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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

In the matter of  
  
GEORGIA POWER COMPANY,  
et al.  
  
(Vogtle Electric Generating  
Plant, Units 1 and 2)

Docket Nos. 50-424-OLA-3  
50-425-OLA-3

Re: License Amendment  
(Transfer to Southern  
Nuclear)

ASLBP No. 93-671-01-OLA-3

MEMORANDUM AND ORDER  
(Motion to Exclude OI Conclusions)

Georgia Power Company (GPC) seeks a Board ruling which would exclude from evidence any conclusions made by the NRC's Office of Investigations (OI) in an OI report, Case No. 2-90-020R, dated December 17, 1993 (OI Report).<sup>1</sup> We have decided to deny that Motion.

<sup>1</sup> See "Georgia Power Company's Motion To Exclude Admission of OI Conclusions," dated July 28, 1995 (Motion); "Intervenor's Response to Georgia Power Company's Motion to Exclude Admission of OI Conclusions," August 14, 1995 (Intervenor's Response); "NRC Staff Response to Georgia Power Company Motion to Exclude Admission of OI Conclusions," August 17, 1995 (NRC Staff Response).

## Background

Intervenor identified the OI Report as an exhibit in this proceeding.<sup>2</sup> During Intervenor's examination of George Hairston, GPC's Executive Vice President of Nuclear Operations,<sup>3</sup> the witness was asked whether he agreed with an OI conclusion on page 42 of the OI Report. This OI conclusion was that Vogtle Plant Manager George Bockhold had deliberately provided inaccurate information to the NRC in 1990 regarding the plant's emergency diesel generators. Following objection and argument, the Board provisionally admitted the OI conclusion, subject to further briefing of the admissibility issue, leading to GPC's filing of the instant motion. See Tr. 9309-9325 (July 13, 1995).<sup>4</sup>

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<sup>2</sup> The OI Report (Intervenor Exhibit 39) has appended to it 113 numbered exhibits. These exhibits are collectively identified by Intervenor as a separate hearing exhibit (Intervenor Exhibit 130).

<sup>3</sup> Mr. Hairston is also President and Chief Executive Officer of the Southern Nuclear Operating Company, Inc., a subsidiary of GPC's corporate parent The Southern Company.

<sup>4</sup> GPC previously briefed the issue of whether the OI Report and its exhibits were admissible evidence in this proceeding in its filing dated May 18, 1995. See "Georgia Power Company's Brief On The Inadmissibility Of The OI Report Or In The Alternative Motion For Certification To The Commission." After reviewing GPC's brief, the Board ruled that it would require Intervenor to identify on a section-by-section basis the portions of the OI Report to be used during the examination of witnesses, and that the Board would make admissibility rulings on a section-by-section basis.

(continued...)

## Discussion

Georgia Power argues that the OI Report consists of unreliable hearsay testimony and is therefore not admissible. *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-367, 5 NRC 92, 121 (1977). The exclusion of unreliable hearsay testimony is fundamental to the law of evidence.<sup>5</sup> In particular, it is reflected in the Federal Rules of Evidence and in the court decisions interpreting those rules. Pre-eminent among those applicable decisions is *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988) (*Beech*). That case is cited and discussed by all the parties.

*Beech*, at 161, interprets Federal Rule of Evidence 803 as follows:

Federal Rule of Evidence 803 provides that certain types of hearsay statements are not made excludable by the

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<sup>4</sup>(...continued)

Tr. 4877-78 (May 18, 1995). The record also reflects the Staff's position that the OI Report would be admissible under an exception to the hearsay rules of evidence. *Id.* Neither Staff nor Intervenor chose to file written briefs on the issue at that time, and the Board reiterated its ruling upon reconvening the proceeding in Augusta, Georgia. Tr. 5117-18 (May 22, 1995). The issue of the OI Report's admissibility did not arise again until Mr. Hairston was questioned on July 13, 1995.

<sup>5</sup>10 CFR §2.744(C) governs the admissibility of evidence, stating "Only relevant, material and reliable evidence which is not unduly repetitious will be admitted." We consider the hearsay rule to be helpful in complying with this standard.

hearsay rule, whether or not the declarant is available to testify. Rule 803(8) defines the "public records and reports" which are not excludable, as follows:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law at to which matters there was a duty to report, . . . or (C) in civil actions and proceedings [ . . . ], factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

*Beech*, at 164 and 162, holds that documents are either admissible or inadmissible under Rule 803(8) and there is no special treatment for "factual findings" or for "conclusions." The court said, at 162, that "factually based conclusions or opinions are not on that account excluded from the scope of Rule 803(B)(C)."

The Federal Rules of Evidence establish the general rule that government reports are admissible in evidence. The only exception is if we find that "the sources of information or other circumstances indicate lack of trustworthiness." The key words here are, "lack of trustworthiness." In *Beech*, the court's explanation of when a document lacked trustworthiness is found on page 167, footnote 11 as follows:

The Advisory Committee proposed a nonexclusive list of four factors it thought would be helpful in passing on this question: (1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to

possible litigation (citing *Palmer v. Hoffman*, 318 US 109, 87 L Ed 645, 63 S Ct 477, 144 ALR 719 (1943)). Advisory Committee's Notes on Fed Rule Evid 803(8), 28 USC App. p. 725 [28 USCS Appx. Fed Rules of Evid, Notes following Rule 803]; see Note, The Trustworthiness of Government Evaluative Reports under Federal Rules of Evidence 803(8)(C), 96 Harv L Rev 492 (1982).

In a case similar in many respects to this one, the trial court applied the trustworthiness requirement to hold inadmissible a JAG Report on the causes of a Navy airplane accident; it found the report untrustworthy because it "was prepared by an inexperienced investigator in a highly complex field of investigation." *Fraley v Rockwell Int'l Corp.* 470 F Supp 1264, 1267 (SD Ohio 1979). In the present case, the District Court found the JAG Report to be trustworthy. App. 35. As no party has challenged that finding, we have no occasion to express an opinion on it.

### Conclusion

In reaching our conclusion, we have weighed the factors suggested by the Advisory Committee. The parties differed greatly on how we should consider those factors.

The report of OI is timely, considering the complexity of the investigation and the need to defer to the U.S. Attorney's Office during consideration of criminal action. In particular, the report is more timely than that of the Vogtle Coordinating Group, which succeeded it. (We consider that timeliness is only weakly related to credibility.) The investigator who prepared the OI Report, Larry Robinson, is skilled and experienced. There has been no hearing, which is not unusual in an investigation. On the issue of bias, there

may be some question of prosecutorial bias, as may normally exist in government investigative offices; however, there is not the kind of self-serving bias that exists when a railroad makes official records for the purpose of defending itself from a suit, as in *Palmer v. Hoffman, supra*. On balance, the factors weigh in favor of admitting this evidence.

We note that the decision with which we are faced is evidentiary. We are deciding whether there is enough trustworthiness in a document to admit it into evidence. After it is admitted, there may well be further consideration of its credibility and its weight. With respect to these considerations, Georgia Power has presented formidable arguments that may cause us to limit the weight we place on this evidence.

Because this is an evidentiary determination, we do not consider it our task to review the entire process by which the report was prepared, including the alleged motivations of the investigator. Rule 803(8)(C) is broadly drafted to admit government reports. It is drafted with the awareness that wealthy litigants often hire experts whose bias does not exclude their testimony. Likewise, even if a government report seems to suffer some bias, that does not require its

exclusion, providing it is "trustworthy."<sup>6</sup> We are satisfied that Mr. Robinson, who completed the report, was considered to be an outstanding, experienced investigator.<sup>7</sup> He received the Director's award for his outstanding investigative skills.<sup>8</sup> His work was extensively reviewed.<sup>9</sup> Based on his work, his supervisors decided to refer the case to the United States Attorney, showing that they credited the quality of the investigation.<sup>10</sup> Furthermore, the Vogtle Coordinating Group, which reviewed the report and disagreed with many of its findings, thought the report sufficiently trustworthy to consider its recommendations in great detail. We do not

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<sup>6</sup>Note, *Harvard Law Review*, "The Trustworthiness of Government Evaluative Reports Under Federal Rule of Evidence 803(8)(C) 96 Harv L Rev 492, 506-507 (1982), cited in *Beech* at footnote 11, page 167.

<sup>7</sup>Georgia Power makes no showing that Mr. Robinson failed to comply with applicable OI guidelines in performing interviews of NRC witnesses. Georgia Power ignores the extensive investigative experience Mr. Robinson has, including three years with the Federal Bureau of Investigation, five years as a special agent with the Veteran's Administration, and 11 years as an NRC investigator in Region II. See Robinson's Dep. Tr. (November 8, 1994) at 5-8. Ben Hayes, OI Director during the subject investigation of Georgia Power, described Mr. Robinson as a very competent investigator who had more experience than anyone else in Region II. See Hayes' Dep. Tr. (March 17, 1995) at 24-5; Hayes Testimony at Tr. 11640.

<sup>8</sup>Hayes Testimony at Tr. 11642-643.

<sup>9</sup>Hayes Testimony at Tr. 11637-639, 11641-11642.

<sup>10</sup>Hayes Testimony at Tr. 11695-697.

agree with Georgia Power that just because the Coordinating Group disagreed with the findings of the OI Report, that the report was not trustworthy. (Nor do we find that the findings of the Vogtle Coordinating Group are untrustworthy just because the OI Report differs from its findings in many respects.)

Staff has argued that the OI Report is trustworthy but irrelevant or repetitious. We disagree with its position. Just because the Vogtle Coordinating group subsequently adopted differing views that have been adopted by the Staff does not make the OI Report's findings less relevant or more redundant. It is our job as adjudicator to evaluate both of these reports. That there are two competing views of the evidence does not create redundancy. Quite to the contrary, it makes an understanding of both reports vital to a careful understanding of this case.

The conclusions of the OI Report, to which *Beech* would have us apply the same legal treatment as for factual findings, are admissible. Those conclusions already provisionally admitted shall continue to be in evidence. Based on this ruling, it now appears that there are special circumstances requiring the testimony of Mr. Larry Robinson, who is the person with the broadest exposure to the evidence that led to the development of the OI Report. Mr. Robinson



also has special knowledge of the nature of his relationship to Mr. Mosbaugh and whether or not that biased the investigatory process, as alleged by Georgia Power. 10 CFR § 2.720(h)(2)(I). If necessary, we would welcome a motion to call Mr. Robinson as a witness. We encourage the Staff to make him voluntarily available, as it has promised to do. NRC Staff Response at 11-12.

1. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is this first day of September, 1995, ORDERED, that:

Georgia Power Company's Motion to Exclude Admission of OI Conclusions, July 28, 1995, is *denied*.

FOR THE ATOMIC SAFETY AND LICENSING BOARD



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Peter B. Bloch  
Chairman

Rockville, Maryland

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of

GEORGIA POWER COMPANY, ET AL.

(Vogtle Electric Generating Plant,  
Units 1 and 2)

Docket No.(s) 50-424/425-OLA-3

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (MOTION TO EXCLUDE....) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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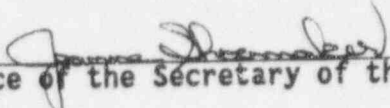
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Dated at Rockville, Md. this  
1 day of September 1995

  
Office of the Secretary of the Commission