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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

GEORGIA POWER COMPANY'S OPPOSITION TO INTERVENOR'S MOTION TO STRIKE TESTIMONY OF HILL AND WARD AND TO CONDUCT ADDITIONAL DISCOVERY

Georgia Power Company ("Georgia Power") hereby submits this Opposition to Intervenor's Motion to Strike Testimony of Hill and Ward and to Conduct Additional Discovery.

First, there is no basis for striking the rebuttal testimony of Dr. Hill and Mr. Ward. Intervenor attempts to engraft into this administrative proceeding requirements that apply only to pretrial expert witness discovery under the Federal Rules of Civil Procedure despite the fact that the NRC has never adopted such rules. Moreover, the underlying purpose of the expert discovery provisions of the Federal Rules of Civil Procedure is inapplicable to an administrative proceeding where expert testimony is prefiled in advance of the appearance of the witness and affords the adverse party time to prepare for cross-examination. Intervenor's complaint about an alleged lack of prior notice or of a lack of time to prepare for cross-examination is also baseless. Intervenor has known for months that Georgia Power was contemplating rebuttal testimony, and will have had

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Mr. Ward and Dr. Hill's testimony for almost a month prior to their currently scheduled appearance date.

Second, to the extent that Intervenor's Motion attempts to strike the testimony of Messrs. OwYoung and Johnston, which testimony was received into evidence on August 23, 1995, such motion is untimely and should be denied.

Third, Intervenor has also failed to demonstrate good cause for seeking further discovery on issues as to which (1) he has previously sought discovery, but which was denied by the Licensing Board, or (2) he could have sought discovery during the discovery period, but did not. The principal basis for Intervenor's document requests is apparently to allow Intervenor yet another round of discovery in order to support a surrebuttal case. That is, now that Georgia Power has rebutted Intervenor's Prefiled Testimony with substantial testimony from Cooper representatives OwYoung and Johnston, Intervenor is dissatisfied with his initial case. However, there must be an end to discovery in this proceeding.

During the discovery period related to the diesel generator reporting issue, Georgia Power made available approximately 60,000 pages of documentation related to the operability, reliability, and testing of the Vogtle diesel generators between March 20, 1990 and November 30, 1990, as well as many documents relevant to the 1989 timeframe. Intervenor has had more than a reasonable opportunity to discover information with which to support his case. It would be prejudicial to Georgia Power to further expand the schedule for this proceeding in order for Intervenor to have another round of discovery. It is time to bring this case to an end. Intervenor's Motion for Additional Discovery should be denied.

1. The Motion to Strike Expert Testimony Should be Denied

A. Background

Intervenor has misstated the facts concerning Georgia Power's disclosure of its rebuttal witnesses. On May 15, 1995, Counsel for Georgia Power informed the Board and the parties, pursuant to Intervenor's interrogatory, of the names of persons "that may well be rebuttal witnesses," Tr. 5/15/95 at 4334, including the possibility that Dr. Howard Hill would be called as an expert rebuttal witness. Georgia Power has also discussed its intended rebuttal witnesses with the parties in a number of off-the-record conversations. For example, on August 11, 1995, there was an "extensive discussion off the record of scheduling of individual witnesses," including the panels of OwYoung/Johnston and Ward/Hill. Tr. 8/11/95 at 11022. Further, Intervenor was fully apprised of Mr. Ward's knowledge and expertise concerning the Vogtle diesel generators during the deposition which Intervenor conducted of Mr. Ward on July 19, 1994.

Georgia Power's representation concerning rebuttal witnesses in May was obviously preliminary in nature because it was based only on a review of Intervenor's prefiled testimony without the benefit of cross-examination of Intervenor. Counsel for Georgia Power indicated during the proceeding that certain issues were being considered for rebuttal testimony, and that the decision to submit rebuttal testimony would be based on the results of the cross-examination of Intervenor. See Tr. 7/7/95 at 8637. The decision whether to submit rebuttal testimony of particular witnesses was not made until the completion of Mr. Mosbaugh's cross-examination.

At the Board's suggestion, Georgia Power filed its rebuttal testimony as written prefiled testimony Tr. 7/6/95 at 8305. Counsel for Georgia Power committed to file its rebuttal testimony ten days after Mr. Mosbaugh's cross-examination was completed, Tr. 6/8/95 at 7820, and filed the rebuttal testimony of Dr. Hill and Messrs. Johnston, OwYoung, and Ward within that timeframe.[1/] Intervenor has had in its possession the Prefiled Rebuttal Testimony of Messrs. OwYoung and Johnston since August 19, 1995, and of Dr. Hill and Mr. Ward since August 22, 1995.

B. Argument

First, as demonstrated above, Intervenor was informed about potential rebuttal witnesses prior to the submittal of rebuttal testimony during scheduling discussions on May 15. In addition, Georgia Power did not make a final determination concerning rebuttal testimony until after the cross-examination of Intervenor was complete. Therefore, Intervenor can not now complain that he did not have adequate notice of the rebuttal testimony. Further, Intervenor has had the Ward/Hill testimony for two weeks, and these witnesses are not scheduled to appear at the hearing until September 19, 1995. Thus, Intervenor will have had nearly one month to prepare for cross-examination of Dr. Hill and Mr. Ward. This is more time to prepare for witness examination than is required by the Rules of Practice. See 10 C.F.R. § 2.743(b)(1) (requiring that testimony be filed 15 days prior to a witness' appearance). Intervenor can hardly claim that he is prejudiced by this ample amount of time to prepare.

[1/] Intervenor's argument that Georgia Power has not supplemented its interrogatory responses lacks merit. Georgia Power attempted to provide the requested information as timely as possible by disclosure on the record. Further, the prefiled testimony also provided the information sought by Intervenor's interrogatory concerning expert witnesses by identifying the experts, stating the facts, opinions, or conclusions to which they would testify, and providing the grounds for their opinions and conclusions.

Second, Intervenor's position that the rebuttal testimony of Dr. Hill and Mr. Ward should be stricken because Georgia Power breached a "mandatory" duty to file a pretrial expert report under Fed. R. Civ. P. 26(a)(2)(B) (Motion at 5-8) is entirely without merit. In suggesting that rebuttal testimony be presented in the prefiled format (Tr. 7/6/95 at 8304), the Board never set out any requirement that an expert report be filed. This comes as no surprise, as the NRC has never adopted the requirement for the filing of a prehearing expert report in its Rules of Practice. Moreover, such a requirement has never been cited in any reported NRC decision. Accordingly, adoption of such a requirement would be unprecedented in NRC proceedings.[2/] While Licensing Boards may look to the Federal Rules of Civil Procedure for guidance, there is no precedent for a Licensing Board adding a requirement from the Federal Rules that is not already present in the NRC's Rules of Practice.

Intervenor himself has not followed such a practice. Intervenor asserted that portions of his prefiled testimony constitute expert testimony. "Mr. Mosbaugh's prefiled testimony demonstrates that he is qualified to give expert testimony based on his knowledge, skill, experience, training and education. Because his testimony can further the Board understanding of issues related to air quality, it constitutes admissible expert testimony." Intervenor's Response to Georgia Power Company's Motion to Strike Partially Intervenor's Prefiled Testimony, May 7, 1995, at 8-9 (emphasis added). Despite these assertions, Intervenor filed no expert report. Nor, for that matter, did Intervenor ever supplement his discovery responses to identify such expert testimony in advance of its filing. Georgia Power submits that Intervenor's failure to provide an expert report

[2/] To the extent that Intervenor seeks a change in the NRC's Rules of Practice, such a request, which would not be within this Board's jurisdiction, must be submitted as a Petition for Rulemaking under 10 C.F.R. § 2.802.

to Georgia Power with respect to Mr. Mosbaugh's testimony should estop Intervenor from claiming that Georgia Power must now provide him with such expert reports.

Nor would the filing of an expert report make any sense in this administrative proceeding. Under Rule 26(a)(2)(B), the purpose of requiring a pretrial expert report that discloses expert testimony prior to trial is for the parties to be able to prepare for effective cross-examination of live witnesses at trial and, if necessary, to arrange for other expert witness testimony. Fed. R. Civ. P. 26(a)(2)(B) advisory committee's note. No such purpose would be served by requiring filing in NRC proceedings of prehearing expert reports in addition to prefiled testimony where there is no live direct testimony. In effect, the prefiled testimony satisfies the function of the pretrial expert report in that it informs the adverse party of the testimony and allows that party an opportunity to prepare for cross-examination.

In contrast to the facts presented here, the cases cited by Intervenor in support of this argument (Motion at 6-7) deal with instances where witnesses were not properly identified as experts prior to trial. In this case, Intervenor has been on notice for months that Dr. Hill might submit testimony as an expert rebuttal witness. Intervenor has also known for more than two years that Mr. Ward could submit testimony that was expert in nature (see Motion at 2 n.1) and also deposed Mr. Ward on July 19, 1994. Therefore, the cases cited by Intervenor are inapplicable to the instant case where full disclosure was made to Intervenor.

Further, the unsupported assertion that the testimony of Dr. Hill and Mr. Ward "should have been filed as part of Licensee's case in chief" (Motion at 7, 8) is simply wrong. Licensees are not obliged to anticipate and counter Intervenor's evidence in Licensees' case-in-chief. Cf.

Rodriguez v. Olin Corp., 780 F.2d 491, 496 (5th Cir. 1986) (plaintiff "is under no obligation to anticipate and negate in its own case in chief any facts or theories that may be raised on defense"); Martin v. Weaver, 666 F.2d 1013, 1020 (6th Cir. 1981), cert. denied, 456 U.S. 962 (1982) ("plaintiff has no duty to anticipate or to negate a defense theory in plaintiff's case-in-chief."). Accordingly, it is absurd to suggest that "Intervenor should have had an opportunity to depose these experts before he was required to submit prefiled testimony . . . ." Motion at 7.[3] This argument makes the incredible presumption that Georgia Power possessed an ability to anticipate every issue that Mr. Mosbaugh would raise in his prefiled testimony and could have assembled a rebuttal case even before Mr. Mosbaugh's prefiled testimony was submitted and before Mr. Mosbaugh was cross-examined. No such superhuman exercise is required by the Rules of Practice. Indeed, Dr. Hill and Messrs. OwYoung and Johnston were not even contacted by Georgia Power with respect to rebuttal testimony until after Mr. Mosbaugh's prefiled testimony was submitted. Further, Dr. Hill was similarly retained in this case only after Mr. Mosbaugh filed his testimony (initially to consider root cause testimony which was later stricken).

The rebuttal testimony of Dr. Hill and Mr. Ward is proper rebuttal testimony in all respects, as it serves to "explain, repel, counteract or disprove the evidence of the adverse party." United States v. Chrzanowski, 502 F.2d 573, 576 (3d Cir. 1974), cited in Geders v. United States, 425 U.S. 80, 86 (1976). Indeed, the rebuttal testimony submitted by Dr. Hill and Mr. Ward specifically responds to statements made by Mr. Mosbaugh in his retyped prefiled testimony as well as statements during his cross-examination.[4] The witnesses address topics such as alleged

[3] Intervenor, in fact, deposed Mr. Ward at length on July 19, 1994. To Licensee's knowledge, no transcript of that deposition was ever prepared.

[4] See, e.g., Rebuttal Testimony and Responses to Board Questions of Howard T. Hill and Lewis A. Ward on Diesel Generator Air Quality Issues, Aug. 21, 1995 at 4.

condensation of large quantities of water in pneumatic control lines and control air design standards which Georgia Power did not believe would be issues when Georgia Power prepared its case-in-chief.

Nor is there any prohibition against filing of expert testimony simply because the adverse party in the case has not proffered expert testimony, contrary to Intervenor's suggestion (testimony of Hill and Ward should have been filed as part of Licensee's case in chief . . ."because Intervenor has not called expert witnesses." (Motion at 8)). Moreover, Intervenor's claim that he "has not called expert witnesses" is directly contrary to the previous assertion that "Mr. Mosbaugh's prefiled testimony demonstrates that he is qualified to give expert testimony based on his knowledge, skill, experience, training and education. . . Because his testimony can further the Board understanding of issues related to air quality, it constitutes admissible expert testimony." Intervenor's Response to Georgia Power Company's Motion to Strike Partially Intervenor's Prefiled Testimony, May 7, 1995, at 8-9 (emphasis added). Nonetheless, whether Intervenor chooses to submit expert witness testimony has no bearing on whether Georgia Power is permitted to do so.

In the event that Intervenor's Motion is intended or treated as a motion to strike the testimony of Messrs. OwYoung and Johnston, such motion is untimely. Their testimony was received into evidence on August 23. Intervenor moved at that time to strike portions of the testimony, but the Board denied that motion. Tr. 8/23/95 at 12415-12428. If Intervenor had any further arguments, it should have presented them before this ruling. The Board has previously refused to

entertain late motions to strike. Furthermore, Georgia Power believes that the testimony of Messrs. OwYoung and Johnston is necessary for an adequate record.

Also, Intervenor's Motion at 8 mischaracterizes the OwYoung/Johnston witness panel. While both witnesses have presented expert testimony, their testimony is primarily factual, i.e., testimony about facts that transpired following the March 1990 site area emergency, which one or both of them witnessed.

Finally, Intervenor asserts that the testimony of Messrs. OwYoung and Johnston "previously addressed issues now being re-raised by Messrs. Ward and Hill (e.g., arguments concerning the ISA standards and moisture in the diesel air system)." Motion at 8. Intervenor asserts that this is somehow prejudicial to Intervenor because Georgia Power has now heard the questions which Intervenor asked Messrs. OwYoung and Johnston, suggesting that the same questions will be asked of Dr. Hill and Mr. Ward. This assertion is absurd. First, Georgia Power's witnesses are under a sequestration order and Georgia Power is prohibited from sharing Intervenor's cross-examination among witnesses. Moreover, contrary to Intervenor's assertion, these two panels are not repetitive. The testimony of Messrs. OwYoung and Johnston concerning water in the diesel control system is based on first-hand observations of the Vogtle diesel systems in 1990 from the perspective of the diesel vendor. Dr. Hill, on the other hand, is providing expert testimony concerning the formation of water in the diesel control system based on a present day review of the control system. With respect to the ISA standard, unlike Mr. OwYoung, Mr. Ward is providing the Company's position on the Vogtle Final Safety Analysis Report and Georgia Power's response

to the NRC Generic Letter 88-14. Based on the foregoing, the Motion to Strike the Hill/Ward and OwYoung/Johnston testimony should be denied.

2. The Motion for Additional Discovery Should be Denied

A. Background

Intervenor first raised the need for additional discovery during a scheduling conference call among the Board and the parties on August 30, 1995.[5/] Intervenor's counsel stated that the purpose for requesting additional discovery was "to conduct a thorough examination of their experts." Tr. 8/30/95 at 12920. In the same conference call, Intervenor explained that discovery conducted thus far was focused on Intervenor's case in chief and that now Intervenor needs an opportunity to have additional discovery for its rebuttal case. Tr. 8/30/95 at 12920-21. The Board noted during the call that most of the items requested by Intervenor did not appear to be "discovery of the experts" (Tr. 8/30/95 at 12921) and that additional discovery could be had by Intervenor only upon a demonstration of good cause (Tr. 8/30/95 at 12919, 12929).

Intervenor subsequently filed the instant motion seeking additional discovery to "evaluate, address, and rebut factual statements or inferences raised by the Owyoung-Johnston expert panel." Motion at 1. Further, Intervenor asserts that "good cause" for such discovery exists because of "Georgia Power's failure to comply with prior discovery obligations and for failing to identify Messrs. Owyoung and Johnston as experts prior to [their] appearing at the hearing." Motion at 10.

[5/] When discussing the need for additional discovery on the conference call, counsel for Intervenor indicated that his motion demonstrating good cause for this discovery would be filed on August 31, 1995. Tr. 8/30/95 at 12920.

B. Argument

Intervenor's Motion for Additional Discovery is fatally flawed because it is based on the false premise that Intervenor is automatically entitled to a new round of discovery when Georgia Power identifies additional witnesses as part of its rebuttal case, even when such identification occurred long after the discovery period ended. While Georgia Power remains obligated to supplement existing discovery requests, as necessary, Intervenor does not have the right to obtain new discovery simply because Georgia Power elects to rebut Intervenor's case with additional witnesses, including experts.

As discussed above, Georgia Power has complied with its discovery obligations by identifying expert witnesses in as timely a manner as possible and by providing their prefiled, written rebuttal testimony to the Board and the parties. Further, prior to their appearance at the hearing, Georgia Power provided Intervenor with the documents used by Messrs. OwYoung and Johnston in preparing their prefiled testimony. Georgia Power has also provided intervenor with all of the documents used by Mr. Ward and some of the documents used by Dr. Hill in the preparation of their testimony. The remainder of the documents used by Dr. Hill will be produced as soon as possible and prior to his appearance at the hearing.

Intervenor's real concern appears to be that his positions have been undercut by the rebuttal testimony of Messrs. OwYoung and Johnston and by the prefiled testimony of Messrs. Hill and Ward. Given Intervenor's predicament, he has chosen a familiar and predictable path: he has moved to reopen discovery in hopes of finding a new factual basis or developing a new contention on which to base his case. The Board should not countenance Intervenor's request because, as

the Board has already observed, Intervenor's discovery requests have little to do with "discovery of the experts," and Intervenor has failed to articulate the requisite good cause to reopen discovery.

Moreover, as discussed above, Intervenor's complaints regarding the testimony of Messrs. OwYoung and Johnston, admitted on August 23, is late and should not be heard now. The time for any motion in connection with their testimony was prior to the time that the witnesses were dismissed from the proceeding.

As a preliminary matter, Requests 1-9 seek certain documentation discussed in the NRC Staff's routine electrical maintenance inspection conducted May 9-20, 1994. (Inspection Report 50-424/94-12 and 50-425/94-12) ("I.R. 94-12"). This report was provided to the parties by Board Notification ("BN") 94-11, dated July 19, 1994 and addressed earlier allegations that Intervenor elected to raise with the Staff confidentially rather than in this proceeding. Intervenor's Motion fails to show good cause why he did not seek this related documentation while the discovery period was still open in July 1994. As a result, Georgia Power objects to Requests 1-9 on grounds that they should have been requested during discovery, and those Requests should be denied for that reason. See Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), Nov. 9, 1994 slip op. at 3 (motion to reopen discovery denied because "Intervenor has not shown due diligence in protecting his rights").[6] Georgia Power addresses each of Intervenor's discovery requests in turn below.

[6] See also Paul Kadair, Inc. v. Sony Corporation of America, 694 F.2d 1017, 1031 (5th Cir. 1983) ("[D]iscovery may be limited if dilatorily sought.").

Request No. 1. This request seeks diesel control logic drawings and diesel control panel layout drawings that were identified in BN 94-11 (I.R. 94-12 at 10-11). Intervenor's document request offers no good cause explanation as to why he failed to request this information during the lengthy discovery period. Intervenor's retyped prefiled testimony (at 15-16) describes how the diesel control logic works, thus indicating Intervenor's familiarity with this information and its potential relevance to his case. Further, as this Board has already articulated on the record (Tr. 8/24/95 at 12565), Intervenor's knowledge of the diesel control logic was a necessary prerequisite for his testimony regarding the effects of moisture on the control logic system. Thus, Intervenor seeks discovery on an item central to his case-in-chief long after discovery was closed in this proceeding simply because the OwYoung-Johnston rebuttal revealed that Intervenor did not fully understand the control logic system after all. Georgia Power should not be penalized for Intervenor's mistakes in his prefiled testimony. Request No. 1 should be denied.

Request No. 2. This Request seeks the MWO that was in effect when water was inadvertently introduced into a diesel trip line during bubble testing (identified in BN 94-11 (I.R. 94-12 at 10)). The only potential relevance of this event was whether it might have related to the alleged discovery of water in pneumatic lines in 1990. Having conclusively determined the event occurred in 1991, this MWO has no further relevance to the proceeding, and Intervenor has not shown good cause in requesting it. Further, Intervenor's assertion that Georgia Power previously committed to provide this document is simply wrong. Intervenor requested the MWOs "referenced in" Board Ex. 8, which is Deficiency Card 1-91-303. Tr. 8/11/95 at 10924. The MWO requested by Intervenor is not referenced in the Deficiency Card. Request No. 2 should be denied.

Request No. 3. This Request seeks all MWOs identified in Intervenor's Demonstrative Aid No. 4. The parties have already spent extensive time and effort in reaching agreement on the information contained in that Demonstrative Aid. Intervenor offers no explanation as to why additional efforts are needed. If additional MWOs were needed, they should have been requested earlier. Intervenor has failed to show good cause with respect to this Request, and it should be denied.

Request No. 4. This Request seeks certain design change packages and minor deviations to design related to the diesel pneumatic controls as previously identified in BN 94-11 (I.R. 94-12 at 10-11). Intervenor offers no explanation as to why he failed to request this information during the lengthy discovery period. There being no good cause showing, the Request should be denied.

Request No. 5. This Request seeks a deficiency card and four MWO packages that allegedly identify improperly configured diesel pneumatic lines. BN 94-11 (I.R. 94-12 at 11) states that these documents identify and resolve a tagging concern related to the high temperature jacket water trip sensors and their respective test valves. Intervenor's request offers no explanation as to why he failed to request this information during the lengthy discovery period. Intervenor's original pre-filed testimony, at 26, addresses the issue of alleged improperly connecting tubing, thus indicating Intervenor's familiarity with this information and its potential relevance to his case. This portion of Intervenor's testimony was struck by the Board. Memorandum and Order, May 11, 1995 at 11. This Request should be denied.

Request No. 6. This request seeks information concerning out of specification dew point measurements taken in the January 1994 time frame. This information is irrelevant to the issue in

the case -- whether Georgia Power believed it was providing accurate information about the diesel generators in 1990. A similar discovery request was denied by the Board in August 1994. Memorandum and Order (Intervenors' Seventh Set of Interrogatories), Aug. 8, 1994, at 2 (authorizing Georgia Power to limit interrogatory responses to "events occurring prior to the last alleged misrepresentation"). In any event, this issue was fully researched by the NRC Staff and documented in BN 94-11 (I.R. 94-12 at 8-9). Further, these 1994 events are not relevant to what Messrs. OwYoung and Johnston knew in March-April 1990. Intervenor's explanation of the potential relationship of this event to the 1990 time frame is too attenuated and speculative to provide a basis for granting additional discovery. This Request should be denied.

Request No. 7. This Request seeks information regarding Calcon sensor and other pneumatic component problems or failures consisting of MWOs ranging in date from 1990 to 1993. The MWOs identified in this request are all identified in BN 94-11 (I.R. 94-12 at 3-5). Intervenor offers no explanation of good cause as to the failure to request this information during the lengthy discovery period. In addition, the reason cited by Intervenor for these documents, that he "believes the assertion that there were no calcon failures since 1992 to be false" (Motion at 16) is irrelevant to this proceeding. Furthermore, Intervenor's reason for requesting this information has nothing to do with "discovery of the experts;" rather, Intervenor is simply looking for an alternate rationale to support his factual basis that the root cause of the diesel failure was water in the control air system. This Request should be denied.

Request No. 8. This Request seeks the 28 MWOs reviewed by the NRC Staff for evidence of pneumatic control system leakage during their May 1994 inspection and identified in BN

94-11 (I.R. 94-12 at 6). Again, some of the MWOs are dated 1991 and 1993 and are therefore irrelevant to this proceeding. See Memorandum and Order (Intervenors' Seventh Set of Interrogatories), Aug. 8, 1994, at 2 (authorizing Georgia Power to limit interrogatory responses to "events occurring prior to the last alleged misrepresentation"). This Request should be denied.

Request No. 9. This Request seeks information regarding the 31 MWOs reviewed by the NRC Staff for evidence of maintenance of proper air quality during their May 1994 inspection and identified in BN 94-11 (I.R. 94-12 at 8). A number of the MWOs are dated 1991 and later and are therefore irrelevant to this proceeding. See Memorandum and Order (Intervenors' Seventh Set of Interrogatories), Aug. 8, 1994, at 2 (authorizing Georgia Power to limit interrogatory responses to "events occurring prior to the last alleged misrepresentation"). The Request should be denied.

Request No. 10. Intervenor seeks the entire I&C log from March 9, 1990 to the end of 1991. Georgia Power objects to this request on grounds that it seeks information beyond the relevant timeframe. See Memorandum and Order (Intervenors' Seventh Set of Interrogatories), Aug. 8, 1994, at 2 (authorizing Georgia Power to limit interrogatory responses to "events occurring prior to the last alleged misrepresentation"). Intervenor has not made any good cause showing as to why relevant information was not requested during discovery. In any event, the Board has requested that relevant excerpts from the I&C log concerning dew point measurements with respect to April 9, 1990, be produced, and Georgia Power complied with that request on Friday, September 8. Intervenor has provided no other showing as to information in the I&C log aside

from the dew point measurement information pertaining to April 9, 1990. Accordingly, the Request should be denied.

Request No. 11. In this Request, Intervenor seeks production of the MWO in progress when Mr. Johnston detected water in the pneumatic control system in 1995. Georgia Power objects to this request on grounds that the documents sought are irrelevant and are outside the scope of the proceeding. On Friday, September 8, the Board stated that it would first hear the testimony of Mr. Stokes as to his prior testimony on findings of moisture in the control air system, and that Intervenor was free to file a motion on the relevancy of the 1995 finding following Mr. Stokes' testimony. There has to date been no ruling by the Board that the finding of moisture in the test tap line in 1995 is relevant to the admitted contention in this proceeding. Georgia Power believes that the 1995 finding has no bearing on whether Georgia Power believed it was making accurate statements to the NRC in 1990. Therefore, this Request should be denied.

Request No. 12. This Request, similar to Request No. 7, seeks "all documents . . . concerning Calcon sensors and the failure of Calcon sensors." Motion at 19. Georgia Power objects to this seemingly boundless request on grounds that it is overbroad, unduly burdensome, and cumulative. Georgia Power believes Intervenor has received all relevant information concerning Calcon sensor failures. In connection with the testimony of Mr. Ward, Georgia Power has produced a two volume set of Calcon sensor calibration history, which was assembled in April 1990 and provided to the IIT, and which was also made available to Intervenor during discovery. Intervenor has made no showing that good cause exists to require Georgia Power to produce

additional documentation. There is no good reason why Intervenor failed to request information relating to Calcon sensors during the discovery period. See objections to Request No. 7, supra.

Request No. 13. Request No. 13 seeks documents "maintained by Cooper" concerning the maintenance history of Cooper diesels.[7] Georgia Power objects to this Request on grounds that it is overbroad, unduly burdensome, not narrowly tailored to produce relevant evidence, and could have been made during document discovery. The Request seeks all documents concerning the maintenance history of Cooper diesels without focusing on a particular aspect of the diesels or a relevant timeframe. Intervenor could have requested diesel maintenance documents in discovery, as this issue was clearly related to matters raised in Intervenor's retyped prefiled testimony, showing Intervenor's awareness of the issue, and no explanation of good cause for this failure is provided. Numerous documents concerning diesel generator maintenance have been made available to Intervenor in discovery. In addition, the request is clearly not focused on expert witness discovery. For these reasons, Request No. 13 should be denied.

Request No. 14. This Request seeks information concerning air start valves. Georgia Power objects to Request No. 14 on grounds that Intervenor has provided no good cause justification for his failure to request this information in document discovery. In his prefiled testimony, Intervenor alleged that water caused a weak air roll as a precursor to the March 20, 1990 event. Retyped Prefiled Testimony of Allen L. Mosbaugh at 40-41. It is apparent that Intervenor could

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[7] This is a request for third party discovery against Cooper. The Rules of Practice only provide for the filing of document requests against other parties in the proceeding. See 10 C.F.R. § 2.714(a) ("Any party may serve on any other party . . . .") (emphasis added); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-1, 21 NRC 11, 21 (1985). Cooper is not a party to this proceeding. Even if discovery were open -- and it is not -- document discovery against non-parties would require a subpoena duces tecum personally served on the individuals and their individual counsel. 10 C.F.R. § 2.720; Kerr-McGee, 21 NRC at 22 (citing Pacific Gas & Elec. Co. (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683 (1979)).

have submitted this interrogatory during document discovery and failed to do so. The Board should not reward Intervenor for his failure to conduct proper discovery. This Request should be denied.

Request No. 15. This Request seeks documents concerning Cooper's Part 21 notification. It is unclear whether Intervenor seeks discovery from Cooper or Georgia Power as to documents relating to the Part 21 notification. If the document request is directed at Cooper, then Intervenor will have to obtain a subpoena to seek discovery from Cooper. See response to Request No. 13, supra. If the document request is directed at Georgia Power, Georgia Power objects on grounds of relevance and on grounds that such reports, if they exist, are outside the scope of the admitted contention. Intervenor apparently seeks to now litigate the adequacy of the Part 21 notification made by Cooper, which has no conceivable bearing on the admitted contention. Intervenor raised this issue in his testimony; he has made no showing of good cause why he failed to timely request discovery. This Request should be denied.

Request No. 16. Georgia Power will produce to Intervenor documents relied upon by Dr. Hill and Mr. Ward in preparing their rebuttal testimony. Beyond this, Georgia Power objects to the request as seeking documents that are irrelevant to the Hill-Ward testimony and protected by the work product privilege.

Dr. Hill was initially retained to consider Mr. Mosbaugh's root cause testimony that was later stricken by the Board. He was also asked at various times by Georgia Power's attorney's for his views on similar technical issues raised by Mr. Mosbaugh but were not included in Mr. Hill's rebuttal testimony. There are therefore documents reviewed or generated by Dr. Hill that are

beyond the scope of his rebuttal testimony. Such documents are irrelevant to the testimony, and the documents that Mr. Hill may have generated on issues outside of the scope of his testimony are further protected from disclosure under the work product doctrine because they were prepared at the direction of lawyers in connection with litigation. See United Coal Companies v. Powell Const. Co., 839 F.2d 958, 966-67 (3d Cir. 1988) (work product doctrine applies to mental impressions of non-lawyers or agents acting at the direction of lawyers) (citations omitted); United States v. Nobels, 422 U.S. 225, 238-39 (1975) (it is "necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself").

Similarly, the request for drafts of testimony should be denied as protected work product. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-75-28, 1 NRC 513, 514 (protecting from disclosure draft hearing testimony since it was "in the form of trial preparation material of counsel.").[8/] Further, Intervenor has made no showing, as required by 10 C.F.R. § 2.740(b)(2), of "substantial need" of work product, nor any showing that Intervenor is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1162 (1982).

Finally, with respect to the request for prior testimony or writings that relate to the subject matters discussed in their prefiled testimony, Georgia Power states that all of Mr. Ward's prior testimony has been proffered in this proceeding and Intervenor has copies of that testimony.

[8/] But see Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-79-30, 10 NRC 594, 595 (1979).

Georgia Power also states that aside from privileged material, Dr. Hill has no prior testimony or published writings that relate to matters discussed in his prefiled testimony.

3. Depositions of Dr. Hill and Mr. Ward

Georgia Power is willing to make Dr. Hill and Mr. Ward available for a deposition or informal interview prior to September 19, the date set for their appearances by the Board.

4. The Motion for Discovery to Ensure a Complete and Accurate Record Should be Denied

In this section of its Motion (Motion at 21-23), Intervenor has made no showing of good cause other than to baldly assert that the information is needed to ensure a complete and accurate record. Such an unsupported assertion does not demonstrate good cause. Indeed, Intervenor has made no such showing as he must, since issues relating to whether the dew point measuring instruments were defective were known to Intervenor when discovery was open.

In fact, Intervenor could have requested these documents during discovery, as demonstrated by his retyped prefiled testimony in which he alleges that the dew point measuring instruments were providing correct readings. Retyped Prefiled Testimony of Allen L. Mosbaugh at 66-90. Intervenor should not be rewarded for his failure to request this information. Accordingly, Georgia Power objects to all of the discovery requests in this section for failure to show good cause., and this request for additional discovery should be denied. Further, it should be noted that Georgia Power has complied with the Board's request that Georgia Power ensure that its discovery responses were accurate, and that Georgia Power (as well as the NRC Staff) is

continuing to review issues related to conditions of the dew point measuring instruments. In addition to these general objections, Georgia Power provides more specific objections below.

Request No 1. In this Request, Intervenor seeks information relating to alleged "as found" readings recorded on dew point measuring instrumentation, including readings taken "any time after 4-7-90 for VP-2466" and all Georgia Power employees who allegedly knew about such findings. (Motion at 22) Intervenor has failed to show good cause for failure to request this information during document discovery. Further, the Board has previously ruled that Georgia Power is not required to respond to interrogatories concerning diesel generator problems "up to the present day." Memorandum and Order (Intervenors' Seventh Set of Interrogatories), Aug. 8, 1994 at 2; see Motton v. Owens, 128 F.R.D. 72, 73 (M.D. Pa. 1989) (failure to request production pertaining to a relevant time period makes discovery overly broad and unduly burdensome). The same reasoning should apply to this document request. In any event, this request is duplicative of the information that both Georgia Power and the NRC Staff is assembling at the Board's request. This Request should be denied.

Request No. 2. This Request seeks information concerning a fax transmission of Intervenor's Exhibit II-215. Georgia Power objects to the request that it identify all other persons who reviewed the document. Such information is irrelevant to the admitted contention and appears nothing more than an intrusion into privileged communications between Georgia Power and its counsel. This Request should be denied.

Request No. 3. This Request seeks all locations where VP-2466 was stored between April 7, 1990 and the present, and related documentation. Georgia Power objects to this request

on grounds that it is overly broad, unduly burdensome, could have been requested during discovery, and calls for irrelevant information. Intervenor alleged that the dew point measuring devices were giving valid readings in 1990; therefore, he should have requested information concerning the maintenance of these devices during discovery and has made no showing of good cause for his failure to do so. Further, Intervenor has not shown the relevance of the transportation or storage of the VP-2466 device for the last five years. See Response to Request No. 1, supra. The document request is overly broad because it provides no limitation as to relevant dates.

Request No. 4. Intervenor requests "all documents pertaining to Alnor VP-2466 created between 1989 and present." Georgia Power objects to this request on grounds that it is overbroad, cumulative, repetitive, and is irrelevant to issues in this proceeding. The request is duplicative of request #3 in that it requests "all documents" relating to Alnor VP-2466. Moreover, Intervenor has made no showing of the relevance of all documents relating to the instrument generated for the past six years, and such an unlimited request is unduly burdensome. See response to Request No. 1, supra.

Request No. 5. This Request seeks the Administrative Control procedures governing the M&TE program in 1990. Georgia Power objects to this request on grounds that it is untimely. Intervenor made the Alnor measuring device an issue in his prefiled testimony, and therefore could have requested the Administrative Control procedures in effect in 1990 during document discovery. Retyped Prefiled Testimony of Allen L. Mosbaugh at 66-90. Intervenor has provided no good cause basis for his failure to request this information during discovery.

Request No. 6. This Request seeks information concerning whether VP-2466 had its radiation source replaced. Georgia Power objects to this request on relevance grounds. Intervenor has provided no discussion as to the relevance of having the radiation source of the Alnor device replaced. Additionally, Intervenor could have made this request during document discovery, and has provided no good cause explanation why such a request was not made.

Conclusion

For all of the reasons stated above, the Board should deny Intervenor's Motion to Strike the Rebuttal Testimony of Hill and Ward and should deny the Motions for Additional Discovery.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Georgia Power Company's Opposition to Intervenor's Motion to Strike Testimony of Hill and Ward and to Conduct Additional Discovery," dated September 11, 1995, were served upon the persons listed on the attached service list by deposit in the U.S. Mail, first class, postage prepaid, or where indicated by an asterisk by hand delivery, this 11th day of September, 1995.

David R. Lewis
Counsel for Georgia Power Company

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commissioners

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

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