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U.S. NRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'92 FEB -5 P3:22

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
ALABAMA POWER COMPANY )  
 )  
(Joseph M. Farley Nuclear Plant, )  
Units 1 and 2) )  
 )

Docket Nos. 50-348-CivP  
50-364-CivP

OFFICE OF SECRETARY  
DOCKETING & SERVICE

(ASLBP NO. 91-626-02-CivP)

NRC STAFF'S MOTION *IN LIMINE* TO EXCLUDE  
IRRELEVANT TESTIMONY SUBMITTED BY ALABAMA POWER COMPANY

INTRODUCTION

The NRC Staff hereby moves the Licensing Board to exclude the portions of Alabama Power Company's (APCo's) pre-filed direct testimony identified in the Attachment to this Motion on the grounds that they are irrelevant to the issues in this proceeding. The testimony in question seeks to introduce evidence regarding (a) the operability of equipment at the Farley Nuclear Plant found by the NRC Staff to be in violation of the Equipment Qualification Rule, 10 C.F.R. § 50.49, or (b) the safety significance of an actual failure of that equipment.<sup>1</sup> These matters are irrelevant to this proceeding. First, because safety significance is inherent with respect to each item required to be environmentally qualified pursuant to 10 C.F.R. § 50.49, the

<sup>1</sup> APCo has pre-filed testimony by several witnesses regarding their opinion of the operability of, and safety significance associated with, individual items of electrical equipment which the NRC Staff contends do not meet the environmental qualification requirements of 10 C.F.R. § 50.49. The parts of APCo's pre-filed direct testimony the NRC Staff moves to exclude and a brief summary of each part are listed in the Attachment.

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regulation does not require evaluation of (a) equipment operability<sup>2</sup> or (b) the effect of an individual piece of equipment's failure on an associated system as an element for establishing the violation. Second, in determining a civil penalty, the Modified Enforcement Policy<sup>3</sup> directs the NRC not to consider refinements on operability arguments such as the actual time the equipment is required to be operable, administrative measures or controls available to ensure the safety function is accomplished, the degree to which the operability of a system is affected, or, that through additional analyses or testing, the equipment may be demonstrated to be qualified or qualifiable. Generic Letter 88-07, Enclosure at 3. Thus, the issue of safety significance or operability of an individual piece of equipment or system found in violation of the requirements of 10 C.F.R. § 50.49, as presented in portions of APCo's pre-filed direct testimony, is irrelevant to an enforcement action brought pursuant to the Modified Enforcement Policy for such a violation.

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<sup>2</sup> Equipment operability is governed by the plant Technical Specifications (Tech Specs); the limiting conditions for operations (LCOs) in the Tech Specs require specific action if equipment is inoperable, including plant shutdown.

<sup>3</sup> As discussed in n.9 *infra*, the Commission has approved several modifications to the NRC Enforcement Policy regarding violations related to 10 C.F.R. § 50.49 (Environmental Qualification of Electrical Equipment). The Modified Enforcement Policy applicable to the Farley enforcement action was proposed to the Commission in SECY-87-255. The Commission approved the NRC Staff proposal with additional Commission modifications in a January 12, 1988 Staff Requirements Memorandum.

## DISCUSSION

### A. Equipment Qualification Rule Requirements

Licensees are required, pursuant to 10 C.F.R. § 50.49, to establish a program to environmentally qualify electric equipment important to safety, that is, (1) safety-related electrical equipment, (2) nonsafety-related electrical equipment whose failure under postulated environmental conditions could prevent satisfactory accomplishment of certain enumerated safety functions, and (3) certain post-accident monitoring equipment. 10 C.F.R. § 50.49(a) and (b). The rule requires testing of, or experience with, equipment identical or similar to that installed to show that installed equipment meets its performance specifications under environmental conditions existing during and following design basis accidents, with analysis to demonstrate similarity if the equipment tested was not identical to that installed or the test conditions were not at least as harsh as the postulated accident environment. 10 C.F.R. § 50.49(d), (e), (f), (k), and (l). The rule further requires licensees to have documented that testing and analysis by November 30, 1985, and maintain records of that documentation. 10 C.F.R. § 50.49(g) and (j). The rule contains no exception allowing a licensee to dispense with documentation and avoid or mitigate a violation of the rule by performing analysis after the November 30, 1985 compliance deadline concerning operability or the consequences of the failure of the equipment.<sup>4</sup> In short,

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<sup>4</sup> 10 C.F.R. § 50.49(i) provided for applicants for operating licenses granted after February 22, 1983, but before the environmental qualification compliance deadline of November 30, 1985, to perform analysis to ensure that their plants could operate safely pending  
(continued...)

if a piece of equipment falls within the grasp of the rule, that equipment must be qualified to certain performance specifications and records kept of the qualification without regard to whether the equipment is in fact operable without the testing or records, or whether actual failure of the equipment, as installed, as a result of exposure to a harsh environment would create a significant safety problem.<sup>5</sup>

#### B. Admissible Evidence

Evidence is admissible in an NRC proceeding if it is relevant, material, reliable and not repetitious. 10 C.F.R. § 2.743(c). The Federal Rules of Evidence are often applied in NRC proceedings. *Southern California Edison Company* (San Onofre Nuclear Generating Station, Units 1 and 2), ALAB-717, 17 NRC 346, 365 n.32 (1983) citing generally, *Duke Power Company* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-659, 15 NRC 453, 475 (1982). Under these rules, "[r]elevant evidence" means evidence having any tendency to make

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

completion of the environmental qualification of equipment required by the rule. That analysis could include operability and safety significance considerations. Also, Justifications for Continued Operation (JCOs) performed on equipment pending qualification at operating plants prior to the environmental qualification compliance deadline properly considered operability and safety significance of postulated equipment failure. These exceptions are not apposite to the Farley violations.

<sup>5</sup> The NRC has made this assumption for enforcement purposes in order to reduce the resources anticipated to be spent by licensees and the NRC to evaluate in detail whether system operability was in question. Generic Letter 88-07, Enclosure at 3.

the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

### C. Scope of Proceeding

The scope of an action initiated by the Commission may be limited and defined by the Commission and the issues in enforcement proceedings may be limited to whether the facts as stated in an order are true and whether the remedy selected is supported by those facts.<sup>6</sup> The Order Imposing a Civil Penalty dated August 21, 1990, which is the basis for the instant proceeding, clearly limits the scope of the proceeding to whether the violations alleged by the NRC Staff occurred, and whether the civil penalty imposed by the NRC Staff should be sustained on the basis of those violations. Section V of the Order states,

In the event the licensee requests a hearing as provided above, the issues to be considered at such hearing shall be:

- (a) whether the licensee was in violation of the Commission's requirements as set forth in the Notice of Violation and Proposed Imposition of Civil Penalty [dated August 15, 1988], and
- (b) whether, on the basis of such violations, this Order should be sustained.

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<sup>6</sup> Cf. *Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44,45 (1982), *aff'd*, *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983) (The Commission, citing an earlier Order suspending construction, *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, at 441-42 (1980), held that, "[t]he Commission may limit the issues in enforcement proceedings to whether the facts as stated in the Order are true and whether the remedy selected is supported by those facts."). Regarding the authority to define the scope of the proceeding, that is, its agenda and substance, the Court in *Bellotti* stated, "We have no doubt that, as a general matter, such authority must reside in the Commission." 725 F.2d at 1381.

Order at 3-4.<sup>7</sup>

Presiding officers in enforcement hearings reviewing NRC Staff enforcement actions apply the policy and procedure guidance of the Commission. See *Hurley Medical Center* (One Hurley Plaza, Flint Michigan), ALJ-87-2, 25 NRC 219, 224 (1987). See also *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), LBP-91-9, 33 NRC 212, 226 (1991) (Licensing Board in civil penalty proceeding looked to language of Commission Enforcement Policy statement to find foundation for decision of agency official to levy a violation). Generally, the Commission's presiding officers and the Commission, by the terms of the NRC Enforcement Policy, apply that policy in reviewing enforcement actions. 10 C.F.R. Part 2, Appendix C, Preamble.

#### D. Modified Enforcement Policy

For enforcement actions involving violations of 10 C.F.R. § 50.49, the Commission approved a Modified Enforcement Policy, promulgated in Generic Letter 88-07, which sets forth the Commission's Modified Enforcement Policy for certain violations of 10 C.F.R. § 50.49.<sup>8</sup>

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<sup>7</sup> In its Memorandum and Order of January 3, 1991, the Board reiterated this limited scope in stating, "The issues to be decided in the hearing are whether APCo was in violation of the Commission's requirements as set forth in a Notice of Violation and Proposed Imposition of Civil Penalty of August 15, 1988, and whether the Order should be sustained." Memorandum and Order at 2.

<sup>8</sup> A Commission policy statement "must be respected by the licensing boards and [the Appeal Board] unless and until rescinded by the Commission or overturned by the Courts. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, (continued...)

Significantly, the Modified Enforcement Policy does not allow consideration of analysis offered to show (1) that a system with unqualified equipment could perform its function, or (2) the effects of the postulated failure of each unqualified item of electrical equipment important to safety.<sup>9</sup> The Modified Enforcement Policy states that:

The significance of the EQ violations is considered when the NRC evaluates the number of systems affected by the EQ violations and determines the EQ violation category. The NRC will assume, for escalated enforcement cases, that the unqualified equipment could affect operability of the associated system. The NRC will not consider refinements on the operability arguments such as the actual time the equipment is required to be operable, administrative measures or controls available to ensure the safety function is accomplished, the degree to which the operability of a system is affected, or, that through additional analyses or testing, the equipment may be demonstrated to be qualified or qualifiable. This assumption is made for enforcement purposes in order to reduce the resources anticipated to be spent by licensees and the NRC to evaluate in detail whether

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<sup>8</sup>(...continued)

<sup>7</sup> NRC 41, 51 (1978), *remanded on other grounds sub nom. Minnesota v. Nuclear Regulatory Commission*, 602 F.2d 412 (D.C. Cir. 1979), *cited in Mississippi Power & Light Company Grand Gulf Nuclear Station, Units 1 and 2*, ALAB-704, 16 NRC 1725, 1732 n.9 (1982).

<sup>9</sup> Generic Letter 88-07 states the Commission's Modified Enforcement Policy for those licensees who were not in compliance with 10 C.F.R. § 50.49 as of the November 30, 1985 environmental qualification deadline. Generic Letter 88-07 followed two previous modifications to the NRC Enforcement Policy for violations of 10 C.F.R. § 50.49. Generic Letters 85-15 and 86-15, sent to NRC licensees on August 6, 1985 and September 22, 1986, respectively, set forth NRC enforcement criteria, which also were approved by the Commission, concerning the handling of environmental qualification violations. Prior to Generic Letter 88-07, the criteria provided for the assessment of daily civil penalties of \$5,000 per item of unqualified equipment for each day the plant operated and the item was unqualified after November 30, 1985, up to a maximum of \$500,000 per item, provided that the licensee, as of that date, clearly knew or clearly should have known that it had equipment for which qualification had not been established. Generic Letter 85-15, among other things, defined, for the purposes of enforcement, unqualified equipment as "equipment for which there is not adequate documentation to establish that this equipment will perform its intended functions in the relevant environment."

system operability was in question.

Generic Letter 88-07, Enclosure at 3 (Emphasis in original).

Safety significance is inherent with respect to each item required to be environmentally qualified pursuant to 10 C.F.R. § 50.49. To ensure that licensees have a technically sound basis for making assessments of plant safety, the regulation requires a licensee to have reasonable assurance whether electrical equipment important to safety would function as intended during and following a design basis event before operating its nuclear reactor after November 30, 1985. To determine whether electrical equipment important to safety will function as intended during and following a design basis event, a licensee must set performance specifications to ensure the equipment will function and test and analyze the equipment's electrical characteristics to ensure that the performance specifications are satisfied. The knowledge obtained through testing and analysis must be documented in an auditable form so that the NRC may verify it. A licensee's lack of knowledge concerning that equipment results in the licensee's inability to assure that such equipment would function in the event of an accident, which is safety significant. A licensee's performance of new analysis or collection of new data that yield fortuitously positive results does not affect a licensee's prior lack of reasonable assurance. Neither the licensee nor the Staff could have known in advance whether the new analysis or data would indicate that such equipment would function when called upon to do so during an accident resulting in a harsh environment.

As explained in the Modified Enforcement Policy, the NRC aggregates individual violations of 10 C.F.R. § 50.49 to determine the extensiveness of the qualification problem



represented by those individual violations in order to assess a civil penalty. The Commission developed Categories A, B, and C based on the extensiveness of the violations, which reflect the overall pervasiveness and general safety significance of the significant environmental qualification violations.

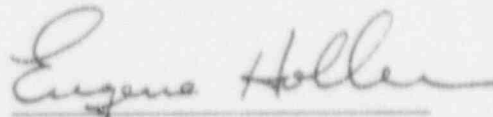
E. Summary

As set forth above, 10 C.F.R. § 50.49, as to violations of the requirements therein, does not require the evaluation of equipment operability or the consequence of the failure of an individual piece of equipment on an associated system as an element for establishing the violation, and the Modified Enforcement Policy, as to the assessment of a civil penalty for violations of 10 C.F.R. § 50.49, prohibits the NRC from considering those matters. Thus, the issue of safety significance or operability for an individual piece of equipment or system found not to be in compliance with the requirements of 10 C.F.R. § 50.49 is irrelevant to an enforcement action for a violation of 10 C.F.R. § 50.49. For this reason, the pre-filed testimony listed in the Attachment to this Motion regarding the safety significance or operability of individual items of electrical equipment should be excluded as irrelevant.

CONCLUSION

For the foregoing reasons, the testimony listed in the Attachment to this Motion should be excluded from the evidence in this proceeding.

Respectfully submitted,



Richard G. Bachmann

Eugene Holler

Robert M. Wei

Counsel for NKC staff

Dated at Rockville, Maryland  
this 4th day of February, 1992

APCo pre-filled direct testimony irrelevant to this proceeding:

Love/Sundergill/Jones p. 60-61, Q & A 51

Messrs. Sundergill and Jones offer testimony regarding the operability of the V-type terminations based on additional testing and analyses completed in October 1987 (Wyle Test Report 17947-01).

Love/Sundergill/Jones p. 76-77, Q & A 64

Messrs. Love, Sundergill and Jones offer testimony regarding the safety significance of the 10 C.F.R. § 50.49 deficiencies the NRC Staff contends existed with the V-type terminations.

Love/Sundergill/Jones p. 132-134, Q & A 121

Mr. Love offers testimony regarding the safety significance of the terminal blocks which NRC Staff contends did not meet 10 C.F.R. § 50.49 requirements.

Love/Sundergill/Jones p. 177, Q & A 152

Messrs. Love and Sunderquill offer testimony as to the safety significance of the 10 C.F.R. § 50.49 deficiencies the NRC Staff contends existed with the ChicoA/Raychem seals.

Love/Sundergill/Jones p. 194-195, Q & A 173

Mr. Sunderquill offers testimony regarding the safety significance of the Limitorque Motor Operated Valves which the NRC Staff contends did not meet 10 C.F.R. § 50.49 requirements.

Love/Sundergill/Jones p. 203, Q & A 186

Mr. Sundergill offers testimony regarding the safety significance if the GEMS level transmitters with reduced silicone oil levels did not function.

Love/Sundergill/Jones p. 215-216, Q & A 203

Mr. Sundergill describes Wyle Test Report 40196-1 and Dr. Robert Bolt's analysis as a basis for concluding that Violation I.C.4 has no safety significance.

Bolt p. 8, Q & A 11

Dr. Bolt analyzes the operability (lubricating and stay-in-place function) of Premium RB or mixed grease on fan motors and room coolers.

DiBenedetto p. 70-71, Q & A 78 (1st Paragraph)

Mr. DiBenedetto offers testimony regarding the operability of the V-type terminations based on additional testing and analyses completed in October 1987 (Wyle Test Report 17947-01).

DiBenedetto p. 76-77, Q & A 92

Mr. DiBenedetto offers testimony that the V-type terminations would have functioned even with the 10 C.F.R. § 50.49 deficiencies the NRC Staff contends existed.

DiBenedetto p. 87-88, Q & A 103

Mr. DiBenedetto offers testimony that the 5-to-1 splice configuration on the hydrogen recombiner would have functioned even with the 10 C.F.R. § 50.49 deficiencies the NRC Staff contends existed.

DiBenedetto p. 93, Q & A 113

Mr. DiBenedetto offers testimony that the ChicoA/Raychem seals would have functioned with the 10 C.F.R. § 50.49 documentation deficiencies the NRC Staff contends existed.

DiBenedetto p. 124, Q & A 157

Mr. DiBenedetto describes analysis of maintenance documentation as showing that Violation I.C.4 has no safety significance.

DiBenedetto p. 128, Q & A 163

Mr. DiBenedetto offers testimony that the Limitorque Motor Operated Valves would not be inoperable without the T-drains the NRC Staff contends were required to conform with the test documentation.

Woodard p. 6-9, Answer 6.3

Mr. Woodard offers testimony as to the safety significance of not meeting the documentation requirements of 10 C.F.R. § 50.49.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

92 FEB -5 P3:32

In the Matter of )  
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ALABAMA POWER COMPANY )  
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(Joseph M. Farley Nuclear Plant, )  
Units 1 and 2) ) (ASLBP No. 91-626-02-CivP)

Docket Nos. 50-348-CivP  
50-364-CivP

OFFICE OF THE SECRETARY  
DOCKETING & SERVICE  
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S MOTION *IN LIMINE* TO EXCLUDE IRRELEVANT TESTIMONY SUBMITTED BY ALABAMA POWER COMPANY" in the above-captioned proceeding have been served on the following by facsimile or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system or as indicated by a double asterisk through express mail, this 3rd day of February, 1992:

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Chairman  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Dr. James H. Carpenter  
Administrative Judge  
Atomic Safety and Licensing Board  
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Washington, DC 20555

Peter A. Morris\*\*  
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Office of the Secretary\*  
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Washington, DC 20555  
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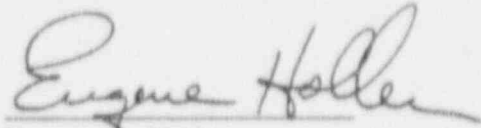
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A handwritten signature in cursive script that reads "Eugene Holler". The signature is written in dark ink and is positioned above a horizontal line.

Eugene D. Holler  
Counsel for NRC Staff