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February 6, 1992

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of:	)	
ALABAMA POWER COMPANY	)	Docket Nos. 50-348-CivP
	)	50-364-CivP
(Joseph M. Farley Nuclear	)	
Plant, Units 1 and 2)	)	
	)	(ASLBP No. 91-626-02-CivP)

ALABAMA POWER COMPANY'S OPPOSITION  
TO NRC STAFF'S MOTION TO EXCLUDE  
CERTAIN TESTIMONY

I. INTRODUCTION

On February 4, 1992, the NRC Staff filed a "Motion In Limine to Exclude Irrelevant Testimony Submitted by Alabama Power Company" (Motion). In its Motion, the Staff seeks to exclude selected portions of Alabama Power Company's direct testimony addressing either (a) the operability of equipment alleged by the NRC Staff to be in violation of 10 C.F.R. § 50.49, or (b) the safety significance of an actual failure of that equipment. Alabama Power Company opposes that Motion. The selected testimony is directly relevant to the proceeding and is specifically contemplated by the Atomic Energy Act as well as the Modified Enforcement Policy.<sup>1/</sup> This testimony is also admissible to ensure that the Board has a full record on the "totality of circumstances" underlying this

<sup>1/</sup> Modified Enforcement Policy Relating to 10 CFR 50.49, "Environmental Qualification of Electrical Equipment Important to Safety For Nuclear Power Plants" (Generic Letter 88-07).

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civil enforcement action. Alabama Power Company does not believe the Modified Enforcement Policy was ever intended to be a means to cut off a full discussion of the context of issues in dispute.

## II. BACKGROUND

As stated by the NRC Staff in its Motion, evidence is admissible in an NRC proceeding if it is relevant, material, reliable, and not repetitious. 10 C.F.R. § 2.743(c). The standard for "relevance" is not high. The NRC Staff (Motion at 4-5) itself has relied upon the definition from the Federal Rules of Evidence. "'Relevant evidence' means evidence having any tendency to make 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. The evidence the Staff seeks to strike meets this standard because it is of great consequence to several matters within the scope of this proceeding as discussed below. Moreover, the Staff ignores 10 C.F.R. § 2.743(a), which establishes an even looser standard, permitting the parties "to present such oral or documentary evidence and rebuttal evidence and to conduct . . . such cross examination as may be required for full and true disclosure of the facts."

With respect to the scope of this proceeding, the NRC Staff states that it is limited by the Order Imposing a Civil Penalty dated August 21, 1990. Motion at 5. In essence, however, the Order invited Alabama Power Company to request a hearing on: a) whether the violations as alleged in the Notice of Violation

were included violations, and b) whether, on the basis of any violations sustained, the Order imposing a civil penalty should be upheld. The Staff's view of the scope of this proceeding is far too narrow. In assessing whether the Order imposing a civil penalty should be upheld, this Board is entitled to make a de novo finding on the basis of the hearing record and "the totality of circumstances" as to whether alleged violations were properly treated for enforcement purposes. Atlantic Research Corporation, ALAB-594, 11 NRC 841, 849 (1980). The Board cannot reach this decision without making an assessment of the appropriateness of a civil penalty, the severity level of substantiated violations, and the escalation/mitigation factors applied to any base civil penalty. See, e.g., Reich Geo-Physical, Inc., ALJ-85-1, 22 NRC 941 (1985); Consolidated X-Ray Service Corp., ALJ-83-2, 17 NRC 693 (1983); see also 10 C.F.R. § 2.205(f).

The relationship of the evidence at issue to the determinations to be made by the Board, and to the "totality of circumstances" surrounding this enforcement action, is explained generally in Section III below. Further specific responses related to each of the excerpts of testimony at issue are included in an Attachment to this Opposition.

### III. DISCUSSION

The NRC Staff argues in its Position, that the matters it seeks to exclude are irrelevant for two reasons:

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 regulation does not require evaluation of (a) equipment operability [footnote omitted] 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 [footnote omitted] 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.

Motion at 1-2. The Staff's logic, however, is wrong in both respects. First, regardless of whether safety significance is inherent in each item of equipment subject to Section 50.49, safety significance is germane to the issue of what enforcement sanction is appropriate for a violation of any NRC regulation, including Section 50.49. Second, even assuming for argument that the Modified Enforcement Policy controls this proceeding,<sup>2/</sup> safety significance is a directly relevant consideration under that or any policy.

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<sup>2/</sup> The Staff suggests in its Motion that this Board is bound by the Modified Enforcement Policy, referring to it as "policy and procedure guidance of the Commission." Motion at 6. Alabama Power Company is not prepared to concede this point at this time. The Company has maintained throughout this proceeding that it would prefer to address this issue in briefs/proposed findings, based on the evidentiary record. In any event, the issue is not dispositive of the present Motion.

A. Operability Evidence is Directly Relevant to Qualification

The first issue before the Board in this proceeding is whether specific alleged violations were indeed violations. Qualification of equipment, by definition, involves in part the capability of equipment to perform its safety function under accident conditions. Operability is likewise defined as the capability of equipment to perform its intended safety function. Obviously, therefore, operability (or, as sometimes styled, "safety significance") evidence is relevant to the issue of whether equipment was qualified. The relationship for the specific issues in dispute is explained in more detail in the Attachment to this Opposition.<sup>2/</sup>

In this regard, the NRC Staff in its Motion also clearly shows that qualification of equipment by testing or analysis is required by 10 C.F.R. § 50.49(d), (e), (f), (k) and (l). The separate requirement of documentation of qualification is specified in 10 C.F.R. §§ 50.49(g) and (j). Motion at 3. The Staff goes on to equate the two sets of regulations for enforcement purposes -- relying on the Modified Enforcement Policy. However, to the extent

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<sup>2/</sup> For example, the V-type termination issue addresses the impact on qualification of a specific tape wrap configuration different from the tested sample. Alabama Power Company's position is that the terminations were qualified; that the configuration difference was a technically unimportant matter for qualification; that it was not a matter that needed to be addressed in detailed qualification documentation; and that the Company had reasonable assurance of qualification as of the EQ deadline, as well as promptly upon identification of the potential issue in 1987. Evidence of operability of the terminations (or "safety significance") is directly relevant to whether a qualification violation existed. It is also directly relevant as corroboration of Alabama Power Company's earlier engineering judgments and analyses.

Alabama Power Company's evidence shows that equipment was indeed operable (i.e., capable of performing intended function, "qualifiable," or "qualified" except for documentation), there was no violation of the substantive qualification requirements. At most, there was a violation of only documentation requirements. It follows that evidence related to these issues is indeed evidence germane to the matters at issue in this proceeding.

B. Safety Significance is Always Germane to Enforcement Matters

Assuming that a violation existed, the Staff argues that safety significance is inherent with respect to all equipment subject to Section 50.49, and therefore that the violation is per se safety significant. In a very broad sense this may be true. However, it does not follow that this renders evidence on the actual safety impact of alleged violations inadmissible in a proceeding on the appropriateness of a civil penalty. This Board, and presumably the NRC Staff in the first instance, must consider safety significance in deciding what enforcement sanction is appropriate for any regulatory violation.<sup>4/</sup>

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<sup>4/</sup> See, e.g., 10 C.F.R. Part 2, Appendix C, Section III. The NRC adopts a graded approach to enforcement based on the significance of the violation. Under the logic of the Motion, the Staff could equally argue that all equipment covered by plant technical specifications is safety significant. However, not all violations of technical specifications are treated the same for enforcement purposes. Those violations with no actual or potential safety consequences are routinely treated outside the civil penalty context. Id. at Supplement 1, Examples D.1 and E.

The NRC's statutory authority to impose civil penalties is established and circumscribed by Section 234 of the Atomic Energy Act. 42 U.S.C. § 2282. Section 234, as interpreted by the Commission, requires the NRC to consider safety significance when assessing civil penalties. In Atlantic Research Corporation, CLI-80-7, 11 NRC 413 (1980), the Commission addressed the scope of its authority to issue civil penalties pursuant to Section 234. It ruled that fines could properly be issued only if it has been established that the "civil penalties may positively affect the conduct of the licensee or other similarly situated persons in accord with the policies in the Atomic Energy Act, and that the civil penalties are not grossly disproportionate to the gravity of the offense." Id. at 421 (emphasis added). The "gravity" determination here required by the Commission in accordance with the Atomic Energy Act inherently recognizes that an assessment of safety significance is required in the determination of a civil penalty amount.

The Staff argues that the Modified Enforcement Policy would preclude precisely the determination that is required by Section 234 of the Act and by Commission precedent. However, as will be shown further below, the Modified Enforcement Policy provides no such shield. It specifically contemplates assessments of safety significance in several respects beyond the gross assumptions of significance inherent in the "bean counting" of numbers of systems affected by alleged violations, as called for in Section IV of that policy. Moreover, any interpretation of the Modified Enforcement

Policy that would preclude consideration of case-specific safety significance would be contrary to the Atomic Energy Act and Commission precedent.

Assuming the Board were to rule that the Modified Enforcement Policy precludes consideration of the evidence at issue, Alabama Power Company wishes to preserve its argument that, as a result, the Modified Enforcement Policy violates Section 234 of the Atomic Energy Act. Alabama Power Company maintains that mere violations of the documentation aspects of Section 50.49 cannot be treated for enforcement purposes as equivalent to violations of the substantive requirements -- under either Section 234 of the Atomic Energy Act or the Modified Enforcement Policy. In this light, Alabama Power Company would request that the Board treat the evidence in dispute as an offer of proof. See 10 C.F.R. § 2.743(e).

C. Section III of the Modified Enforcement Policy Requires That Operability and Safety Significance be Considered Prior to the Initiation of Escalated Enforcement Action

The NRC Staff in its Motion primarily relies upon language extracted from Section IV of the Modified Enforcement Policy, whereby the policy precludes consideration of operability analyses and other safety significance arguments in determining a Severity Category for a violation. Motion at 7-8. The Modified Enforcement Policy instead bases the Severity Category determination on a superficial "bean counting" of equipment affected. The Staff states that it opted for this approach in the Modified Enforcement Policy to protect its resources. Id. at 4, n.5. However, the Modified Enforcement Policy does not preclude consideration of



operability and safety significance evidence. Sections III and IV of the Modified Policy are sequential in nature -- the first establishing the parameters by which to determine whether a particular EQ violation warrants escalated enforcement action, the latter providing the civil penalty structure applicable to escalated EQ enforcement actions. Although operability considerations may be expressly precluded from consideration in Section IV, they are integral to the determination under Section III as to whether any escalated enforcement action (i.e., a civil penalty) is warranted.<sup>5/</sup>

Indeed, the title of Section III, "EQ Violations Not Sufficiently Significant to Merit a Civil Penalty Under the Modified Policy," is a clear indication that not all violations of Section 50.49 warrant escalated enforcement actions or should necessarily be assessed a civil penalty. The determination of whether a given violation is significant enough to warrant escalated enforcement action is, therefore, relevant under the Modified Enforcement Policy. Such a determination necessarily involves considerations of equipment operability and safety significance of "deficiencies" identified.

Section III specifically explains that if, for example, the qualification file contains inadequate information, escalated enforcement action is not a necessary result.

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<sup>5/</sup> Stated otherwise, a violation should not even be assessed for impact on systems under Section IV of the Modified Enforcement Policy unless it has passed the "significance" threshold test of Section III.

. . . if sufficient data exists or is developed during the inspection to demonstrate qualification of the equipment or, based on other information available to the inspector, the specific equipment is qualifiable for the application in question, the qualification deficiency is not considered sufficiently significant for assessment of civil penalties.

Modified Enforcement Policy at 2. Therefore, under the terms of the Modified Enforcement Policy itself, data developed during the inspection demonstrating that equipment was operable would be relevant to show that a civil penalty is not warranted.

By describing this documentation deficiency situation as an "example" of a condition not sufficiently significant to warrant escalated enforcement, it is also clear that the Modified Enforcement Policy does not intend for those circumstances to be exclusive of other possible less significant conditions for which escalated enforcement action is equally inappropriate. There are many approaches by which a licensee may demonstrate that a particular condition is not sufficiently significant to warrant escalated enforcement action. One method might be use of after-the-fact confirmatory testing. Such testing could assess the validity of concerns raised either by the licensee on its own or by the NRC Staff inspectors regarding the qualification of a particular equipment item. In fact, the use of such evidence of safety significance appears to be contemplated in Section III --

the one example presented includes the situation where "data" is "developed" following identification of a concern or condition.<sup>6/</sup>

In the Attachment to the Opposition, we address specifically each excerpt of testimony the Staff seeks to strike and show how it is relevant, at a minimum, to an argument that the alleged violation is insignificant and that the matter should be addressed under Section III of the Modified Enforcement Policy.

D. The Proffered Evidence is Germane to this Proceeding to Explain the "Totality of Circumstances"

As discussed above, this Board is tasked in this proceeding with assessing whether the civil penalty imposed by the Staff should be sustained based on "the totality of circumstances" as developed on the record. Atlantic Research Corporation, 11 NRC at 849. Apart from Section 234 of the Atomic Energy Act and Section III of the Modified Enforcement Policy, the evidence the Staff seeks to exclude is highly relevant to illustrate the "totality of circumstances" surrounding this enforcement action.

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<sup>6/</sup> Section III is not the only place operability assessments are relevant to enforcement treatment under the Modified Enforcement Policy. Generic Letter 88-07, to which the policy is attached, specifically calls for a licensee to make "a prompt determination of operability" when a potential qualification issue is identified. Generic Letter 88-07, at 2. The purpose in doing so is to confirm that, if called upon, the equipment would perform its intended safety function. A licensee's operability assessment are thus part of the overall evaluation of a qualification issue. These assessments are part of the circumstances that can be considered in making a determination of whether escalation of any base civil penalty is appropriate. See Mitigation/Escalation Factor 3, Modified Enforcement Policy at 4.

The Attachment provides further details on the relevance of each excerpt of testimony the Staff would exclude. In general, Alabama Power Company believes that the Staff is often mischaracterizing the positions of the Alabama Power Company witnesses as "after-the-fact" analyses and operability assessments. Alabama Power Company's witnesses present a picture of the inspection and subsequent meetings with the Staff wherein the Staff simply refused to consider technical arguments on the merits of individual issues, raising the shield of the Modified Enforcement Policy. In fact, the information the witnesses were providing was intended only: to confirm or document pre-existing conclusions based on engineering judgment; to address new, post-deadline technical issues; to show that "concerns" raised by NRC inspectors were not technical "concerns" at all because they lacked safety significance (and did not need to be addressed in EQ documentation); or to address higher standards for EQ documentation, requiring further support for the conclusion that equipment at issue was indeed operable. All of these considerations are relevant to the appropriateness of the violations and the civil penalty at issue.<sup>1/</sup>

In a recent Motion, the NRC Staff supported a request for more time to file rebuttal evidence in this proceeding by alluding to

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<sup>1/</sup> In a sense, these total circumstances may also be relevant to the "clearly should have known" test required as a threshold to any enforcement under Section II of the Modified Enforcement Policy. Operability or safety significance assessments give proper perspective to what a reasonably prudent engineer, versed in environmental qualification, should be held to have clearly known by November 30, 1985.

this Board's need for "a full and complete record" on which to base its decision.<sup>8/</sup> In the present context, Alabama Power Company agrees with this sentiment. The Staff's current Motion should be denied in all respects.<sup>9/</sup>

#### IV. CONCLUSION

For the foregoing reasons, the NRC Staff's Motion should be denied in all respects. Alabama Power Company would also welcome

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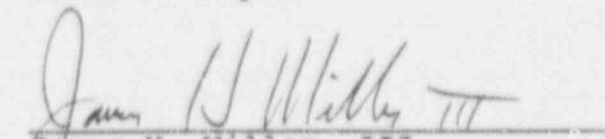
<sup>8/</sup> NRC Staff's Motion for Extension of Time to File Rebuttal Testimony and Request for Expedited Consideration, dated January 21, 1982, at page 1.

<sup>9/</sup> In this regard, we also see no pressing need for, or benefit to be derived from, excluding this testimony at this point in the proceeding; that is, in advance of post hearing briefs and proposed findings of fact. Although determinations of relevance and materiality usually pre-ede the admission of evidence, agency Boards historically have not treated this as an "ironclad rule in administrative proceedings in which no jury is involved." Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-520, 9 NRC 48, 50 n.2 (1979); see also Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), LBP-75-69, 9 NRC 822, 830 (1975). Rather, "[t]he determination of materiality could be safely left to a later date without prejudicing the interests" of the parties. Seabrook, 9 NRC at 50, n.2.

The opportunity to argue this Motion at the hearing on Tuesday,  
February 11, 1992.

Respectfully submitted,

  
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Dated at Washington, D.C.  
this 6th day of February 1992.

## ATTACHMENT

- (1) 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).

**Relevance:** This testimony, by its very terms, goes directly to the existence of a violation, the appropriateness of a civil penalty and to the assessment of the "significance" of any violation for purposes of Modified Enforcement Policy Section III. The testing referred to was purely confirmatory. Messrs. Love, Sundergill and Jones previously testified that, upon identification of this issue in July 1987 by Alabama Power Company, they had already concluded that in their engineering judgment the splices were at a minimum "qualifiable". Love/Sundergill/Jones at 48-54. The subsequent testing referred to here confirmed (indeed, validated) their judgment, demonstrated conclusively that the potential qualification issue identified by Alabama Power Company in 1987 was not a technical concern at all, demonstrated that at most a documentation issue was involved, and provided the relevant documentation in full accord with Modified Enforcement Policy Section III. Again, this is relevant to the appropriateness of a finding that a violation occurred and to the appropriateness of a civil penalty for any such violation.

- (2) 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.

**Relevance:** This testimony is directly relevant to the existence of a violation and to the enforcement treatment of the issue; it also amplifies the "totality of circumstances" surrounding the enforcement action at issue. More specifically, the witnesses characterize the V-type termination issue as it existed in their view in a way that is directly relevant to whether escalated enforcement action is appropriate under Modified Enforcement Policy Section III. Moreover, the witnesses reiterate that Wyle's testing -- confirming their earlier judgment and analysis -- was available prior to the end of the EQ inspection in November 1987. The Modified Enforcement Policy Section III expressly allows that a file "deficiency" could be remedied by information "developed" prior to the end of the inspection.

- (3) 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.

**Relevance:** This testimony is relevant in several respects. First, this testimony directly relates to the "bean counting" of systems affected called for by Section IV of the Modified Enforcement Policy (the very Section the Staff erroneously cites as a basis for exclusion). In this testimony, Mr. Love shows that the Staff witnesses have not made any correlation to show that the performance of the terminal blocks at issue would indeed affect the performance of systems or components. Thus, the Staff has failed in its burden to show a number of systems/components potentially affected, which is to be the basis for a Severity Category determination.

On pages 133-34, Mr. Love also testifies that the terminal blocks at issue in fact implicated only a limited number of Reg. Guide 1.97 systems or components. This testimony was offered as directly relevant to the Severity Category determination of Section IV of the Modified Enforcement Policy.

Second, Mr. Love testifies that the instrument accuracy issue does not affect the performance of any instrument circuits. This is not an operability argument -- it is a qualification argument. It is Mr. Love's testimony -- and Alabama Power Company's position -- that instrument accuracy is not a qualification issue for environmental conditions during which instruments will not be used. This is akin to an argument that qualification for a component needs only to be based on an appropriate environmental profile. As such, this testimony on performance of the equipment involved is relevant to whether a violation existed.

Finally, this testimony again relates to the overall circumstances of the "violation," or the "significance" of that "violation." This testimony is directly relevant to enforcement treatment under Modified Enforcement Policy Section III. Precisely because there is no performance issue (as Mr. Love explains), Alabama Power Company maintains that escalated enforcement is inappropriate.

- (4) Love/Sundergill/Jones p. 177, Q & A 152  
Messrs. Love and Sundergill offer testimony as to the safety significance of the 10 C.F.R. § 50.49 deficiencies the NRC Staff contends existed with the Chico A/Raychem seals.

**Relevance:** This testimony is relevant to the existence of a violation, to the determination to be made under Modified Policy Section III, as well as illustrative of the "total circumstances" surrounding the alleged violation. Messrs. Love and Sundergill take the position throughout their testimony on this issue that this equipment was qualified.



In their view, adequate documentation existed in the file prior to the EQ deadline. The Staff repeatedly has raised concerns on this issue lacking in technical merit, and then argued that the Modified Enforcement Policy precludes consideration of the witnesses explanations. In this excerpt of testimony, Messrs. Love and Sundergill add the perspective that, if more explicit documentation was viewed as necessary, it simply was not a "significant" matter. This will support a finding that Modified Enforcement Policy Section III should be applied in this case to preclude a civil penalty.

- (5) Love/Sundergill/Jones p. 194-195, Q & A 173  
Mr. Sundergill 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.

**Relevance:** This testimony is again directly relevant to the question of whether this issue should support escalated enforcement action. First, it shows generally that this was not a significant issue needing to be addressed in a qualification file. Second, it shows that documented data was available prior to the inspection showing that this was not a valid qualification issue. This consideration is directly relevant to the Modified Enforcement Policy Section III (see the specific example provided therein).

The last paragraph of the excerpt is also directly relevant to the Severity Category "bean counting" determination called for by Section IV of the Modified Enforcement Policy. Mr. Sundergill shows that only two systems per unit were affected by the alleged violation.

- (6) 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.

**Relevance:** This testimony places the alleged violation in appropriate perspective. These circumstances should always be relevant to an enforcement decision. Moreover, by demonstrating the alleged violation as having no safety consequences, this testimony will support an argument that escalated enforcement should not be taken under the general guidelines of Section III of the Modified Enforcement Policy.

- (7) 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.

**Relevance:** Mr. Sundergill's testimony on the grease issue generally is that the equipment affected was qualified. The deviation between installed grease and tested grease was in his opinion unimportant based on engineering judgment and on documentation that pre-existed the EQ inspection at Farley Nuclear Plant (see, e.g., Love/Sundergill/Jones at 212-214). This testimony supports Alabama Power Company's position on this issue that no violation occurred.

The excerpt of testimony the Staff seeks to exclude is relevant to the fundamental issue of whether a violation occurred. Mr. Sundergill shows two facts -- the Wyle test and Dr. Bolt's opinion -- that confirm and validate the earlier judgments and data. In addition, the confirmatory data supports the credibility of the Company's expert witness, demonstrates that the issue raised as a potential concern was not a true issue that needed to be addressed, and supports the view that this was not a matter that needed to be addressed in more detailed documentation.

The evidence also supports an argument that this was an "insignificant" violation that should not have formed the basis for a civil penalty under Section III of the Modified Enforcement Policy.

(8) 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.

**Relevance:** Alabama Power Company sees no basis to exclude this evidence. Alabama Power Company's position on the grease issue is twofold: first, that grease is not an item of electrical equipment subject to qualification; and second, that use of Premium RB grease was not a true issue to be addressed because it did not impact qualification of the fan motors and room coolers. The testimony goes directly to the heart of the second issue -- the qualification of the equipment involved. The Company's position on this equipment is that it was qualified. The Company has maintained that position since prior to the EQ deadline. The Company took the position, at the inspection and during subsequent meetings, that the grease issue raised by the Staff was not a technically valid issue, that it did not need to be addressed in documentation at least until raised by the inspectors in 1987, and that the analysis provided in September 1987 demonstrated that the issue was "insignificant" and did not warrant escalated enforcement. Dr. Bolt is merely confirming what the Company has argued all along. His expert opinion in this proceeding validates and supports the Company's earlier arguments. Under the Staff's logic, the Modified Enforcement Policy could be construed to exclude all expert testimony in

this proceeding (it is all "after-the-fact"). Such a result in untenable.

- (9) DiBenedetto p. 67-71, 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).

Relevance: See response to Item (1) above. This paragraph addresses the confirmatory testing that validated earlier engineering judgments and conclusions proving this to be a technically invalid issue. This is certainly a circumstance relevant to whether a violation occurred -- especially so because Alabama Power Company takes the position that the termination configuration differences were unimportant.

Moreover, documentation of this testing was available in October 1987 -- prior to the end of the EQ inspection at Farley Nuclear Plant. This testing, and this testimony, will therefore support an argument that escalated enforcement is not appropriate under Section III of the Modified Enforcement Policy.

- (10) DiBenedetto p. 76-77 [presumably Staff meant p. 79], Q & A 9  
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.

Relevance: See response to Item (9) above. Mr. DiBenedetto's contemporaneous opinion is that this was not a significant issue. He corroborates the positions taken by Mr. Love and Alabama Power Company at the time the issue was identified. His testimony is certainly relevant to whether documentation was necessary on this issue, whether a violation occurred, and whether escalated enforcement is appropriate.

- (11) 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.

Relevance: There is no basis to strike this testimony. Mr. DiBenedetto's testimony relates directly to the qualification status of this equipment as of November 30, 1985, and as of the time of the audit. This is an issue directly in dispute. Moreover, his testimony regarding the operability of the termination is relevant in three respects: 1) it places in proper perspective that this was not a significant issue that reasonable EQ engineers would have been

addressing in detailed documentation prior to the inspection; 2) it shows that Alabama Power Company's judgments made were verified, supporting their original validity; and 3) it will support an argument that this insignificant issue should not be the basis for escalated enforcement under Section III of the Modified Enforcement Policy.

(12) DiBenedetto p. 93, Q & A 113

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

**Relevance:** This testimony has several components, all relevant. First, Mr. DiBenedetto refers to Alabama Power Company's position on this issue that the seals were qualified. That was and remains the Company's position. That position is based on documentation that pre-dated the November 30, 1985 EQ deadline. This is clearly relevant. Second, Mr. DiBenedetto refers to the Company's January 8, 1988 evaluation. This was not an after-the-fact analysis -- it was simply a documented articulation of the Company's pre-existing position. The Company does not rely on it as a basis for qualification (other than to address Staff issues). Those files already existed. There is no basis to strike the reference. Third, Mr. DiBenedetto simply references again his, and the Company's, prior conclusion that these seals would have operated. In other words, they were qualified. This is directly in dispute and the testimony highly relevant. Finally, for argument, Mr. DiBenedetto assumes that there should have been more documentation. His testimony as to the lack of significance of this issue is germane to whether escalated enforcement is appropriate (under Modified Enforcement Policy Section III or otherwise).

(13) DiBenedetto p. 124, Q & A 157

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

**Relevance:** This testimony is directly relevant to the questions of 1) whether grease deviations were of sufficient significance to constitute qualification concerns; 2) whether grease deviations were of sufficient significance such that a licensee should have been aware that they needed to be addressed in EQ documentation; and 3) whether, given the "totality of circumstances" as well as Modified Enforcement Policy Section III, escalated enforcement is appropriate for "deficiencies" in this area.

(14) 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.

**Relevance:** This testimony is again directly relevant to the question of whether this violation occurred and whether, if so, escalated enforcement is appropriate. The Company maintains that T-drains do not affect qualification. Moreover, any "deficiencies" in this area are purely documentation matters that were addressed during the inspection. Therefore, a civil penalty should not be sustained. See the example given in Section III of the Modified Enforcement Policy.

(15) 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.

**Relevance:** This testimony in its entirety is relevant to the total circumstances surrounding this enforcement action. It is directly relevant to the question of whether a civil penalty should be upheld. And, more specifically, it is relevant to an argument that Section III of the Modified Enforcement Policy should be applied by the Board differently than it has been by the Staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'92 FEB -7 P4:07

In the Matter of: )  
ALABAMA POWER COMPANY ) Docket Nos. 50-348-CivP  
(Joseph M. Farley Nuclear ) 50-364-CivP  
Plant, Units 1 and 2) )  
(ASLBP No. 91-626-02-CivP)

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of "ALABAMA POWER COMPANY'S OPPOSITION TO NRC STAFF'S MOTION TO EXCLUDE CERTAIN TESTIMONY" in the above-captioned proceeding have been served on the following by hand delivery as indicated by an asterisk, by Federal Express (morning delivery) as indicated by two asterisks, or otherwise through deposit in First Class United States Mail, this 6th day of February, 1992:

G. Paul Bollwerk, III\*  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Eugene J. Holler, Esq.\*\*  
Office of the General Counsel  
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Atomic Safety and Licensing Board  
Panel  
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Dr. James H. Carpenter\*  
Administrative Judge  
Atomic Safety and Licensing Board  
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Washington, D.C. 20555

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Adjudication  
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Washington, D.C. 20555

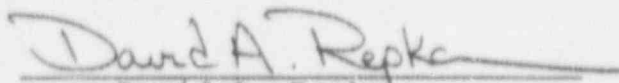
Office of the Secretary (2)  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
Attn: Docketing and Service  
Section

Mr. W. G. Hairston, III  
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Adjudicatory File (2)  
Atomic Safety and Licensing Board  
Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

James Lieberman, Director  
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Company