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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '95 FEB 27 A10:09
ATOMIC SAFETY AND LICENSING BOARD

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

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)	
)	
GEORGIA POWER COMPANY)	Docket Nos. 50-424-OLA-3
<u>et al.</u> ,)	50-425-OLA-3
)	
(Vogtle Electric Generating)	Re: License Amendment
Plant, Unit 1 and Unit 2))	(transfer to Southern Nuclear)
)	
)	ASLBP No. 93-671-01-OLA-3

INTERVENOR'S "PHASE I" FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. STATEMENT OF THE CASE

Georgia Power Company submitted an application on September 18, 1992 to amend its license to allow Souther Nuclear to become the operator of Plant Vogtle. On October 22, 1992, Allen L. Mosbaugh and Marvin B. Hobby filed a petition to intervene in this licensing proceeding in order to oppose Georgia Power Company's application. We dismissed Mr. Hobby's petition for lack of standing on November 17, 1992. On February 18, 1993, we admitted Mr. Mosbaugh as a party to this case. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-5, 37 NRC 96 (1993). The contention admitted in this proceeding is:

The license to operate the Vogtle Electric Generating Plant, Units 1 and 2, should not be transferred to Southern Nuclear Operating Company, Inc., because it lacks the requisite character, competence and integrity, as well as the necessary candor,

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truthfulness and willingness to abide by regulatory requirements.

Id. at 111. The proceeding was subsequently divided into two phases, Phase I-illegal license transfer allegations and Phase II-Diesel Generator allegations; with additional phases related to questions concerning The Southern Company and remedy to follow if necessary.

On August 24, 1994, Georgia Power filed a motion for summary disposition in the Phase I illegal license portion of this proceeding. On October 3, the NRC Staff filed its Response and on October 4 Intervenor filed his Response. We issued a decision concerning the summary disposition of the illegal transfer allegation on November 8, 1994. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-37, _ NRC _ (1994). In our Order we state that we would

consider granting relief only if Intervenor shows that Georgia Power misrepresented material facts to the Nuclear Regulatory Commission with respect to the control of Georgia Power's nuclear operations.

Id. at 3. We also defined the sole issue of fact that we would admit at trial as "a material issue of fact concerning whether or not omissions or misstatements did occur." Id. at 5. The only evidence we would allow to be admitted was evidence:

(1) showing what statements or omissions were made by Georgia Power officials to the NRC concerning the control of Vogtle, (2) providing the context to reach a conclusion concerning the falseness and the materiality of the statements or omissions, and (3) permitting us to assess the degree of culpability involved in the statements or omissions.

Id. at 5.

We noted that the Intervenor and the Licensee portrayed the same facts very differently, but that looking at the overall pattern with a favorable interpretation from Intervenor's perspective, we were able "to assume that the practical ability to make major decisions about Vogtle had shifted from Georgia Power to SONOPCO." Id. at 16. We further stated that because key SONOPCO employees were serving more than one master it would be "difficult to determine how power actually was exercised." Id. We further put Licensee on notice as to its burden of proof in this stage of the proceeding stating that the:

party seeking the amendment has the burden of proof and it is Georgia Power's responsibility, at this stage of the proceeding, to demonstrate that there are no reasonable inferences from which to assume that control of Vogtle had shifted to SONOPCO.

Id. at 16-17. We went on to state that "it is permissible to assume that SONOPCO was a powerful entity within Southern Company", based on Intervenor's evidence. Id. at 17.

The phase I hearing on illegal license transfer allegations commenced on January 4, 1995 and concluded on January 13, 1995. In the course of this hearing nine witnesses testified live, one by telephone; and, in lieu of calling additional witnesses to testify live at the hearing, the Board accepted into the record designated portions of deposition testimony from numerous witnesses.

At the close of the hearing a schedule was set for the parties to submit proposed finding of fact and conclusions of law. Licensee filed on February 13, 1995, the Intervenor on

February 23rd, and the NRC Staff on March 6, 1995. The License had the opportunity to file rebuttal on March 13, 1995.

II. BURDEN OF PROOF

As the Applicant, Georgia Power has the burden of proof on every issue relevant to this proceeding. 10 C.F.R. §2.732. The record in this proceeding demonstrates that Georgia Power Company could not meet their burden.

III. FINDINGS OF FACT

A. Background

The Southern Company is a registered holding company under the Public Utility Holding Company Act of 1935; it is parent to five operating companies, including Georgia Power Company ("Georgia Power" or "GPC") and Alabama Power Company ("Alabama Power" or "APC"). The Southern Company holds one hundred per cent (100%) stock ownership of both GPC and APC. In addition to operating companies, The Southern Company has formed wholly owned subsidiary corporations, including Southern Company Services ("SCS"), a service company that provides, at cost, specialized services to GPC, APC and other entities within the Southern system. In December of 1990, The Southern Company incorporated a new wholly owned subsidiary known as Southern Nuclear Operating Company or "Southern Nuclear." Two years earlier, on November 1, 1988, a "Southern Nuclear Operating Company project," commonly

referred to as the "SONOPCO project," was organized in Birmingham, Alabama.¹

GPC owns a minority interest in two nuclear facilities, plant Hatch and plant Vogtle. Approximately seventy per cent (70%) of GPC's assets are represented by its ownership interest in these two plants.

In 1987, two operating companies owned and operated all the nuclear power plants within the Southern system. APC was the sole owner and operator of Plant Farley; GPC was the co-owner and sole operator of Plants Hatch and Vogtle. The Southern Company is not licensed to operate any of these nuclear plants and is not subject to the provisions of the license. At the time the applications to license plants Hatch and Vogtle were filed, NRC was not notified in writing that The Southern Company would exercise control over any license-related activity. The fact that Georgia Power is a wholly owned subsidiary of a holding company was required to be disclosed at the time the application was filed. See 10 C.F.R. Part 50, App. L, § I.1. Another required disclosure relates to sources of funding. Under 10 C.F.R. Part 50, App. C, § II.A.2, an applicant must identify all sources of its construction funds. Georgia Power concedes that, unless the parent company is listed as a license applicant along

¹ To avoid confusion, throughout this brief we refer to the formally incorporated Southern Nuclear Operating Company as "Southern Nuclear." Hereinafter reference to "SONOPCO" refers to the concept of a nuclear operating company before the "SONOPCO project" was formed. We use the term "SONOPCO project" strictly to refer to the entity formed on November 1, 1988.

with the subsidiary, they do not become licensees. Post hearing brief of Licensee at p. 72. Only the licensed operator of a nuclear facility is authorized to control nuclear operations.

Marvin B. Hobby received a B.S. from Mercer University in 1968 in Natural Science with a concentration in physics. Between 1968-1971 he worked at the Oak Ridge Associated Universities, where he obtained training in nuclear physics, radiochemistry and nuclear biology. Hobby p. 1. He was first employed by GPC in 1971 as the Director of GPC's Edwin I. Hatch Visitors Center. Mr. Hobby remained employed with GPC until 1979. Id. In 1980 Mr. Hobby was hired by the Institute of Nuclear Power Operations ("INPO") as Communications Manager and was named Staff Assistant to Admiral E. P. Wilkinson, the President and Chief Executive Officer ("CEO") of INPO. He was subsequently promoted to the position of Assistant to the President and Secretary of the Corporation. In 1984, Mr. Hobby was loaned by INPO to serve as Project Manager of the Congressional Education Program of the newly formed Nuclear Utilities Management and Resources Committee ("NUMARC"), where he reported to Mr. J. H. Miller, Jr., the Chairman of NUMARC. Mr. Miller concurrently held the position as President of GPC. Id., pp. 1-2.

In 1985, GPC hired Mr. Hobby as GPC's Assistant to the President. Mr. Hobby was assigned the responsibility of evaluating GPC's nuclear operations for plant Hatch and the construction and start-up of Plant Vogtle, Units 1 and 2, including the evaluation of timeliness, cost-effectiveness,

quality of construction, as well as qualifications and competence of personnel. Hobby p. 2. In addition, Mr. Hobby had responsibility for preparing the monthly operation and construction reports covering nuclear operations and was responsible for submitting these reports to GPC's Board of Directors . Id.

B. Construction of plant Vogtle and the decision to Hire Admiral Wilkinson

In 1985 Mr. Miller asked Mr. Hobby to recruit INPO's former President, Admiral Wilkinson, to serve as an Executive Consultant to GPC's President to prepare an independent evaluation of Plant Vogtle's then on-going construction and staffing efforts. Admiral Wilkinson accepted the position and, prepared his overall findings and in early 1986, presented the findings and his recommendations to Mr. Miller. Admiral Wilkinson advised Mr. Miller that the company needed to make significant changes in top management. Hobby pp. 2-3.

Following Admiral Wilkinson's briefing, Mr. Miller told Mr. Hobby that he was going to seek approval from GPC's chief Executive Officer, Mr. Robert Scherer, to hire Admiral Wilkinson to head GPC's management over the construction of plant Vogtle. Mr. Miller told Mr. Hobby that Mr. Scherer approved the decision to place Admiral Wilkinson over plant Vogtle construction efforts and instructed Mr. Hobby to commence making plans for the Admiral's arrival. Mr. Miller advised Mr. Hobby to communicate to Admiral Wilkinson that Mr. Scherer had approved the Admiral's taking over construction of the Vogtle project. Mr. Hobby

contacted Admiral Wilkinson and told him that Scherer had approved the decision. Hobby pp. 3-4.

In the Spring of 1986, after GPC's President, Mr. Miller, and CEO, Mr. Scherer, approved Adm. Wilkinson's taking over plant Vogtle's construction, Mr. Addison objected. Mr. Miller told Mr. Hobby of Mr. Addison's intervention and asked him to advise Adm. Wilkinson that the arrangements had to be cancelled. Hobby p. 4.²

C. Organizational changes between 1986 and 1987

Well in advance and in anticipation of Mr. Miller's planned retirement from GPC in November 1987, GPC decided that responsibility for nuclear operations would be transferred to Mr. H. Grady Baker, GPC's then Senior Executive Vice President. GPC management recognized that Mr. Baker had little experience with nuclear operations, and named Mr. Hobby as Mr. Baker's executive assistant for the purpose of getting Mr. Baker up to speed on nuclear issues and of advising him on nuclear matters. Hobby pp. 4-5.

In October, 1987, Mr. Hobby was selected to represent GPC before the World Association of Nuclear Operators Conference, held in Paris, France. He was thereafter made Manager of Nuclear Support, reporting to GPC's Senior Vice President for nuclear

² Significantly, the Georgia Public Service Commission found Georgia Power "to have been imprudent in its management of the construction of Vogtle Unit 1, and the Georgia PSC's decision with regard to imprudence was affirmed on appeal. Georgia Power Co. v. Georgia Pub. Serv. Comm'n, Civ. No. D-50843m Superior Court, Fulton County (July 21, 1988)." Intervenor Exhibit 38 at p. 4.

operations, James O'Reilly, who in turn reported to Grady Baker. Hobby pp. 6-7. In this position, Mr. Hobby had responsibility over Human Resources, Information Services, Records Management and Technical Procurement. Mr. Hobby had specific responsibility for approving all corporate organization change notifications to be submitted to the Nuclear Regulatory Commission ("NRC"). Additionally, he functioned as GPC's administrative liaison with INPO, represented GPC's Nuclear Operations on company committees, and functioned as GPC's Administrative Manager of Nuclear Operations Corporate Emergency Response Team. Hobby p. 7.

D. February, 1988 reorganization

In February 1988, Mr. O'Reilly left GPC and was replaced by Mr. George Head. A reorganization occurred during this transition and Mr. Hobby was named Manager of Nuclear Support Services. Mr. Hobby retained all of his prior responsibilities, and in addition gained responsibility for Nuclear Security, and Financial Services; and Mr. Hobby also gained responsibility over GPC's nuclear performance indicator program. Hobby pp. 7-8.

Additionally Mr. Hobby became GPC's nuclear liaison to the co-owners of Plants Hatch and Vogtle. Hobby p. 8. The Joint Owners of plants Hatch and Vogtle had established a Joint Committee on Power Generation. The Committee membership were made up of representatives from Oglethorpe Power, MEAG and GPC. GPC had two members on the Committee: one member represented Nuclear and the other Fossil and Hydro. Mr. Hobby was GPC's Nuclear representative. The committee met monthly.

Additionally, Mr. Hobby talked with representatives from Oglethorpe and MEAG several times a week. Michael Barker attended the regularly scheduled monthly meetings to brief the Committee on the performance of GPC's nuclear units and the status of the nuclear operating budget. See Hobby p. 29.

E. Establishment of a nuclear operating company task force

The concept of a stand alone nuclear operating company was contemplated for a dozen or more years before it came to fruition. The record suggests that the pivotal point of formation of a nuclear operating company occurred in 1987. At this time Mr. Addison met in private with Joe Farley (then President and CEO of APC). They jointly agreed that Mr. Farley would emerge as the chief executive of a newly formed nuclear operating subsidiary; Addison Dep. at pp. 38, 45, 67, and that the management of the subsidiary would be located in Birmingham, Alabama. Addison Dep. at p. 80. Georgia Power's then CEO, Mr. Scherer, was not included in these discussions; had no idea of the process employed to select Mr. Farley as CEO of this emerging subsidiary; and was not told of the decision to locate Southern Nuclear in Birmingham. Scherer 6/8/94 Dep. at pp. 47-48, 77. Mr. McDonald's testimony at the hearing confirms that the decision to move GPC's nuclear operations to Birmingham was made by Mr. Farley and Mr. Addison. Tr. 1260. (McDonald).

F. "Phase I" Task Force

The Southern System established a Business Strategies Task Force in early 1987. In turn, the Business Strategies Task Force

established a separate task force, referred to as the "Phase I Task Force," to study the feasibility of setting up a nuclear operating subsidiary that would be wholly owned by The Southern Company. This task force consisted of Marvin Hobby (GPC), George Hairston (APC) and Bob Gilbert (APC). In addition, an attorney from Balsh Bingham (APC's law firm), Bob Buettner, functioned as a member of the Task Force. Hobby p. 5.

In July 1987, the Phase I Task Force presented its recommendations to the Business Strategies Task Force and to a meeting of Southern System executives. The System executives accepted the Task Force's recommendation. Hobby pp. 5-6.

G. "Phase II" Task Force

In November of 1987, a second Task Force, referred to as the "Phase II Task Force," was implemented with authority to form SONOPCO. Hobby at p. 6.

The Phase II Task Force was divided into an executive group and a working group. The executive group consisted of Grady Baker (GPC's Senior Executive Vice President), A.W. Dahlberg (President of Southern Company Services), and Bill Whitt (Executive Vice President of Alabama Power). The working group was headed by Pat McDonald (APC Senior Vice President). Mr. McDonald would meet with the executive group. The staff of the working group consisted of Tom McHenry (a GPC manager), Lou Long (a SCS manager) and Bob Gilbert (an APC manager). See Hobby p. 6.

Before becoming a Georgia Power employee, Mr. McDonald was appointed by The Southern Company to determine the organizational structure of SONOPCO. Long Dep. at pp. 11, 14, 16. It was determined that each nuclear plant under SONOPCO's management would have a separate project headed by a project vice president. The three project vice presidents would report to a senior vice president. In addition, a separate technical services organization headed by a vice president and an administrative services organization headed by a separate vice president would also be formed. The senior vice president and the two services vice presidents would report to an executive vice president; and the executive vice president would report to a chief executive officer.

On March 2, 1988, Mr. McDonald (who then held the position of senior vice president at APC) and others met with the NRC to formally discuss the formation of SONOPCO. Stip. Ex. 1, Long Dep. at p. 25-30. NRC Staff was advised that The Southern Company implementation would begin with the incorporation of SONOPCO, and there was no mention of the need to create a SONOPCO "project." Long Dep. at pp. 25, 30.

H. Restructuring of nuclear operations

The accommodation of Georgia Power's nuclear operations to the SONOPCO configuration occurred in stages. First, GPC's executive nuclear management was reconfigured. Originally, GPC had a single organization over both plants Hatch and Vogtle that was headed by a senior vice president, who at the time was Mr.

George Head. Mr. Head reported to GPC's Senior Executive Vice President, Mr. Baker. Mr. Head and Mr. Baker were replaced by Mr. McDonald as Executive Vice President.³ Thereafter, on May 18, 1988, the boards of directors of The Southern Company, GPC and APC approved the formation of SONOPCO. Stip. Ex. 5. GPC's Board also elected Mr. Hairston as senior vice president, and Mr. McCoy as project vice president at that time. Messrs. McDonald and Hairston were concurrently named to these same positions at Alabama Power.

On September 21, 1988 Mr. Addison issued an announcement stating that the joining of GPC's and APC's nuclear operations was the "first step" taken towards the formation of nuclear operating subsidiary. See Stip. Ex. 10.

I. Selection of SONOPCO officers

The selection of SONOPCO officers began in 1987, when Mr. Addison offered to become the chief executive of SONOPCO and Mr. Farley agreed. According to Mr. Scherer, responsibility to staff and reconfigure GPC's nuclear operations was left to the "executive management of the SONOPCO operation."⁴

³ Mr. McDonald was originally identified as a senior officer of Georgia Power by Mr. Scherer on April 4, 1988. He was formally elected as Executive Vice President, Nuclear on April 22, 1988. McDonald at p. 1. GPC's nuclear corporate organization, in particular Senior Vice President George Head, and Executive Vice President Grady Baker were not involved with the decision to name Mr. McDonald as GPC's Executive Vice President. See Hobby pp.10-11.

⁴ In 1988, Mr. Scherer provided deposition testimony in the Fuchko and Yunker v. GPC Section 210 proceeding (Exhibit 7). This testimony is highly probative because it was given before there was any accusation by Mr. Hobby or anyone else that GPC transferred its license to SONOPCO. In this respect, Mr. Scherer testified that

Mr. Farley specifically participated in the selection of Ken McCoy for the position of Plant Vogtle project vice president. Farley at 25-26. He also participated in the selection of SONOPCO's vice president of Technical Services; and the vice president of Administrative Services. Tr. 1276 (McDonald). Mr. Farley's involvement with SONOPCO staffing decisions was so pronounced that he personally met with Mr. Long to tell him that he had been selected as the vice president of Technical Services.

the "executive management" of SONOPCO was actively functioning and had the responsibility to reorganize and staff GPC's nuclear operations:

A: ...That was left to the executive management of the SONOPCO operation to determine what disciplines were necessary and what talents and experience were required [to staff the corporate structure over GPC's nuclear operations].

Q: So you relied upon their consideration of who should be considered for what jobs?

A: That's right.

Q: Okay, did you ever talk to Mr. McDonald or anybody who was a part of that executive management as to what their criteria for SONOPCO jobs were?

A: No, I did not.

Q: Okay, and is Mr. McDonald, is he one of the people that you're talking about who was responsible for evalu--

A: He would be the chief person responsible for the overall operation of SONOPCO. I can't say as to whether he developed the job descriptions or someone within his organization -- I can't say that.

Scherer 12/21/88 DOL Dep. at pp. 15-16 (emphasis added).

Mr. Scherer's involvement with Mr. Addison on nuclear operations matters appears to have been remote to the point that Mr. Addison, "los[t] track of whether Scherer or McDonald was [GPC's] CEO." Addison Dep. at p. 83.

This would be the first time Mr. Long ever met Mr. Farley. Long Dep. at pp. 5-6, 20.

Mr. Farley was involved with the selection of SONOPCO executives irrespective of whether the SONOPCO employee had a formal reporting relationship to Mr. Farley.⁵ This involvement evidences that Mr. Farley was able to function as the de facto head of SONOPCO.⁶ Mr. Dahlberg was also involved in the selection of Mr. McCoy although he was not a GPC employee at the time.⁷

J. Southern Company files to form SONOPCO with the SEC and Oglethorpe's decision to intervene

GPC recognized that the co-owners of Plants Vogtle and Hatch would not agree to the formation of SONOPCO. Further, GPC knew that Oglethorpe would intervene before the SEC unless they came to an agreement about the organization of SONOPCO. Long Dep. at pp. 31-32. In this matter, Oglethorpe was unwilling to approve the creation of SONOPCO until contractual arrangements between Oglethorpe and GPC related to the transfer of operational control from GPC to SONOPCO were agreed upon. See Oglethorpe SEC

⁵ At the time Mr. Long was selected as the technical services vice president he was employed by SCS and had no reporting relationship to Mr. Farley, who at the time was APC's CEO and president. The same is true with respect to Mr. McCoy. Mr. McCoy was selected as a GPC vice president and Mr. Farley had no connection whatsoever to Georgia Power.

⁶ Mr. Addison was also involved with the selections. Addison Dep. at pp. 45, 38, 67.

⁷ Mr. Dahlberg was CEO of Southern Company Services and became a GPC employee on June 1 as GPC's president. See Stip. Ex. 5.

Intervention at p. 3 (Exhibit 38). Pursuant to the Public Utilities Holding Company Act, The Southern Company would have to make a "U-1" filing with the Securities and Exchange Commission before it could incorporate SONOPCO. Georgia Power understood that Oglethorpe was afforded the opportunity to intervene before the SEC and by doing so the incorporation of SONOPCO would be stymied. Realizing that efforts to resolve its differences with Oglethorpe were failing and anticipating that Oglethorpe would intervene, the Phase II Task Force began implementing a different strategy. Previously, the plan was to phase in SONOPCO in five separate phases beginning with the incorporation of SONOPCO, the Task Force decided to form an unincorporated entity known as the "SONOPCO project." Plans to form the SONOPCO project commenced in May of 1988. Long Dep. at p. 32.

As the decision to implement the SONOPCO project took form, Georgia Power's representative on the Task Force, Thomas McHenry, issued a memorandum to Mr. McDonald raising a concern that the legality of The Southern Company's implementation of SONOPCO may not have been adequately analyzed as a result of undue influence coming from Southern Company management. Intervenor Exhibit 37. In pertinent part, the memorandum states:

The Nuclear Company Phase II task force mission has been described in many forums as a nuclear operating company feasibility and implementation study. In practice, this mission has been somewhat distorted by a clear and consistent unwritten philosophy that the Southern Company, in effect, has already decided to form a nuclear operating company. Thus, task force activities have concentrated on how to implement the formation of a Southern Nuclear Operating Company and [ignored] identification of any overwhelming reasons

why such an enterprise could not be formed...e.g., illegal, NRC operating license transfer...I am concerned that we should not be so mesmerized by the 'make-it-happen philosophy that we fail to include the swamps in an otherwise rosy picture...I believe that, to date, the task force has been too influenced by the feeling that Southern management wants this to happen regardless of the outcome; therefore it is our job to make it happen and not to point out swamps.

Intervenor Exhibit 37.

On June 22, 1988, The Southern Company filed an application with the SEC to form SONOPCO as a subsidiary. Stip. Ex. 6. No mention of the interim formation of a SONOPCO project is discussed in the SEC filing, see Stip. Ex. 6, nor were the NRC or the SEC informed at this point in time that The Southern Company and its subsidiaries were going establish a SONOPCO project in Birmingham, Alabama.

Oglethorpe formally intervened before the SEC in September of 1988. Intervenor Exhibit 38. This petition to intervene sets forth Oglethorpe's concerns in detail.

K. McDonald exhibits hostility towards GPC executive management

In June of 1988 Mr. Dahlberg was named as GPC's President. Dahlberg at p. 1. Mr. McDonald exhibited a reluctance to cooperate with GPC executives. Mr. McDonald formally reported only to Mr. Scherer, GPC's CEO. He did not report to GPC's president, Mr. Dahlberg, until such time as Mr. Dahlberg became CEO and President of GPC in December of 1988. Nonetheless, as President of GPC, Mr. Dahlberg had responsibility for establishing all of the 1989 budget targets for GPC's various departments, including nuclear. A meeting was held in the 14th

floor conference room of GPC's corporate offices to discuss GPC's nuclear budget. In response to a concern raised by Mr. Hobby during that meeting that Mr. Dahlberg's target would be exceeded by a large margin, Mr. McDonald stated that he didn't work for Mr. Dahlberg, so the targets didn't matter to him. Although Mr. McDonald did not currently have a direct line reporting relationship to GPC's President (at the time he reported only to GPC's CEO and Chairman of the Board, Mr. Scherer), Mr. Dahlberg was senior to Mr. McDonald within the organization; had specific responsibility for issuing budget guidelines; and chaired GPC's Management Council, which was slated to review and approve the nuclear budget. See Hobby pp. 11-12. As such, Mr. McDonald's statement represents a differentiation in Mr. McDonald's mind between his responsibility to GPC and its Management Council and his responsibility to operate nuclear operations as if it were subject to a separate management authority.

L. Georgia Power partially discloses its reorganization plans with NRC staff

On July 25, 1988, Georgia power personnel met with NRC Region II staff to discuss the GPC nuclear plant operations organization and plans to reorganize Georgia Power's nuclear operations. An organizational chart depicting the "Nuclear Operations -transition Organization" was provided to the NRC identifying Mr. McDonald as the Executive Vice President - Nuclear operations. Joint Stipulation at ¶ 10; Joint Stipulation Exhibit 9. At this time NRC Region II was told that GPC was splitting its nuclear operations into two separate projects, a

Hatch project and a Vogtle project, but that GPC's nuclear operations would remain in Atlanta until SEC approval for SONOPCO is obtained, and the location of SONOPCO would not be decided until after SEC approval. Stip. Ex. 9 at Enclosure 1. The record created in this proceeding indicates that the information provided to the NRC at this time was inaccurate or incomplete in three respects: 1) NRC was not advised that a "SONOPCO project" would be formed; 2) NRC stated that GPC's nuclear operations would not be moved until SEC approval was obtained whereas, in fact, GPC's nuclear operations were moved prior to SEC approval; and 3) the location of SONOPCO had not been selected whereas, in fact, Mr. Addison and Mr. Farley had already determined that SONOPCO would be located in Birmingham.

NRC never provided GPC with written consent to establish the SONOPCO project and a transfer of control review was never requested by GPC nor undertaken by NRC. Significantly, at the time Georgia Power presented the earlier transition organization consisting of five phases, NRC Executive Director of Operations, Mr. Stello, stated that a "change of control letter" may be required when going from phase II to phase III of the five phase plan discussed with NRC. Mr. McDonald testified that the transition referred to by Mr. Stello would occur to when GPC's nuclear operations were "relocated to Birmingham." Tr. 1531 (McDonald).

M. Staffing of the Hatch and Vogtle projects and formation of the SONOPCO project

The Phase II task force created organization charts depicting the entire SONOPCO organization. The staffing of SONOPCO's Hatch and Vogtle projects essentially transpired during a two-day period, during which time Mr. McDonald, Mr. McCoy and Mr. Beckham filled in a blank organization chart with the individuals they selected to staff SONOPCO's corporate organization. McHenry Aff. at p. 5; Tr. 1301-1305 (McDonald).

The Phase II Task Force's "SONOPCO project" strategy was fully implemented on November 1, 1988. By that date the Hatch, Vogtle and Farley projects and the technical services and administrative services organizations were joined together and referred to jointly as the SONOPCO project. Hobby p. 11; Stip. Ex. 12.

N. Georgia Power decides to form NOCA

The idea to establish a Nuclear Operations Contract Administration Group ("NOCA") initiated with Mr. Dahlberg. Tr. 1197 (Dahlberg). With GPC's nuclear operations having been transferred to the SONOPCO project in Birmingham, Mr. Dahlberg decided it was necessary to establish a nuclear operations contract administration group in Atlanta. Tr. 2392 (Hobby). In the process of reaching this decision, Mr. Dahlberg's executive assistant, Mr. Whitney, met with Mr. Hobby to explain how Mr. Dahlberg wanted and expected NOCA to function. Tr. 2390 (Hobby).

GPC's three highest-ranking executives (Mr. Scherer, GPC's Chairman of the Board; Mr. Dahlberg, GPC President and CEO; and

Mr. Baker, GPC's Senior Executive Vice President) unanimously agreed that GPC had to establish NOCA. Tr. 1193 (Dahlberg).⁸

The purpose of NOCA was to provide GPC's executive management, primarily Mr. Dahlberg, with information and advice about how well SONOPCO was managing GPC's nuclear plants. Tr. 2296 (Hobby). Specifically, NOCA was to monitor the performance of GPC's nuclear plants, including safety performance. Tr. 1199-1200 (Dahlberg).

NOCA was specifically established to provide information and advise Mr. Dahlberg on matters pertaining to safety and budgeting. With respect to safety, Mr. Hobby, as General Manager of NOCA, was to review SALP reports, NRC evaluations and INPO evaluations, and would otherwise trend various factors related to nuclear operations, such as availability of GPC's nuclear units, the number of reactor trips; safety system availability (including diesel generators), accumulation of nuclear waste, radiation exposure, industrial safety, and reactor operator training and retraining. See Tr. 2290-2291; 2295; 2386 (Hobby).⁹

⁸ Before GPC's nuclear operations were transferred to the SONOPCO project, Mr. Baker held discussions with Mr. Hobby and Mr. Head about the need to form an interface group between GPC and SONOPCO. See Hobby pp. 14-15.

⁹ Responsibilities of the General Manager of NOCA were outlined in Mr. Hobby's job description as follows:

- (1) To manage all aspects of the contract with SONOPCO to achieve the safe, dependable and cost-effective operation of our nuclear power plants;

Mr. Baker advised Hobby that there was stiff competition for the General Manager of Nuclear Operations Contract Administration. Eventually, Mr. Hobby was selected for the position by Mr. Head, and was approved for the job by Mr. Baker and Mr. Dahlberg. See Hobby pp. 14-15.

Mr. Dahlberg testified that the decision to establish NOCA occurred because GPC management viewed the SONOPCO project as a separate organization distinct from GPC. Tr. 1195 (Dahlberg) ("I did think about it as a separate organization, and that is the reason we set up [NOCA] at that time."). The desire to keep NOCA separate from the SONOPCO project caused Mr. Dahlberg to establish NOCA under the direction of Mr. George Head rather than Mr. McDonald. Tr. 2381-2382 (Hobby).¹⁰

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- (2) To establish reasonable goals, accountabilities and budgets for nuclear operations that support GPC's Business Management Plant;
 - (3) To monitor nuclear operations to ensure performance supports GPC's Business Management Plan;
 - (4) To serve as the primary interface between GPC and SONOPCO and between GPC and the Joint Owners in nuclear operation matters;
 - (5) To be the primary interface with other company operations, including top management, and with the Public Service Commission on matters related to nuclear operations including budget, financial planning, prudence and performance.

See Hobby pp. 19-20 (emphasis added).

¹⁰ Although Mr. Dahlberg initially testified that he created NOCA because he viewed SONOPCO project and GPC as two separate organizations, Tr. 1195, when responding to an important line of questioning by the Chairman of the Licensing Board about the reason for dismantling NOCA, Mr. Dahlberg flip-flopped and testified:

The record establishes that GPC considered the SONOPCO project as a separate entity. Shortly after the SONOPCO project came into existence, in December of 1988, M. Scherer testified that Georgia Power viewed the SONOPCO project as a separate entity which was established to and commenced operating GPC's nuclear plants in November of 1988:

Q: What is the relationship between SONOPCO and Georgia Power?

A: What is the relationship?

Q: Yeah.

A: Right now the relationship is that SONOPCO will operate the generating plants, the nuclear generating plants, for the individual operating companies, Alabama and Georgia, that own nuclear power facilities.

Q: I don't know a lot about corporations and all, but what, what do you call what SONOPCO is?

I have a hard time separating SONOPCO from Georgia Power Company...I'm getting the same result from the same people and so I still had the technical expertise...So I have a hard time separating between organizations.

Tr. 1208 (Dahlberg). Given that GPC did view the formation of the SONOPCO project as a separate entity, Mr. Dahlberg's assertion that he could not separate the two organizations does not ring true. Moreover, Mr. Dahlberg further testified:

[W]hen we went through the transitions we were very careful to make sure that we protected those lines of responsibility... [W]e were very careful to keep the chain of command within Georgia Power Company.

Tr. 1211-1212 (Dahlberg). The decision to have NOCA report to Mr. Head rather than to anyone associated with SONOPCO was the clearest attempt to protect the lines of responsibility and to assure that GPC's chief executive has independent resources to analyze and evaluate SONOPCO project's involvement with GPC's nuclear operations.

A: SONOPCO at the present moment doesn't exist. It is, we -- there is a, a -- whatever it's called -- a petition before the Securities and Exchange Commission to create SONOPCO as a subsidiary corporation of the Southern Company.

And, uh -- but the formation of it, the actual configuration of it, exists in reality in Birmingham, because we have brought together the corporate general office staff of Alabama and Georgia, and also of Southern Company Services, into one central location, with the responsibility of operating the nuclear plants of the various operating companies.

Q: Okay.

A: And we're awaiting approval from the Securities and Exchange Commission.

Scherer 12/21/88 DOL Dep. at pp. 15-16 (emphasis added).

This view of the SONOPCO project is further reflected in an on-the-record statement made by GPC's counsel, J. Schaudies, during the course of the Fuchko and Yunker Section 210 proceeding:

Your Honor, as a point of clarification, there are no jobs other than one interface position which is held by Marvin Hobby that are nuclear jobs within Georgia Power that are not under the ambit of SONOPCO. Now I say under the ambit of SONOPCO because technically the employees at Hatch and Vogtle are Georgia Power employees because the delay in creating SONOPCO because of lack of SEC approval. But those are jobs that are responsible back through the administrative and technical support offices of Southern Company Services which is under the SONOPCO project and located in Birmingham, Alabama. There is not a nuclear organization within Georgia Power any longer.

Fuchko and Yunker v. Georgia Power Co., 89-ERA-9 & 10, January 3, 1989 hearing Tr. at pp. 316-17 (emphasis added).¹¹

¹¹ This proceeding concerned whether Messrs. Fuchko and Yunker were discriminated against as a result of their not being selected to staff the SONOPCO project after raising safety concerns to Mr. McDonald and other GPC managers.

Realizing that its current nuclear monitoring capabilities were transferred to and under control of the SONOPCO project organization, Georgia Power's top management decided to set up a separate monitoring group to commence functioning as if the SONOPCO project was functioning as a separate organization. Tr. 2311-2315 (Hobby). In this respect, Mr. Dahlberg, the former CEO of Southern Company Services (SCS), was aware of the oversight normally exercised by GPC to monitor SCS's performance. The monitoring of SCS was "periodically [performed] as part of their budget process." Tr. 1213-1214 (Dahlberg). Mr. Dahlberg considered the level of oversight he needed to properly manage the SONOPCO project, and determined that NOCA was necessary to perform that function. Tr. 1193 (Dahlberg).

O. Formation of NOCA

Mr. Dahlberg issued a letter announcing the creation and function of NOCA on December 27, 1988. See Intervenor Exhibit 13. This letter was worded in accordance with Mr. Dahlberg's instructions and was signed by Mr. Dahlberg. Tr. 1190-1191 (Dahlberg).

Mr. Dahlberg's memorandum discussed the need and purpose for immediately forming NOCA. He states that NOCA would, "effective immediately" commence operations and requested that GPC management cooperate with and assist NOCA. See Hobby p. 15; Tr. 2305 (Hobby).

Mr. Dahlberg sent copies of his December 27, 1989 letter to Mr. Addison, Mr. Farley and Mr. Franklin, members of the SONOPCO project interim board of directors. Tr. 1191 (Dahlberg).

P. Mr. Dahlberg limited knowledge of nuclear operations

Mr. Dahlberg's desire to form NOCA and to select Mr. Hobby as its general manager is consistent with the past practice of the company.¹² The necessity for such a group is understandable given his near total ignorance of nuclear operations in general and the operations of plant Vogtle in particular. He did not know the official positions or even the identity of some of the most important persons who worked in the nuclear side of GPC. For example, he did not know whether Vice Presidents Long and McCrary were officers of GPC (Tr. 1149), he did not know who the engineering and licensing manager at plant Vogtle was (Tr. 1150), he did not know who the maintenance support manager was (Tr. 1151) and he did not correct the statement made by Mr. McDonald directly to the NRC Commissioners which failed to mention that Mr. Hairston was in the chain of command.

Likewise, Mr. Dahlberg did not know many basic terms with which any "hands on" manager of a nuclear facility would be fully familiar. He did not know what a NUREG was, he did not know what a Confirmation of Action (COA) letter was, he did not know the role boron played in the operation of a nuclear reactor and he

¹² Since 1985, Mr. Hobby was involved with assisting GPC executives, including its former President, Mr. Miller and Senior Executive Vice President, Mr. Baker, with managing nuclear operations.

did not know that water was the moderator for the nuclear fission process at plant Vogtle. Tr. 1151-52. Additionally, he never even saw the emergency plan for plant Vogtle (Tr. 1232), he was unfamiliar with the NUREG which concerned the Site Area Emergency (Tr. 1167) and he was so unfamiliar with the SONOPCO projects operations in Birmingham that he didn't know that Farley conducted weekly staff meetings of the GPC-double-hatted managers located in Birmingham and didn't know that Mr. McDonald's office was next to Mr. Farley's office. Tr. 1181-83 (Dahlberg)

More significantly, he was not aware of many of the basic safety systems and issues which were occurring at plant Vogtle during his tenure as the CEO of GPC. His failure to know what a COA letter was indicated his complete abdication of knowledge related to the very important COA filed in response to the Site Area Emergency. His failure to know what a Plant Review Board (PRB) was indicated that he was not kept informed of the numerous issues which were regularly dealt with by the PRB and was unfamiliar with the important and mandatory safety functions performed by the Board. The fact that he was unfamiliar with the term "dilution valve" indicated that he was never properly briefed on the "dilution valve" issue for which the NRC Office of Investigations ("OI") found wilful misconduct on behalf of GPC and for which the NRC Staff issued a large fine against GPC. Tr. 1151-52

Q. McDonald's Reaction to NOCA

27. On January 3, 1989, Mr. Hobby discussed Mr. Dahlberg's memo of December 29, 1988 with Mr. McDonald. Mr. McDonald was upset that Mr. Dahlberg had created NOCA and told Mr. Hobby he would have no part in it and further advised Mr. Hobby that he (McDonald) would determine if NOCA was necessary and he (McDonald) would decide who would staff such an organization.

See Hobby p. 25; Tr. 2359-2360.

Mr. McDonald testified that after Mr. Dahlberg created NOCA he instructed his entire organization not to cooperate with NOCA or Mr. Hobby. Tr. 1489-1481 (McDonald). Specifically, Mr. McDonald testified that he specifically denied Mr. Hobby information he wanted to provide to Mr. Dahlberg:

Q: My question is, did you have a conversation with Mr. Hobby where you chose to ignore Mr. Hobby's request for information that he wanted to provide to Mr. Dahlberg?

A: ...Yes, I did, sir.

Mr. McDonald went on to testify that he would not allow his organization to provide the type of information Mr. Hobby needed to discuss with Mr. Dahlberg. Tr. 1481 (McDonald) ("we did not provide the type of information where he would represent me to Mr. Dahlberg").

Mr. McDonald instructed the entire SONOPCO organization that it was not to cooperate with NOCA:

Q: In fact, you went so far as to prohibit Georgia Power employees stationed on the SONOPCO project from directly contacting Mr. Hobby or nuclear operation contract administration...The entire organization was not going to cooperate with the kinds of information that Mr. Hobby wanted, is that correct?

A: That's true.

Tr. 1480-1481 (McDonald).

The only information Mr. McDonald would allow his organization to provide NOCA was information that would be useful to the joint owners, but he intentionally refused to provide NOCA with the information Mr. Hobby needed to represent to Mr. Dahlberg what was happening in Birmingham. Tr. 1481 (McDonald).

Mr. McDonald was so disturbed by NOCA that he interfered with NOCA's management responsibilities in area unrelated to NOCA's budgeting, safety and performance oversight responsibilities. For example, NOCA had significant responsibilities related to Georgia Power's rate case before the Georgia Public Service Commission ("PSC"). At the direction of Mr. McDonald, SONOPCO project hindered NOCA's attempt to respond to the data requests by limiting NOCA to a single contact, Tim Marvin. Mr. Marvin was not a GPC employee; he was a SONOPCO project employee on the SCS payroll. When the NOCA staff knew who within the SONOPCO organization had information responsive to a data request, NOCA was prohibited from directly contacting SONOPCO project employees (including GPC employees) and could not directly obtain information from individual SONOPCO employees. All communications between NOCA and the SONOPCO project had to be channelled to Tim Marvin. This restriction caused a bottleneck and delayed responses to PSC data requests. See Hobby pp. 26-27.

Dwight Evans, Executive Vice President of GPC, had overall responsibility for the rate case. Mr. Evans frequently met with Mr. Hobby to discuss rate case matters. Mr. Evans told Mr. Hobby that he met with Mr. Farley and Mr. McDonald, who told him that Mr. Hobby was the source of delay in responding to PSC data requests. See Hobby pp. 27-28. Mr. Evans told Mr. Hobby that Mr. Farley and Mr. McDonald were out to get Hobby fired. When Mr. Head learned of Mr. Evan's comment, he scheduled a meeting with Mr. McDonald to see if he could resolve the problem. Mr. McDonald cancelled the meeting and refused to schedule another. See Hobby pp. 28-29.

R. Farley's Reaction to NOCA

On January 31, 1989, a meeting was called in a conference room at The Southern Company hangar at the Peachtree-DeKalb Airport. In attendance were, inter alia, Mr. Hobby, Mr. Farley, Mr. McDonald, Mr. Dahlberg, and Mr. Edwards, Esq. (a partner with the Troutman Sanders law firm). Mr. Edwards stated that the establishment of NOCA offered an opportunity to further negotiate with Oglethorpe. Mr. McDonald responded that he didn't have an interface group. Mr. Farley stated that NOCA was a bad idea because having one Southern Company division oversee and monitor another was not in the Southern Company's best interest. See Hobby pp. 25-26.

From an operational standpoint, NOCA was in existence for four months, from January 1989 until the end of April 1989. NOCA could not perform its stated function because of a great deal of

interference from SONOPCO project management, particularly Mr. McDonald. As a result of the interference NOCA was unable to commence performing its intended function. Tr. 2293; 2376-2377 (Hobby). The interference included the inability to hire a performance engineer to compile and analyze information and Mr. McDonald's instruction to SONOPCO project management not to cooperate with NOCA's requests for information.

S. Staffing of NOCA

In December of 1988, Mr. Hobby became General Manager of NOCA. Given the importance of this new position, Mr. Hobby received a two-step promotion (from a Level 18 to a Level 20).¹³ See Hobby p. 19; Intervenor Exhibit 13.

NOCA's initial assignment was to implement a nuclear monitoring program. Tr. 2311-2315 (Hobby).

At the time NOCA was created, Mr. Hobby was told by GPC's Senior Vice President that it was imperative that NOCA begin to fulfill NOCA's responsibilities and to commence its function as soon as possible. NOCA was authorized to commence functioning prior to the incorporation of SONOPCO before a contract between GPC and SONOPCO could be formalized (i.e., during the "SONOPCO project" phase). Tr. 2291-2292, 2304-2306 (Hobby).¹⁴

¹³ Mr. Hobby was also named Assistant to the Senior Vice President. See Hobby p. 19.

¹⁴ Mr. Dahlberg's flip-flop as to his view of the SONOPCO project as a separate organization stems from GPC's argument that because there was a delay in the incorporation of SONOPCO, GPC's nuclear operations would continue to be managed by GPC employees. This argument is flawed because GPC's nuclear operations would

Mr. Head had received hiring authority from Mr. Dahlberg to hire two nuclear Performance Engineers and two Nuclear Administrators. See Hobby p. 21. Two nuclear administrators (Don Proctor and Gerald Johnson) were immediately available for were hired. Hobby p. 21.

Mr. Hobby was familiar with Michael Barker, who worked for him as a nuclear performance engineer before GPC's nuclear operations were transferred. He decided that Mr. Barker would be the best candidate for the job and began the process of hiring Mr. Barker. Hobby p. 21. The attempt to hire Mr. Barker would end with the demise of NOCA.

Mr. Hobby learned that SONOPCO project management would not allow Mr. Barker to join NOCA unless the job would constitute a promotion. At that point the performance engineer position was independently evaluated by GPC's personnel department to be at a level 13. This evaluation was approved by GPC's Senior Vice President of Administrative Services, Mr. Jack Causey and agreed to by GPC Senior Vice President George Head. Michael Barker was in a level 12 position and the job with NOCA represented a one-step promotion. See Hobby pp. 21-22; Tr. 2353-2354. Mr. Hobby learned that the SONOPCO project would still not allow Mr. Barker to interview for the position. In response, Mr. Head authorized Mr. Hobby to post the job so the interview process would fall

continue to be managed by GPC after SONOPCO was incorporated and would continue to do so until the license was transferred.

under GPC company rules, which would allow Mr. Barker to interview for the position. Tr. 2356 (Hobby).

GPC posted the NOCA performance engineering job as a level 13. Some 20 applicants responded to the posting. Three final candidates emerged, all of whom were stationed in the SONOPCO project: Mike Allotta, Tom Penland and Mike Barker. see Hobby p. 22-23.

When Mr. Hobby attempted to interview the three final candidates for the performance engineer position, GPC's Human Resources Department stated to Mr. Hobby that Mr. McDonald did not agree that the position should be a Level 13 and was not going to allow anyone from SONOPCO to interview for the job. See Hobby p. 23.

On March 22, 1989, Mr. Hobby advised Mr. Grady Baker that SONOPCO was holding up the interview process. Mr. Baker advised Mr. Hobby that he should hire the best person who applied for the performance engineer position. See Hobby p. 24.

The inability to interview and hire Michael Barker as a Performance Engineer prohibited NOCA from commencing its monitor program to assess the operation and performance of GPC's nuclear units. Without a knowledgeable and experienced performance engineer NOCA could not perform its job function. NOCA was thereby prohibited from performing its stated mission and was unable to advise Mr. Dahlberg and other executive management personnel about the performance of GPC's nuclear plants. See Hobby p. 24.

T. SONOPCO project Board of Directors

By 1989 a SONOPCO project de facto board of directors was functioning, with Mr. Farley, Mr. McDonald, Mr. Addison and the CEOs of GPC, APC and SCS constituting the board. McDonald at 21; Dahlberg at 8, Tr. 1173-74 (Dahlberg). Prior to incorporation they knew essentially who the board would be and there were meetings of that group of people. Tr. 1176 (Dahlberg). This de facto board made decisions in a consensus type process. Tr. 1180 (Dahlberg). The de facto board discussed the issues related to the operations and budgets of Georgia Power. Tr. 1181 (Dahlberg)

Reference to SONOPCO project board of directors meetings are made in the appointment calendars of Addison and Dahlberg. The February 14, 1989 entry in Mr. Addison's appointment schedule states that a "SONOPCO PROJECT BD MEETING" occurred at 3:00 p.m. See Addison Calendar (Exhibit 31). Reference to additional SONOPCO project board of director meetings is contained in Mr. Dahlberg's and Mr. Addison's appointment calendar entries for March 6, 1989, both of which indicate that the SONOPCO project board met at 1:00 p.m. that day. See Addison Calendar (Exhibit 31); Dahlberg Calendar (Exhibit 32); Addison Dep. at p. 53.¹ This de facto board met to

¹ The Board is greatly troubled by GPC's current denial of the existence of a SONOPCO project board of directors. It is difficult to understand how GPC can deny the existence of a de facto SONOPCO project board of directors after Mr. Dahlberg stated under oath that: "There was a board of directors for the SONOPCO project," Tr. 1173-74 (Dahlberg), and later, during the same deposition, when asked whether prior reference to a board of directors was to the SONOPCO project board, Mr. Dahlberg again testified that he was referring to the existence of a SONOPCO project board. Id.

discuss budget and operational matters pertaining to GPC's and APC's nuclear plants.

This SONOPCO project board was involved with a number of issues, including the budget process that would be employed; the cost of replacing the condenser tubes at plant Hatch; and the planning of outages. Tr. 1176-77 (Dahlberg).

U. Farley Becomes Executive Vice President-Nuclear

On March 1, 1989, Mr. Farley was named as the Executive Vice President-Nuclear of The Southern Company and as Executive Vice President-Nuclear of Southern Company Services. Tr. Farley at 1. Neither The Southern Company nor SCS had such a position in the past and the creation of it represents a fundamental alteration of The Southern Company's involvement with and control over GPC's nuclear operations.

The SONOPCO project began publishing a bi-weekly news letter, Synopsis, out of its Birmingham offices. In Vol. 1, No. 6, dated March 30, 1989, Synopsis dedicated an issue to explaining Mr. Farley's role with the SONOPCO project and his role as Executive Vice President-Nuclear for The Southern Company. The cover story begins:

On March 1, Joe Farley became executive vice president-nuclear for the Southern Company and assumed overall responsibility for providing management and technical services for the Southern electric system.

Intervenor Exhibit 89 at p. 1.

Significantly, the editor of Synopsis, Ms. Jane Henry, testified that this particular Synopsis edition was reviewed and approved in its final form by Mr. Farley. Henry Dep. p. 10

Mr. Dahlberg testified that in his opinion the article "went a little too far" because Mr. Farley did not assume responsibility for "the day to day operation of the nuclear plants." Tr. 1225-1226 (Dahlberg). It is difficult to know the basis for Mr. Dahlberg's statement because he was not in a position to observe Mr. Farley's activities at the SONOPCO project executive offices. Mr. Dahlberg did know that the article was widely distributed and had, himself, received a copy. Tr. 1226 (Dahlberg). Mr. Dahlberg testified that he would expect GPC employees who read the article to assume that Mr. Farley had overall responsibility for the operation of GPC's nuclear operation. Yet, Mr. Dahlberg never issued an oral or written clarification. Tr. 1226 (Dahlberg).

By this juncture, Mr. Farley had assumed full responsibility for briefing The Southern Company board about the status of GPC's and APC's nuclear plant operations. Tr. 1851-52 (Farley).

The Emergency Plan for plant Vogtle requires that Georgia Power corporate management be contacted in case of an emergency or other significant event occurring at the plant. Immediately following Mr. Farley becoming Executive Vice President-Nuclear, his name is added to the top of the Corporate Emergency Telephone Directory. Exhibit 126 at p. 78 (6-29-89 revision).

V. Farley's position as Executive Vice President-Nuclear for the Southern Company is not discussed with NRC before May 1990

The record indicates that NRC was never provided written notice of Mr. Farley's becoming Southern Company Executive Vice President-Nuclear. The earliest mention of Georgia Power's speaking to anyone within NRC of Mr. Farley's role as Executive

Vice President of Southern Company is contained in a Memo for File written by Mr. McDonald following individual briefings Mr. McDonald, Mr. Farley, and Mr. Hairston had with four NRC Commissioners and NRC's Executive Director on May 2, 1990. Hairston Exhibit M. Mr. McDonald's memorandum was not provided to Intervenor until just before the hearing. At that time we authorized Intervenor to take Mr. McDonald's deposition, which occurred on December 23, 1994. During the course of this deposition, when asked about the May 3, 1990 memo, Mr. McDonald testified that he could no longer recall how he described his relationship with Mr. Farley to the Commission. Tr. 1508 (McDonald). However, when Mr. McDonald took the stand on January 5, 1995 (13 days latter), Mr. McDonald testified that he could recount what he told the Commission on May 3, 1990. Tr. 1508 (McDonald). We find Mr. McDonald's ability to recount what he told the Commission in May of 1990 not credible, this finding is based not only on the flip-flop in testimony within a 13 day time span, but also as a result of the following:

- 1) Mr. McDonald initially explained his flip-flop in testimony because he recalled what was contained in the April 1991 letter he sent to SCS's CEO (Mr. Franklin). Tr. 1508 (McDonald). But, a careful review of Mr. McDonald's testimony demonstrates that his recollection was not based on the content of the April 1991 letter, but rather stemmed from the fact that he was previously

required to explain Mr. Farley's role and could recall the "litany" he presented on numerous prior occasions:

I do remember the litany that I always respond to and what his role is, because a lot of people ask what his role is.

Tr. 1509 (McDonald). If Mr. McDonald's recollection flowed from his repeated past explanation, then he would have been able to recall some aspect of this "litany" when he was deposed on December 23, 1994. The fact that he was unable to do so 13 days before he testified at the hearing indicates a lack of credibility and calls into question the veracity of his hearing testimony.

- 2) Mr. McDonald's veracity and credibility concerning his ability to recall how he described Mr. Farley's role to the Commission in May of 1990 is also called into question as a result of false statements made by Mr. McDonald when he submitted his sworn April 1, 1991 Response to Intervenor's 2.206 petition. Therein, Mr. McDonald falsely asserted that Mr. Farley's role in the selection of SONOPCO project personnel was proper because it occurred at a point in time after Mr. Farley was elected Executive Vice President-Nuclear of the Southern Company. See Intervenor Exhibit 48 at pp. 8-9 ("[Intervenor asserts that Farley should not have participated in the selection of GPC corporate officers who would be working within the SONOPCO project...is without merit...[because] such assistance fell within his

duties as Executive Vice President-Nuclear of The Southern Company.") This assertion on the part of Mr. McDonald is false because he knew that Mr. Farley did not become Executive Vice President-Nuclear until March 1, 1989, whereas the selection of GPC's corporate officers occurred in the spring of 1988. Mr. McDonald's past inaccurate explanation of Mr. Farley's assumption of responsibility when he became Executive Vice President-Nuclear provides a further indicia that the testimony Mr. McDonald presented on January 5, 1995 concerning his description of Mr. Farley's role to the Commission on May, 3 1990, is unreliable, unbelievable and, at best questionable.

W. Full Power License Hearing

On March 30, 1989 the Commission held hearings to determine whether plant Vogtle Unit 2 could commence full power operation. Intervenor Exhibit 17 at p. 1. The record demonstrates that Mr. Farley's involvement with the SONOPCO project was not disclosed; nor was his position as Executive Vice President-Nuclear of The Southern Company or SCS disclosed.

In preparation of the March 30, 1989 Full Power License hearing, NRC staff conducted an inspection of GPC's corporate organization. Tr. 2679 (Allenspach, Hood). This inspection occurred between December 19-21, 1988. JE 11 at p. 1. During the inspection the "organizational structure and supporting role of the SONOPCO project was also explained." NRC Prefiled Testimony at p.

5. An inspection report was subsequently issued on February 7, 1989, "conclud[ing] that the corporate organization was functioning as described in FSAR Amendment 39." JS at ¶15.

Amendment 39 to the Vogtle FSAR, Chapter 13, updated the organizational structure for the Vogtle Units 1 and 2. NRC staff evaluated this updated organization as part of the February 1989 NUREG-1137, Supplement 8, to the Vogtle Safety Evaluation Report. NRC Prefiled Testimony at p. 7. In February, 1989, based on communications received from GPC, NRC staff believed that GPC's corporate organization was functioning as stated in NUREG-1137, Supplement 8, Section 13.1.1, Figure 13.1. See Attachment 1 to NRC Prefiled Testimony at p. 13-4. Based on NRC staff's review of GPC's corporate organization and information provided from GPC, NRC believed in February 1989 that Mr. McDonald reporting to GPC's Chairman and CEO (Scherer) and that GPC's President (Mr. Dahlberg) was not a part of the corporate line management at plant Vogtle. Tr. 2684, 2695, 2703 (Hood, Allenspach)

Between November, 1988 and the commencement of the Full Power Licensing Hearing, NRC did not receive any information (written or oral) indicating that GPC's corporate organization had changed or was not functioning as depicted in Figure 13.1 of NUREG-1137 or FSAR Amendment 39, Chapter 13, Figure 13.1.1-1. Tr. 2684 (Hood). Prior to the Full Power Licensing hearing, the only document depicting the corporate organization above Mr. McDonald provided to the NRC is Figure 13.1.1-1 to Amendment 39 of the plant Vogtle

FSAR, dated November 23, 1988 ("Figure 13.1.1-1"). See JE 12.² Figure 13.1.1-1 depicts Mr. Scherer (GPC's Chairman of the Board and CEO) heading the corporate nuclear organization; Mr. McDonald (GPC's Executive Vice President-Nuclear) is shown as reporting to Scherer; while GPC's president (Mr. Dahlberg) is depicted as being outside the chain of command.

Significantly, at no time prior to the Full Power License hearing did GPC (or anyone else for that matter) brief the NRC orally or in writing about Mr. Farley assuming overall management responsibility for managing plant Vogtle or otherwise advise or

² The FSAR represents an essential safety document. 10 C.F.R. § 50.34(b)(6) requires that an FSAR be submitted by the licensee. Georgia Power is required to address in the plant Vogtle FSAR information concerning "(i) The applicant's organizational structure, allocations or responsibilities and authorities, and personnel qualifications requirements." Id. Moreover, the FSAR must also clearly set out the division of responsibility in order to meet the Quality Assurance Criteria requirement set out in 10 C.F.R. 50 App. B, I Organization ("The authorities and duties of persons and organizations performing activities affecting the safety related functions or structures, systems, and components shall be clearly established and delineated in writing").

Chapter 1 of the plant Vogtle FSAR under the heading "Description of Corporate Organization" states:

The GPC is a public utility incorporated under the Laws of the State of Georgia with its principal offices located at 333 Piedmont Street, Atlanta Georgia. GPC is a wholly-owned subsidiary of The Southern Company.

See FSAR Chapter 1 at 1.4.1.2.

Chapter 13 of the plant Vogtle FSAR at 13.1.1-16 states:

The corporate organization, which provides the line responsibility for the operation of the VEGP, is shown in figure 13.1.1-1. The ultimate responsibility...rests with the chairman and CEO, who assigns responsibilities to the various organizations as described in paragraph 13.1.1.2.

explain to the NRC exactly what role Mr. Farley was playing within the SONOPCO project organization and how his role related to the operation of GPC's nuclear plants.³

At the Full Power License hearing, Georgia Power executives mad a number of false, misleading and/or inaccurate statements. These are fully discussed in Section IV (G) (6) (b) and (d) of this Order.

X. Oglethorpe questions McDonald's reporting relationship

The manager responsible for monitoring day-to-day nuclear activity for Oglethorpe was Mr. Dan Smith, Oglethorpe's Director of Power Generation. Mr. Smith's primary interface on nuclear issues was Mr. Hobby. On numerous occasions, Mr. Smith advised Mr. Hobby that Oglethorpe believed that Mr. McDonald was receiving management direction from Mr. Farley and was concerned that this reporting

³ GPC was nonetheless aware that NRC staff went to the SONOPCO project to inspect the corporate management structure over GPC's nuclear plants. See JE 11. During this inspection NRC staff was not informed of Mr. Farley's role within the SONOPCO project. See Tr. 2680 (Rogge); Tr. 2680 (Allenspach). On February 7, 1989 NRC staff issued the final inspection report concerning GPC's corporate organization structure that would be relied upon when decided to issue authorization to commence full power operation of plant Vogtle Unit 2. Tr. . This inspection report explained NRC's understanding of the functioning of the SONOPCO project organization as follows:

The corporate organization which is referred to as the SONOPCO Project is headed by the Executive Vice President. The Vice President of Technical Services and Vice President of Administration report to the Executive Vice President of Nuclear Operations.

JE 11 (inspection report at p. 3).

Based on the above description, NRC staff did not understand that Mr. Farley was the functional head of the SONOPCO project.

relationship violated the plant Vogtle and plant Hatch FSAR requirements and otherwise indicated that the co-owners were not complying with the terms and conditions of their NRC licenses. See Hobby p. 30-31; DOL Tr. 850-854 (Smith). Mr. Smith's concern about the reporting relationship came to a head during the March 30, 1989 Full Power License hearing held before the Commission.

Dan Smith advised Mr. Hobby that he attended the Full Power Hearing for Plant Vogtle Unit 2 on March 30, 1989 and was upset over some of the testimony presented during the hearing and told Mr. Hobby that Oglethorpe was going to request a tape of the proceeding. Hobby p. 31. Mr. Smith obtained a transcript of the proceeding (a tape recording was not available). Thereafter, Mr. Smith sent Mr. Hobby a copy of the transcript containing Oglethorpe's marginalia comments. Specifically, where Mr. McDonald states to the Commission: "I report to Dahlberg," his comments written in the margin state:

On paper only! In actuality McDonald appears to report to Farley who reports to Addison! Fact is GPC knows less about plants than we do! We provide GPC with daily reports!

Intervenor Exhibit 17 at p. .

Mr. Smith expressed two main concerns to Marvin Hobby: 1) that Mr. McDonald stated to the NRC that he reported to Mr. Dahlberg but Oglethorpe believed this was untrue inasmuch as Mr. McDonald was reporting to Mr. Farley; and 2) that when Mr. McDonald was pressed several times about the reporting structure -- specifically, how far the Plant Manager at Vogtle was in the organization from the CEO -- Mr. McDonald gave the chain of command and left out one

entire layer of management (i.e., Mr. Hairston) and ignored Mr. Farley's role altogether. See Hobby pp. 31-32.

Mr. Smith's continued concern over the reporting relationships within the SONOPCO project were raised again in 1991 in a discussion Mr. Smith had with Mr. Hobby. In January of 1991, Mr. Smith phoned Mr. Hobby and told him that he had attended a January 11, 1991 meeting between SONOPCO and the NRC and that several statements made by Mr. McDonald during the course of that meeting appeared to be false. Mr. Smith told Mr. Hobby that, in effect, Mr. McDonald stated that prior to December, 1990, Mr. Farley had no responsibilities over Administrative Services and Technical Services at SONOPCO. Mr. Smith stated that it was his belief that Mr. McDonald left the impression with the NRC that Mr. Farley had no authority over plants Hatch, Vogtle and Farley or Georgia Power personnel. Mr. Smith stated to Mr. Hobby that he did not believe that to be true. See Hobby p. 47.

Although Mr. Hobby was not in a position to physically observe the interaction between Mr. McDonald and Mr. Dahlberg or between Mr. McDonald and Mr. Farley, he eventually reached the conclusion that with respect to the day to day management direction, Mr. McDonald received management direction from Mr. Farley and reported to Mr. Farley.⁴ See Hobby p. 30; Tr. 2330-2331. Indeed, Mr.

⁴ Mr. Hobby served as GPC's representative to the co-owners. He was required to respond to numerous requests from Oglethorpe concerning the reporting relationship above Mr. McDonald. Mr. Hobby did not feel obligated to report his own conclusions to Oglethorpe concerning the reporting relationships within the SONOPCO project; he merely fed Oglethorpe the company line. Internally, Mr. Hobby raised the issue in a April 27, 1989

McDonald and Mr. Hairston had established personal as well as close working relationship with Mr. Farley. Tr. 1979 (Shipman).

Y. Farley Staff Meetings

Beginning in March of 1989, when Mr. Farley moved his office from APC to the executive floor of the SONOPCO project, weekly SONOPCO project staff meetings, dubbed "Farley Staff Meeting" were conducted in Mr. Farley's conference room. Tr. 1943-1944 (Shipman).

The Farley staff meetings were limited to the executive management of the SONOPCO project and support staff reporting to Mr. Farley. Specifically, these staff meetings were attended by Mr. Farley, Mr. McDonald, Mr. Hairston, the three project Vice Presidents (Mr. McCoy, Mr. Beckham, Mr. Woodard); Vice President of Administrative Services (Mr. McCrary); Vice President of Technical Services (Mr. Long); Mr. Meier; Mr Crosby and Mr. Spencer. Tr. 1720 (Hairston). Each Monday morning, "Mr. Farley would initiate [the staff meeting], and the first thing you would do is call on the

memorandum he gave to Mr. Williams. Mr. Williams instructed Hobby to destroy the memo. Mr. Hobby was uncomfortable concealing his concerns and therefore contacted Morris Howard, a former NRC Regional Administrator to discuss his concern and to determine whether Hobby had a legal obligation to inform the NRC of his concern. Mr. Howard was not able to provide an adequate answer. Mr. Hobby personally reviewed the Code of Federal Regulations to determine if he had an obligation to report this to the NRC, but was still unable to determine whether he had a legal obligation to report his concern to the NRC. Eventually, in June of 1989, Mr. Hobby contacted his mentor, Admiral Wilkinson for his advice. See Intervenor's Exhibit 19. Admiral Wilkinson's recommendation was that Hobby work with Oglethorpe Power and with others in the company to resolve his concern.

presiding VP who had projects reporting to him and ask for plant status." Long Dep. at pp. 48, 55.

Following the executive staff meeting, Mr. McCoy would conduct a Vogtle project staff meeting. Tr. 1944 (Shipman). Management direction discussed during the Farley staff meetings would then be passed by Mr. McCoy to the Vogtle project staff. Tr. 1945-1946. For example, during a Farley staff meeting discussion concerning a Notice of Unusual Event (NOUE) was discussed in detail, including the management response to the event. Tr. 1948-1951.

These weekly staff meetings constitute a pivotal management oversight mechanism over the nuclear plants where all emerging and existing developments concerning the management, operation, and administration of GPC's and APC's nuclear plants were discussed.⁵

Z. SONOPCO project management practice required Mr. Farley to receive daily briefings

⁵ Mr. Farley testified that:

It was therefore necessary for me to stay informed as to developments at Georgia Power's and Alabama Power's nuclear plants so that I could assume my responsibilities at Southern Nuclear should it become the operating licensee for the plants.

Farley at 21; also see Tr. 1848 (Farley). This rationalization makes little sense because operational responsibility was years away and, in fact, Georgia Power never even filed an application with the NRC to amend the Hatch and Vogtle licenses to designate Southern Nuclear as the licensed operator until September 18, 1992 -- after Mr. Farley retired as a Southern Nuclear executive, which occurred in May of 1992. Clearly, Mr. Farley needed information to function in his capacity as executive vice president-nuclear of Southern Company and as the CEO of Southern Nuclear when it was incorporated.

SONOPCO project customary management practice required Mr. Farley to be briefed on all significant operational events occurring at all three plants. Tr. 1953, 1966 (Shipman).⁶ Mr. Hairston and Mr. McDonald reported to Mr. Farley, and they reported to Mr. Farley on important events occurring in the corporate offices, including the events of April 19, 1990, concerning the issuance of the plant Vogtle Site Area Emergency Licensee Event Report ("LER"). Tr. 1965-1966 (Shipman); Intervenor Exhibit 10, p. 4.⁷

The reporting relationship between Mr. McDonald and Mr. Farley was so pronounced, and managers understanding of the multiple reporting process so confused, that Mr. Shipman believed that Mr. McDonald was "triple hatted" and had a direct reporting relationship to Mr. Farley as a Southern Company Services employee. Tr. 1966-1967; 1984 (Shipman). It was not until after he testified in this proceeding in 1994 that Mr. Shipman learned Mr. McDonald

⁶ Mr. Shipman had been in a position to observe the reporting relationship between Mr. Farley and Mr. McDonald for a number of years. That Mr. Shipman believed Mr. McDonald took management directive from Mr. Farley and that Mr. Hairston specifically reported to Farley on matters related to the issuance of the Site Area Emergency LER leaves little doubt that Mr. Farley was involved in day-to-day operational activity.

⁷ The errata sheet to Mr. Shipman's deposition testimony asserts that "Mr. Hairston reported to Mr. Dahlberg through Mr. McDonald for operational and licensing activities related to Plant Vogtle." See Shipman Errata Sheet (bound into record at Tr. 1995). However, GPC (including Mr. Shipman) never asserted a factual basis to support Mr. Shipman's change in testimony. Mr. Shipman testified at the hearing that he observed Mr. McDonald and Mr. Hairston reporting to Mr. Farley. He did not testify that he ever saw Mr. McDonald or Mr. Hairston report anything to Mr. Dahlberg. This errata sheet, moreover, was not produced until Mr. Shipman took the witness stand.

was not a SCS employee and that Mr. Farley was not officially within Mr. McDonald's chain of command. Tr. 1967 (Shipman).

Moreover, executives at the SONOPCO project never received any organizational charts concerning their reporting relationships. As Mr. Long testified, "[f]rankly, we're not big on organizational charts, if you want to know the truth." Long Dep. at p. 56. There appears to be no published organizational chart for the SONOPCO project. On April 1, 1991, when Georgia Power filed a response to a 2.206 petition filed by Mr. Hobby and Mr. Mosbaugh, Georgia Power asserted that an organizational chart of the "Phase I" organization in existence on May 15, 1989 listed Mr. McDonald, NOCA and Mr. Dahlberg and otherwise excluded the remainder of GPC's nuclear operations and Mr. Farley. Joint Stipulation Exhibit 35; Intervenor Exhibit 48 at p. 6; Tr. 1464-1465 (McDonald).

AA. Oglethorpe Expresses a Concern about the Reporting Relationship and Requests GPC to respond to the Concern

In 1989, Mr. Fred Williams served as GPC's Vice President of Bulk Markets. Tr. 2456 (Williams). He was responsible for administering contracts between GPC and the joint owners of GPC's non-nuclear plants. Mr. Williams was not involved in the decision to establish NOCA; did not know who decided to form NOCA and did not know why Mr. Dahlberg felt he needed to establish NOCA. Tr. 2506 (Williams). Mr. Williams had responsibility for negotiating contracts with Oglethorpe and the other joint owners. Mr. Hobby did not have a formal reporting relationship to Mr. Williams in 1989. Tr. 2360 (Hobby).

On March 31, 1989, Oglethorpe advised the SEC that:

GPC personnel with whom Oglethorpe Power dealt directly in relation to its interests are now subject to a separate authority and are located in Birmingham, Alabama" and that Oglethorpe's ability to obtain contractually required information is thus hindered, and its ability to fulfill its obligation as co-owner reduced... It is certainly not in the public interest to permit establishment of a structure that would impede proper oversight of nuclear plant operations.

Oglethorpe SEC Intervention Reply at p. 4 (Exhibit 39).

At the April 1989 monthly meeting of the Subcommittee on Power Generation, Oglethorpe demanded that Georgia Power provide an organizational chart and otherwise explain "how Farley fits into the picture and who he reports to up through the Board." Hobby p. 33; Joint Stipulation Exhibit 33.

On April 26, 1989, Mr. Hobby transmitted a memo to Mr. Williams setting forth Oglethorpe's request. Joint Stipulation Exhibit 33.

On May 15, 1989 Mr. Williams responded to Oglethorpe's request for information. Mr. Williams' response was delivered to Oglethorpe at the May, 1989 Subcommittee of Power Generation meeting. Oglethorpe's representative at the meeting, Mr. Dave Self, reviewed Mr. Williams' response. Mr. Self told Mr. Hobby that the response was incomplete and did not answer specific factual inquiries raised by Oglethorpe; in particular, it did not specify Mr. Farley's reporting relationship within the SONOPCO project or to GPC's Board of Directors. See Hobby pp. 33-34; Joint Stipulation Exhibit 35.⁸

⁸ Mr. Williams' May 15, 1989 memo essentially quotes from a letter that Mr. McDonald issued on April 24, 1989 to SCS concerning Mr. Farley's duties as Executive Vice President-Nuclear

After receiving Mr. Williams' May 15, 1989 memo, Mr. Smith continued to mention the fact that Mr. McDonald was reporting to Mr. Farley. Tr. 2345-2346 (Hobby).

BB. Dahlberg Determines he Must Meet with Farley to Resolve and Settle McDonald's continued refusal to cooperate with NOCA

Mr. Head had numerous discussions with Mr. Dahlberg, during which time Mr. Dahlberg told Mr. Head that he was very supportive of NOCA. Tr. 2295; 2342. (Hobby). When NOCA determined that the SONOPCO project was hostile towards and would not cooperate with NOCA, Mr. Head discussed the matter with Mr. Dahlberg on several occasions. Tr. 2339-2340 (Hobby); Tr. 1200 (Dahlberg); Head DOL Tr. 667, 669.

In April of 1989, Mr. Head told Mr. Dahlberg that he was going to Birmingham to talk with Mr. McDonald to see if they couldn't straighten things out. Mr. Dahlberg's response was that he should not meet with Mr. McDonald because he needed to first discuss the matter with Mr. Farley. See Hobby p. 34; Tr. 2339-2340 (Hobby). Mr. Dahlberg was unable to remember his discussion with Mr. Head and testified that he would accept Mr. Head's testimony as truthful. Tr. 1203-1204 (Dahlberg).⁹

for Southern Company Services. Intervenor Exhibit 69. As in Mr. Williams' memo, Mr. Farley's role as Executive Vice President-Nuclear for The Southern Company is not discussed in the April 24th letter.

⁹ GPC was aware of Mr. Head's and Mr. Hobby's testimony when it presented Mr. Dahlberg's prefiled testimony and knew that there was no factual basis to deny that the conversation had occurred. Indeed, Mr. Dahlberg stated that he did not question the accuracy of Mr. Head's testimony. Yet, Mr. Dahlberg's prefiled testimony indicates that Mr. Dahlberg did not advise Mr. Head not to contact or meet with Mr. McDonald until after Dahlberg first met

Mr. Head told Mr. Hobby about Mr. Dahlberg's need to meet with Mr. Farley before he could straighten things out with Mr. McDonald. Mr. Head and Mr. Hobby had previously held discussions about Mr. McDonald's reporting relationship and the concern that he was receiving management direction from Mr. Farley. When Mr. Hobby asked Mr. Head why, if McDonald reported to Mr. Dahlberg, did Mr. Dahlberg have to speak with Mr. Farley about something he wants Mr. McDonald to do, Mr. Head responded: "I guess you've got your answer about who Mr. McDonald reports to." Tr. 2367 (Hobby).¹⁰

with Mr. Farley (on page 14 Mr. Dahlberg's prefiled testimony states: Q: Did you advise Mr. Head that, until you met with Mr. Farley, you could not resolve Mr. Head's concern about SONOPCO project's lack of cooperation with NOCA? A: I do not recall so advising Mr. Head.). This response indicates a lack of candor on the part of GPC, who should have volunteered that the discussion had, in fact, occurred (i.e., Mr. Dahlberg's response should have more accurately stated something to the effect: "I no longer remember the conversation, but do not doubt that it occurred").

¹⁰ Mr. Head testified at the Hobby Section 210 proceeding that he did not perceive the memo as raising a regulatory concern because he was not concerned about the reporting relationship. When asked to explain his basis as to why he was not concerned, Mr. Head testified that he was not concerned about who Mr. McDonald reported to because Mr. Scherer took over nuclear operations from Mr. Head and issued a letter stating that Mr. McDonald would be reporting to Mr. Scherer. Hobby Tr. pp. 648-649 (bound into record at Tr. 2375. The fact that Mr. Scherer issued a memorandum indicating that Mr. McDonald would report to him does not provide a factual basis for Mr. Head to determine that Mr. McDonald reported to Mr. Dahlberg after Mr. Scherer had retired as GPC's CEO and after GPC's nuclear operations were moved to Birmingham and incorporated into the SONOPCO project management structure. It stands to reason that Mr. Head would not sign a memo he believed did not accurately portray the fact that a concern existed within NOCA about the reporting relationship that existed after GPC's nuclear operations were transferred to the SONOPCO project. The fact is that Mr. Dahlberg's statement to Mr. Head that he could not speak with Mr. McDonald until Mr. Dahlberg discussed the matter with Mr. Farley provides a factual basis for Mr. Head to conclude that the reporting relationship within the SONOPCO project as it related to Mr. McDonald included Mr. Farley.

CC. April 27, 1989 Hobby\Head Memo

In preparation for the meeting Mr. Dahlberg would have with Mr. Farley, Mr. Williams asked Mr. Hobby to prepare a memorandum discussing the problems NOCA was having with SONOPCO. See Hobby p. 36.

Mr. Hobby prepared a memo dated April 27, 1989. Before submitting the memo to Mr. Williams, Mr. Hobby showed the memo to Mr. Head. Mr. Head stated to Mr. Hobby that he felt so strongly about the issues raised in the memo that he wanted to personally co-sign the memo. Mr. Head and Mr. Hobby co-signed the April 27, 1989 memo. See Hobby p. 37; Tr. 2364 (Hobby); Joint Stipulation Exhibit 34.

The April 27, 1989 memo signed by both Hobby and George Head states:

A significant concern that a lot of people have is who does Mr. McDonald work for. ...Oglethorpe Power is so concerned that it has formally requested confirmation that Mr. McDonald receives his management direction from and reports to Mr. Dahlberg. ...Oglethorpe is very concerned about this issue and they feel NRC is concerned. A Region II NRC employee suggested to Oglethorpe that NRC was so concerned that they might seek to put a resident inspector in Birmingham to see what was going on.

Joint Stipulation Exhibit 34 at p. 7.

Mr. Hobby hand-carried the memo to Mr. Williams, who read it in Hobby's presence. When Williams finished reading the memo he told Hobby to destroy all copies of the memo. He said that Oglethorpe Power had raised this same concern about to whom Mr. McDonald reported and GPC could not have a memo in its files

raising the same concern. In response to Williams' instruction to destroy the memo, Mr. Hobby advised Mr. Williams that he was raising a regulatory concern and that Mr. Williams should not order him to destroy copies of the memo. See Hobby p. 37.

In response to Mr. Hobby's raising a regulatory concern, Mr. Williams stated that he thought the NRC had been briefed on the SONOPCO organization and, moreover, if the NRC ever raised the issue GPC need only show the NRC an organizational chart See Hobby p. 37.

On April 27, 1989, Mr. Hobby asked Mr. Williams to explain why, if Mr. McDonald reported to Mr. Dahlberg, did Mr. Dahlberg have to go to Mr. Farley to resolve a problem he was having with Mr. McDonald. Mr. Williams responded that the political dynamic within the Southern System was such that: 1) Mr. Farley and Mr. McDonald had a close working relationship and if Mr. Dahlberg and Mr. McDonald came to an impasse over how GPC would monitor SONOPCO, it would be brought to Mr. Farley's attention; 2) the Southern Board was divided between support for Mr. Addison and Mr. Farley and, as such, Mr. Addison was not in a position to intervene on the side of Mr. Dahlberg;¹¹ and 3) Mr. Dahlberg was not in a position to escalate a problem he was having with Mr. Farley to Mr. Addison because Mr. Addison would eventually make a recommendation to the Southern Company Board regarding who should succeed him as Southern

¹¹ Dwight Evans, Executive Vice President of GPC, earlier in 1989, likewise advised Mr. Hobby that the Southern Company Board was divided between support for Farley and support for Addison. Hobby at p. 38.

Company's president. Disagreeing with Mr. Farley risked an adverse impact on Addison's decision as to who he would recommend as his successor. See Hobby p. 38.

At the conclusion of their April 27, 1989 meeting, Williams kept a copy of the memo and handed the original back to Mr. Hobby. Williams stated that he would destroy the copy he was retaining after in short order and advised Hobby to destroy all copies of the memo. See Hobby p. 37. Mr. Williams testified that he asked Mr. Hobby to reconsider sending the memo in order to resolve the issues raised in the memo in a "cordial atmosphere." Tr. 2460 (Williams).

Realizing that Mr. Head had signed the April 27th memo, Mr. Williams talked to Mr. Head about the reporting relationship concern raised in the memo. Tr. 2463-2464. According to Mr. Williams:

I didn't tell him how to reword the memo. What I went and told him, sir, was my position as I understood and I saw the relationship of reporting in Southern Nuclear and the operating company of Georgia Power Company. Mr. Head was on the same management council as Mr. McDonald, both reporting to Mr. Dahlberg. And that's what I was pointing out to Mr. Head that this does not agree with what actually was happening. And so, you don't usually go tell a senior VP that he said something wrong, when I went and just talked to him about my feelings and the way I saw things in the organization as it was functioning.

Tr. 2466 (Williams).

Mr. Williams testified that during this meeting he did not ask Mr. Head to reconsider submitting the memo. Tr. 2463-2464 (Williams). This testimony conflicted with Mr. Williams' deposition testimony where he testified that he asked Mr. Head to

"rethink about whether you put this memo out or not from your organizational standpoint." Tr. 2465 (Williams).

Mr. Hobby told Mr. Head about Mr. Williams' instruction to destroy the memo. Mr. Head advised Mr. Hobby that he should destroy all copies of the memo but retain the original. Mr. Hobby did as Mr. Head suggested. See Hobby pp. 38-39.

On April 28, 1989, Mr. Williams travelled to the SONOPCO project and met with representatives of SONOPCO to discuss the problems between SONOPCO and NOCA. Mr. Hobby called Mr. Williams at home late in the afternoon on April 28th to discuss what transpired in Birmingham. During this conversation Mr. Williams stated to Mr. Hobby that the meeting was attended by Mr. Beckham, Mr. McCoy, and Mr. Meier, while Mr. Hairston attended portions of the meeting. The consensus of the SONOPCO project management was that Georgia Power did not need nuclear expertise in its Atlanta offices. Mr. Williams then told Mr. Hobby to destroy the original as well as all copies of the April 27, 1989 memo. See Hobby pp. 39-40.

On the morning of May 5, 1989, between 8:30 and 9:00 a.m., Mr. Fred Williams met with Mr. Dahlberg. Intervenor Exhibit 32 (Dahlberg Calendar). Mr. Williams independently recollected meeting with Mr. Dahlberg within "a day or two after" receiving the memo. Tr. 2469 (Williams). During this meeting Mr. Williams told Mr. Dahlberg about the concern contained in the April 27th memo regarding Mr. McDonald's reporting relationship with Mr. Farley ("Q: And so then you would be aware that Mr. Dahlberg knew about

Mr. Hobby's concern about the reporting relationship because you told it to Mr. Dahlberg, Correct? A: That's correct.) Tr. 2467 (Williams). Mr. Williams recalled that he may also have shown the April 27th memo to Mr. Dahlberg. Tr. 2462 (Williams).

DD. May 5, 1989 Meeting Between Dahlberg and Farley

On the afternoon of May 5, 1989, Mr. Dahlberg and Grady Baker met with Mr. Farley. Intervenor Exhibit 32.

During the May 5, 1989 meeting, Mr. Dahlberg raised the issues mentioned in the April 27th memo with Mr. Farley. Mr. Williams told Mr. Hobby that, as a result of the April 27th memo, Mr. Dahlberg was "beat up side the head" by Mr. Farley and GPC's senior management was no longer in a position to support Mr. Hobby. See Hobby p. 42. GPC was specifically given leave to call Mr. Williams as a rebuttal witness to refute Mr. Hobby's testimony. Tr. 2405-2406. GPC called Mr. Williams as a witness but did not refute Mr. Hobby's testimony concerning Mr. Williams' statement that "Dahlberg got beat upside the head." Mr. Dahlberg's recollection of the May 5th meeting was not clear, although he recalled that one of the subject discussed during the meeting concerned the SONOPCO project's lack of cooperation with NOCA. Tr. 1202 (Dahlberg).¹²

¹² The hearing record reflects the following:

Q: Mr Dahlberg, do you remember ever having a chat or a discussion or off handed remarks with Mr. Farley about NOCA where that [cooperation problems between SONOPCO and NOCA] just came up?

A: At this [May 5, 1989] meeting, I remember it coming up as one of the subjects we discussed").

Tr. 1202 (Dahlberg).

On May 5, 1990, Mr. Dahlberg and Mr. Grady Baker met with Mr. Farley. Mr. Dahlberg advised Mr. Farley that he wanted to increase Hobby's staff. Tr. 1819-20(Farley). Mr. Farley responded that that would not be necessary because it would be duplicative to have one company reviewing another company on an ongoing basis. Tr. 1756 (Farley). Three days later, on May 8, 1990, Mr. Hobby received a call from William Evans, GPC's Corporate Concerns Coordinator, advising Hobby that "Farley was going to make the call" about matters related to NOCA. Hobby at 41; Also see Evans DOL Dep. at pp. 17-18 ("[Farley] would decide what to do with the transfer of those positions"). Mr. Dahlberg made the decision to eliminate NOCA following his meeting with Mr. Farley. Tr. 1229 (Dahlberg).

EE. Georgia Power's Corporate Concerns and SONOPCO project

On April 24th at 2:15 p.m., a GPC Corporate Concerns investigator, Bill Evans, phoned Mr. Hobby and told him that he was investigating a concern regarding SONOPCO's blocking GPC personnel stationed at Plant Hatch from transferring to GPC's Vidalia District office. Mr. Evans asked Mr. Hobby whether, as the interface between GPC and SONOPCO, he could resolve the concern. Mr. Hobby advised Mr. Evans that SONOPCO was also refusing to allow people to interview for positions within NOCA. Mr. Evans stated to Mr. Hobby that Mr. Dahlberg and Mr. Baker were going to discuss this Employee Concern with Mr. Farley on May 5, 1989, and asked if he wanted to know if he wanted to add anything to that Corporate Concern. Mr. Hobby provided Mr. Evans information that was included in the written corporate concern provided to Mr. Baker

before the May 5, 1989 meeting. See Hobby pp. 35-36; Intervenor's Exhibit 18.

Lee Glenn, the manager of GPC's Corporate Concerns program, was aware of Mr. Hobby's concern over the reporting relationship within the SONOPCO project. Mr. Hobby met with Mr. Glenn to discuss the concern over whether Mr. McDonald was receiving management direction from Mr. Farley. See Hobby p. 36.

On May 8, 1989, Mr. Hobby received a call from Bill Evans, the Corporate Concerns investigator. Mr. Evans advised that the Performance Engineer position was discussed at the May 5th meeting and that the decision to staff the position would be made by Mr. Farley. See Hobby p. 41.

GPC asserts that Mr. Evans' statement to Mr. Hobby is inadmissible hearsay. We find that his statement is admissible not only because the circumstances here demonstrate its reliability, but because the statement is not hearsay.¹³

¹³ Federal Rule of Evidence 801(d)(2)(D) provides:

A statement is not hearsay if ... [t]he statement is offered against a party and is ... a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship...

A three-part test should be employed to determine whether a statement is not hearsay within the meaning of 801(d)(2)(D);

For a statement to be admissible under Rule 801(d)(2)(D), the offering party must make a three-part showing. [1] The party must establish the existence of the employment relationship independent of the declarant's statement offered as evidence. [2] The statement must be made during the existence of

Mr. Head retired in May 1989 and Kerry Adams was named as his replacement. On or about May, 23 1989, Mr. Adams and his

the declarant's 'agency or employment.' [3]
The statement must concern a matter within the
scope of the declarant's employment.

Boren v. Sable, 887 F.2d 1032, 1038 (10th Cir. 1989) (citations omitted).

All three parts to this test are easily satisfied. First, Mr. Evans was employed (and continues to be employed) by GPC as its Corporate Concerns program Coordinator. Second, Mr. Evans made the statement to Mr. Hobby that Farley would make the call in GPC's corporate offices in response to an inquiry he had received from Mr. Hobby. Third, Mr. Evans specifically had been given responsibility to investigate matters related to corporate concerns and, in particular, with respect to how GPC would respond to concerns raised by SONOPCO project employees. His statement, therefore, was made within the scope of Mr. Evans' employment.

The facts here are similar to those in United States v. Portsmouth Paving Corp., 694 F.2d 312, 322 (4th Cir. 1982), where the court held that a statement made by a secretary transmitting a message from a member of the company is not hearsay under Rule 801(d)(2)(D). In the matter before the Board, Mr. Evans was specifically relaying information he obtained from Mr. Glenn, his boss and manager of the corporate concerns program. Similarly, in Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529, 532 (3rd Cir. 1976), the court held that the transmittal by a third person of a statement made by management to a prospective employee is not hearsay. Once again, Mr. Evans' transmittal of a statement attributable to Mr. Glenn and/or his boss, Grady Baker, may not be excluded on the basis of 801(d)(2)(D).

Finally, even if Mr. Evans statement was considered nothing more than reiterating the statement of Mr. Baker through his chain of command, Fed.R.Evid. 805 provides:

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

In this case, Mr. Baker's statement conforms to an exception within the hearsay rule as does the statement of Mr. Glenn. There is no logical or legal reason to exclude Mr. Evans testimony because it is being offered as evidence for the truth of the matter asserted.

assistant, Dan Shannon, met with Hobby. They advised him that Mr. Baker had asked them to pass on a message that Hobby was to hire no more people. Previously, on March 22, 1989, Mr. Baker specifically advised Mr. Hobby to staff the Performance Engineer. See Hobby p. 41-42.

FF. Performance Indicators

Mr. Dahlberg was responsible for GPC's rate case before the PSC and he selected GPC Executive Vice President Dwight Evans to manage the rate case for him. Hobby p. 43.

Interest in establishing an acceptable performance indicator was the subject of PSC attention for two years before the rate case commenced. Intervenor Exhibit 141 at p. 3579, 3583. Mr. Dahlberg testified that he wanted an alternative indicator because he did not want Georgia Power to get stuck with the standards recommended by the PSC witnesses. Tr. 1112 (Dahlberg).

Mr. Dahlberg and Mr. McDonald had a major disagreement over how GPC would respond to the PSC's request for an alternative performance indicator from the company.¹⁴ Mr. McDonald determined that the company would not submit an alternative to the company and would not allow SONOPCO project personnel to work on an alternative indicator. Dahlberg 17; McDonald 15. Mr. Farley also opposed providing an alternative performance standard to the PSC. Tr. 1109

¹⁴ The performance indicator program eventually put in place by the PSC primarily functioned to assess GPC's economic performance of its nuclear units. NOCA's monitoring of SONOPCO's performance would encompass the total performance, including key and significant safety functions not associated with the PSC's financial-related performance indicators. Tr. 2309-2310.

(Dahlberg). Mr. Dahlberg determined that an alternative performance indicator should be prepared for submission to the PSC.

On August 10, 1989, Messrs. Dahlberg, McDonald and Evans met to resolve the dispute. The discussion was so heated that Mr. McDonald broke a rung in the chair in which he was seated. See Hobby p. 43; Tr. 1105 (Dahlberg); Tr. 1504 (McDonald). At the conclusion of the meeting Mr. McDonald was instructed to begin preparing a set of acceptable performance indicators Georgia Power could present to PSC if necessary.

Mr. Evans met with Mr. Hobby after the August 10, 1989 meeting to tell him about the meeting, he stated that he believed that Mr. Hobby was going to get more help from GPC management in dealing with Mr. McDonald in the future. Mr. Hobby was asked to send a representative to the SONOPCO project meeting. Mr. Hobby selected a member of NOCA's staff, Gerald Johnson, to attend. See Hobby pp. 43-44.

The meeting went forward as planned. In attendance were Messrs. Farley, McDonald, Johnson, Barker and Hicks, as well as just about all of the top management of the SONOPCO project. Johnson Dep. p. 26

Upon his return, Mr. Johnson told Mr. Hobby about what occurred during the SONOPCO project meeting, including the fact that Mr. McDonald stated that he was not going to allow SONOPCO project personnel to prepare an alternative performance indicator:

When Mr. Johnson returned from the meeting he briefed me on it. He said that when the meeting began Mr. McDonald

said he was not going to let SONOPCO play any role in preparing testimony about an alternative performance indicator program -- in defiance of what Mr. Dahlberg had instructed. I was told that Mr. Farley attended the meeting and provided direction as to how the SONOPCO project would handle the issue.

The information I received from the meeting was that Mr. Farley would decide what role GPC employees at the SONOPCO project would play in developing alternative performance standards -- not Mr. McDonald -- even after Mr. McDonald had received specific instructions from Mr. Dahlberg.

Hobby pp. 43-44.

Mr. Johnson testified that the decision not to work on an alternative performance indicator was a joint decision made by Mr. McDonald and Mr. Farley and that this decision was made during the meeting held at the SONOPCO project:

Q: What was decided at the meeting?

A: The meeting at SONOPCO?

Q: Yes.

A: The information was presented and my understanding is that SONOPCO was going to be working on rebuttal testimony and my understanding was that reasons why we should not have a performance indicator, not the fact that we would have an alternative performance indicator but why we shouldn't have an indicator.

Q: Who made that decision?

A: Upper management in that room. As I said, Mr. Farley and Mr McDonald were all in there. So it was kind of a joint. It was my understanding that it was a joint decision.

Johnson Dep. p. 38-39.

Mr. Hobby also spoke to Mr. Michael Barker about the SONOPCO project's refusal to work on an alternative performance indicator. Mr. Barker confirmed that Mr. Farley attended the meeting and that Mr. Farley provided management direction to Mr. McDonald during the

meeting about what information the SONOPCO project would provide with respect to an alternative performance indicator. See Hobby p. 44. Mr. Johnson also spoke with Mr. Barker and with Mr. Hicks, both of whom confirmed that they were instructed not to do any more work on an alternative performance standard and that this directive came from SONOPCO project upper management. Johnson Dep, p. 29. Also see Section IV (G) (7) of this Order for a further discussion of alternative performance indicators.

GG. Negotiations with Oglethorpe

By August of 1989, GPC's negotiations with Oglethorpe were at a stalemate. No negotiations were scheduled to resolve their respective differences. See Hobby p. 44.

In August, 1989, Oglethorpe's Dan Smith told Mr. Hobby that he still had great concerns about who Mr. McDonald reported to and he said he had done all he could to resolve the matter. He stated that Oglethorpe wanted to resolve its differences with GPC relative to SONOPCO so that SONOPCO could be incorporated as quickly as possible. Mr. Smith stated that Oglethorpe was willing to separate the nuclear issue from any other outstanding issue and he was willing to immediately begin discussions with Hobby to resolve all issues related to the formation of SONOPCO. See Hobby p. 44-45.

Hobby advised Mr. Baker about Oglethorpe's proposal. Mr. Baker immediately phoned Tom Kilgore, Senior Vice President at Oglethorpe. Following their discussion, Mr. Baker authorized Hobby to commence negotiating with Mr. Smith. Mr. Baker placed one condition on the negotiations: Hobby had to keep the discussions

confidential so that Mr. Farley and Mr. McDonald would not learn of them. Oglethorpe agreed to the condition. Oglethorpe took precautions not to alert Mr. Farley to the discussions. See Hobby p. 45. At the same time, Georgia Power knew that Mr. Farley was involved in the negotiations. Meier Dep. 7-8.

During the course of the negotiations, Oglethorpe and Georgia Power reached an understanding that any agreement reached between them would officially be transmitted to Georgia Power as if it were a proposal originating from Oglethorpe Power. To accomplish this, drafts of the agreement would be reviewed secretly by Georgia Power, and after it was tentatively approved, the draft would be transmitted to Georgia Power by Oglethorpe. See Hobby p. 45.

In order to keep the negotiations confidential from SONOPCO project, it was agreed that Mr. Smith would keep all proposed agreements on Oglethorpe's computer system. The final draft was reviewed and approved by GPC's law firm, Troutman Sanders, before it was officially transmitted to GPC from Oglethorpe. Troutman Sanders comment on the final draft was that language should be included to "avoid any accusation that SONOPCO is operating the plants without a license." See Hobby pp. 45-46; Intervenor's Exhibit 20.

Following Oglethorpe's transmittal of the draft to GPC, Mr. Hobby was removed from the negotiation. He was replaced by John Meier, a SONOPCO project employee reporting directly to Farley. See Hobby pp. 46-47

HH. The Company-wide management review

After Mr. Dahlberg became CEO of GPC he decided to initiate a company-wide management review. At the end of 1989, Mr. Dahlberg completed this company-wide review of management to "assure [himself] of the qualifications of the management of Georgia." Dahlberg excluded GPC's entire nuclear operations from review. See Dahlberg at 16, Tr. 1185-86 (Dahlberg).

II. Georgia Power did not prepare a performance evaluation for Mr. McDonald

The record indicates that Georgia Power did not prepare an independent evaluation for Mr. McDonald. Rather, McDonald's evaluation was prepared Alabama Power's CEO, Mr. Harris and reviewed by Mr. Farley. Mr. Dahlberg apparently did not sign the evaluation but was called to see if he wanted to add anything, which he declined to do. Tr. 1861-62 (Farley).

JJ. Preparation of GPC's Nuclear Budget

The handling of GPC's nuclear budgets changed with the formation of the SONOPCO project. GPC's nuclear operating budgets were prepared by the SONOPCO project and reviewed by Farley. Thereafter they were included in a presentation attended by the SONOPCO project board. Mr. Farley testified that in May of 1990, before SONOPCO was legally incorporated, he thought the budgets "were the best that could be done...I blessed them, yes, I did." Tr. 1782-83 (Farley).

With respect to the 1990 nuclear operating budget, Mr. Hobby received calls from Oglethorpe as to whether the budget had been approved. In December of 1989, Hobby called Mr. Jeff Wallace,

Manager of Resource Management, and asked him the status of the nuclear budget. Mr. Wallace told him the budget had been approved at a meeting of The Southern Company management council and further that Dahlberg had disagreed with the proposed budget and Addison had said, "That's it. That's the budget." Hobby at 47-48.

Another NOCA employee, Mr. Gerald Johnson, had come out of GPC's budgeting department. Mr. Johnson testified that from talking to the GPC budgeting people he learned that the 1990 nuclear budget was approved by "the Board out of the Southern Company," that included all the operating company presidents and that the only GPC budget not approved by the GPC management council was the nuclear budget. Johnson DOL Dep. at pp. 41-42.

The budget process was to be prepared by the SONOPCO project and presented to GPC's Management Council and from there to GPC's Board of Directors. Tr. 1241 (Dahlberg). Mr. Hobby, as General Manager of NOCA, was given specific responsibility by Mr. Dahlberg to evaluate the budget coming from the SONOPCO project and advise senior GPC management accordingly. Hobby p. 20. GPC's 1990 nuclear budget was prepared by the SONOPCO project in Birmingham. Tr. 1240 (Dahlberg); 1780-1781 (Farley). At no time during the preparation of GPC's 1990 nuclear budget did the SONOPCO project provide NOCA access to a draft of the budget. Moreover, when the final proposed SONOPCO project budget was issued, NOCA could not get a copy from the SONOPCO project but, through its access to E-Mail, NOCA obtained the proposed 1990 nuclear budget from Oglethorpe Power. See Hobby p. 47.

Oglethorpe wanted to know where the proposed SONOPCO project budget stood and whether it was going to be accepted by GPC. So Mr. Smith repeatedly inquired NOCA whether the proposed SONOPCO project budget had been approved. To respond to Mr. Smith's inquiries, Mr. Hobby spoke with the responsible manager within GPC's Resource Management department, Mr. Jeff Wallace. Mr. Wallace had responsibility for managing GPC's budgeting process with GPC's Management Council. Mr. Wallace advised Mr. Hobby that GPC's nuclear budget had been approved by the Southern Company management group; that Mr. Dahlberg was not pleased with the nuclear budget and raised the matter with Mr. Addison who told Mr. Dahlberg "that's it." Mr. Wallace told Mr. Hobby he received his information directly from Mr. Dahlberg. Mr. Hobby then asked Mr. Gerald Johnson to call Mr. Wallace about the status of GPC's nuclear budget. Mr. Johnson advised Mr. Hobby that Mr. Wallace provided him with the same information Hobby had received. Hobby p. 47-48.

Mr. Warren Jobe was GPC's chief financial officer and a member of GPC's Management Council. Tr. 1235 (Dahlberg). Mr. Jobe testified that it was possible that GPC's 1990 nuclear budget was not approved by GPC's Management Council. Jobe Dep. pp. 42-44.

KK. Termination of Allen Mosbaugh

Mr. Dahlberg initially testified that he could not recall speaking to Mr. Farley about whether Mr. Mosbaugh should be terminated for tape recording. Tr. 1130 (Dahlberg). Additionally, in a sworn affidavit dated July 24, 1991, and when testifying

during the Mosbaugh Section 210 proceeding, Mr. Dahlberg failed to mention any discussions with Mr. Farley when discussing from whom Mr. Dahlberg received termination recommendations regarding Mr. Mosbaugh's tape recording activity. Tr. 1133-1134 (Dahlberg). Mr. Farley specifically recalled discussing it with Mr. Dahlberg and recommending to Mr. Dahlberg that Mr. Mosbaugh should be terminated. Tr. 1832 (Farley). Mr. Dahlberg then testified that he was "sure" that Mr. Farley expressed to him the opinion that Mr. Mosbaugh should be terminated. Tr. 1131 (Dahlberg).

LL. GPC's management Council

GPC's Management Council was made up of executives of GPC. It functioned as a policy-setting body and made corporate decisions concerning resource allocation. Tr. 1100 (Dahlberg). Mr. Dahlberg believed it was important for the senior officers of the company, including nuclear, to periodically review policy decisions that needed to be made, to review budgets, to review the vision and mission statements and corporate goals of the company. Tr. 1098-1099 (Dahlberg). The management counsel attempted to operate by consensus. Any unresolved matters were resolved by Mr. Dahlberg. Tr. 1100-1101 (Dahlberg). Mr. McDonald stopped functioning as a member of GPC's Management Council in July of 1989 and GPC asserted in sworn interrogatory responses that he was not a member. Intervenor Exhibit 144.

MM. Nuclear Oversight Committee

GPC's Board of Directors established a nuclear operations overview committee ("Nuclear Committee").¹⁵ Tr. 1242 (Dahlberg). This Committee consisted of outside board members, none of whom have a background in the area of nuclear power. Tr. 1243 (Dahlberg).

Mr. Dahlberg attended his first Nuclear Committee meeting on 7-21-88 and regularly attended Committee meetings until he left GPC.

Mr. McDonald attended all of the Committee meetings between May 23, 1988 until his retirement in 1993.

Mr. Scherer attended all of the Committee meetings between May 23, 1988 and May 17, 1989. The first Committee meeting held after May 17 1989 occurred on July 24, 1989. Replacing Mr. Scherer as a regular attendee of the meeting is Mr. Farley. With the exception of a special 40 minute meeting held on April 18, 1990, Mr. Farley attended every Committee meeting held during the next three years (July 24, 1989 to July 30, 1991). Moreover, Mr. Farley's involvement coincides with his name being added to the plant Vogtle Corporate Emergency Telephone Director under the heading "GPC Corporate Management" (which occurred on 6-29-89) and reflects Mr. Farley's replacement of Mr. Scherer as the chief executive over GPC's nuclear operations. GPC did not volunteer that Mr. Farley regularly attended GPC's Nuclear Oversight Committee meetings for of three years. Until the records of these meetings were provided

¹⁵ Appendix B attached hereto is a chart depicting the dates and attendees of the Nuclear Committee.

at the Board's request, GPC painted a different picture of Mr. Farley's involvement.¹⁶

The content of the Nuclear Oversight Committee's meeting minutes contradict GPC's assertions in the April 1, 1991 2.206 Response. The 2.206 Response asserts that the "sole" purpose Mr. Farley attended the Committee meetings was to report the status of the formation of Southern Nuclear. Intervenor Exhibit 48 at p 21, fn. 4. This assertion is unbelievable for the following reasons:

- 1) Mr. Farley continued to attend the Committee meetings after Southern Nuclear was formed. In the April 1, 1991 2.206 Petition response, GPC asserts that as of January, 1991, when Mr. Farley became CEO of Southern Nuclear, he "had no management control over licensed activities or GPC personnel...[and] functions much the same as the CEO of SCS..." See Exhibit 48 p. 8 (2nd full paragraph). Yet, Mr. Mr. Farley attended all of the Committee meetings held in 1991. In comparison, between May of 1988 and the end of 1994, the CEO of SCS never attended a single Committee meeting. Mr. Farley did not function in the same manner as the SCS CEO.
- 2) Committee minutes and agendas indicate that Mr Farley did not make presentations about Southern Nuclear during most of the meetings he attended. For example, the July 24, 1989 meeting Agenda is so detailed that, had such a presentation been made, it would have been reflected (i.e., the Agenda provides: 10:00-10:05 Opening Remarks by Committee Chairman; 10:05-10:20 Status of Plant Hatch by McCoy; 10:20-10:35 Major Problems list Discussion (McCoy); 1055-11:05 Break; 11:05-12:00 working lunch; 12:30-1:00 p.m. Questions and Discussion; 1:00-2:30 plant tour. See Project No. 072660. No time was allotted for Mr. Farley to make a presentation about the status of SONOPCO. Moreover, the minutes of the meeting specifically state that the Chairman of the Committee "conducted the meeting in accordance with the agenda" and that the minutes are "an accurate account of the meeting." See Project No. 072657; 072659; also see Project Nos. 072663-072669 (January 30, 1990 Committee minutes are an accurate account of what occurred and do

¹⁶ Due to the late submission of the Nuclear Committee minutes, cross examination of licensee's witnesses did not occur.

not reflect reference to briefing by Farley).¹⁷ As would be expected, the agenda and Committee minutes specifically reflect when Mr. Farley did make a presentation. See Project No. 072676 (July 31, 1990 meeting agenda allotting between 12:10-12:40 p.m. for "J.M. (Joe) Farley" to brief Committee on the "Status of SONOPCO"); and Project No. 072683 (July 31, 1990 meeting minutes stating "Mr. Farley gave a status report on the Southern Nuclear Operating Company Project").

- 3) Mr. Farley did not need to attend the meetings in order for the Committee to obtain a briefing on the status of SONOPCO. The regular attendees of the meeting, including Mr. Dahlberg and Mr. McDonald, were capable of providing the Committee information on the status of SONOPCO. For example, on March 15, 1989 (after Mr. Farley was elected Executive Vice President-Nuclear), the Committee minutes denote that Mr. Dahlberg briefed the Committee on "the status of Southern Nuclear Operating Company (SONOPCO)." See Project No. 072638.
- 4) Mr. Dahlberg's explanation of the purpose and function of the Committee demonstrates that Mr. Farley would have been involved in discussions related to operational issues, safety matters and the major problems which developed at GPC's nuclear plants. According to Mr. Dahlberg:

That committee would review the performance of our plants -- not cost performance, but safety performance. It would include periodic visits to each of the nuclear plants. It would include periodic reports from the nuclear officers responsible...We would go through the top ten problems with that oversight committee. Here is the problem we are incurring, here's what we're doing about it, here are the resources that are involved, here's the anticipated completion date. So that board had a complete review periodically...I attended all the meetings of that oversight committee, and as we went through the issues that were in front of us, they asked questions of nuclear management about what they were doing on a particular issue, did other plants have the same problem, how were we gathering that information...how we were measuring our performance against others...I should add one more thing. They did receive reports also. If we had received a rating from NRC, the SALP ratings, they would have

¹⁷ No agenda exists for this meeting.

reviewed that...So they asked questions about that, INPO reports and those types of evaluations that we received.

Tr. 1242-1245 (Dahlberg).

Based on this explanation of what was occurring during the Committee meetings, it is simply inconceivable that Mr. Farley would not have been involved with discussions concerning GPC's nuclear operations, safety performance and problems occurring at GPC's nuclear plants.

- 5) Mr. Farley's appearance at the Committee meetings is associated with Mr. Scherer's departure. Mr. Farley was named as Executive Vice President-Nuclear in February of 1989 and commenced functioning in that position on March 1, 1989. The Committee met three times after March 1, 1989 before Mr. Farley commenced attending the meetings (3-15-89; 4-27-89 and 5-15-89). Moreover, between May 1988 and May 1989, Mr. Farley did not provide the Committee with a single briefing about the status of the formation of Southern Nuclear although during this time period a) the SEC petition was filed (6-88); b) Oglethorpe intervened (9-88); and c) GPC's nuclear operations were transferred to the SONOPCO project (11-88). The Committee records rather reflect a "changing of the guard," Mr. Scherer departed and Mr. Farley arrived.

The Nuclear Committee was not established to make managerial recommendations; the members of the Committee did not consider themselves expert enough to do so. Tr. 1244-1245 (Dahlberg). Mr. Dahlberg's role on the committee was to participate in the discussions and to assure follow-up where necessary. Tr, 1244 (Dahlberg).

The information provided to the Nuclear Committee was never presented to GPC's Management Council, including the top 10 problems list; INPO reports; and NRC evaluations.

NN. Mr. Dahlberg reliance on the Crisis Management plan to cover Georgia Powers' response to a nuclear accident

An indication that Mr. Dahlberg was out of touch with nuclear operations is his discussion at a Management Council meeting of the need to cover nuclear accidents as part of GPC's Crisis Management Plan. Tr. 1232 (Dahlberg). This plan is separate from the Vogtle Emergency Plan, which Mr. Dahlberg testified he never reviewed. Id. To the extent Mr. Dahlberg wanted to change or understand what would occur in case of a nuclear accident, he should have reviewed the plant Vogtle and plant Hatch Emergency Plan rather than attempting to alter a crisis management plan to accomplish what the Emergency Plan already should accomplish.

OO. Outage Philosophy

Mr. Farley oversaw the introduction of GPC's nuclear operating philosophy.¹⁸ Mr. Farley specifically remembered discussing nuclear operating outage philosophy for the SONOPCO project, in a management type of meeting, he could not remember if it was at a

¹⁸ One of the Mosbaugh tapes includes the following statement of Mr. McCoy that was made on August 6, 1990 at the plant Vogtle site:

Let me make a comment again and be sure that everybody understands this because -- there's been some discussions in some of the other plants of SONOPCO that we're not adhering to this and so we had some discussion at the highest levels including Mr. Farley, McDonald, Hairston and the three VPs about our scheduling philosophy for outages...The conclusion of that discussion was that optimum means the basically shortest schedule that you are able to do something in -- everything goes right. That you do not put any contingency or extra time in there and after lots of discussion everybody agreed that that was the right way to do the scheduling.

See (Exhibit 5).

SONOPCO project "retreat" headed by Farley that was attended by all SONOPCO project executives, and excluding Dahlberg. Tr. 1840-41 (Farley). However, he did remember that there was agreement that you shouldn't put a lot of contingency time in your outage planning. Tr. 1841 (Farley). Mr. Farley's involvement with the implementation of GPC's outage philosophy was discussed with plant Vogtle site personnel. Intervevor Exhibit 5 ("McCoy: ...we had some discussions at the highest levels including Mr. Farley, McDonald, Hairston and uh, the three VP's about our scheduling philosophy for outages.").

IV. STATEMENT OF LEGAL ISSUES
(ILLEGAL TRANSFER OF CONTROL)

Section 184 of the Atomic Energy Act prohibits the transfer of control of a license without first obtaining written and informed consent by the NRC:

No license granted hereunder...shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission shall, after securing full information, find that transfer is in accordance with the provisions of this Act, and shall give its consent in writing.

42 U.S.C. § 2234 (1982). Similarly, the Commission's regulations at 10 C.F.R. § 50.80 provide:

No license...or any right thereunder, shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall give its consent in writing.

Through the enactment of Section 184, Congress purposefully included one of the most comprehensive prohibitions ever enacted against any form of transfer of control of a license issued by the government of the United States:

By section 184, Congress established a strong public policy prohibiting the 'transfer of control of any license' by every conceivable means, without the prior written and informed consent of the Nuclear Regulatory Commission. This broad and sweeping statutory language was clearly intended to proscribe the alienation in any manner or form of any license or right to utilize or produce special nuclear material, without the specified Commission action. The integrity of the regulatory process in this regard can only be maintained by the most scrupulous adherence to such statutory requirements, in reality as well as in form.

Safety Light Corp. (Bloomsburg Site), LBP-90-7, 31 N.R.C. 116, 129

(1990) (emphasis added). Such a comprehensive prohibition against the transfer of control demands a conservative and strict interpretation of the concept of control, particularly given Congress' recognition of public concern over nuclear power and the public's right to intervene and challenge any legal entity seeking the right to operate or control (either directly or indirectly) a nuclear facility. This reasoning was applied in Safety Light Corp., which explains:

The whole history of the commercial utilization of nuclear energy and materials in fraught with deep public concern over the possible effects of any exposure to radioactivity. The entire subject has produced intensely emotional reactions by a large segment of the population. Consequently, Congress has been very sensitive to the necessity of rigorous controls and close regulation of the entire nuclear industry. As a result, the regulatory framework it has established and charged the Nuclear Regulatory Commission with implementing is probably the tightest and most pervasive of any commercial or industrial activity in this country.

Against this background it is apparent that any person or corporation that chooses to engage in licensed nuclear byproduct material activities, is not completely free to conduct itself in a business-as-usual manner. There are substantial constraints upon unfettered business actions and forms resulting from a high degree of regulatory oversight, direct or consequential. Not surprisingly, such limitation apply to issues involving the direct or indirect transfer of licenses [or] significant changes in corporate and other licensees...

Safety Light Corp., (Bloomsburg Site), LBP-90-7, 31 N.R.C. 116, 122 (1990).

Although more abstract than hardware mechanical problems, the issue of control is perhaps the single most important safety issue at any nuclear facility. The issue of control determines who will control and have responsibility for every safety feature of the

licensee. It determines who has the ultimate responsibility to insure that a licensee fully complies with every federal law and regulation governing a nuclear power plant. Far from being a mere technicality, the control of a license determines where the "buck stops" on every regulatory and safety matter.

Material false statements regarding the issue of control implicate core Congressional and regulatory mandates. When the NRC, through the powers granted by the U.S. Congress and federal law, grants a license to a person or corporation, that grant cannot be circumvented, directly or indirectly - by wilful conduct or by abdication. The alienation of control constitutes the complete negation of the Congressionally mandated regulatory scheme. Any false statement made by a licensee related to the issue of control must be severely sanctioned.

A. What is the SONOPCO project and is it sufficiently distinctive from Georgia Power to constitute a separate entity under Section 184 of the Atomic Energy Act such that a transfer of control could occur?

Section 184 of the Atomic Energy Act prohibits the transfer of a nuclear license to any "person" without the proper authorization from the NRC. As a threshold matter, the Board must determine whether the SONOPCO project was a "person" within the meaning of Section 184.

The term "person" as used in the Commission's regulations is defined very broadly in 10 C.F.R. § 2.7 (emphasis added) as:

(1) any individual, corporation, partnership, firm, association, group, government agency other than the Commission...

Applying this definition we have little doubt that the SONOPCO

project constitutes an "association" within the meaning of 10 C.F.R. § 2.7.

The term "association" is defined in Black's Law Dictionary, Fifth Edition, in the following manner:

The act of a number of persons in uniting together for some special purpose or business. It is a term of vague meaning used to indicate a collection or organization of persons who have joined together for a certain or common object.

Black's Law Dictionary, 5th ed. (1979).

Relying on this definition, we examine whether the "SONOPCO project" qualifies as an "association."

There can be no doubt that the SONOPCO project fits into the classical definition of an association: it represents the joining together of a number of persons for the single purpose of operating all of the Southern Company's nuclear plants with the common goal of increasing operational efficiency.

The fact that the SONOPCO Project was functioning as an association is established by the record as a whole. For example, the contemporaneous utterances made by GPC's attorney, Mr. Schaudies, in January, 1989 to an administrative law judge that "there is not a nuclear organization within Georgia Power any longer" because the entire nuclear organization, with the exception of Mr. Hobby was under the "ambit of SONOPCO" and the statement of GPC's CEO and Chairman of the Board, Mr. Scherer, who testified in December of 1988 that "SONOPCO exists in reality in Birmingham, because we have brought together the corporate general office staff of Alabama and Georgia, and also of Southern Company Services, into

one central location, with the responsibility of operating the nuclear plants of the various operating companies," demonstrate the independent status of SONOPCO and SONOPCO's control over former GPC nuclear operations. Moreover, Mr. Farley, on April 4, 1990 sent a letter to all the employees stationed at SONOPCO project asking them to fill out a "Performance Pay Plan" or "PPP" survey. The survey requests employees to check their company and lists "SONOPCO project" as a company. Intervenor Exhibits 7 & 8. Thereafter, on August 6, 1990, Mr. McCoy discusses the PPP survey results, stating that "...Mr. Addison himself is looking at all of those [PPP survey results] from each of the operating companies. SONOPCO being one of those and uh, the CEO's of each of the operating companies have to answer to him personally on their performance..." Intervenor Exhibit 9.

Finally, by March, 1989 GPC and the Southern System announced to all of their employees in nuclear operations that the SONOPCO Project, would be headed by Mr. Farley, and that he had "assumed overall responsibility for providing management and technical services for the nuclear power plants in the Southern electric system." See Intervenor's Exhibit 89. The control over GPC's licensed activities were, at this time, transferred to an association referred throughout the Southern System as the SONOPCO Project.

B. What considerations govern to determine whether a transfer of control has occurred?

Within NRC jurisprudence, there is little case law interpreting section 184 of the Act. The Safety Light case appears

to be the only case considering the scope of section 184. In Safety Light, the Appeal Board noted that transfer of stock would constitute a transfer of control because the sale vested the new owner to direct all aspects of the company, including licensed activity. Id., at 365. Unlike Safety Light, in this case, no stock has been transferred. We must therefore consider the question of whether some form of de facto transfer of control has occurred. We particularly find case law interpreting the Federal Communications Act ("FCA") useful and instructive. We observe that, as noted in Safety Light, the AEA was modeled after the FCA. Indeed, the FCA prohibition against transfer of control is less stringent than that contained in the AEA and, if anything FCA case law provides the minimum legal standard on what may constitute transfer of control of a license under the AEA.¹

¹ In Safety Light, the Board observed that the heightened public health and safety concerns over nuclear power would, if anything, require stricter prohibitions against transfer of control than discussed in case law interpreting the FCA. Safety Light, 31 N.R.C at 364 ("given the manifest public health and safety implications of activities under nuclear licenses, it is reasonable to assume that Congress would have been even more interested in clothing this Commission with the authority to pass advance judgment on the acceptability of transactions such as those now in issue").

It is common practice "to construe new legislation in the light of analogous but unrelated prior legislation." Sutherland Stat. Const. §53.02 (5th Ed.). Employing the principle of analogy allows for the interpretation of statutes which are not specifically related but which "apply to similar persons, things, or relationships." Sutherland Stat. Const. §53.03 (5th Ed.). In doing so the court is able to give effect to the likely intent of the lawmakers and "establish a more uniform and harmonious system of law." Id. Uniform laws are commonly construed in light of provisions contained in other uniform laws. Sutherland Stat. Const. §53.04 (5th Ed.). Interpretations of similar but unrelated statutes may be considered relevant. Id. Statutes that deal with

We initially observe that under the FCA, de facto control is strictly prohibited.

It is well settled that 'control,' as used in the [Federal Communications] Act and pertinent Commission rules, encompasses all forms of control, actual or legal, direct or indirect, negative or affirmative, and that the passage of de facto as well as de jure control demands the prior consent of the Commission."

Stereo Broadcasters, Inc., 55 F.C.C.2d 819, 821 (1975).² Also see S.W. Texas Public Broadcasting Council, 85 F.C.C.2d 713, 715 (1981); Lorain Journal Co. v. F.C.C., 351 F.2d 824 (1965), Cert. denied, 383 U.S. 967 (1966); WWIZ, Inc., 36 F.C.C. 561, 579, 2 R.R.2d 169, 191 (1964); Astrolines Communications Comp. Lim. Partnership v. F.C.C., 857 F.2d, 1556, 1563 (D.C.Cir. 1988).³

public policy considerations should be construed in favor of the public's interest. "A narrow construction should not be permitted to undermine the public policy sought to be served." Sutherland Stat. Const. §56.01 (5th Ed.). Public policy is a manifest display of the values and norms of society and has a place in the decision making process. Id. The fact that the AEA's alienation of control provision is based on the FCA, demonstrates that Intervenor's use of well established FCA case law interpreting the control provision is sound in all respects.

² It has been noted that the "licensing provisions on the Atomic Energy Act were based on those contained in the earlier enacted Federal Communications Act." Safety Light Corp. (Bloomsburg Site), ALAB-931, 31 NRC 350, 364 (1990). Accordingly, recourse to federal case law interpreting Section 310(d) of the Federal Communications Act is appropriate.

³ Similarly, the concept of control is broadly construed by the Securities and Exchange Commission. For example, in Myzel v. Fields, 386 F.2d 718, 738 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968) control was defined to include "indirect means of discipline or influence short of actual direction." Also see Richardson v. MacArthur, 451 F.2d 35, 41 (10th Cir. 1971) ("control" requires only some indirect means of discipline or influence short of actual direction). Moreover, Shell v. Hensley, 430 F.2d 819, 826 (5th Cir. 1970), the court noted that the definition of control included de facto control of the officers and directors of the corporation.

NRC regulations published at 10 C.F.R. § 50.80 together with 10 C.F.R. §2.7, expressly prohibits the transfer of control to an association. We find that the SONOPCO project is an association and under NRC regulations, a transfer of control did occur.

C. What is a Holding Company and how does its corporate existence differ from Georgia Power?

The Board has requested on several occasions that the parties submit briefs on the issue of whether The Southern Company, as Georgia Power Company's parent company (or for that matter Southern Nuclear, a wholly owned subsidiary of The Southern Company) may exercise control over Georgia Power's operating license whether or not they are licensed operators. From the outset we note that the term "person" as used in the Commission's regulations is defined in 10 C.F.R. § 2.7 includes corporations. Georgia Power and The Southern Company represent separate corporate entities. Accordingly, under section 184 of the Act and 10 C.F.R. § 50.80, a transfer of control between them is prohibited until such time as written consent is received from the Commission.

As a threshold matter, during all of the prehearing proceedings, the 2.206 proceedings and at the hearing itself, Georgia Power never articulated or asserted that, as a holding company, The Southern Company has the legal authority to exercise control over an operating license issued by the Commission to one of its subsidiaries. To the contrary, Georgia Power strongly denied that the Southern Company, through Mr. Addison or Mr. Farley, has ever exercised control of Georgia Power's nuclear operations.

The plant Vogtle license in question separately identifies the owners of plant Vogtle from the licensed operator of the plant. While numerous owners are listed, only one licensed operator, Georgia Power, has ever been identified as the licensed operator of the plant. A licensed operator need not have any ownership interest in a nuclear plant. In fact, the present license amendment specifically requests that Southern Nuclear, which will not have any ownership interest in plant Vogtle, become the sole licensed operator while Georgia Power is to retain its ownership interest.

Where a change in control over an operating license can impact on public health and safety, mere change in ownership, without more, does not. Drake v. Detroit Edison Co., 453 F. Supp. 1123, 1131 (W.D. Mich. 1978). In Drake, the Plaintiffs charged that the sale of 20% of a nuclear power plant being constructed by the Detroit Edison Company, to two electrical cooperatives violated various sections of the Atomic Energy Act. Drake v. Detroit Edison Co., 443 F.Supp. at 835 ("Plaintiffs contend that the sale amounts to an acquisition of a nuclear facility by the co-ops without a license amendment. . .prior to NRC approval"). The court found that the plaintiffs did not have standing because the transfer of ownership did not amount to a transfer of control over the license and, as such, the plaintiffs did not have any interest upon which standing could be granted. Id. at 1128-29. The court stated that:

Any interest plaintiffs possess with respect to the public health and safety will be injured by the

construction and operation of the nuclear facility, not by the transfer of an ownership interest therein.

Id. at 1131 (emphasis added).⁴

The purpose of the license requirement is to "provide adequate examination by the NRC of such factors as safety features. . . competent supervision and operation of nuclear facilities." Drake, 443 F.Supp. at 837.

We find that an ownership interest does not imply any right to control or interfere with the licensed operator's management and control over plant operations.⁵ We next examine whether The Southern Company's interest is anything more than an ownership interest.

Under law, a corporation that is solely owned or controlled by another corporation does not, by virtue of such stock ownership alone, lose its distinct and separate legal identity. See, e.g., 18 Am. Jur. 2d §55. Holding companies and parent companies alike are presumed to have a separate corporate existence and, as such, are to be treated as a separate entity. Miller v. Robertson, 266 U.S.

⁴ With respect to Drake, NRC staff issued a determination as to whether the sale by Detroit Edison violated NRC regulations. See letter of the Director of Nuclear Reactor Regulation to Dr. Robert G. Asperger dated March 3, 1978. NRC staff stated in its letter that Section 184 of the AEA is "designed to ensure that a person cannot, without application to and permission from the Commission, obtain a license merely by acquiring control of a licensee. p. 2, fn. (citing decision of Director of Inspection and Enforcement, dated May 9, 1977, denying Request for Emergency action by Babcock and Wilcox Co. Pursuant to 10 C.F.R. 2.206 in Docket Nos. [omitted]).

⁵ If ownership alone was sufficient grounds to become involved with the operation of Plant Vogtle, than Oglethorpe, who has a 30% ownership interest, should have had equal control over Plant Vogtle's operation as did The Southern Company.

243, 255, 69 L Ed 265, 45 S Ct 73 (1924).

At the time the licenses for plant Vogtle were issued, Georgia Power -- a separate and distinct corporate entity -- applied for and received licenses to operate the facility. There is nothing in the record to indicate that the NRC was ever advised that Georgia Power was anything less than a separate legal entity. In fact GPC maintained in all its previous filings with the NRC and throughout the oral testimony of its then-Chief Executive Officer, that GPC (not the Southern Company) maintained full control and responsibility for plant Vogtle at all times.⁶

⁶ Most troubling in this respect was GPC's statement in their brief before this Board stating that holding companies, such as The Southern Company, may have "effective corporate control" over licensed activities. GPC Brief at 73. Not only does this proposition run counter to the numerous filings GPC made with the Commission regarding control, it runs counter to the testimony of all of GPC's witnesses at the hearing, who attempted to assert that "effective corporate control" remained within GPC. For example, CEO Dahlberg stated in his prefiled testimony that Mr. Farley did not have authority to control licensed activities at Plant Vogtle and furthermore, that:

From the beginning of the phased formation of Southern Nuclear we were very aware of our obligations under the NRC operating licenses. Pursuant to those obligations, we were careful to ensure that no entity or individual other than Georgia Power and its officers and employees were in control of licensed activities at its nuclear plants.

Dahlberg at pp. 6-7.

In any event, the legal authority relied upon by GPC, SECY-94-280, is not controlling on this matter. This SECY regulation concerned the control of assets, not the control of licensed activities. The Commission was concerned with the licensees creating a "corporate veil to avoid decommissioning costs" and the language referenced by GPC was dicta and unrelated to the issues involved in this case.

However, the SECY does reference requests by licensees to

At the time the license for plant Vogtle was issued, Georgia Power maintained a separate corporate existence from The Southern Company. At no time has Georgia Power indicated that its corporate existence was merged with The Southern Company. We find that the operating license was issued solely to Georgia Power and that at the time of its issuance, NRC was under the impression that The Southern Company did not exercise control over Georgia Power such that their separate corporate identities could be disregarded. We therefore find that The Southern Company and Georgia Power are separate legal entities.

Finding that The Southern Company and Georgia Power constitute separate "persons," the question of whether an improper transfer of control has occurred turns on whether the separate corporate identities of Georgia Power and Southern Company disintegrated sufficiently so that their corporate identities merged. Case law demonstrates that stock ownership coupled with other circumstances can result in the legal disintegration of the separate corporate existence between parent and subsidiary. Milgo Electronic Corp. v. United Business Communication, Inc., 623 F.2d 645 (10 Cir. 1980), cert.den. 449 U.S. 1066, 66 L.Ed. 2d 610, 101 S.Ct. 794.

In this respect, when a subsidiary is so dominated and

"transfer indirect control of the license either through mergers between utilities or by utilities establishing new parent-subsubsidiary relationships." SECY-94-280, p.5. In each of the cases cited to in the SECY, the utilities in question informed the NRC Staff of their intent to "transfer indirect control," obtained explicit permission for the transfer and were subjected to an "added license condition" or "commitment" related to the transfer.

controlled by its parent corporation as to render it merely an instrument or agent of its parent, the separateness of a corporate identity is no longer viable and parent and subsidiary become one in the eyes of the law. Matter of Sims, 994 F.2d 210, 217-18 (5th Cir. 1993), cert. den. ___ US ___, 126 L.Ed. 2d 669, 114 S.Ct. 702 (1993) See Also Berger v. Columbia Broadcasting System, Inc., 453 F.2d 991, 994 (5th Cir.), cert. den. 409 U.S. 848, 34 L. Ed. 2d 89, 93 S.Ct. 54 (1972); Fisser v. International Bank, 282 F.2d 231, 234 (1960) (subsidiary nothing more than alter ego of parent company); Pasco International (London), Ltd. v. Stenograph Corp., 637 F.2d 496 (1980).

Additionally, the fact that the Southern Company vests in its Chief Executive Officer the proxy to vote the common stock of its subsidiaries does not give the Southern Company or its CEO the right to control the day-to-day management of Georgia Power:

It is fundamental, as explained in Berger v. Columbia Broadcasting System, Inc., 453 F.2d 991 (5th Cir.), cert. denied, 409 U.S. 848, 93 S.Ct. 54, 34 L.Ed.2d 89 (1972), that 'one of the principle purposes for which the law has created the corporation' is to give it an existence separate and distinct from its stockholders, thus giving them an opportunity to limit their personal liability. Id., at 994. The various theories for piercing the corporate veil have been created for the purpose of disregarding that separate legal identity in situations where equity demands it, such as when the owners have misused the corporate form...See Krivi Industrial Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1102 (5th Cir. 1973).

Matter of Sims, 994 F.2d 210, 217-18 (5th Cir. 1993).

Whether the separate and distinct corporate existence of Georgia Power and The Southern Company merged is extremely

significant in this case because the license to operate plant Vogtle is only in the name of the subsidiary, Georgia Power. The Southern Company may not avoid the burden of obtaining a license to operate a nuclear facility simply by exercising control over a subsidiary after the license is issued. As the Supreme Court of the United States has recognized, a holding company, in order to maintain its separate existence as a holding company, cannot assume control over a subsidiary. Consolidated Rock Products Co v. Du Bois, 312 U.S. 510, 522, 85 L.Ed. 982, 61 S.Ct. 675 (1940).

Under black letter holding company case law, the decision to obtain the original license for plant Vogtle under the ownership and control of Georgia Power, and not under the control of The Southern Company, strictly prohibits The Southern Company from using its ownership interest to control licensed activity. As a matter of law, The Southern Company is a completely separate entity. Not only could The Southern Company not control licensed activity at plant Vogtle, any role it may have had in the governance or management of plant Vogtle should have been fully disclosed to the NRC. In fact, The Southern Company's role in management/governance at plant Vogtle was not properly disclosed to the NRC.

Allowing a holding company to exercise control over a nuclear power plant licensed in the name of a subsidiary would completely negate the law and regulations governing the granting of licenses for nuclear materials. Under this reasoning, every holding company would avoid the burden of applying for and obtaining the right to

control and influence operational activity of a licensed operator simply by obtaining the license in the name of one of its subsidiaries. The law simply does not allow for this method for the transfer of control. See Sec. 184 of the Atomic Energy Act, 42 U.S.C. §2234.

The record before us is clear that the Commission has never given its consent in writing to any entity other than Georgia Power to operate plant Vogtle.⁷ Under these circumstances, any realignment or restructuring within the Southern System which results in strengthening The Southern Company hold over Georgia Power's nuclear operations, may constitute either a direct or

⁷ We are cognizant that The Southern Company's responsibility for providing capital to Georgia Power was recognized by the NRC. Georgia Power Co., (Alvin W. Vogtle Nuclear Plant, Units 1 and 2). LBP-77-2, 5 NRC 261, 268-69 (1977). Financial arrangements are contractual in nature and there is no indication that The Southern Company's financial responsibilities included a contractual agreement for Southern to control the day to day management of Georgia Power. Rather, the involvement of Southern Company was no greater than the involvement of the other co-owners of Plant Vogtle who had even more direct financial responsibilities than The Southern Company. The regulations address the anticipated role of a parent company. See 10 C.F.R. Pt. 30, App. A. These provisions make a clear distinction between the licensee and the parent company. It is the licensee who has to provide notice to the NRC if the parent company guarantee cancels or can no longer provide financial assurance and who must provide for alternative financial assurance in the name of the licensee. Id. at III. B. This distinction in the regulations demonstrates that the licensee and it's parent company are considered to be distinct entities with the parent company functioning as a financial guarantor. Another provision making this distinction is 10 C.F.R. Part 50, which requires information as to the parent company's financial capability to be given if it provides any of the funds relied upon by the applicant, who is a newly formed entity. App. C, Sec. II.A.2. This distinction can also be found in 10 C.F.R. Part 50, App. L, Sec. I.1. This section requires the applicant to undergo an antitrust review, which includes a review of "each corporate parent, subsidiary and affiliate".

indirect transfer of control. Indeed, Section 184 of the Act expressly prohibits any conceivable transfer of control without obtaining informed written consent of the Commission. With respect to Georgia Power's nuclear operations, a cognizable transfer of control must occur when it can be determined that the corporate identities between parent and subsidiary are altered such that the parent can influence day-to-day management direction of the subsidiary.

A determination of whether the transfer of control of a license does not hinge on business necessity. Whether there is good cause for exercising control and whether a valid business reason justifies the action of the parent is not a valid consideration:

The strong public policy enunciated by Congress in barring unapproved transfers of control of licensees is controlling, and hence there can be no avoidance of such mandatory requirements by NRC acquiescence, delays, laches or equitable estoppel, notification of SEC or its own shareholders, alleged business reasons as justification, spinoffs, or the provisions of 10 C.F.R. Part 50.

Safety Light Corp. (Bloomsburg Site), LBP-90-7, 31 N.R.C. 116, 129 (1990).

Regulations dealing with health and safety should be strictly construed. If Congress had intended that an owner of a nuclear power plant, who is not the licensee, could control the operating license, it would have provided for such. In fact Congress did the opposite. Congress placed strict limitations on who would be considered the licensed operator of a nuclear facility. The Southern Company had no authority to exercise control over the

operating license of plant Vogtle.

D. Indicia of Control

Federal Communications Commission case law identifies the areas of inquiry in cases of de facto transfer of control. Southwest Texas Public Broadcasting Council, 85 F.C.C.2d 713, 716 (1981); Letter to Russo and Cohn, 5 F.C.C. Rcd. No. 26, at p. 7586 (1990). In Shell v. Hensley, 430 F.2d 819, 826 (5th Cir. 1970), the court looked at de facto control and determined that control vests in any person who has the de facto power to control the direction, management and policies of the corporation.

Based on the various cases, we have determined that a number of factors are useful to determine whether a transfer of control has occurred. Because each case is so different, there is no set formula we can apply.

There are two independent areas that must be considered to determine whether a transfer of control occurred: First, whether Georgia Power's CEO, Mr. Dahlberg, abdicated control over Georgia Power's nuclear operations to The Southern Company, specifically Mr. Farley or Mr. Addison. Second, whether the SONOPCO project functioned as a separate and distinct entity within the Southern system.

Based on the totality of the factors identified below, we find that a transfer of control did take place at least by the point in time that Mr. Farley became Executive Vice President-Nuclear of The Southern Company.

E. Indicia Demonstrating Transfer of Control

1. Selection of Farley to head SONOPCO

In 1987 The Southern Company board was in the process of deciding whether to establish a nuclear operating subsidiary. At this juncture Mr. Addison met in private with Joe Farley (then President and CEO of APC). They jointly agreed that Mr. Farley would emerge as the chief executive of a Southern Company nuclear operating subsidiary. Addison Dep. at p. 38, 45, 67. GPC's CEO was not included in the discussions about who would head SONOPCO. Scherer 6/8/94 Dep. at pp. 47-48, 77.

2. Location of SONOPCO

In 1987, Addison and Farley made the decision as to where SONOPCO would be located. Addison Dep. at p. 80. Moreover, Mr. Scherer, GPC's CEO at the time, was never even asked where Southern Nuclear should be located (Scherer 6/8/94 Dep. at p. 48, and Mr. McDonald, who was heading up GPC's nuclear operations, testified that he thought Mr. Addison did it. Tr. 1259 (McDonald). If McDonald and Scherer were not involved in the decision to move GPC's nuclear operations, the decision apparently rested with Farley and Addison. The transfer of a nuclear organization is an important operational decision. The fact that it was made by Farley and Addison demonstrates that GPC was not in control of its nuclear plants.

3. The functioning of a SONOPCO Project Board of Directors

There is little doubt that a SONOPCO project board of directors commenced functioning when Georgia Power's nuclear operations were moved to Birmingham. Specific reference to a

SONOPCO project board meeting is contained in the February 14, 1989 entry in Mr. Addison's appointment schedule. Intervenor Exhibit 31. Reference to additional SONOPCO Project board of director meetings are also contained elsewhere in Mr. Addison's calendar and in the calendar produced by Mr. Dahlberg. Both Mr. Addison's and Mr. Dahlberg's calendar entry for March 6, 1989 reflect that the SONOPCO project board met at 1:00 p.m. Intervenor Exhibits 31 & 32. Moreover, Mr. Dahlberg stated under oath that: "There was a board of directors for the SONOPCO project," Tr. 1173 (Dahlberg), and later, during the same testimony, mentioned the existence of the SONOPCO project board Id. At the hearing Mr. Dahlberg testified that this board met and discussed issues related to the nuclear operations, including the preparation of the budget; cost of replacing condenser tubes at plant Hatch and outage schedules. Tr. 1181 (Dahlberg), and that decisions were reached during these board meetings. Tr. 1180 (Dahlberg).

We conclude that the equivalent of a functioning SONOPCO project board of directors did exist.

4. Farley heads weekly staff SONOPCO project staff meetings

Mr. Farley's management over GPC's and APC's nuclear operations included his initiating weekly SONOPCO project staff meetings. Long Dep. at pp. 48, 55 ("Mr. Farley would initiate it, and the first thing you would do is call on the presiding VP who had projects reporting to him and ask for plant status"). These weekly staff meetings represent a key management oversight mechanism covering all emerging and existing developments

concerning the management, operation, and administration of GPC's and APC's nuclear plants were discussed. Tr. 1848-49(Farley). Moreover, Mr. Farley testified that he was kept informed by SONOPCO Project staff concerning the performance of GPC's and APC's nuclear units and that these reports provided him with the information he needed to brief The Southern Company Board. Tr. 1849-50 (Farley); also see, Shipman Notebook (Exhibit 29).

5. Farley visits GPC's nuclear plants to address changes in personnel evaluation and compensation

As the chief executive over nuclear operations, Mr. Farley went to the plant Vogtle and plant Hatch sites to discuss with plant management changes in personnel evaluation and pay that were going to be implemented. Smith Dep. at pp. 50-51.

6. Farley's involvement with the Staffing of SONOPCO

a) Ken McCoy

In early 1988, Mr. Farley and Mr. McDonald determined that a Vogtle project Vice President needed to be installed. Mr. McCoy was hired because Mr. Farley, Mr. McDonald and other project employees felt that the position should be created. Farley at 25-26.

b) Louis Long

Key SONOPCO staff responsible for nuclear operations includes the Vice Presidents of Administrative Services and Technical Services. The selection of these positions occurred without the knowledge of GPC's then CEO, Mr. Scherer. Scherer 6/18/94 Dep. at p. 81. Moreover, Mr. Farley personally met with Mr. Long and

personally told him that he would be named as a SONOPCO Vice President. Mr. Farley's meeting with Mr. Long is significant because 1) Mr. Long did not report to Mr. Farley (Farley was at that point CEO of Alabama Power Company, and Long was a manager with Southern Company Services); 2) Mr. Long was specifically instructed to meet with Mr. Farley; and 3) this represents the first time Mr. Long ever met with Mr. Farley. Long Dep. at p. 20.

c) Charles McCrary

In 1988, Charles McCrary was selected as Vice President of Southern Company Services to serve as Vice President of Administrative Services for SONOPCO project. Farley at 22-25. GPC's CEO had no involvement. In this respect, Mr. Scherer testified that all he knew was that Mr. McCrary "was an assistant to Mr. Farley at Alabama Power Company and was later named a Vice President, I don't know in what role." Scherer 6/8/94 Dep. at 80. Scherer had no role selecting McCrary as a SONOPCO project Vice President and did not know if he was even involved with the SONOPCO project. Scherer 6/8/94 Dep. at pp. 80-81.

7. Farley controls nuclear operating negotiations with Oglethorpe

In order for GPC to transfer its nuclear operations to SONOPCO, Oglethorpe and GPC had to implement an agreement on how they and the other co-owners of GPC's nuclear plants would reorganize their relationships. The key negotiations concerning GPC and Oglethorpe were conducted between Mr. Farley and Mr. Stacey. Farley at 33.

8. Oglethorpe management observes Farley's involvement with

GPC's nuclear operations

The record supports the fact that during the critical SONOPCO "Project" takeover stage, Oglethorpe management, noticed a change in the management structure. Concerns were raised directly to high level GPC management, including Mr. Dahlberg, by the chief executive of Oglethorpe. In this respect, Oglethorpe executive Dan Smith noted in writing that GPC's public statements as to who was running their nuclear facilities was not accurate. Intervenor's Exhibit 17.

9. SONOPCO project managers identify Farley as head of GPC's nuclear operations

Starting in 1988, Mr. Shipman was the general manager of Nuclear Support, reporting to Mr. McCoy. On August 5, 1994, counsel to Intervenor deposed William Shipman. At that time Mr. Shipman testified that Mr. McDonald reported to Mr. Farley. Mr. Shipman testified then that he had been in a position to observe the reporting relationship between Mr. Farley and Mr. McDonald for a number of years. The fact that plant Vogtle's general manager of Nuclear Support testified that Mr. McDonald reported to Mr. Farley is dispositive evidence of the reporting relationship in place at the SONOPCO project.

Thus, not only was the reporting relationship obvious to Oglethorpe and NOCA, the SONOPCO project's management confirmed the actual reporting structure.

10. GPC's manager of NOCA identifies Farley as heading GPC's nuclear operations

GPC's former manager of NOCA, Marvin Hobby, identified Mr.

Farley as head of GPC's nuclear operations. This concern was shared, in part, by Mr. Hobby's supervisor, Senior Vice President George Head, who cosigned a confidential letter to GPC regarding this issue. Stip. Ex. 33.

11. Farley has input to McDonald's annual reviews

During the course of the Hobby proceedings, Mr. Farley testified that Mr. McDonald's evaluation was prepared by Alabama Power Company's President, Mr. Harris, who then discussed it with Mr. Dahlberg. Before the evaluation was issued, it was given to Mr. Farley for comment. Tr. 1861-62 (Farley).

12. Dahlberg excludes nuclear personnel from company-wide review

At the end of 1989, GPC's President and CEO, A.W. Dahlberg, undertook a company-wide review of management to "assure [himself] of the qualifications of the management of Georgia." Yet, Mr. Dahlberg excluded the entire nuclear management from review. See Dahlberg at 16; Tr. 1185-86 (Dahlberg). The exclusion of GPC's nuclear operations from Mr. Dahlberg's review is a strong indication that GPC's CEO was not involved or in charge of the plant Vogtle and plant Hatch nuclear operations.

13. Dahlberg's inability to resolve GPC nuclear-related personnel matters without involving Farley

When nuclear operations were transferred to the SONOPCO project's offices in Birmingham, Alabama, Mr. Dahlberg decided to establish NOCA to oversee the performance of GPC's nuclear plants. The manager Mr. Dahlberg selected to head NOCA was Marvin Hobby, who reported to GPC Senior Vice President George Head. Hobby

advised Mr. Head and Mr. Baker that the SONOPCO project was under instruction from McDonald not to cooperate with NOCA. SONOPCO project's interference with NOCA caused Mr. Head to meet with Dahlberg on more than one occasion in an effort to resolve the matter. DOL Tr. 669 (Head). On May 5, 1990 Dahlberg and Grady Baker met with Mr. Farley. Mr. Dahlberg advised Mr. Farley that he wanted to increase Hobby's staff. Tr. 1819-20 (Farley). Mr. Farley responded that that would not be necessary because it would be duplicative to have one company reviewing another company on an ongoing basis. Tr. 1756 (Farley). A few days after the meeting (May 8, 1990) Mr. Hobby received a call from William Evans, GPC's corporate concerns coordinator. Mr. Evans advised him that "Farley was going to make the call" concerning matters related to the staffing of NOCA. See Hobby at 35. Also see Evans DOL Dep. at pp. 17-18 ("[Farley] would decide what to do with the transfer of those positions").

14. Farley blessed GPC's nuclear operating budget

GPC's nuclear operating budgets were prepared by the SONOPCO project and reviewed by Farley. Thereafter they were included in a presentation attended by the SONOPCO project board. Mr. Farley testified that in May of 1990, before SONOPCO was legally incorporated, he thought the budgets "were the best that could be done...I blessed them, yes, I did." Tr. 1782-83 (Farley). This "blessing" occurred without Mr. Farley having any legal authority over GPC's nuclear operations.

15. Farley and Addison approve GPC's portion of the SONOPCO budget

Not only did Farley bless GPC's nuclear budget but Mr. Addison also participated in its approval. In December of 1989, Hobby called GPC's budgeting office and spoke with Jeff Wallace, manager of Resource Management, and asked him the status of the nuclear budget. Mr. Wallace told him the budget had been approved at a meeting of the Southern Company management council and further that Dahlberg had disagreed with the proposed budget and Addison had said, "That's it. That's the budget." Hobby at 47-48.

16. Farley directs plant outage philosophy

On August 6, 1990, the Vogtle project Vice President visited the plant site. At that time Mr. McCoy made the following statement:

Let me make a comment again and be sure that everybody understands this because -- there's been some discussions in some of the other plants of SONOPCO that were not adhering to this and so we had some discussion at the highest levels including Mr. Farley, McDonald, Hairston and the three VP's about our scheduling philosophy for outages...The conclusion of that discussion was that optimum means the basically shortest schedule that you are able to do something in -- everything goes right. That you do not put any contingency or extra time in there and after lots of discussion everybody agreed that that was the right way to do the scheduling.

(Exhibit 5).

Mr. Farley's involvement in establishing the plant Vogtle and plant Hatch outage philosophy evidences his control over GPC's nuclear operations.

17. Farley rather than GPC briefs The Southern Company Board on the performance of GPC's nuclear plants

After deciding that Farley would head up all of GPC's and APC's nuclear operations, he provided briefings to The Southern

Company board about the status of GPC's nuclear operations. These briefings are rather conducted by Farley. Tr. 1851-52 (Farley). Significantly, Mr. Farley testified that he was kept informed by SONOPCO Project staff concerning the performance of GPC's and APC's nuclear units and that these reports provided him with the information he needed to brief The Southern Company Board. Tr. 1849-50 (Farley).

18. Farley is involved in GPC's rate case before the Georgia Public Service Commission with respect to nuclear issues

Mr. Farley's control over GPC's nuclear operations extended to matters before the Georgia Public Service Commission ("PSC"). Moreover, Mr. Farley would review all the requests and "ensure they were handled in an expeditious" manner. Tr. 1803 (Farley). And Mr. Farley was copied on rate case documentation while Mr. Dahlberg was not. See Farley Rate Case Memos (Exhibit 32). Finally, Mr. McDonald reached a point where he flatly refused to follow Mr. Dahlberg's instructions concerning a nuclear performance indicator the PSC was considering imposing on GPC's nuclear plants. Johnson DOL Dep. at pp. 26, 29. The matter was finally resolved by Farley. Johnson DOL Dep. at p. 39.

19. Farley identified as top executive to be contacted by on-call project manager of GPC's nuclear plants

Periodically, the SONOPCO project prepared documentation concerning "on-call" management of GPC's nuclear plants. Basically the Vogtle duty manager was responsible for keeping the "on-call" project managers informed on a 24-hour-a-day basis concerning important events occurring at the plant site. Mosbaugh at 3.

Documentation and procedures were implemented to ensure that proper management was contacted in the event of an emergency. GPC's former acting assistant general manager plant support, Mr. Mosbaugh, would periodically serve as the plant Vogtle duty manager. In that capacity, Mr. Mosbaugh was provided information concerning the procedures to be used. In this regard, typed lists were provided to Mr. Mosbaugh. One such list was entitled "Telephone List - On-Call Project Manager." Mosbaugh at 5. Mr. Mosbaugh was made aware that persons listed under Georgia Power Company Corporate Management were to be contacted in descending order from the top of the list. Mosbaugh at 5. The individual at the top of the list to be contacted was Joseph M. Farley. See Mosbaugh at 5.

20. GPC excludes listing nuclear operations managers from its 10-K form

The SEC requires GPC to file an annual Form 10-K report. Part III, Item 10(b)(2) of the 10-K report requires GPC to identify all its executive officers. GPC failed to identify the existence of any nuclear operations officers (i.e., McDonald, McCoy, Hairston, etc.). GPC's failure to identify all its nuclear officers demonstrates that it is neither in control nor in touch with its nuclear operations.⁸

⁸ Georgia Power failed to explain the reason for omitting its entire nuclear organization from its 10-K filing. During the summary judgment state of this proceeding, Georgia Power argued that Intervenor was unfairly using the omission from the 10-K filing because no discovery was done and a perfectly logical reason could explain the omission. Yet, when provided an opportunity to explain it, Georgia Power failed to do so.

21. The publication of Synopsis

The SONOPCO project publishing its own bi-weekly news letter out of its Birmingham offices. Significantly, the March 30, 1989 edition of Synopsis described Mr. Farley as having "overall responsibility" of GPC's and PAC's nuclear operations. Intervenor Exhibit 89 at p. 1. Significantly, the editor of Synopsis, testified that this article approved in its final form by Mr. Farley, Henry Dep. p. 10, and Mr. Dahlberg testified that he expect GPC employees who read the article to assume that Mr. Farley had overall responsibility for the operation of GPC's nuclear operation, nonetheless a correction or clarification was never issued by GPC or Synopsis. Tr. 1226 (Dahlberg).

22. Admissions made by GPC agents

Statements made by a GPC attorney and GPC's CEO and Chairman of the Board constitute admissions that a transfer of control occurred. Specifically, GPC's counsel stated "there is not a nuclear organization within Georgia Power any longer."

23. McDonald's failure to participate at GPC Management Counsel meetings

Georgia Power's Management Council was not operating as Georgia Power alleged in its response to the 2.206 petition. The record contains all of the Georgia Power Management Council minutes between May, 1988 and December 1990. Intervenor Exhibit 135. According to the Management Council minutes, between August, 7, 1989 and December 19, 1990 Mr. McDonald failed to attend a single Management Council meeting. The minutes further demonstrate that, between May 1988 and December 1990 no one else belonging to Mr.

McDonald's organization, including Mr. Hairston and Mr. McCoy, participated at any Management Council meetings. If nuclear operations remained under the control of GPC, then Mr. McDonald should have continued to attend Management Council meetings and the Management Council should have exercised the type of oversight reflected in GPC's 2.206 Response.

**24. Lack of Knowledge and Involvement of Georgia Power's CEO
(Abdication of responsibility)**

Since 1990 GPC has been subjected to numerous NRC investigations and reviews about the alleged wilful misconduct of Bockhold and McCoy. Yet, Mr. Dahlberg was unaware that allegations of "wilful misconduct" had been filed against Vice President McCoy and plant Manager Bockhold. Tr. 1152-53 (Dahlberg). For Mr. Dahlberg not to know the nature of these allegations, or that such serious allegations had been raised against two of the most important managers with responsibility over plant Vogtle is shocking. It demonstrates a complete abdication of responsibility and total absence of "hands on" management. On the other hand, Mr. Farley not only knew of the charges, he knew who filed them; that there was tape recorded evidence in the possession of NRC relating to the charges. Tr. 1831-39 (Farley).

Mr. Dahlberg's abdication of control is also evident by this near total ignorance of nuclear operations in general and the operations of plant Vogtle in particular. Tr. 1149-51 (Dahlberg).

25. The creation and destruction of NOCA

Mr. Dahlberg established NOCA to monitor the SONOPCO project. Yet, Mr. McDonald refused to cooperate with NOCA. When Mr. Head,

the Senior Vice President over NOCA attempted to meet with Mr. McDonald to get Mr. McDonald and SONOPCO project to cooperate, he was stopped by Mr. Dahlberg who indicated that he first had to speak with Mr. Farley. A May 5, 1989 meeting between Farley and Dahlberg was set up. Mr. Dahlberg was "beat about the head" during the meeting because NOCA had prepared a confidential memo explaining the cooperation problems and raising a question as to whom Mr. McDonald reported. Mr. Farley objected to NOCA and it was disbanded.

26. Georgia Power did not have unfettered access to nuclear operations personnel

Georgia Power did not have unfettered access to Georgia Power employees stationed at the SONOPCO project. The record establishes that GPC's CEO issued a letter establishing NOCA and instructing all GPC employees to cooperate with NOCA. Nonetheless, unfettered use of and access to Georgia Power employees stationed at the SONOPCO project were denied. NOCA did not have unfettered access to necessary data and was directed to limit its contact to a non-Georgia Power employee and to halt direct communication with the GPC and other employees comprising the SONOPCO project.

Second, we are persuaded that, with respect to obtaining use of SONOPCO's resources to prepare an alternative nuclear performance indicator for submission to the Georgia PSC, SONOPCO project management, including Mr. Farley, limited Georgia Power's access to the resources and data it needed to prepare a performance standard for submission to the PSC.

Third, the decision to relocate Georgia Power's nuclear

operations to Birmingham was made by Mr. Farley and Mr. Addison. That decision hampered GPC's access to and management over its nuclear operations.

27. Georgia Power lost control of SAER

The Safety Audit and Engineering Review (SAER) group is located at plant Vogtle. This group functioned as the primary Quality Assurance organization for the plant. This group's functions are both "licensed activities" and "safety related". Tr. 1665 (McCoy). The SAER group reports to the SAER manager in the corporate organization, who in turn reported to Ken McCoy. Tr. 1635 (McCoy). In January 1991, after Southern Nuclear was incorporated, the entire SAER group at plant Vogtle as well as the corporate SAER manager were converted from Georgia Power employees to Southern Nuclear employees. Tr. 1656 (McCoy). At this point Mr. McCoy was supervising the various groups at plant Vogtle and within the SONOPCO headquarters wearing both a Georgia Power hat and a Southern Nuclear hat. Tr. 1515 (McDonald).

Significantly, Mr. McCoy testified that the SAER group did not report to him in his capacity as a Georgia Power employee. Instead, Mr. McCoy testified that the SAER group reported to him under the Southern Nuclear side of his hat. Tr. 1656 (McCoy). Thus, the organization on the plant Vogtle site with the primary QA responsibility did not report through the Georgia Power chain of command. Instead, the SAER group reported through McCoy to the SONOPCO/Southern Nuclear chain of command.

Georgia Power has been staunch in its description of the

strict and absolute separation between the hemispheres of the multiple hatted individuals. Tr. 1515 (McDonald). It has stated that one side of the hat cannot direct any activity of the other side of the hat. Tr. 1526-1528 (McDonald). The individuals reported up the chain to superiors with the same hat. Tr. 1515 (McDonald). This being the case, it is obvious that the SAER group reported up the line to Mr. McCoy's Southern Nuclear hat to Mr. Hairston's Southern Nuclear hat to Mr. McDonald's Southern Nuclear hat and then to Mr. Farley who reports to Mr. Addison. Thus, Georgia Power is by-passed, and lost authority and management control over the licensed activities of the SAER group.

Not only does this loss of control over the QA functions at plant Vogtle support Intervenor's contention that Georgia Power did in fact alienate control over its nuclear operations, the fact that the QA functions at plant Vogtle were not even on paper reporting to the purported Georgia Power side of the SONOPCO project was never disclosed to the NRC. The failure to disclose the reporting chain of the SAER group constituted a material omission of Georgia Power's reporting requirements.

F. Mr. Farley's early involvement with Georgia Power's nuclear operations establishes that a transfer of control of control has occurred.

It is well settled that the premature acquisition of control of a radio station by someone outside the licensee's corporate organization can result in the transfer of control. Phoenix Broadcasting Co., 44 F.C.C. 2d at 839; Stereo Broadcasters, Inc.

At some point, apparently in March of 1989, Mr. Farley was named executive Vice President, nuclear of The Southern Company, and Executive Vice President - Nuclear of SCS. Neither The Southern Company nor SCS ever had such a position in the past. The creation of this executive position within The Southern Company demonstrates a fundamental realignment of The Southern Company's involvement with and control over GPC's nuclear operations.

The facts before this Board far exceed those found in either Phoenix Broadcasters or Stereo Broadcasters. For example, with respect to financial matters, Mr. Farley: 1) headed key negotiations with GPC's co-owners concerning financial arrangements related to SONOPCO; 2) prepared testimony to the Georgia Public Service Commission with respect to matters pertaining to GPC's rate case; 3) "blessed" GPC's nuclear budgets; and 4) reported matters pertaining to GPC's nuclear plants to the board of The Southern Company rather than GPC's CEO who was a member of The Southern Company Board. Second, with respect to hiring and firing determinations: 1) Mr. Farley's deposition testimony establishes that he advised Mr. Dahlberg to terminate Mr. Mosbaugh; 2) Mr. Farley "made the call" whether NOCA could be staffed; 3) Mr. Farley traveled to GPC's nuclear plants and advised the employees at the site about changes in compensation and evaluation of performance; 4) Mr. Farley was involved in selecting Mr. McDonald to head GPC's nuclear

operations; 5) he was involved in the selection of most if not all of the SONOPCO executives, including Mr. Long, Mr. McCrary and Mr. McCoy; and 6) Mr. Farley was involved in preparing the performance evaluation of Mr. McDonald. Third, with respect to matters effecting operations, he was: 1) involved with the decision to relocate GPC's nuclear operations from Atlanta to Birmingham; and 2) he convened weekly meetings of the SONOPCO project's top management to discuss operational matters.

The case before this Board has aspects that run parallel to FCC case law governing premature acquisition of control of a station license. In this respect, FCC prohibits prospective purchasers of broadcasting stations from becoming involved in the station's operations in such a way that they would assume control of the station before the Commission has approved their application. Phoenix Broadcasting Co., 44 F.C.C. 2d at 839.

In Phoenix Broadcasting, the F.C.C. held that a prospective buyer could not be intimately involved in the day-to-day activities of station KPHX because it would constitute a premature assumption of control over the station's operating license. 44 F.C.C. 2d at 840. In this case the owner of the station and the prospective purchaser requested FCC permission to implement an interim plan, while awaiting approval for the purchase, where the purchaser would furnish funds; be employed as a consultant to design and assist in the implementation of the change in programming format, sales and marketing; and would be involved with making recommendations in the hiring and firing of

station personnel. Most importantly, in an attempt to guard against the transfer of control, the agreement provided that all recommendations made by the purchaser, including those related to the hiring and firing of personnel, were to be "submitted to the owner in writing and his written approval must be obtained before any action is taken." 44 F.C.C. at 839.⁹

The Commission held that despite these assurances, the purchaser would be intimately involved in the programming and commercial operation of the station and the hiring and firing of personnel. The Commission concluded that "the realities of such a situation...would appear to constitute a premature assumption of control contrary to Section 310(b) of the Act." 44 F.C.C. at 840.¹⁰

The Commission arrived at a similar decision in Stereo Broadcasters, Inc. 87 F.C.C. 87.¹¹ This case involved a

⁹ Rather than prepare a document delineating Farley's involvement, GPC sought to include language in documents it intended to forward to Oglethorpe so as to "avoid accusation of license transfer." See Edwards Memo (Exhibit 20).

¹⁰ Transfer of control cannot depend on labels given to the transaction by the parties; rather, it must turn on factual circumstances surrounding the transaction. Stereo Broadcasters, Inc., 87 F.C.C.2d 87, 93 (1981); Town and Country radio, Inc., 28 F.C.C. 129 (1960)

¹¹ In Stereo Broadcasters, Inc., 55 F.C.C. 819 (1975); modified on other grounds, 59 F.C.C.2d 1002 (1976), the Commission considered whether an employment agreement between the licensee and a general manager which provided that the licensee retain "absolute control of the station" and required the general manager to obtain prior authorization before entering into contracts or before making major purchases or instituting program changes. The Commission looked beyond the wording of the agreement to the actual state of affairs at the station, which included the licensee's absence for

probational agreement between the owner of a station and a prospective purchaser under which the purchaser had the right to operate and control the station as well as obtain profits from it. 87 F.C.C. 88 As in Phoenix Broadcasters, the agreement stated that the purchaser was to obtain approval from the owner before making major decisions affecting the operations of the station. The evidence presented established that the prospective purchaser had substantial control over the managing of the station's finances, personnel, programming and other miscellaneous affairs with a significant decrease of control from the owner. Therefore the Commission held that the agreement, and the purchaser's actions in implementing it, constituted an illegal transfer of control. 87 F.C.C. at 95-97.

We find that Mr. Farley's premature involvement with Georgia Power's nuclear operations is singularly sufficient to find that a transfer of control has occurred.

V. STATEMENT OF LEGAL ISSUES
(OMISSIONS AND MISREPRESENTATIONS
RELEVANT TO CHARACTER AND COMPETENCE)

A. Statement of Law

We now consider the relevance and applicability of the omissions and misrepresentations Intervenor alleges were made by Georgia Power regarding the control issue.

1. Is the character and competence of the proposed licensee, Souther Nuclear, relevant to this proceeding?

a significant period of time and his practice of referring all problems to the general manager, to determine that control had been transferred. Id.

On February 5, 1993, the NRC Staff answered the following question for the Licensing Board:

To what extent, if any, is the character or competence of individuals already jointly employed by Georgia Power and Southern Nuclear in the management of Vogtle relevant to the approval of the requested license amendment?

NRC Staff Response to Licensing Board Questions ("Staff Response") at p. 4 (emphasis supplied). The Staff's response to the Board's question is well reasoned and we adopt it. Staff's Response indicates that it is appropriate for this Board to consider the character of an applicant in a license transfer proceeding. Staff's Response at 5. The first case upon which Staff relies is Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-9, 21 NRC 1118, 1136-37 (1985), from which the Staff quoted the following passage:

A generally applicable standard for integrity is whether there is reasonable assurance that the Licensee has sufficient character to operate the plant in a manner consistent with public health and safety and applicable NRC requirements. The commission in making this determination may consider evidence regarding licensee behavior having a rational connection to the safe operation of a nuclear power plant. This does not mean, however, that every act of licensee is relevant. Actions must have some reasonable relationship to licensee's character, i.e., its candor, truthfulness, willingness to abide by regulatory requirements, and acceptance of responsibility to protect public health and safety. In addition, acts bearing on character generally should not be considered in isolation. The pattern of licensee's relevant behavior, including corrective actions, should be considered. [Footnote omitted].

Relying on Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-80-32, 12 NRC 281, 291 (1980), Staff further states:

In large part, decisions about licenses are predictive in nature, and the Commission cannot ignore abdication of knowledge by a license applicant when it is called upon to decide if a license for a nuclear facility should be granted.¹²

We believe that the above issues relating to technical competence and to character permeate the pleadings filed by Citizens. They do deserve a full adjudicatory hearing, as they will no doubt get in the operating license proceeding, and they do deserve expeditious treatment because they could prove disqualifying.¹³

(emphasis added).

Finally, Staff concludes with the following:

The issuance of an operating license or amendment requires an affirmative finding of compliance with the Atomic Energy Act, the Commission's regulations and reasonable assurance of health and safety of the public. 10 C.F.R. §50.57. If personnel who will be involved in the operation of the facility lack character to operate the facility, then the requested operating license or amendment may not be issued. [citations omitted]. Here, a few individuals who are currently employed by the licensee, Georgia Power, are also employed by the prospective licensee, Southern Nuclear. The character of these individuals is thus relevant to approval of the requested amendment.

Staff Response at 6.

Additionally, the Board finds that, pursuant to 10 C.F.R. §50.9, communications from an applicant or a licensee to NRC must

¹² Equally, and perhaps of more concern, the Commission cannot ignore false statement in documents submitted to it. Congress has specifically provided that licenses may be revoked for "material false statements," see section 186a of the Atomic Energy Act, and we have no doubt that initial license applications or renewal applications may also be denied on this ground, certainly if the falsehoods were intentional, FCC v. WOKO, 329 U.S. 223 (1946), and perhaps even if they were made only with disregard for the truth. Leflore Broadcasting Company v. FCC, F.2d (D.C. Cir. No. 78-1677, June 5, 1980); Virginia Electric and Power Company v. NRC, 571 F. 2d 1289(4th Cir. 1978). [Footnote from Staff's brief].

¹³ We include, of course, the false statements charge in this category. [Footnote from Staff's brief].

be "complete and accurate in all material respects."¹⁴ The Commission cannot ignore false statements made by a license applicant, Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-84-13, 19 NRC 659, 673-679 (1984); even if they were made only with disregard for the truth. Leflore Broadcasting Company v. FCC, _F.2d_ (D.C. Cir. No. 78-1677, June 5, 1980); Virginia Electric and Power Company v. NRC, 571 F. 2d 1289 (4th Cir. 1978).

Id. at n. 23 (emphasis added).

In South Texas, 19 NRC at 674, the Commission stated the general standard for integrity, and in Three Mile Island, 21 NRC at 1136-37, explained that the licensee's actions:

must have some reasonable relationship to licensee's character, i.e., its candor, truthfulness, willingness to abide by regulatory requirements, and acceptance of responsibility to protect public health and safety.

Metropolitan Edison Company, et al. (Three Mile Island Nuclear Station, Unit No. 1), 21 NRC 1118, 1136-37.

¹⁴ The NRC is an agency within the scope of 18 USCS §1001 which provides for criminal penalties for the making of a knowing or wilful false statement:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

2. Materiality

Materiality of a false statement is not dependent on whether a government agency relied on the statement. The Eleventh Circuit explains the test for materiality as follows:

materiality is satisfied even if the federal government was not actually influenced by the false statements.

U.S. v. Herring, 916 F.2d 1543, 1547 (11th Cir. 1990); United Sates v. Fern, 696 F.2d 1269, 1273 (1983).¹⁵ In this respect it is the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances.

Pereira, 463 F.Supp. at 486, citing United States v. Goldfine, 538 F.2d at 820-21.¹⁶

In sum, materiality turns on whether the false statement had the capability of misleading NRC and not whether NRC was in any

¹⁵ The Commission has determined that planning to make a deliberate false "on the part of applicants or licensees would be evidence of bad character that could warrant adverse licensing action even where those plans are not carried to fruition." Id. at 675, citing Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-83-2, 17 NRC 69, 70(1983).

¹⁶ In Goldfine, the allegedly immaterial statement was made by a registered pharmacist during "the course of an inspection conducted by the regulatory agency charged with the duty of investigating the manner in which he was complying with the requirements imposed upon him by law." 538 F.2d at 821. In Pereira, the alleged statement was made by Pereira to custom agents as he was about to board a plane for Peru. 463 F.Supp. at 484. In both cases the agents or investigators already knew the correct answers to the questions asked and were not misled by the false responses. Id. at 486. However, "emphasizing the potential and not the actual impact of the statement on agency action", the Court of Appeals for the Ninth Circuit found materiality within the scope of §1001. Id. When a statement carries the "potential" of inducing agency reliance and of perverting a legitimate function of the agency it is material. Id. (emphasis supplied).

way actually misled.

G. MATERIAL OMISSIONS AND MISREPRESENTATIONS INDEPENDENT OF A FINDING THAT CONTROL WAS IMPROPERLY TRANSFERRED

We have placed the omissions and misrepresentations alleged by Intervenor into two categories. The first category concerns omissions and misrepresentation that we find to be relevant to this proceeding regardless of whether a transfer of control did in fact occur.

1. Omissions and Misrepresentation Concerning the Georgia Power Company Management Council (Issues 13, 14, 14A)

On September 11, 1990, Intervenor and Mr. Hobby filed a petition with the NRC pursuant to 10 C.F.R. 2.206 alleging, inter alia, that Georgia Power had illegally transferred control over nuclear operations to the SONOPCO project in violation of 10 C.F.R. 50.80. NRC staff thereafter asked licensee to file a response to the 2.206 petition and to submit this response under oath. On April 1, 1991 Mr. McDonald, on behalf of licensee, signed the response to the petition under oath. Intervenor Exhibit 48. Intervenor alleges that this response is materially false with respect to the discussion concerning the Georgia Power Management Council in three respects; 1) Mr. McDonald's participation and attendance; 2) whether Mr. Hairston was a member; and 3) whether the Management Council was functioning as described in the petition response.

a. Mr. McDonald's Participation and Attendance at Georgia Power's Management Council meetings

In support of the claim that Georgia Power had illegally transferred control, the 2.206 petition excerpted sworn

deposition testimony from GPC's Senior Executive Vice President, H. Grady Baker. The excerpt from Mr. Baker's deposition testimony contained in the petition reads as follows:

The appropriate oversight of SONOPCO exists, in that the chief operating office, Pat McDonald and [sic] tje [sic] CEO of -- not the CEO because it's not a corporation -- but Farley and McDonald are officers of Georgia Power Company, reporting to the president, Bill Dahlberg.

Exhibit 49 at p. 6.

Denying that an illegal transfer of control had occurred, Georgia Power asserted that the 2.206 petition had "taken out of context and contorted" the deposition testimony of Mr. Baker. Georgia Power then set forth its version of Mr. Baker's deposition testimony. Licensee's version included a follow-up statement of Mr. Baker. The April 1, 1991 2.206 response sets forth the following excerpt from Mr. Baker's deposition testimony (the added portion is underlined):

The appropriate oversight of SONOPCO exists, in that the chief operating office, Pat McDonald and the CEO of -- not the CEO because it's not a corporation -- but Farley and McDonald are officers of Georgia Power Company, reporting to the president, Bill Dahlberg. McDonald particularly is a member of Georgia Power's management council and attends most of the meeting of the management council or many of the meetings of the management council.

Intervenor Exhibit 48 at p. 6 (emphasis added).

Essentially, Georgia Power sought to rely upon the assertion that Mr. McDonald's participation in GPC's Management Council demonstrated that Mr. McDonald was a functioning member of GPC's management structure because he was a regular participant of Georgia Power Company Management Council meetings. Thereafter,

licensee spelled out the significance of Mr. McDonald's participation claiming this fact was a clear indication that Mr. McDonald reported to Mr. Dahlberg, who presided over Management Council meetings. Georgia Power states:

Additionally, Mr. McDonald is a member of the GPC Management Council and Mr. Farley is not. The GPC Management Council is made up of all the Executive and Senior Vice Presidents of GPC. It functions as a policy-setting body, makes corporate resource allocation decisions and facilitates communications and coordination between GPC departments. Between April 1988 and December 1990, Mr. McDonald reported periodically to the GPC Management Council with Mr. Dahlberg presiding, on nuclear operating matters, including budget matters and organizational goals.

Intervenor Exhibit 48 at p. 7 (emphasis added).

A careful review of the record before us demonstrates that Georgia Power's Management Council was not operating as Georgia Power alleged in its response to the 2.206 petition. The record contains all of the Georgia Power Management Council minutes between May, 1988 and December 1990. Intervenor Exhibit 135. According to the Management Council minutes, between August, 7, 1989 and December 19, 1990 Mr. McDonald failed to attend a single Management Council meeting. The minutes further demonstrate that, between May 1988 and December 1990 no one else belonging to Mr. McDonald's organization, including Mr. Hairston and Mr. McCoy, participated at any Management Council meetings. Moreover, the record supports the finding that, as of August 7, 1989 Mr. McDonald stopped functioning as member of GPC's

Management Council;¹⁷ and other than participating in a 10 minute telephone discussion to write off plant Vogtle's rad-waste facility from the company books held on December 28, 1990, Mr. McDonald attended no more Management Council meetings.¹⁸

Georgia Power had every opportunity to present testimony and evidence to dispel the inference that Mr. McDonald stopped attending management 866Xcounmēēttings in August of 1989, yet failed to present any evidence to the contrary.¹⁹ Accordingly, this Board must conclude that as of August 7, 1989 and until his retirement from GPC on June 1, 1993, Mr. McDonald stopped functioning as a member of GPC's Management Council.

Believing the statement to be false and misleading, we must examine its context and consider the motivation of for its making. We are persuaded that the error was neither careless or unintentional based on the following considerations: First, the statement was made under oath by Mr. McDonald. Submitting the response under oath required licensee to scrutinize the response carefully. Failing to detect such an obvious misstatement leaves

¹⁷ In a sworn interrogatory response GPC listed the members of its Management Council as of December 1989. This list excluded Mr. McDonald. Intervenor Exhibit 144, at p. 2. It would seem that, either Mr. McDonald ceased functioning as a member of GPC's management council or Georgia Power submitted a false response to a sworn interrogatory question.

¹⁸ Mr. Dahlberg testified that he had no reason to believe that Mr. McDonald's attendance at Management Council meetings after 1990 was any different. Tr. 1096 (Dahlberg).

¹⁹ Georgia Power bares the ultimate burden in this case and it failed to present evidence to refute a reasonable factual inference concerning Mr. McDonald's non-participation at Georgia Power Management Council meetings.

little doubt that the error did not result from carelessness. Second, Mr. McDonald, who signed the response under oath, had first-hand knowledge of his participation. Third, the importance of the statement in relationship to the issue being addressed suggests motive. Fourth, GPC kept minutes of its Management Council meetings and could and should have considered these minutes.²⁰ Fifth, a copy of Georgia Power's response was given to Mr. Dahlberg who, like Mr. McDonald, had first-hand knowledge of Mr. McDonald's non-participation.²¹ And, sixth, licensee's focus on the issue of illegal transfer has continued since the 2.206 petition response was filed and it is reasonable to believe that persons knowledgeable about Mr. McDonald's attendance would have corrected the error at some point during the last few years.

Based on the totality of the record we find that there was no factual basis for the statement and no credible explanation to reasonably believe the error was inadvertent. The Board must therefore conclude that licensee intended to and did provide

²⁰ In addition to the Management Council, GPC relied upon Mr. McDonald's participation in NOCA meetings and Georgia Power Board meetings. With respect to these meetings GPC apparently did rely on the minutes. See Intervenor Exhibit 48 at p. 7.

²¹ The Board is particularly troubled by Mr. Dahlberg's assertion at the hearing that the description of Mr. McDonald's participation on the Management Council was a "true" statement. Tr. 1088 (Dahlberg). Mr. Dahlberg testified that Mr. McDonald may not have attend a Management Council meeting for over a year, Tr. 1091 (Dahlberg); and that Mr. McDonald was the only member of the Management Council representing GPC's entire nuclear organization. Tr. 1079-80 (Dahlberg). It is inconsistent for Mr. Dahlberg to profess a hands-on manager style over GPC's nuclear operations and not know the extent of Mr. McDonald's participation on the Management Council or to have otherwise required Mr. McDonald to send a representative to Management Council meetings.

false and misleading information to the NRC.

b. False and misleading statements concerning the composition of the Management Council

Georgia Power asserted in its's response to the 2.206 petition that "GPC Management Council is made up of all the Executive and Senior Vice Presidents of GPC." Intervenor Exhibit 48 at p. 7 (emphasis added). GPC admits that this is a false statement because Mr. Hairston was not a member of GPC's Management Council.²² Based on Georgia Power's admission, we need only examine materiality and intent.

The wording of this statement leads to the conclusion that Mr. Hairston was a member of GPC's management Council and presumably participated therewith.²³ Additionally, the statement was part of a general attempt by Georgia Power to exaggerate the scope and influence of the Management Council over nuclear operations.

The statement is admittedly false. We therefore examine the

²² While admitting that Mr. Hairston was a Senior Vice President but not a member of the Management Council, licensee did not disclose the fact that he was the only senior vice president at GPC who was not a member of the Management Council was Mr. Hairston. McDonald at 13-14. Moreover, Intervenor had difficulty obtaining this admission from GPC's witness, Mr. Dahlberg, with respect to this matter. See Tr. 1077-1082 (Dahlberg).

²³ NRC would have to interpret this to mean that Mr. Hairston was a member of the Management Council. At the time the statement was made NRC staff was aware that Mr. Hairston was a GPC senior vice president. The Plant Vogtle FSAR (JE 12) and NRC's understanding of the reporting relationship after Mr. Hairston issued his May 1, 1989 letter (Intervenor Exhibit 120) clarifying his position as a GPC Senior Vice President leave no doubt that NRC would reasonably interpret this to mean that Mr. Hairston was a member of GPC's Management Council.

context of the statement and consider the motivation for its making. We examined Mr. McDonald's testimony at the hearing and conclude that he intentionally included this language in the response knowing it to be misleading and false. During the course of Mr. McDonald's testimony he revealed the actual thought process he employed when the language was developed. Mr. McDonald testified that when the statement was drafted he had a "vision of Executive Vice President and the Senior Vice Presidents that reported to Mr. Dahlberg being on that management council," Tr. 1443 (McDonald), and "[a]t that time," when the error was made, Mr. McDonald was of the "opinion that the members of that council were the Executive Vice Presidents, of course reporting directly to Mr. Dahlberg, and there were some Senior Vice Presidents who also reported directly to him, whereas George Hairston reported to me and not directly to Mr. Dahlberg." Tr. 1444-45 (McDonald). Mr. McDonald's testimony demonstrates that he was aware at the time the language was approved that Mr. Hairston was not a member of the Management Council.

In addition to Mr. McDonald's testimony the record also establishes that GPC's top three nuclear executives, Mr. Hairston, Mr. McDonald and Mr. Dahlberg, had responsibility to review the petition response.²⁴ Mr. McDonald signed it and both Mr. Hairston and Mr. Dahlberg were on distribution. Intervenor Exhibit 48 at pp 1a-b. Given the number of persons with first-

²⁴ Mr. McDonald testified that Mr. Hairston did, in fact, partake in the review process. Tr. 1446 (McDonald).

hand knowledge as to the make-up and membership of GPC's Management Council, the length of time and the amount of scrutiny devoted to the issue of illegal license transfer gives rise to the inference that GPC would have detected this error years earlier.

We are therefore persuaded that the error was neither careless or unintentional.

c. Misleading statements concerning Georgia Power Management Council's involvement with nuclear operations.

Licensee's April 1, 1991 response to the 2.206 petition asserts that, with respect to nuclear operations, the Management Council "functions as a policy-setting body, makes corporate resource allocation decisions and facilitates communications and coordination between GPC departments" and that "Mr. McDonald reported periodically to the GPC Management Council "on nuclear operating matters, including budget matters and organizational goals." Intervenor Exhibit 48 at p. 7 (emphasis added). In order to have accomplished these functions the Management Council would need input from GPC's nuclear operations management. It is difficult to believe that the Management Council facilitated "communications and coordination" between GPC's nuclear operations department and the other departments of the company because no one representing GPC's nuclear operations would attend Management Council meetings. There appears to be a total lack of meaningful communication from GPC management within the SONOPCO project to the Management Council.

With respect to organizational goals, the record establishes that the Management Council was not involved with nuclear organizational goals. Specific examples of this are as follows: First, it appears that on September 5, 1989 the Management Council determined that all "organizational heads should present their goals to the full Management Council for review and approval." Exhibit 135 at p. 81. Mr. McDonald never made such a presentation to the Management Council. Id. Additionally, at the end of 1989 Mr. Dahlberg reviewed with his Management Council the entire management structure at which time he excluded Mr. McDonald's nuclear organization. Even if Mr. Dahlberg had a rational reason for excluding nuclear operations from a company-wide review, if Mr. McDonald was involved with GPC's organizational goals, he should still have attempted to participate in the discussions of other managers, such as Mr. Hobby, with whom his organization did interact. Moreover, the record establishes that the explanation provided by Mr. Dahlberg as to why he was excluding the nuclear organization from review did not provide a basis as to why Mr. McCoy's performance should not have been reviewed with the Management Council or why managers stationed at the plant sites also were not evaluated at that time.²⁵

²⁵ Mr. Dahlberg explained that the exclusion of GPC's nuclear operations from the organization occurred because GPC's nuclear officers had been reviewed in 1988 when the SONOPCO project was formed. Tr. 1185-88 (Dahlberg). Mr. Dahlberg nonetheless conceded that the Vogtle Project Vice President, Mr. McCoy, may not have been reviewed in 1988. Mr. McCoy was not a GPC employee prior to 1988 and there is no logical reason why he would have been

This Board is also troubled with the assertion in the April 1, 1991 2.206 petition response that Mr. McDonald periodically reported to the Management Council with respect to GPC's nuclear budget. It is important to place this comment in proper context. This statement was made as part of a discussion which, in its totality, portrays Mr. McDonald as an active and regular participant of the Management Council. The record establishes that he was in no way an active participant.²⁶ Mr. McDonald appears to have never participated in any Management Council review of a proposed nuclear budget in 1989 (the 1990 budget) and thereafter. Mr. McDonald no longer had anything to do with the GPC's Management Council that he had no idea whether the Management Council had reviewed his nuclear operating budget before Mr. McDonald presented it to Mr. Addison. Tr. 1406 (McDonald).²⁷

The record also casts serious doubt as to whether the Management Council ever approved the 1990 nuclear operations and maintenance (O & M) budget. First, the 1990 SONOPCO budget review represented a departure from past practice. GPC's nuclear budgets were previously reviewed by Mr. Addison in Atlanta as

excluded from a company-wide review occurring a year and a half after he was hired.

²⁶ Mr. McDonald's prefiled testimony attempts to clarify this by claiming that the term "reported" was only meant to mean that he "provided" budgets to the Management Council for their review. McDonald at p. 14.

²⁷ On the other hand, Mr. McDonald did review his nuclear budget with Mr. Farley prior to its presentation to Mr. Addison and Mr. McDonald knew that Mr. Farley had "blessed" his budget.

part of an overall GPC budget presentation. Thus, while Mr. Addison attended a budget review for GPC in Atlanta on December 12, 1984,²⁸ he had already attended a meeting on December 4, 1989 where the SONOPCO project nuclear budget was presented by Mr. McDonald.²⁹ Indeed, the record supports that the budget process employed was such that The Southern Company treated SONOPCO project as if it was a fully functional entity responsible for developing and approving its own budget. See Intervenor Exhibit 90 at p. 1 (December 11, 1989 Synopsis publication interview of Mr. Farley who states therein that there had been "a recent decision to prepare the budget for 1990 as if the project were a company"). In this respect, Mr. Farley testified that "the President of the holding company [Addison] must look to the head of his service company [SONOPCO project]" and, in so doing, Mr. Addison looked to Mr. Farley to serve this function for the SONOPCO project commencing with the preparation of the 1990 nuclear budget. Tr. 1786 (Farley). Mr. Addison's visit to the SONOPCO project on December 4, 1989 was to approve the SONOPCO project budget and this approval came

²⁸ See December 4, 1989 Management Council minutes at p. 100 ("presentation to Mr. Addison scheduled for December 12, 1989").

²⁹ GPC explained the purpose of the December 4, 1989 meeting in its post-hearing brief as a meeting where the SONOPCO group would make a presentation on the 1990 nuclear budget to Mr. Addison. See GPC Post-hearing Brief at ¶ 88. Any review by GPC's Management Council after the budget was approved by Mr. Addison would be redundant and meaningless. More to the point, GPC's Management Council met before the presentation to Mr. Addison and any objection Mr. Dahlberg was ever going to raise, would occur during the Addison presentation.

before Mr. Addison visited GPC and approved its budget on December 12, 1989.

In fact, the nuclear budget was presented to Mr. Addison on December 4, 1989. In addition to Mr. Addison, the presentation was made before all of the persons identified as comprising a SONOPCO project "Board of Directors."³⁰ Mr. McDonald testified that when he made the budget presentation to Mr. Addison on December 4, 1989, he had no idea whether GPC's Management Council had reviewed this nuclear budget. Tr. 1406 (McDonald). The Management Council functioned as an advisory board to Mr. Dahlberg. Once the nuclear budget was presented by Mr. McDonald to Mr. Addison in the presence of Mr. Dahlberg, there is no logical reason why Mr. Dahlberg would reconsider the budget or seek GPC Management Council approval. In this respect, the Management Council minutes indicate that the SONOPCO project final proposed nuclear budget was reviewed on the morning of December 4, 1989, and it was \$18 million over the budget projects previously established by the Management Council. Intervenor Exhibit 135 p. 105. (Management Council Minutes).³¹ Neither

³⁰ This group consisted of Mr. Addison (Southern Company President); Mr. Farley (Southern Company Executive Vice President Nuclear); Mr. Franklin (Southern Company Services President); Mr. Harris (APC President); and Mr. McDonald (Executive Vice President GPC and APC).

³¹ On October 14, 1988 Mr. Dahlberg told the Management Council that, commencing with the 1990 budget, GPC's Management Council would "serve as the sole review board for the budgets." Intervenor Exhibit 135 at p. 31. During the July 25, 1989 Management Council meeting, the Council set November 14, 1989 as the date "Budgets [were to be] completed and reviewed by Management Council." Intervenor Exhibit 135 at p. 72.

Mr. McDonald nor anyone from his nuclear organization attend the Management Council meeting to explain or otherwise justify the inability to meet the budget target³² Mr. Adams did attend the December 4, 1989 Management Council meeting. See Exhibit 135 p. 98. Mr. Adams testified that he recalled raising a concern to Mr Dahlberg about the proposed 1990 SONOPCO budget being \$15-20 million over budget, and he recalled Mr. Dahlberg stating that he too "thought it was high." Adams Dep. p. 21-22.³³ Mr. Adams further testified that he was unaware of how the discrepancy was resolved. Id. Indeed, Mr. Warren Jobe, GPC's chief financial officer Management Council member, Tr. 1235 (Dahlberg), testified that it is possible that GPC's nuclear budget was not approved by GPC's Management Council. Jobe Dep. at p. 42-44.³⁴ Moreover, two members of GPC's Nuclear Operations Contract Administration group, Mr. Hobby and Mr. Johnson, were told that the Management

³² It is difficult to see how the Management Council could approve an \$18 million discrepancy without the participation of Mr. McDonald.

³³ Also see Intervenor Exhibit 51 (internal GPC memo stating that SONOPCO plants could be operating 5-30% above comparable industry averages).

³⁴ In December of 1988, Mr. Dahlberg established the Nuclear Operations Contract Administration group. One of the stated purposes of this group was to review and analyze SONOPCO project budgets and advise GPC's executive management accordingly. Hobby at p. 20. Mr. McDonald and Mr. Farley objected to NOCA and would not provide NOCA with any budget information. By not attending Management Council meetings and by prohibiting the SONOPCO project from providing NOCA with budget information, the Management Council was not in a position to adequately assess the appropriateness of GPC's nuclear budget.

Council did not approve the nuclear budget.³⁵

Finally, the 1990 Management Council minutes demonstrates that at no time during 1990 did Mr. McDonald meet with the Management Council to discuss the SONOPCO project nuclear budget. The Management Council minutes totally exclude mention of such fundamental issues³⁶ and events occurring at plant Vogtle that it cannot be said that the Management Council was the forum relied upon by Mr. McDonald or Mr. Dahlberg to discuss matters related to GPC's nuclear operations. The record rather indicates that, after the formation of the SONOPCO project, a management group referred to as the SONOPCO project Board began to function as the Management Council did before nuclear operations were transferred into the SONOPCO project. For example, the SONOPCO

³⁵ Mr. Hobby states in his pre-filed testimony:

[I]n early December, 1989, I called Mr. Jeff Wallace in Resource Management and asked him the status -- he was basically head of the budgeting process. He told me the budget had been approved by the Southern Company management group and that Mr. Dahlberg had not been pleased with it and brought the matter up to Mr. Addison. But, Mr. Addison said, "That's it." I asked where he got that information and he said, "From the man himself," referring to Mr. Dahlberg.

When I finished the phone call, Gerald Johnson approached me and asked the status of the nuclear budget. I asked him to call the extension I had just dialed. He did and told me that he got the same answer as I had just received.

Hobby 47-48. Also see Johnson Dep. at 40-42 (only GPC's nuclear budget was not approved by the GPC Management Council).

³⁶ Issues such as the following are never mentioned in the minutes: 1) the fact that the 2.206 petition was filed; 2) that OI investigations were occurring at plant Vogtle; 3) that Mr. Mosbaugh had made tape recordings; and 4) the termination of Mr. Mosbaugh.

project Board discussed the outage schedules, costs of replacing condenser tubes and the nuclear budget. See Tr. 1176-1177 (Dahlberg). None of these matters were discussed at a GPC Management Council meeting.

In conclusion we find that the 2.206 petition response discussion about the function of the Management Council with respect to nuclear operations budget after the SONOPCO project was misleading and false. At the time the 2.206 Petition Response was filed, Mr. McDonald and GPC's entire nuclear operations department essentially stopped interacting with GPC's Management Council. Moreover, we believe that the 2.206 petition response is incomplete because it failed to explain the role and existence of a SONOPCO project board or the other management structures that were established to replace the function performed by the Management Council.

2. Omissions and Misrepresentations Related to Statements Concerning Georgia Power's Emergency Plan

Intervenor asserted in an amendment to the 2.206 petition filed on October 1, 1990 that remarks made by Mr. McCoy at a Vogtle plant site meeting and follow-up conversations occurring at the plant site indicated that Mr. Farley was contacted as part of the duty reporting chain. Intervenor Exhibit 49 at pp. 4-5. GPC responded to this assertion on April 1, 1991.³⁷ To defeat the assertion and to explain why Mr. Farley's name may have come up as someone contacted as part of the plan, the 2.206 response

³⁷ At the time GPC responded to the petition, it was unknown whether McCoy's remarks were recorded and in the possession of NRC.

states:

Mr. McCoy does not believe his statements addressing the reporting structure for plant duty managers suggested that Mr. Farley was notified in lieu of Mr. Dahlberg. Vogtle project emergency planning procedures require the duty manager to notify senior corporate management, including both Mr. Dahlberg and Mr. Farley, in the event of a significant event at Vogtle.

Intervenor Exhibit 48 at p. 12.

GPC goes on to state that "The fact that Mr. Farley will be notified along with the GPC officers in the event of a nuclear-related emergency is not surprising." Id.

In fact, the GPC emergency planning procedures in place at that time did require Mr. Farley to be contacted. The applicable Plant Vogtle Emergency planning procedures is VNS-EP-04 (Exhibit 125). Pursuant to Section 4.1.1 of this procedure, the On-Call Project Manager must refer to the "Corporate Emergency Telephone Directory" and must notify four identified groups of personnel: (1) Director of Corporate Response; (2) Senior Corporate Management; (3) Public Information Manager; and (4) Joint Owners. Intervenor Exhibit 125 at p. 9. The procedure further requires the On-Call Project Duty Manager to use the Attachment 2 "checklist" to log by initial, date and time the accomplishment of the section 4.1.1 required actions concerning the notification of these four groups of personnel. (Exhibit 125 at page 13)

A complete Corporate Emergency Telephone Directory" can be found in between pages 78 and 108 of Intervenor's Exhibit 126. Within this telephone directory, at page ii, is a table of contents of "Call Out Lists," which specifically identifies the

call-out list of the "On-Call Project Manager." Intervenor Exhibit 126 at p. 79. The telephone directory specifically sets forth instruction as to who within a given list is to be notified. Page 80 of Intervenor Exhibit 126 translates "Indicated Notes" found within the Corporate Telephone Directory and provides the necessary instruction as how to use the Call-Out Lists. These notes provide that in cases where an asterisk is affixed to a group of personnel, the On Call Project Manager is to start at the top of the list and initiate phone calls until contact with one of the identified individuals is accomplished. This instruction therefore would require the On Call Project Manager to attempt to contact all persons identified in a group where an asterisk is not affixed.

The Call-Out List for the On Call Project Manager is found at pages 81-83 of Intervenor Exhibit 126. The same 4 categories of personnel listed in the same order are in the Call-Out List for the On-call Project Manager as was in section 4.1.1 of VNS-EP-04 ie. (1) Director of Corporate Response, (2) Georgia Power Company Corporate Management,³⁸ (3) Public Information Manager, (4) Joint Owners. Listed in descending order under the heading "Georgia Power Corporate Management" are 1) Joseph M. Farley; 2) R.P. McDonald; 3) W.G. Hairston; 4) A.W. Dahlberg; 5) J.T. Beckham; and 6) C.K. McCoy. There is no asterisk affixed to this

³⁸ There is a minor difference between this callout category terminology "senior corporate management" used here and that in Exhibit 126 "GPC corporate management" . Revisions of exhibit after 8-10-90 used the term "corporate management" but all three of these terms identify the executives of GPC.

category. There is every indication that licensee correctly states in the 2.206 petition response that the "Vogtle project emergency planning procedures require the duty manager to notify senior corporate management, including both Mr. Dahlberg and Mr. Farley."

GPC's purported senior executive over nuclear during the relevant time, Mr. McDonald, testified that this statement was true.³⁹

In 1992 the ASLB initiated this proceeding, which in part considered Mr. Farley's role in licensed activity. The original 2.206 response concerning the functioning of formal plant procedures would become a significant factual issue and in April 1994, Mr. McCoy was questioned during his deposition about the Vogtle Emergency procedures. At this point in time, licensee

³⁹ Mr. McDonald testified as follows:

Q: Mr. McDonald, I would like you to look at Exhibit 48, page 12...And there's a sentence that says, "Vogtle Project Emergency Planning Procedures require the Duty Manager to notify senior corporate management including both Mr. Dahlberg and Mr. Farley in the event of a significant event at Vogtle." Do you see that?

A: I do.

Q: That is in fact a true statement, isn't it?

A: That is just what we've been talking about.

Q: I'm asking --

A: That's true.

Q: That is a true statement. Okay.

Tr. 1427-1428.

altered its prior factual assertions, claiming that the procedures did not require that Mr. Farley be notified. See ASLB Memorandum and Order (Motion to Reopen Discovery), dated November 9, 1994.

Following Mr. McCoy's deposition, on August 30, 1994 George Hairston submitted a letter to the director of NRC's Office of Nuclear Reactor Regulation. Mr. McCoy had also worked on the August 30th letter. Tr. 1706(Hairston). Therein, licensee asserted that an error had been made in the 2.206 petition because plant procedure did not require that Mr. Farley be contacted in the event of a crisis situation.⁴⁰

Testimony concerning the functioning and implementation of plant Vogtle emergency plan procedures presented by licensee witnesses is so divergent that it can never be reconciled. On one side of the spectrum Mr. McDonald stated that the April 1, 1991 2.206 petition response accurately states that plant procedure require Mr. Farley to be contacted.⁴¹ On the opposite

⁴⁰ Licensee specifically addressed the following sentence in its April 1, 1991 2.206 Response: "Vogtle Project emergency planning procedures require the duty manager to notify senior corporate management including both Mr. Dahlberg and Mr. Farley in the event of a significant event at Vogtle" (emphasis added), by asserting that "the procedures did not specifically require notification of both Mr. Dahlberg and Mr. Farley". Intervenor Exhibit 129 at p. 1.

⁴¹ Mr. McDonald testified that Intervenor's Exhibit 68 was the Emergency Plan Procedures referenced in the 2.206 Response and specifically testified that section 4.1.1 of this procedure required the On Call Project Duty Manager to use of the Corporate Emergency Telephone Directory. Tr. 1414-16 (McDonald). Mr. McDonald testified that the "On Call Project Manager Telephone list" was a "formal document referred to in the Emergency Plan Procedure," and "was part of a formal plant procedure." Tr. 1424-

side of the spectrum, Mr. McCoy testified that this was not true; that plant procedure did not require Mr. Farley to be contacted. There is no middle ground; either the 2.206 petition contained a material false statement or the August 30, 1994 correction contains a materially false statement. What's more, since both Mr. McDonald and Mr. McCoy have first hand knowledge of the procedures and how they were implemented, one or the other must have provided false testimony to this Board.

To determine which is true we rely on the totality of the record. As discussed below, the record as a whole supports a finding that the April 11, 1991 2.206 Response accurately stated the procedure and accurately states that the procedure required Mr. Farley to be contacted.

We first consider the plain meaning of the written procedure. On its face, the procedure unambiguously sets forth the methodology that must be followed. Pursuant to the wording

26 (McDonald). Mr. McDonald then conceded that if the On Call Project Manager failed to contact Mr. Farley it would have been a mistake:

CHAIRMAN BLOCH: So the On Call Project Manger by procedure at the time was required to call Mr. Farley, wasn't he?

THE WITNESS: By these procedures, that is correct.

CHAIRMAN BLOCH: And they are the procedures of the plant. he would have been making a mistake if he did anything else, wouldn't he have.

THE WITNESS: That is correct.

Tr. 1418-1419 (McDonald).

of the procedure, Mr. Farley would necessarily have to be contacted. Second, Mr. McCoy testified that there was position-specific training of corporate personnel with respect to emergency procedures, Tr. 1571 (McCoy); and that these training records are required to be retained by the licensee, Tr. 1565-66 (McCoy); and that Mr. McCoy had "not been ask to produce those documents." Tr. 1566 (McCoy).⁴² On November 9, 1994, this Board issued an order requiring Georgia Power to serve copies of "all relevant procedures used at Vogtle from 1988 to present [and] all training materials that Georgia Power used for the purpose of assuring the proper execution of the relevant procedures." Order at 5 (emphasis added) (footnote omitted). In response to this order GPC's counsel states that "Georgia Power has identified no training materials for the procedures described above, other than the procedures themselves which are exercised during emergency drills." See Letter of John Lamberski to ASLB, dated November 16, 1994.

McCoy is the Vice President over both the corporate and site organizations of plant Vogtle and is has responsibility over corporate emergency planning, training, and records maintenance. It is impossible for this Board to understand how GPC could assert prior to the hearing that no training materials exist

⁴² Mr. McDonald also testified to the existence of training materials; that corporate personnel were specifically trained on the VNS-EP-04 procedure; that he had seen the training materials, including the "checklists" found in Attachment 2 of Intervenor Exhibit 125 at p. 13; and that the training materials were "maintained and routinely inspected by the NRC." Tr. 1419-1421 (McDonald).

apparently without ever confirming this with the responsible corporate officer. The failure to produce the very records Mr. McCoy testified to be in existence leaves the Board little alternative but to conclude that the training were not produced because they demonstrate that the August 30, 1994 letter to the NRC incorrectly states that Mr. Farley was not required to be notified.

Third, Mr. McCoy's testimony is simply incredible. He asserts that the Corporate Emergency Telephone Directory was "not a part of a procedure" but merely a handy "reference to find phone numbers;" and that it was "not a required document by any NRC regulations, and it's not even a procedure. It is simply an aid to find phone numbers." Tr. 1575-76; 1592 (McCoy). To demonstrate this point, Mr. McCoy asserted that the duty manager could implement Emergency Procedure VNS-EP-04 without the Corporate Emergency Phone Directory. According to Mr. McCoy, the duty manager need only refer to "the phone directory if [he] wanted to. It's just simply an aid to duty managers". Tr. 1592 (McCoy). But Mr. McCoy's testimony rings hollow because he was ultimately forced to concede that an ordinary phone directory did not provide the "mobile phone numbers, home phone numbers, beeper numbers" needed to respond to the emergency. Tr. 1592 (McCoy). Mr. McCoy's testimony also rings hollow because the Corporate Emergency telephone directory required signature approval by Mr. McCoy. See Intervenor Exhibit 126 at pp. 1, 6, 11, 16, 21, 26, etc.

Finally, Mr. McCoy testified that the addition of Mr. Farley's name to the list was a secretarial error. Tr. 1611 (McCoy). This assertion is also incredible. Intervenor's Demonstrative aid B demonstrates a pattern concerning Mr. Farley's addition to the list. Prior to Farley becoming Executive Vice President, Nuclear for the Southern Company and Southern Company Services, he was excluded from the list. When the list was issued thereafter Mr. Farley was placed at the top of the list and Mr. Dahlberg was moved from the third position to the fourth. For the next 6 revisions, from June 1989 to August 1990, there are no changes in the top 4 positions. But following the filing of the 2.206 petition in September, 1990, the list was altered such that Mr. Dahlberg was placed into the 2nd position. Finally, upon Mr. Farley's retirement on May 26, 1992, Mr. Dahlberg was placed at the top of the list until he was promoted to President of The Southern Company and was dropped from the list. The addition and deletion of names follows a pattern and cannot be said to be linked to a secretarial error.

In conclusion, training records could have been produced by licensee which should have resolved whether Mr. McDonald or Mr. McCoy's version of the procedure was truthful. The failure to produce these records and the fact that the only reasonable interpretation of the procedures demonstrates that Mr. Farley was to be contacted, leads this Board to conclude that the licensee misrepresented the emergency plan procedure in the August 30, 1994 letter to the NRC.

3. **Misrepresentations Pertaining to the Selection of SONOPCO project Vice Presidents (McCrary and Long)**

Georgia Power states in its October 3, 1991 Response to the 2.206 petition that there is no inconsistency in the testimony Mr. McDonald gave during the Fuchko and Yunker and Hobby cases concerning the selection of Messrs. Long and McCrary. (Exhibit 79, p. 4). This is repeated in Mr. McDonald's prefiled testimony, where he states that his 5/7/90 Hobby deposition testimony did not contradict his testimony in the Fuchko and Yunker DOL proceeding. McDonald p. 11-12. But the record before us demonstrates that Mr. McDonald did provide inconsistent testimony.

Mr. McDonald first testified about his involvement in the selection of Messrs. McCrary and Long in December, 1988 when he was deposed during the Fuchko and Yunker DOL proceeding. At that time Mr. McDonald testified as follows:

Q: Who selected the administrative and technical services Vice Presidents...What person selected those people, the people in those positions?

A: I don't know.

Q: So you did not select them.

A: No.

Q: Who are the Vice-President for those services?

A: Charles McCrary and Lewis Long.

Q: And Charles McCrary is Vice-president for what?

A: McCrary? Administrative Services.

Q: Okay. How about Lewis Long, is technical services?

A: Yea. Now let me qualify my statement, in

saying that I don't know. The selection of those people is under the authority and responsibility of the Southern Company Services. I imagine in the normal course of events that selection is officially made by the President of Southern Company Services. There may have been another arrangement that I am not aware of, but I think that that was true.

McDonald 12/23/88 DOL Dep. at pp. 12-13 (emphasis added).

The next time he testified about the selection process was when he was deposed during the Hobby DOL proceeding in May, 1990. This testimony was inconsistent with that presented during the Fuchko and Yunker proceeding. Where before he asserted that he had no knowledge of the selection process and "imagined" that the "responsibility" and "authority" rested elsewhere, Mr. McDonald now testified that he alone selected both Mr. Long and Mr. McCrary for their positions and personally requested the Southern Company Services Board of Directors to elect them to these positions:

Q: Were you involved in the selection of Mr. Long as Vice President of Technical Services?

A: For that position, yes.

Q: Were you involved in the selection of Mr. McCrary for Administrative Services?

A: Yes.

Q: Other than the Board of Directors who else are you aware of who had a role in the selection of Mr. Long?

A: No one that I know of.

Q: Just you?

A: Well, I might have discussed it other people but I was the one who requested the he be

considered for that position by the Board of Directors.

Q: And as to Mr. McCrary--

A: Same.

McDonald Hobby DOL Dep. at pp. 12-13 (May 7, 1990).

Before this Board Mr. McDonald was questioned about the selection of Messrs. McCrary and Long. This time his explanation was inconsistent with both the Hobby and Yunker and Fuchko deposition testimony. At the hearing he explained that there was a selection board established to review candidates for the position of Vice President of Administrative Services. Tr. 1276 (McDonald); that this Board consisted of Mr. McDonald, Mr. Farley, Mr. Tom Nunnely and Mr. Jack Causy, Tr. 1276 (McDonald); that the board determined that Mr. McCrary would be the best candidate to fill the position; and that a representative of the section board advised Mr. Franklin (SCS's CEO) of the selection. Tr. 1276 (McDonald).⁴³

⁴³ Georgia Power and Mr. McDonald had the opportunity, in the October 3, 1991 Response to the 2.206 petition to admit the inconsistency and explain how the inconsistency came about. Instead there was an attempt to justify the inconsistencies and this attempted justification continued up until the hearing. After the hearing Georgia Power admitted in its post hearing brief that "Mr. McDonald was not able to adequately explain why, during his December 1988 deposition in Yunker and Fuchko, he wasn't sure who had recommended Messrs. Long and McCrary to the SCS Board of Directors. Tr. 127-90 (McDonald)." See Georgia Power's Post Findings of fact and Conclusions of Law, dated February 13, 1995 at p. 169 fn. 55. Georgia Power then states that this is besides the point because the "April 1, 1991 response focused on whether Mr. McDonald's statements were inconsistent with respect to his involvement in the selection process, and not with respect to anyone else's involvement in that process." Id. Georgia Power now chooses to ignore the fact that on October 1, 1991 it asserted that "Mr. McDonald Supplied Truthful Testimony Regarding His Knowledge

Eventually, Mr. McDonald testified that at the time he gave the testimony in the Fuchko proceeding that he had probably forgotten the selection committee process. Tr. 1285-1286 (McDonald). He even stated that he could imagine having forgotten about it in 1988, but being able to remember it crystal clear in 1995. Tr. 1286 (McDonald). Mr. McDonald made several attempts to explain this by referring to the definition of the word "select" and in so doing only managed to confuse himself. Tr. 1287-1289 (McDonald).

In sum, the record establishes the following: 1) Mr. McDonald testified on December 23, 1988 that he did not select Messrs. Long and McCrary and he could only "imagine" that the "selection is officially made by the President of Southern Company Services" but "[t]here may have been another arrangement that I am not aware of;" 2) On May 7, 1990 Mr. McDonald significantly altered this testimony by asserting that he may have discussed the selection of Mr. Long and Mr. McCrary with others, but he was the person who selected them for their positions and that he personally made the "request" to the SCS Board that McCrary and Long be elected as Vice Presidents; and 3) at the hearing Mr. McDonald was able to provide detailed testimony about the establishment of a "review board" and that this review board recommended to the SCS Board that McCrary and Long be elected.

of the Method Used To Select Certain SONOPCO Project Vice Presidents." Intervenor Exhibit 79 at p. 3 (capitalization and emphasis in original).

We find that Mr. McDonald was well aware of the selection process when he testified in the Fuchko and Yunker proceeding but chose to present an incomplete . . . misleading description;⁴⁴ we

⁴⁴ The record establishes elsewhere that Mr. McDonald exhibited a propensity for providing inaccurate and incomplete responses to deposition questions. For example Mr. McDonald testified that he was unable to explain what the On Call Project Manager telephone List was in relationship to the on call Project Managers:

A: But to answer your question. Your line of questioning here is about the duty corporate manager, and that sheet [the Telephone list - On call Project Manager] does not - - that is not what that sheet is. If you would like to ask me who the duty corporate manager would be for the Vogtle Plant, I can tell you.

Q: Can you tell me what that sheet is?

A: All I could tell, it was a telephone sheet with telephone numbers.

Q: Are you indicating that you don't ever recall seeing that particular document before?

A: No.

April 14, 1994 Deposition of McDonald (Bound into record at Tr. 1426).

Mr. McDonald actually knew what the document was and how it fit into company procedures, as the following testimony given at the hearing demonstrates:

Q: ...the On Call Project Manager Telephone List is a formal document referred in Emergency Plant Procedure. Correct?

A: That's correct.

* * *

Q: It was more than a telephone sheet with telephone numbers. It was a document that was part of a formal plant procedure, wasn't it?

A: That's correct.

Tr. 1424-1426 (McDonald).

further conclude that this testimony was inconsistent with the testimony Mr. McDonald presented during the Hobby proceeding and before this Board; and we conclude that the licensee's statements in the October 3, 1991 response to the 2.206 petition with respect to Mr. McDonald's past testimony was not candid, attempted to obfuscate the differences in testimony, failed to present a complete picture of the actual selection process and failed to correct misleading statements contained in the portions of the testimony referred to in the 2.206 petition.⁴⁵

4. **Falsely asserting in the 2.206 petition response that Mr. Hobby was given a Phase I organization chart (Issue No. 10)**

Georgia Power asserts in its April 1, 1991 2.206 petition response on page 6 of Attachment 1 that:

Mr. Hobby has omitted material information provided to him prior to the submission of the Petition. A Phase I organizational chart was provided to Mr. Hobby on May 15, 1989 attached to a memorandum from Mr. Fred Williams in response to an April 26, 1989 memorandum from Mr. Hobby. See Exhibit 17. Thus, as early as April 1989, the role of Mr. Farley had been explained to Mr. Hobby (a manager) by Mr. Williams (an officer of the Company).

(Exhibit 48, p. 6).

The assertion that the May 15, 1989 memorandum depicted the Phase I organization or explained Mr. Farley's role in the SONOPCO project is false. We are particularly troubled by the wording of this paragraph because it implies that Mr. Hobby

⁴⁵ When GPC submits testimony to the NRC there is a presumption that the selected portions of the testimony are accurate. GPC failed to do this when responding to the 2.206 petition.

intentionally omitted material information, when it turns out this information was never provided to him.

Mr. McDonald testified that the reason he stated that Mr. Hobby made this material omission is because a Phase I organization chart was provided to Mr. Hobby on May 15th by Mr. Williams which purportedly explained Mr. Farley's role. Tr. 1453 (McDonald). However, Mr. McDonald further testified that the chart which is attached to the letter, See Stip. Ex. 35, was not a Phase I organization chart. Tr. 1454-1458 (McDonald). Mr. McDonald then admits that the statement that Mr. Hobby received a Phase I organization chart was a mistake. Tr. 1459-60 (McDonald).

When questioned further about the organizational chart Mr. McDonald's testimony becomes convoluted:

Q: Is -- I think you've already testified that the memo attached to Mr. Williams' May 15th memo is not a Phase I organization chart, correct?

A: Now I've got to -- let me go back and make sure I'm clear here. That corresponds to the Phase I organization relationships that I had with Mr. Dahlberg. I had that relationship from the day I went to work for him on April 1988 until I retired. So that is a true depiction of my relationship and reporting responsibilities during that period of time.

Q: Okay. Well, taking that to be the case, then --

BOARD EXAMINATION

CHAIRMAN BLOCH: Is it a Phase I organization chart?

THE WITNESS: Well, see, I don't see this Phase I organization chart talked to in here. I beg your pardon. It is a Phase I organization chart. I think what -- I think what that means -- I think that means that Mr. Williams

knew very clearly what was being asked, and he was asked who did he report to, so all he did is pick up the chart which had been approved for Georgia Power and give it back to them and says, "This is for our reports. This is the Phase I reporting where he is reporting during Phase I," which he was correct. It is not a -- it is not a -- it is a reporting relationship between me and Mr. Dahlberg for -- during Phase I.

Tr. 1464-1465 (McDonald).

This explanation is not satisfactory because the assertion that all Mr. Williams' had to do was provide an organizational chart depicting Mr. McDonald's reporting relationship to Mr. Dahlberg is not responsive to Mr. Smith's underlying request that the organizational chart depict the entire organization.⁴⁶ Second, Mr. McDonald states that the chart depicted the relationship Mr. McDonald had with Mr. Dahlberg "from the day I went to work for him on April 1988 until I retired." We believe the record supports that Mr. McDonald's reporting relationship to Mr. Dahlberg probably did not change between April 1988 and the time Mr. McDonald retired. The difficulty, however, is that Mr. McDonald did not report to Mr. Dahlberg between April and December of 1988.

The record supports a finding that the Licensee made a

⁴⁶ Mr. Smith requested information regarding the SONOPCO reporting chain up through the board of directors. He requested this information for Messrs. Hairston, McDonald and Farley. He specifically asked how Mr. Farley fit into the picture. When asked if it would be correct to say that information he received was not responsive to this request, he replied affirmatively. Smith Dep. at 25-26. When asked if by looking at the chart if he could tell what entity Mr. Farley was working for, Mr. Smith replied, "Doesn't say." Id. at 26.

material false statement in its April 1, 1991 Response to the 2.206 petition by stating that the May 15, 1989 memorandum depicted the Phase I organization and explained Mr. Farley's role in SONOPCO.

5. **Falsely asserting in the 2.206 petition response that Exhibit B-2 of the "U-1" SEC filing constituted a Phase I organization chart (issue No. 10)**

Intervenor asserted in issue 10 to his prehearing statement of the issues that Georgia Power made a false assertion in its April 1, 1991 response to a 2.206 petition when it asserted that "Exhibit B-2 of [the SEC U-1 filing] was a copy of the Phase I organizational structure" which commenced operation "[o]n about November 1, 1988." Intervenor Exhibit 48 at p. 3. Intervenor claimed that the organization which commenced functioning on November 1, 1988 was not depicted as Exhibit B-2 to the U-1 filing. Intervenor claims that the organization functioning as of November 1, 1988 was the Phase II organization that is depicted in Exhibit B-3 to the U-1 filing. Georgia Power asserts that the organization depicted in Exhibit B-3 did not begin to function until after Southern Nuclear was incorporated.⁴⁷

The difference between Exhibits B-2 and B-3 to the U-1 filing boil down to: 1) the B-2 chart does not depict the existence of "SONOPCO," where the B-3 chart does; and 2) the B-2 chart does not depict a technical services organization and an administrative services organization, whereas the B-3 chart does.

⁴⁷ Exhibits B-2 and B-3 to the SEC filing can be found as part of Joint Stipulation Exhibit 6.

Joint Stipulation Exhibit 6.⁴⁸

Intervenor is correct. The Phase I organization depicted in the B-2 chart actually represents the status of GPC's nuclear organization before the SONOPCO project was formed, while the B-3 chart represents the organization after the SONOPCO project organization came into existence on November 1, 1988. Prior to November 1, 1988 Georgia Power radically reorganized its nuclear operations; it established two nuclear project organizations. First, Mr. McDonald became executive Vice President of Georgia Power while he continued to retain his position as executive Vice President of Alabama Power; Mr. Hairston became Executive Vice President of Georgia Power and he too retained his prior position as Senior Vice President of Alabama Power. Under Mr. McDonald's and Mr. Hairston's guidance, Georgia Power's nuclear department was split in half. Where a single department previously managed both the Hatch and Vogtle plants, a separate Hatch project was formed headed by a separate Vice President, Mr. Beckham; and a separate Vogtle project was formed headed by a Mr. McCoy.

Before the U-1 filing was made in June of 1988, Georgia Power's organization was functioning as depicted in Exhibit B-2. This functioning organization was totally reorganized on November 1, 1988, when Georgia Power employees were relocated to the SONOPCO project. At that point in time Mr. McCrary was functioning as the head of the SONOPCO project's administrative service branch; Mr. Long was functioning as the head of the

⁴⁸ Identical charts can be found as Hairston Exhibits C & D.

SONOPCO project's technical services branch, and Mr. Farley was functioning as the head of the entire SONOPCO project.⁴⁹ Soon after November, 1988, Farley personally conducted the weekly staff meetings of the SONOPCO Project without the participation of non-double-hatted GPC employees, a SONOPCO Project Board commenced functioning with significant powers over nuclear operations and GPC double-hatted nuclear employees winded down their involvement with the GPC Management Counsel. After November, 1988 the GPC Management Counsel, contrary to GPC's assertions in their under-oath response to the Hobby/Mosbaugh 2.206 petition, ceased having any significant input or control over nuclear operations.

We conclude that the April 1, 1991 2.206 petition response erroneously asserts that Exhibit B-2 to the U-1 filing depicts a phase I organizational chart.

6. Georgia Power Misled the Commission During the Vogtle Unit 2 Full Power License Hearing.
 - a. Omission of Mr. Hairston from the management hierarchy and Mr. Hairston subsequent correction

On March 30, 1989 the Commission held hearings on full power operation of Vogtle Unit 2. During the course of the hearing

⁴⁹ On September 21, 1988, Mr. Addison announced that Mr. Farley, Alabama Power Company's then CEO, would be devoting his time to the SONOPCO to provide "leadership and insight." Joint Stipulation Exhibit 10. Mr. Meier, the SONOPCO project Director of Strategic Planning, testified that an April 27, 1989 article appearing in a Georgia Power weekly publication accurately stated that Mr. Farley functioned as "the head of the SONOPCO project." Meier Dep. pp. 31-32. Moreover, Mr. Meier testified that in Phase I the Technical Services and Administrative branches were staffed and were reporting to the Executive Vice President of Nuclear, Mr. Farley. *Id.*, at pp. 48-49.

Commissioner Carr questioned GPC about a "management concern" he had with respect to the reporting structure over plant Vogtle. Commissioner Carr observed that the plant manager seemed to be "a long way from the CEO" and asked Mr. McDonald to explain "the hierarchy between the CEO and the plant manager." Intervenor Exhibit 17 at p. 3. In response, Mr. McDonald stated:

Okay, That's what you mean. Okay. The hierarchy between a CEO and a plant manager, I report to Mr. Dahlberg. Reporting to me is Ken McCoy who is in charge of the entire Vogtle Project. He and I have -- I have two Vice Presidents reporting to me. The Vice President of Hatch has a similar position to his. So he is responsible for all the corporate support as well as the plant. George reports directly to him.

Intervenor Exhibit 17 at p. 3.

Mr. McDonald's response was materially false and misleading because he specifically excluded an entire level of management between Mr. McCoy and Mr. McDonald; he excluded Mr. Hairston, the Senior Vice President.

More troubling than Mr. McDonald's making the inaccurate statement is the fact that, although seated at the Commission table, neither Mr. Dahlberg, Mr. McCoy or Mr. Bockhold corrected Mr. McDonald's mistake. Intervenor Exhibit 17 at p. 2. GPC eventually submitted a correction on May 22, 1989. JE 12. The correction is too little too late for the following reasons: 1) it is simply inconceivable that no one from GPC realized that Mr. McDonald had made the error when it was made and the correction should have been filed before the Full Power License was issued. Instead, it was filed after; 2) the correction was not directed to the attention of the Commission; 3) the correction submitted

was inadequate.⁵⁰

- b. Mr. McDonald and Mr. Dahlberg misrepresent the Corporate structure and function that existed when the Full Power License hearings occurred.

In response to Mr. McDonald's description of the management structure, Commissioner Carr continued to press his concern:

COMM. CARR: I understand your organization. I still have my concern...if [the plant manager has] a problem that needs the CEO's attention he goes a long way to get there, was my concern.

Mr. Dahlberg, seeking to pacify Commissioner Carr, immediately interjects the assertion that he had "personal hands on" involvement with the plant Vogtle's management team:

MR. DAHLBERG: I guess I should add something on that matter also. I guess one of the things we have done well is while Pat [McDonald] is an Executive Vice President of Nuclear, it does mean that he is available to the site. He visits the site. He is there, He talks to the people and he looks at the equipment... It doesn't stop with Pat. I have the same type relationship. We do have a Board of Directors committee for oversight of nuclear. They even visit the site. So it's not removed. I think we have established the kind of a relationship and the kind of a personal hands on with management.

Intervenor Exhibit 17 at p. 5.

Mr. McDonald piggy-backs on Mr. Dahlberg's statement by explaining the feedback mechanism "routinely" employed to make sure the "highest levels of management" and the "entire management structure" are communicating:

⁵⁰ A discussion on the inadequacy of the correction is set forth below.

Let me expound on that just a moment. One of our major management techniques is managing problems and we keep pretty comprehensive lists of the top problems, top 10, 20, 30 problems. Those problems are reviewed periodically by all levels of management including the Board of Directors. We have a completely technical meeting with the Board of Directors describing such things as the PERM problem and any other kind of technical problem there is, so that the entire management structure is involved in personnel matters, technical matters and what have you on a routine basis. All these facts which might otherwise get lost are brought up to the top level of the company.

On the Board of Directors committee, which he [Mr. Dahlberg] takes part, we have some very capable people from various walks of life, like almost any board. We have a gentleman who is head of a big construction company and another -- various types of things. So I think that we talk technical detail on a routine basis with all levels of management very frequently.

Intervenor Exhibit 17 at p. 6 (emphasis added).

Mr. McDonald's and Mr. Dahlberg's back-to-back statements presented a materially false depiction of the makeup, interactions and structure of the management which was functioning at the time of the Full Power Hearings. Mr. Dahlberg's involvement with plant Vogtle was hardly "hands on." Mr. Dahlberg did not know many basic terms which any "hand on" manager of a nuclear facility would necessarily have to be fully familiar. He did not know what a NUREG was; he did not know what a Confirmation of Action (COA) letter was; he did not know the role boron played in the operation of a nuclear reactor or that water was the moderator for the nuclear fission process at plant Vogtle; or that plant Vogtle had a plant review Board. Tr. 1151-52 (Dahlberg). He never saw the emergency plan for plant Vogtle (Tr. 1232). He was so unfamiliar with the SONOPCO projects operations in Birmingham that he didn't know that Farley

conducted weekly staff meetings or the GPC-double-hatted managers located in Birmingham and didn't know that Mr. McDonald's office was next to Mr. Farley's office. Tr. 1181-83 (Dahlberg).

More significantly, he was not aware of many of the basic safety systems and issues which were occurring at plant Vogtle during his tenure as the CEO of GPC. His failure to know what a COA letter was indicated his complete abdication of knowledge related to the very important COA filed in response to the Site Area Emergency. His failure to know what Plant Review Board (PRB) was indicated that he was not kept informed of the numerous issues which were regularly dealt with by the PRB and was unfamiliar with the important and mandatory safety functions performed by the Board. The fact that he was unfamiliar with the term "dilution valve" indicated that he was never properly briefed on the "dilution valve" issue for which the NRC OI found wilful misconduct on behalf of GPC and for which the NRC Staff issued a large fine against GPC. Tr. 1151-52

Since 1990 GPC has been subjected to numerous NRC investigations and reviews about the alleged wilful misconduct of Bockhold and McCoy. Significantly Intervenor raised these issues in a 2.206 petition and in subsequent amendments to that petition. This licensing proceeding directly concern the allegations raised in the petition. Yet, Mr. Dahlberg never reviewed the 2.206 petition filed by Marvin Hobby and Allen Mosbaugh. Tr. 1063-66 (Dahlberg); and unaware that allegations of "wilful misconduct" had been filed against Vice President McCoy

and plant Manager Bockhold. Tr. 1152-53 (Dahlberg).⁵¹ For Mr. Dahlberg not to know the nature of these allegations, or that such serious allegations had been raised against two of the most important managers with responsibility over plant Vogtle is shocking. It demonstrates a complete abdication of responsibility and total absence of "hands on" management. In juxtaposition, where Mr. Dahlberg did not even know that such significant charges had been filed against Mr. McCoy and Mr. Bockhold, Mr. Farley not only knew of the charges, he knew who filed them; that there was tape recorded evidence in the possession of NRC relating to the charges; he formed a very strong opinion hostile to the individual who raised these concerns and had a strong opinion as to the integrity of the managers who were accused of the misconduct. Tr. 1831-39 (Farley).

Mr. Dahlberg's absence of "hands on" management is also evident by his near total ignorance of nuclear operations in general and the operations of plant Vogtle in particular. He did not know the official positions or even the identity of some of

⁵¹ This is a clear indication that he abdicated his responsibility for insuring that all information supplied to the NRC was accurate, truthful, candid and complete. Despite the fact that Mr. Dahlberg never reviewed the 2.206 petition and never even review the entire response to the 2.206 petition, he knew that it was the responsibility of the CEO to ensure that the 2.206 petition response was "completely correct." Tr. 1061, 1066, 1069 (Dahlberg). Yet, Mr. Dahlberg was not even aware that the 2.206 petition had raised concerns about his conduct and his control of plant Vogtle, Tr. 1067 (Dahlberg) ("Q. Were you aware that certain of your actions were called into question by that 2.206 petition? A. No, sir"); and was unaware that Intervenor had filed amendments to the 2.206 petition were ever filed. Tr. 1070 (Dahlberg).

the most important persons who worked in the nuclear side of GPC. For example, he did not know whether Vice Presidents Long and McCary were officers of GPC (Tr. 1149), he did not know who the engineering and licensing manager at plant Vogtle was (Tr. 1150), he did not know who the maintenance support manager was (Tr. 1151) and he did not correct the statement made by Mr. McDonald directly to the NRC Commissioners which failed to mention that VP Hairston was in the chain of command at the GPC/SNOPCO project.

Finally, Mr. Dahlberg testified that he was unaware of any reason why GPC was ever fined by the NRC. Tr. 1151 (Dahlberg). This testimony is also very troubling for the Board. A primary reason the NRC issues a notice of violation and a civil penalty to a utility is to insure that the utility is fully aware of the problem and has taken or will take aggressive steps to correct the problem. If the individual with the final responsibility for insuring the safe operation of plant Vogtle is unaware of why the NRC issued any civil penalties, how could that individual properly supervise the licensed activity? Once again, this testimony demonstrates that the real control over plant Vogtle did not reside with Mr. Dahlberg; that Mr. Dahlberg had abdicated his responsibility and in no sense was functioning as a "hands on" manager.

c. Omission of Mr. Farley from the management hierarchy

The record establishes that GPC viewed the SONOPCO project as a separate entity. Moreover, by the time the hearings commenced, Mr. Farley relocated his offices to the SONOPCO

project executive floor; and his title was changed from CEO of APC to Executive Vice President-Nuclear of The Southern Company and SCS. He gained overall responsibility for managing the SONOPCO project and SONOPCO project personnel were advised that Mr. Farley had "assumed overall responsibility for providing management and technical services" for GPC's and APC's nuclear plants. Intervenor Exhibit 89 at p.1.

Significantly, at no time prior to the Full Power License hearing was NRC either in writing or orally told that Mr. Farley had assumed overall management responsibility for plant Vogtle.⁵²

Prior to the Full Power Licensing hearing, the only document depicting the corporate organization above Mr. McDonald provided to the NRC is Figure 13.1.1-1 to Amendment 39 of the plant Vogtle

⁵² GPC knew that NRC Staff went to the SONOPCO project to inspect the corporate management structure over GPC's nuclear plants. See JE 11. During this inspection NRC Staff was not informed of Mr. Farley's role within the SONOPCO project. See Tr. 2680 (Rogge); Tr. 2680 (Allenspach). On February 7, 1989 NRC staff issued the final inspection report concerning GPC's corporate organization structure that would be relied upon when decided to issue authorization to commence full power operation of plant Vogtle Unit 2. Tr. 2682-2683. This inspection report explained NRC's understanding of the functioning of the SONOPCO project organization as follows:

The corporate organization which is referred to as the SONOPCO Project is headed by the Executive Vice President. The Vice President of Technical Services and Vice President of Administration report to the Executive Vice President of Nuclear Operations.

JE 11 (inspection report at p. 3).

Based on the above description, NRC staff did not understand that Mr. Farley was the functional head of the SONOPCO project.

FSAR, dated November 23, 1988 ("Figure 13.1.1-1"). See JE 12.⁵³ Figure 13.1.1-1 depicts Mr. Scherer (GPC's Chairman of the Board and CEO) heading the corporate nuclear organization; Mr. McDonald (GPC's Executive Vice President-Nuclear) is shown as reporting to Scherer; while GPC's President (Mr. Dahlberg) is depicted as being outside the chain of command. NRC staff witnesses testified that, in preparation of the March 30, 1989 Full Power License hearing, they conducted an inspection of GPC's corporate organization and left with the understanding that it was functioning as depicted in Figure 13.1.1-1 of FSAR and so stated

⁵³ The FSAR represents an essential safety document. 10 C.F.R. § 50.34(b)(6) requires that an FSAR be submitted by the licensee. Georgia Power is required to address in the plant Vogtle FSAR information concerning "(i) The applicant's organizational structure, allocations or responsibilities and authorities, and personnel qualifications requirements." *Id.* Moreover, the FSAR must also clearly set out the division of responsibility in order to meet the Quality Assurance Criteria requirement set out in 10 C.F.R. 50 App. B, I Organization ("The authorities and duties of persons and organizations performing activities affecting the safety related functions or structures, systems, and components shall be clearly established and delineated in writing").

Chapter 1 of the plant Vogtle FSAR under the heading "Description of Corporate Organization" states:

The GPC is a public utility incorporated under the Laws of the State of Georgia with its principal offices located at 333 Piedmont Street, Atlanta Georgia. GPC is a wholly-owned subsidiary of The Southern Company.

See FSAR Chapter 1 at 1.4.1.2.

Chapter 13 of the plant Vogtle FSAR at 13.1.1-16 states:

The corporate organization, which provides the line responsibility for the operation of the VEGP, is shown in figure 13.1.1-1. The ultimate responsibility...rests with the chairman and CEO, who assigns responsibilities to the various organizations as described in paragraph 13.1.1.2.

in NUREG-1137, Supplement 8, to the Vogtle Safety Evaluation Report, which was issued in February of 1989. NRC Prefiled Testimony at p. 7. In fact, between November, 1988 and the commencement of the Full Power Licensing Hearing, NRC did not receive any information (written or oral) indicating that GPC's corporate organization had changed or was not functioning as depicted in Figure 13.1 of NUREG-1137 or FSAR Amendment 39, Chapter 13, Figure 13.1.1-1. Tr. 2684 (Hood).

Given that GPC did not correct NRC's misunderstanding of the functioning organizational structure prior to the commencement of the Full Power Licensing hearing, Commissioner Carr's request to GPC to explain "the hierarchy between the CEO and the plant manager" was extremely significant and it required no less than a complete and candid description of the relationship Mr. McDonald had with Mr. Farley and with Mr. Dahlberg. Given the NRC's actual understanding of the functioning of the SONOPCO project, this omission was material.

- d. **The description of Mr. Dahlberg as a "hands-on" manger of GPC's nuclear operations is misleading.**

Licensee asserts that Mr. Dahlberg was a "hands-on" manager over nuclear operations. Unfortunately, documentary evidence does not support this assertion. First, licensee failed to produce a single letter, memorandum, fax or other documentation demonstrating that a single piece of paper was exchanged between Mr. McDonald and Mr. Dahlberg. Indeed, the only document they testified about was the letter Mr. Dahlberg issued concerning the establishment of NOCA. But in the case of NOCA, the record

demonstrates that Mr McDonald disregarded Mr. Dahlberg's written directive and countermanded it by refusing to provide NOCA with the information it sought. Other than this one memo one would expect additional written communication to have occurred between them, yet none was produced.

Second, Mr. McDonald essentially stopped going to Management Council meetings after December of 1988. Based on the important function the Management Council played, it is difficult to conceive that Mr. Dahlberg had "hands-on" management over nuclear operations. Indeed, if he did it certainly is not reflected in his 1989 appointment calendar. Mr. Dahlberg's contact with Mr. McDonald and all of the other GPC corporate managers involved with nuclear operations is almost non-existent, particular when compared to the level of communication Mr. Dahlberg was having with his other Executive Vice Presidents.

In 1989 GPC had five Executive Vice Presidents all of whom directly reported to Mr. Dahlberg. They were: 1) H. G. Baker; 2) Dwight Evans; 3) J. C. Hemby; 4) W. Y. Jobe; and 5) Pat McDonald. See Joint Stipulation Ex. 35 at p. 2. GPC also had five Senior Vice Presidents, all of whom reported to an Executive Vice President. The Senior Vice Presidents are as follows: 1) Mr. Hairston (reporting to Mr. McDonald); 2) Kerry Adams (also reporting to Mr. Baker); 3) Tom Boren (reporting to Mr. Baker); 4) G. Hodges (reporting to Mr. Hemby); and 5) W. Dahkle (also reporting to Mr. Hemby). Id. A careful review of Mr. Dahlberg's 1989 calendar demonstrates that Mr. Evans was scheduled to meet

with Mr. Dahlberg 47 times; Mr. Jobe was scheduled to meet with Mr. Dahlberg 22 times; Mr. Baker was scheduled to meet with Mr. Dahlberg 23 times; and that Mr. Hemby and his two Senior Vice Presidents were scheduled to meet with Mr. Dahlberg 24 times.⁵⁴ By comparison, Mr. McDonald was scheduled to meet with Mr. Dahlberg four (4) times during the entire year and his Senior Vice President, while Mr. Hairston as well as every other nuclear executive had no scheduled meeting with Mr. Dahlberg during the entire year. Indeed, Mr. Dahlberg met more frequently with Mr. Farley during 1989 than he did with Mr. McDonald.

The only form of regular contact GPC alleges Mr. Dahlberg actually had with Mr. McDonald were telephone calls from Mr. McDonald to Mr. Dahlberg. As a matter of law, the undocumented phone calls between Dahlberg (and/or members of his staff) and Mr. McDonald (and/or members of his staff) were not sufficient to establish control. For example, in Telephone and Data Systems, Inc. v. FCC, 19 F.3d 42, 49 (D.C. Cir. 1994), the Court stated that the control of daily operation "must mean more than approval of major expenses and a loosely defined practice of maintaining 'contact'." The Court also noted that lack of involvement in critical responsibilities demonstrated lack of control. Id. Mr. McDonald testified that he would call Mr. Dahlberg's office on week days and sometimes would speak directly with Mr. Dahlberg; that he could go a few days without speaking to Mr. Dahlberg and,

⁵⁴ Appended as Appendix A is a chart depicting the dates the various individuals are identified in Mr. Dahlberg's 1989 calendar as having met with Mr. Dahlberg.

on rare occasion, could go more than a few days without communicating directly with Mr. Dahlberg. Tr. 1505 (McDonald).⁵⁵ Mr. Dahlberg's prefiled testimony fails to mention or discuss the scope, duration or frequency of any oral communication he may have had with Mr. McDonald, although he did testify to such at the hearing. Tr. 1135 (Dahlberg). The fact remains that GPC failed to produce any documentary evidence supporting the existence of a single phone call, or for that matter the transmission of a single letter, memorandum or fax between Mr. Dahlberg's office and Mr. McDonald.⁵⁶ However, more significantly was Mr. Dahlberg's own testimony which

⁵⁵ Mr. McDonald had previously explained the communication as follows:

...there are calls made from the plant...These are phoned in and passed up to me. Then, I call if there is something significant at all. I will call or George [Hairston] will call Elmer Harris if it's his, or Bill Dahlberg if it's his.

JE 20 at p. 21 (January 11, 1991 Transcript of NRC proceedings).

⁵⁶ The lack of such documentary evidence is particularly disturbing because GPC knew of the underlying allegation no later than September of 1990, when Mr. Hobby and Mr. Mosbaugh filed their 2.206 petition and reasonably should have taken steps to preserve such evidence. GPC provided no reasonable explanation why it would not have preserved such documentary evidence related to the communications between Mr. Dahlberg and Mr. McDonald after it knew of the allegations. Indeed, Mr. Dahlberg specifically testified that his secretary maintained phone records of calls coming into his office. It stands to reason that if this documentary evidence supported GPC it would have been retained and produce at the hearing. GPC bares the ultimate burden in this case and its failure to produce any documentation should give rise to an adverse inference that regular communication between Mr. McDonald and Mr. Dahlberg did not transpire. See 2 J. Wigmore, Evidence § 285 (3d ed. 1940); Rockingham Machine-Lunex v. NLRB, 665 F.2d 303, 305 (8th Cir. 1981); International Union (UAW) v. NLRB, 459 F.2d 1329, 1335-42 (D.C. Cir. 1972).

confirmed his near total lack of experience and knowledge of nuclear operations. Given Mr. Dahlberg's level of experience and knowledge of nuclear operations he needed more than a short phone call to function as a hands-on manager.⁵⁷

Mr. Dahlberg became GPC's President in June of 1988 but did not have responsibility for GPC's nuclear operations until some time in December, 1988. See Dahlberg pp. 1, 4. The record demonstrates that after Mr. Dahlberg joined Georgia Power for nuclear operations until the March 30, 1989 Full Power License hearing occurred, Mr. Dahlberg visited the plant Vogtle site once, which occurred on February 3, 1989. But Mr. Dahlberg's calendar demonstrates that the purpose of this visit was to attending a "Vogtle Project Board Meeting." The Vogtle Project Board was a separately established entity limited to construction activities at plant Vogtle and was not part of and did not report to GPC's nuclear operations, which had been transferred to the SONOPCO project under the direction of Mr. McDonald. Moreover, the minutes of the Nuclear Operations Overview Committee demonstrate that, between May 23, 1988 and March 15, 1989, the Overview Committee never visited the plant Vogtle site. See Minutes of Overview Committee meetings dated 5-23-88 at ¶ 1 (meeting held in Atlanta); 7-21-88 at ¶ 1 (meeting held in Atlanta); 10-12-88 at ¶ 1 (meeting held at plant Hatch); 11-29-88 at ¶ 1 (meeting held in Atlanta); 3-15-89 at ¶ 1 (meeting held in

⁵⁷ Indeed, if he were truly a hands-on manager he would be expected to know something as basic as the functioning of the plant Vogtle Plant Review Board.

Atlanta).

In sum, it appears that prior to the Full Power License hearing, Mr. Dahlberg had limited interaction with plant Vogtle and its nuclear operations management. Moreover, for a period of a year following the Full Power License hearing Mr. Dahlberg visited the plant Vogtle site only on April 26-27, 1989. His April 26th visit was limited to a 90 minute lunch meeting with Burke County citizens. Immediately following this meeting Mr. Dahlberg flew back to Atlanta. The next morning he returned to plant Vogtle as an attendee of the Board of Director's Overview Committee meeting held at the plant Vogtle site.⁵⁸

Finally, the record establishes that Mr. Dahlberg did not provide Mr. McDonald with a separate performance appraisal; that the appraisal was apparently prepared by Mr. Harris; was not signed by Mr. Dahlberg and that Mr. Farley was contacted for input into the appraisal. Tr. 1861-1862 (Farley). Hands-on management requires more than input into a performance appraisal prepared by a separate company concerning an Executive Vice President with supervisory authority over half of the company's assets.

7. Performance Indicators (Issue No. 9)

Georgia Power states in its April 1, 1991, 2.206 Response that the resolution of a dispute between Mr. Dahlberg and Mr.

⁵⁸ The Overview Committee minutes demonstrate that this was the first committee meeting held at plant Vogtle in a year's time (earlier Committee minutes were not produced by Licensee to determine if or when the Overview Committee previously visited plant Vogtle).

McDonald regarding the presentation of performance indicators to the Georgia Public Service Commission (PSC) was evidence of the reporting relationship and who was in control of nuclear operations. In its 2.206 Response, Georgia Power states:

A specific example demonstrating that Mr. Dahlberg is, indeed, responsible for and in control of GPC matters concerning plants Hatch and Vogtle is reflected in Hobby v. GPC. In August 1989, Mr. McDonald had a disagreement with Mr. Dwight Evans concerning testimony to be filed with the Georgia Public Service Commission on the subject of nuclear plant performance standards. Trial Tr. 365-68, 380-81. That disagreement was resolved by Mr. Dahlberg in an August 10, 1989 meeting during which Mr. Dahlberg directed Mr. McDonald to take certain actions.

Exhibit 48, p. 8.

This represents the only example GPC provided to the NRC in its 2.206 response.

Intervenor alleges that this statement is false because Mr. McDonald did not follow Mr. Dahlberg's instruction after the August 10, 1989 meeting and because Mr. Farley reviewed and approved the testimony to be submitted which did not include alternative performance indicators. Intervenor further alleges that the statement is material because it was made in an effort to persuade the NRC that Mr. McDonald reported to Mr. Dahlberg on all matters concerning nuclear operations. Licensee argues that since both Mr. Dahlberg and Mr. McDonald testified that the decision was made to prepare alternative performance standards at this meeting, that the agreement to prepare these standards was honored.

The record establishes that the PSC placed Georgia Power on

notice some two years prior that at the next rate case it expected Georgia Power to prepare an alternative performance indicator. Intervenor Exhibit 141 at p. 3579, 3583. Mr. Dahlberg testified that he wanted an alternative indicator because he did not want Georgia Power to get stuck with the standards recommended by the PSC witnesses. Tr. 1112 (Dahlberg). By August of 1989 Mr. Dahlberg and Mr. McDonald were in total disagreement on how to proceed before the PSC. Mr. Dahlberg decided that Georgia Power should prepare its version of an acceptable performance indicator. Counter to Mr. Dahlberg's judgment, Mr. McDonald determined that the company would not prepare an alternative to the company and would not allow SONOPCO project personnel to work on an alternative indicator. Dahlberg 17; McDonald 15. Mr. Farley also opposed providing an alternative performance standard to the PSC. Tr. 1109 (Dahlberg).

On August 10, 1989, Messrs. Dahlberg, McDonald and Evans met to resolve the dispute. The discussion was heated to the point where Mr. McDonald broke a rung in the chair in which he was seated. See Hobby I. 43; Tr. 1105 (Dahlberg); Tr. 1504 (McDonald). At the conclusion of the meeting Mr. McDonald was told to prepare an acceptable performance indicator as an alternative to the indicators presented by PSC staff. After August 10th a meeting was held at the SONOPCO project. In attendance were Messrs. Farley, McDonald, Johnson, Barker and Hicks, as well as just about all of the top management of the

SONOPCO project. Johnson Dep. p. 26. Mr. Johnson testified that Mr. McDonald stated that he was not going to allow SONOPCO project personnel to prepare an alternative performance indicator, Hobby pp. 43-44, and that the decision not to work on an alternative performance indicator was jointly made by Mr. McDonald and Mr. Farley during the course of the meeting. Johnson Dep. p. 38-39. This event was confirmed by Michael Barker, who discussed the matter with Mr. Hobby. Hobby p. 44. Moreover, Mr. Johnson spoke with SONOPCO project's nuclear performance engineers, Mr. Barker and Mr. Hicks, and both confirmed that they were instructed not to do any more work on an alternative performance standard and that this directive came from SONOPCO project upper management. Johnson Dep, p. 29.

Georgia Power submits that Mr. McDonald did, in fact, follow Mr. Dahlberg's direction. According to Mr. Dahlberg, Georgia Power provided rebuttal via a consultant, Mr. Fitzpatrick, who suggested modifications to the PSC staff's proposed performance standard by identifying "five areas where the proposed standard needed to be changed." Licensee's post-hearing brief at p. 136 (citing to pp. 3523-64 of the PSC hearing transcript).⁵⁹

Georgia Power states that "when it became clear that the PSC was

⁵⁹ Georgia Power suggests that Intervenor was confused by the company's public opposition to such standards while at the same time the company proposed changes via a consultant, Mr. Fitzpatrick who testified before the PSC. *id.*, at pp. 136-137. This explanation is lacking because the witnesses who testified on behalf of Intervenor did not obtain their knowledge from public sources, but were rather the actual GPC employees tasked to work on this issue and attended strategy meetings.

prepared to adopt such standards, Mr. Fitzpatrick's testimony provided the basis for Georgia Power to identify the necessary changes in its brief submitted to the Public Service Commission." Id., at p. 137 (citing Tr. 112, 1121-22 (Dahlberg)).

Georgia Power's explanation is lacking and contradictory to testimony presented by Mr. Fitzpatrick during the PSC hearing. That hearing transcript indicates that the Commission asked Mr. Fitzpatrick if Georgia Power had engaged him to present the Commission with a performance standard based on his theory "or have they just engaged you to tear down the GDS program? . . . Yes or no, do you have a program for us?" to which Mr. Fitzpatrick responded "the answer is no, given the time that was available." Intervenor Exhibit 141 at p. 3578. When the Commission pressed further by asking "have they engaged you to do that, to present to us sometime today, or sometime in the future?", he responded that "it hasn't been discussed with me." Id., at 35798. The Commission stated that it believed that it was the company's responsibility, if it doesn't agree with the GDS program, to come forward with a program that meets and removes the defects. Id. The Commission further stated that there had been interest in this for two years, "the staff has worked on it, and the company has worked on it, but only on the side of what's wrong with somebody else's and they haven't come in with one of their own." Id. (emphasis added). The Commission then asked Mr. Fitzpatrick how long it would take for him to put together performance standards for plants Vogtle and

Hatch, to which he replied: "[I]f we were to start today, in six months." Id. at 3583. The Commission concluded that Georgia Power must not be interested in proposing performance standards because it had over two years to do so and had not. Id.

According to Mr. Fitzpatrick's own testimony during the PSC hearing, licensee is now mischaracterizing the purpose of that testimony.

Licensee's assertion that "Mr. Fitzpatrick's rebuttal testimony critiqued the PSC's proposal and identified five areas where it needed to be changed" does not explain why an alternative performance standard was not available at the hearing for submission to the Commission. That Georgia Power may ultimately have submitted an alternative performance standard after the close of the record as an attachment to its brief does not adequately explain why the alternative was not available for inclusion before the hearing ended.⁶⁰ Moreover, Mr. Dahlberg testified before us that on September 12, 1989, he testified under oath to the Georgia PSC that Georgia Power had no intention of filing an alternative performance standard. Tr. 1118-19 (Dahlberg). In this respect, Mr. Dahlberg testified as follows:

Q: Mr. Dahlberg, do you remember being questioned September 12, 1989 before the Public Utilities Commission, State of Georgia, under oath and asked the following question, "The company" meaning

⁶⁰ Significantly, Intervenor Exhibit 46 includes a September 15, 1989 memorandum identifying that the first draft of the major elements of a Georgia Power proposed performance standard was not prepared until September 15, 1989. Id., at p. 1. This memo was not copied to Mr. Dahlberg, it was rather copied to Messrs. Farley, McDonald and the entire SONOPCO project executive staff.

Georgia Power, "generally was aware as early as March and certainly in April and the May time frame of this year that the staff was going to address the performance standard issue in this case, were they not?" Your answer was, "That's correct." Do you remember that testimony?

A: Yes sir.

Q: And then there was a follow up question. "And the company has not filed a performance standard in this case and has no intention of doing so, is that right?" And your answer was, "That's correct."

A: Correct.

Q: And in response to this and other questions on this same day, you informed the Public Utilities Commission that Georgia Power would not be proposing the alternative performance standards which were an issue in that proceeding, isn't that correct?

A: I believe that's correct, yes.

* * *

Q: And do you remember ever seeing a transcript of the September 15, 1989 proceeding of the Public Utilities Commission in which Commissioner Andrews stated, "I would just comment that it appears to me that the company has knowingly and willfully put the Commission to the choice of the staff's performance plan or none. And at this point in time I believe the Commission is going to have to live with that and the company is going to have to live with it." Do you remember that?

A: Yes.

Tr. 1119-20 (Dahlberg) (emphasis added).

Georgia Power did not present a straight forward explanation to explain why the company was not prepared to present at the hearing an alternative performance indicator. We must take the testimony presented before the PSC at face value. In sum, that testimony establishes that Mr. Fitzpatrick never consulted with

Georgia Power about preparing an alternative performance indicator; that Mr. Dahlberg was unprepared to present an alternative when directly asked to do so by the PSC. It stands to reason that, if the SONOPCO project would not allow its staff to work on an alternative performance standard, which is the testimony of Mr. Hobby and Mr. Johnson, the reason Mr. Dahlberg could not present an alternative at the hearing was because the expertise and resources needed to work on this project were instructed not to do so by Mr. McDonald, with the concurrence of Mr. Farley.

We must conclude that the only factual example presented by GPC in its response to the 2.206 petition erroneously asserts that Mr. McDonald followed Mr. Dahlberg's instructions following the August 10 meeting. It was not Mr. Dahlberg authority but the PSC's reaction that coaxed the SONOPCO project to prepare the alternative performance indicator.

8. Georgia Power's Lack of Candor toward the NRC is Supported by the Testimony of McCoy and Farley

One of the issues this Board must address is whether GPC's responses to the Hobby/Mosbaugh 2.206 petition and other statements and filings with the NRC demonstrated the level of candor required under NRC regulations.

On this issue, the testimony regarding statements made by the plant Vogtle Vice President Kenneth McCoy and statements made by the former Southern Company Executive Vice President for Nuclear, Mr. Joseph Farley are very instructive.

According to testimony by Allen Mosbaugh, which is fully

supported by a contemporaneous tape recording of the event, Mr. McCoy's address to his staff represents a fundamental lack of candor. In a statement to his staff made during an important NRC on-site investigation, McCoy instructed his staff not to be fully candid with the NRC. The taped transcription of McCoy's comments speaks for itself. See McCoy Rebuttal Ex. A.⁶¹

Even more telling evidence of the lack of candor regarding comments to the NRC was demonstrated in the testimony of Mr. Farley. Mr. Farley went so far as to testify that it was inappropriate for GPC employees such as Mr. Mosbaugh to report concerns to the NRC regarding alleged material false statements made by GPC/SNOPCO employees.

Mr. Farley testified that he knew Mr. Mosbaugh had "alleged deliberate misrepresentation," and Mr. Farley "felt that inappropriate and out of order because I don't believe that our

⁶¹ The pertinent segment of the tape transcript reads as follows:

...we need to grow to the point that we're just like a family and, you know, we may fight among ourselves but when externally, we go out and someone brings up something externally or something like that, and uh, we defend our reputation and we all support each other and we all have a part to do and that sort of thing. I think, I think that's the worst thing that [inaudible] picked up on. We have not matured to the point that we all feel like a solid team and we talk to each other about our problems and that sort of thing. But when somebody external to us says, uh, "what do you think about those corporate guys," or something like that, you tell them "you got the best corporate organization in the world." That's what you tell them externally, then you get on the phone (laughing) and say, "you guys didn't support us or whatever the problem is." I think you all understand the context of what I'm talking about.

McCoy Rebuttal Ex. A.

people do that or did that. Certainly I didn't." Tr. 1838 (Farley). Mr. Farley further testified that he was upset about the allegations of wrongdoing on the part of people with whom he had a great deal of confidence. Tr. 1839 (Farley).

As a matter of law, it is not "inappropriate" for an employee to raise safety related concerns with the NRC, even if those concerns allege that various managers engaged in deliberate misrepresentation to the NRC. As the U.S. Court of Appeals for the Fourth Circuit recently stated in a case arising under the Energy Reorganization Act, that Act "gives absolute immunity from on-the-job retaliation to 'whistleblowing' employees who report safety violations of their employers to the Nuclear Regulatory Commission. Carolina Power and Light Company v. U.S. DOL ___ F.3rd ___, No. 94-1459, Slip op. p. 2 (U.S. Court of Appeals for the 4th Cir., January 10, 1995).

Not only did Mr. Farley not want employees such as Mr. Mosbaugh to be candid with the NRC, he did not even want such employees to even file certain concerns with the NRC. Given Mr. Farley's demeanor at the hearing when testifying about Mr. Mosbaugh's reports to the NRC, it is fully evident that Mr. Farley forcefully communicated his philosophy regarding the inappropriate nature of certain contacts with the NRC to his immediate staff (including all those who participated in the Farley staff meetings). In fact, Mr. Farley admitted during his testimony that he communicated this philosophy to other GPC and SONOPCO project employees. Tr. 1832 (Farley).

Mr. Farley's hostility toward employees who raised serious allegations of misconduct with the NRC, combined with Mr. McCoy's statement to GPC employees about how to communicate problems to "external" entities, demonstrate that GPC had a philosophy and practice of not being fully candid with the NRC. This testimony tends to support intervenor's contention that GPC's improper statements in their response to the 2.206 petition, their improper statements during the March, 1989 NRC meeting regarding the chain-of-command and Mr. Dahlberg's "hands on" relationship with plant Vogtle and GPC's contradictory statements regarding Mr. Farley's place in the emergency plan were not the result of harmless errors, but instead demonstrated a consistent attitude by GPC and SNOPCO not to be fully candid with the NRC.

H. OMISSIONS AND MISREPRESENTATIONS REQUIRING THE BOARD TO FIND THAT AN ILLEGAL TRANSFER OF CONTROL HAS OCCURRED.

We next consider omissions and misrepresentations that are based on the presumption that Georgia Power did transfer its license and/or that Mr. Farley should have been considered a member of management reported in the various FSAR filings. These omissions and misrepresentations were set out in Intervenor's pre-filed statement of the issues.

1. GPC's failure to accurately state the corporate organization

The first concerns GPC's failure to accurately state the corporate organization in chapter 1 of the 1988 amendments to plant vogtle's FSAR.

FSAR 1.4.1.2 is headed "Description of Corporate

Organization." Pursuant to this section of the FSAR, GPC is required to set forth the description of the corporate organization of the licensed operator of plant Vogtle. The description of the corporate organization set out in the FSAR reads as follows:

The GPC is a public utility incorporated under the Laws of the State of Georgia with its principal offices located at 333 Piedmont Street, Atlanta Georgia. GPC is a wholly-owned subsidiary of The Southern Company.

10 C.F.R. § 50.34(b)(6) requires that an FSAR be submitted by the licensee. Georgia Power is required to address in the plant Vogtle FSAR information concerning "(i) The applicant's organizational structure, allocations or responsibilities and authorities, and personnel qualifications requirements." Id. Pursuant to 10 C.F.R. § 50.71(e), the licensee must update its FSAR. The FSAR represents an essential safety document.

plant Vogtle's FSAR at 13.1.1-16 states:

The corporate organization, which provides the line responsibility for the operation of the VEGP, is shown in figure 13.1.1-1. The ultimate responsibility...rests with the chairman and CEO, who assigns responsibilities to the various organizations as described in paragraph 13.1.1.2.

Figure 13.1.1-1 identified at 13.1.1-16 depicts the following reporting relationship: Senior Vice President (Hairston), reporting to Executive Vice President (McDonald), reporting to Chairman and CEO (Scherer).

Georgia Power failure to accurately state the organizational structure in the 1988 amendments to chapter 13 of plant Vogtle's FSAR.

On March 28, 1990 GPC filed an amendment to the plant Vogtle

FSAR revising Figure 13.1.1-1. See JE 15. Figure 13.1.1-1 indicates that Mr. McDonald reports to Mr. Dahlberg. The Vice President of Technical Services and the Vice President of Administrative Services are depicted as reporting to Mr. McDonald and then to Mr. Dahlberg. Georgia Power failed to accurately state the organizational structure when filing the March 28, 1990 FASR amendment.

On March 28, 1991, GPC filed an amendment to Chapter 13 of its FSAR asserting that the Executive Vice President-Nuclear reports to GPC's CEO and President with respect to all matters concerning budget and personnel and that Southern Nuclear matters are currently limited to operational support activities. JE 20, FSAR at 13.1.1.2.1.1. Georgia Power falsely asserted in its March 28, 1991 amendment to chapter 13 of plant Vogtle's FSAR that Georgia Power's CEO retained control over matters pertaining to GPC's nuclear budget and personnel.

The March 1991 FSAR Amendment of Figure 13.1.1-1 continued to denote that the Executive Vice President-Nuclear (McDonald) reported to the President and CEO of Southern Nuclear (Farley) with respect to Southern Nuclear matters only and reported to GPC's CEO and President on matters pertaining to GPC. In this filing Georgia Power continued to falsely assert that McDonald reported to Dahlberg.

Georgia Power also failed to accurately represent its corporate reporting structure in numerous meetings with the NRC.

Between December 19-21, 1988, NRC conducted an announced

inspection of GPC's Birmingham, Alabama corporate offices. Mr. Rogge, Senior Resident Inspector, plant Vogtle, participated in the inspection. A meeting was held between NRC and GPC, APC and SCS personnel to specifically discuss "nuclear plant oversight responsibilities, technical support responsibilities, and activities of the corporate organization." During the course of the inspection GPC presented handouts to NRC. The handout and discussion failed to identify Mr. Farley. The inspection report states that the "corporate organization which is referred to as the SONOPCO Project is headed by the Executive Vice President." JE 11, Inspection Report at p. 3. Mr. Farley's involvement with the SONOPCO project and the reporting relationship between Mr. Farley and Mr. McDonald was excluded, as was the fact that Mr. Farley headed up the SONOPCO project at the time of the inspection.

GPC states on page 5 of Attachment 1 to GPC's Response to Intervenor's 2.206 Petition:

On July 25, 1989, GPC and SCS personnel met with NRC personnel to discuss the Southern Nuclear/GPC organizations and generic activities. An overview of the then-current organizational status was provided to NRC, including corporate structure, responsibilities and interface with the plants.

The meeting was attended by NRC resident inspectors, including Mr. Rogge. On August 3, 1989, NRC issued a summary of the meeting. See JE 14. As demonstrated in JE 14, the corporate structure and responsibilities outlined during the July 25, 1989 meeting were false and misleading by omission. Mr. Farley did not attend the meeting and the organization presented excluded

Mr. Farley's involvement and otherwise did not include an organizational chart depicting the reporting relationships above Mr. McCoy and Mr. Beckham, the plant Vice Presidents.

I. OMITTING FACTS PERTAINING TO ACTUAL CONFIGURATION AND OPERATION OF PLANT VOGTLE WHEN FILING THE REQUEST TO AMEND THE PLANT VOGTLE NUCLEAR OPERATING LICENSE.

On September 4, 1992 Georgia Power Company submitted its Application to amend its operating license for plant Vogtle to the NRC. In this application GPC stated that "[t]he purpose of incorporating Southern Nuclear was to establish an organization which would consolidate personnel within the Southern electric system..." Application to Amend Facility Operating License Nos. NPF-68 and NPF-81. Georgia Power further stated in this application:

In January 1991, Southern Nuclear, under Georgia Power Company direction and approval, began to provide nuclear support services, technical services, and administrative services associated with Georgia Power Company's operation of VEGP.

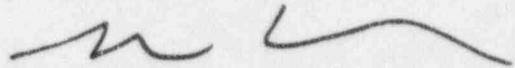
Id. The application also stated that at the same time Southern Nuclear "began to provide nuclear support services, technical services, and administrative services" to plants Hatch and Farley. Id. This application once again contained the same omissions and false statements as had previously been filed by Georgia Power to the NRC.

VI. CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and upon consideration of the entire evidentiary record in this proceeding, the Board makes the following conclusions of law,

2. Within fifteen (15) days after service of this Partial Initial Decision, a petition for review may be filed with the Commission on the grounds specified in § 2.786(b)(4). A petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review. Any other party to the proceeding may, within ten (10) days after service of a petition for review, file an answer supporting or opposing Commission review.

Respectfully submitted,



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(202) 234-4663

Attorneys for Intervenor

Dated: February 24, 1995

1989 DAHLBERG APPOINTMENT CALENDAR

McDonald	Hairston & McCoy	Dahlke	Hodges	Hemby	Baker	Jobe	Evans	Farley
1-31	0	2-9	6-23	1-18	1-9	1-9	1-11	1-31
2-21		6-30	7-12	2-22	1-9	1-9	1-24	2-8
8-10		7-13	8-10	5-30	1-17	1-26	1-26	5-5
11-10		8-28	8-23	6-26	1-18	2-6	1-31	6-19
		9-22	8-16	6-30	1-31	2-14	2-8	10-3
		9-27	8-25	9-22	1-31	2-20	2-16	
		9-27		9-27	2-14	2-24	2-20	
		11-2		11-1	2-23	3-3	2-21	
		12-9		12-14	3-8	4-3	2-28	
					3-10	4-18	3-3	
					3-14	4-18	3-13	
					4-3	5-5	3-14	
					4-18	5-9	4-20	
					4-28	5-9	5-3	
					5-5	6-2	5-9	
					5-9	6-2	5-12	
					6-9	7-27	5-13	
					6-23	8-3	5-17	
					6-28	8-10	5-23	
					6-30	11-2	6-1	
					6-30	11-20	6-8	
					7-28	12-1	6-23	
					10-2		6-23	
							6-26	

							6-26	
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							10-25	
							10-26	
							11-1	
							11-1	
							11-9	
							11-15	
							11-30	
							12-7	
Total: 4	Total: 0	Total: 9	Total: 6	Total: 9	Total: 23	Total: 22	Total: 47	Total: 5

NUCLEAR OVERSIGHT COMMITTEE MEETINGS

May - December 1988 (minutes betwee January and April not produced)

Mtg.#	Date	Location	Attendees
11th	5-23	Atlanta	S - M -
12th	7-21	Atlanta	S D M H
13th	10-12	Hatch	S D M H
14th	11-29	Atlanta	S D M H

1989 (Farley added to Emergency Plan 6-89)

15th	3-15	Atlanta	S D M H
16th	4-27	Vogtle	S D M H
17th	5-17	Atlanta	S D M -
18th	7-24	Hatch	F - M H

1990

19th	1-30	Vogtle	F D - -
20th	4-18	Atlanta	- D M -
21st	7-31	Hatch	F D M H

1991

22nd	1-29	Vogtle	F D M H
23rd	7-30	Hatch	F D M H

1992 (Farley retiers May 1992)

24th	3-27	Vogtle	- D - H
25th	8-20	Hatch	- D M -

1993

26th	3-3	Vogtle	- D M, H
27th	10-29	Hatch	- D - -

1994

28th	3-30	Vogtle	- - - H
29th	10-13	Hatch	- - - H

F = Farley S = Scherer D = Dahlberg M = McDonald H = Hairston

DOCKETED
February 24, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

'95 FEB 27 10:10

In the Matter of)
)
GEORGIA POWER COMPANY)
et al.,)
)
(Vogtle Electric Generating)
Plant, Unit 1 and Unit 2))
_____)

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

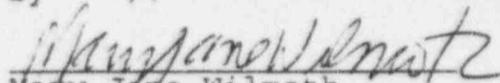
Docket Nos. 50-424-OLA-3
50-425-OLA-3

Re: License Amendment
(transfer to Southern Nuclear)

ASLBP No. 93-671-01-OLA-3

CERTIFICATE OF SERVICE

I hereby certify that the document entitled "Intervenor's 'Phase I' Findings of Fact and Conclusions of Law" has been served this February 24, 1995, by hand delivery on the persons listed in the attached service list (except that it was served by first class mail as indicated by "*").


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DOCKETED
USNR

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

'95 FEB 27 10:09

In the Matter of)

GEORGIA POWER COMPANY)

et al.,)

(Vogtle Electric Generating)
Plant, Unit 1 and Unit 2))

DOCKETED
OFFICE OF SECRETARY
DOCKETING
Docket Nos. 50-424-OLA-3
50-425-OLA-3

Re: License Amendment
(transfer to Southern Nuclear)

ASLBP No. 93-671-01-OLA-3

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Washington, D.C. 20555

recognizing that certain of the conclusions may be subject to change based on the record of the remainder of the hearing.

1. Georgia Power Company transferred control of the operating licenses for plant Vogtle without the prior approval of the Nuclear Regulatory Commission.

2. Georgia Power Company has made material false statements and omissions to the Nuclear Regulatory Commission with respect to representations made to the Agency which were not relevant to license transfer.

3. Georgia Power Company has materially misled the Nuclear Regularity Commission regarding the transfer of control over the plant Vogtle operating licenses.

4. There is substantial basis for concluding at this time that Southern Nuclear lacks the character and competence necessary to operate plant Vogtle in conformity with the NRC's rules and regulations and consistent with protection of the public health and safety.

ORDER

For all the foregoing reasons, it is this _____ day of _____, 1995, ORDERED, in accordance with 10 C.F.R. §§ 2.760 and 2.786:

1. That this Partial initial Decision will constitute, with respect to the matters resolved herein, the final action of the Commission forty days after issuance hereof, unless an appeal is taken in accordance with § 2.786 or the Commission directs that the record be certified to it for final decision.