examine its preparers.²

Georgia Power further states that:

The information gathered by OI is also insufficient to establish the facts required by Georgia Power. None of OI's interviews with NRC personnel were transcribed. The OI report does contain short interview memoranda prepared by Investigator Robinson, but they contain insufficient detail for Georgia Power's needs. It appears that OI had

²Motion at 2.

little interest in developing any exculpatory information. For example, there is no discussion of the telephone conversations in which Georgia Power notified the NRC about concerns raised about the reported diesel start data.³

We consider information about the OI Report to be essential. Either the Staff or Mr. Mosbaugh may choose to introduce some or all of the OI Report into evidence.⁴ Georgia Power has the right to prepare itself by deposing these key witnesses. We note that all the proffered individuals are from the Vogtle Coordinating Group⁵ and none of them can testify, based on first-hand knowledge, about the OI Report. That Report is a carefully developed Staff view and shall be given full consideration by the Board, should it be introduced into evidence.⁶

III. Timeliness

The Staff of the Nuclear Regulatory Commission would have us deny the Motion because it is made after discovery has been officially closed.⁷ However, this request was

³Motion at 11.

⁴Georgia Power has agreed to forego these depositions if the parties will stipulate that they will not introduce the OI Report into evidence. Motion at 12. However, no such stipulation exists.

⁵Response at 5.

⁶See LBP-94-31, 39 NRC ____, September 9, 1994, slip op. at 4.

⁷The Response at the top of page 8 seems to request that we consider the Motion untimely.

first filed on May 13, 1994.⁸ We are convinced that the Motion may be renewed at this time because it was postponed because of discussions about stipulations. Recently, when the process of reaching stipulations concluded, Georgia Power decided that this motion became necessary.⁹ We find that Georgia Power is not precluded from filing the Motion by the discovery deadline imposed on this portion of the proceedings.

IV. Conclusion

This Board does not accept the Staff's interpretation of Safety Light Corporation, et al., LBP-92-3A (1992). In that case, the Board considered the facts before it and concluded — with respect to the evidence before it — that the Licensees should first depose the witnesses offered by the Staff before they could adequately demonstrate the need for additional witnesses. In that case, we might well have reached exactly the same determination. However, in the case before us, we are convinced that the Staff witnesses being sought are primary fact witnesses whose testimony is indispensable. We will not apply another Board's determination of facts before it to the dissimilar facts before us.

We are convinced that all the depositions requested by Georgia Power should be granted. The depositions will cover

⁸Motion at 2.

⁹Motion at 2-6.

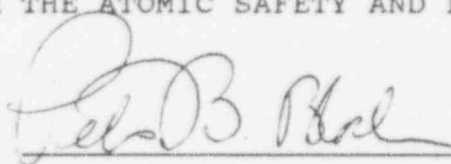
the witnesses' specific knowledge of events at Vogtle and of communications by Vogtle officials. The witnesses may also be asked questions concerning their evaluation of their knowledge, including their conclusions about whether or not Georgia Power improperly concealed information from the NRC and about the seriousness of any errors that Georgia Power may have committed.

V. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is this 19th day of September, 1994, ORDERED, that:

Georgia Power Company's Motion to Depose
NRC Personnel (Motion), filed on August 26, 1994,
is granted.

FOR THE ATOMIC SAFETY AND LICENSING BOARD

A handwritten signature in dark ink, appearing to read "Peter B. Bloch", is written over a horizontal line.

Peter B. Bloch
Chair

Rockville, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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 RE STAFF WITNESS 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.

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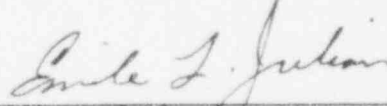
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Dated at Rockville, Md. this
20 day of September 1994


Office of the Secretary of the Commission