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October 16, 1995
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'95 OCT 16 A10:02

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)	
)	Docket Nos. 50-424-OLA-3
GEORGIA POWER COMPANY)	50-425-OLA-3
<i>et al.</i>)	
)	Re: License Amendment
(Vogtle Electric Generating Plant,)	(Transfer to Southern Nuclear)
Units 1 and 2))	

NRC STAFF RESPONSE TO ORDER REQUESTING
BRIEFS ON THE IMPACT OF THE HOBBY DOL DECISION

INTRODUCTION

During the evidentiary hearing held on September 28, 1995, the Board sustained objections to Intervenor's counsel pursuing on cross-examination of the Staff management panel the August 4, 1995, decision by the Secretary of the Department of Labor (DOL) concerning Marvin Hobby (Hobby Decision). Tr. 15,407-15,409. Without an Intervenor motion seeking admission of the issue, the Board, in a Memorandum and Order (Effect of Department of Labor Case No. 90-ERA-30), dated October 3, 1995, stated that the parties may file briefs concerning the effect, if any, of the Hobby Decision on the above-captioned proceeding. For the reasons set forth below, the Staff believes that it does not impact the admitted issues in this proceeding.

DISCUSSION

In the Hobby Decision, the Secretary of Labor found that the decision of Georgia Power Company (GPC) to terminate Hobby's employment in February 1990 "was based solely on retaliatory animus" for raising concerns that the reporting structure between

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GPC and Southern Nuclear as possibly violating NRC requirements because Pat McDonald (a GPC and Alabama Power officer) was taking management direction from non-GPC officer, Joseph Farley (chief executive of the Southern Nuclear Operating Company (SONOPCO) Project and Executive Vice President of the Southern Company). *Hobby v. GPC*, No. 90-ERA-30 (August 4, 1995), at 26, 2-3, 6-25. The Hobby Decision did not focus on whether Mr. Hobby's regulatory concerns were valid, but on (1) whether *he reasonably believed* that his employer was violating NRC requirements irrespective of after the fact determinations regarding the correctness of Mr. Hobby's belief and (2) whether he was discharged, in whole or in part, for raising those concerns. *Id.* at 15-16, 23-26.

Marvin Hobby was a co-petitioner in the October 1992 petition for intervention on the proposed transfer of authority to operate Vogtle, but was dismissed for a lack of standing due to his purely economic interests (shareholder status and desire for reinstatement as a general manager over GPC nuclear facilities). Memorandum and Order (Prehearing Conference; Filing Schedule), dated November 17, 1992 (unpublished), at 3-4, 10. The basis for the proffered illegal transfer contention in the amended petition filed in December 1992 was the *de facto* control of Southern Nuclear (the proposed transferee), particularly the alleged control of Joseph Farley in Vogtle related activities. *See* LBP-93-5, 37 NRC 96, 102-04. The sole bases for the admitted/consolidated contention alleging that GPC lacked "the requisite character, competence, and integrity ... to abide by regulatory requirements" were (1) the alleged

illegal transfer to Southern Nuclear and (2) GPC's "false statements" regarding diesel generator operability and reliability after the March 1990 Site Area Emergency. *Id.* at 102-05, 110. Later rulings by the Board have focused the issues in this proceeding as centered around misrepresentations or omissions to the NRC concerning the relationship of GPC to Southern Nuclear (and the interim organization -- SONOPCO Project) and misrepresentations or omissions in communications with the NRC concerning 1990 diesel generator issues. *See, e.g.*, LBP-94-37, 40 NRC 288, 303-07 (1994); Memorandum and Order (Summary Disposition: Air Quality), dated April 27, 1995 (unpublished), at 8-9.¹

The Board has ruled that matters incorporated by reference in the initial intervention petition (specifically matters raised in the Hobby and Mosbaugh 10 C.F.R. § 2.206 petitions) are not in the proceeding.² LBP-93-21, 38 NRC 143, 148-50 (1993). Moreover, the Board stated that Intervenor may seek admission of additional matters as bases to its contention, "but the ground for this motion must be that the additional matters

¹ During the hearing, the Board allowed testimony concerning the possible intimidation of a Plant Review Board member in 1990 and limited information regarding the handling of Mr. Mosbaugh's FAVA and dilution valve concerns primarily as a backdrop to Mr. Mosbaugh's decision to commence audio taping at Vogtle in 1990 and to refrain from confronting his management regarding the accuracy of diesel generator information. The performance of Mr. Bockhold and other senior GPC managers in these matters was addressed. These subsidiary matters, however, have some nexus to Intervenor's or GPC's actions regarding the admitted issue in the proceeding -- whether GPC intentionally misrepresented or falsified (1) certain information regarding the proposed transfer of the authority to operate or (2) certain information about the diesel generators after the Site Area Emergency.

² The Staff has previously noted that Mr. Hobby and Mr. Mosbaugh included allegations of discrimination by GPC in their § 2.206 petitions filed in September 1990, as supplemented in October 1990. *See* DD-93-8, 37 NRC 314, 315-16 & n.2 (1993), *vacated and remanded*, CLI-93-15, 38 NRC 1 (1993).

are relevant and *newly discovered*." *Id.* at 148 (emphasis in original), citing *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 20-21 (1993). The matter addressed in the Hobby Decision is neither relevant to the admitted issues in this proceeding nor newly discovered as the underlying facts are over five years old and were known to Mr. Hobby at the time the initial intervention petition was filed.

The Hobby decision does not impact the ongoing proceeding. Only those issues that have been timely raised and determined by the Board to be in controversy in the proceeding are at issue. Every matter that might be considered in the Staff's determination of whether to approve the proposed license transfer are not at issue in this proceeding. Rather, nonadmitted issues that affect the decision regarding the proposed transfer are within the province of the Staff.³ If the Intervenor or Mr. Hobby wanted to include the alleged discrimination against Mr. Hobby as a basis for the character and integrity issue, they were obligated to raise it in a timely manner in order to put the parties on notice as to the matters in controversy. Neither the original nor the amended petition for leave to intervene included as a basis for the contention the claim that GPC/Southern Nuclear officials had discriminated against Mr. Hobby due to his concerns about who was in control of Vogtle.

The Board should only concern itself with the alleged "discrimination" against Mr. Hobby if Intervenor were to succeed in convincing the Board to admit the 1989-90

³ As the Staff indicated in BN-95-16, dated September 25, 1995, the Staff is considering whether the Hobby decision is a basis for escalated enforcement action.

employment issue as a late-filed contention pursuant to 10 C.F.R. § 2.714(a)(i)-(iv) or a late-filed contention bases. That motion has not been filed. The mere fact that the recent decision support's Mr. Hobby's belief that he lost his job due to retaliation for raising safety concerns, does not excuse the failure of Intervenor (who adopted the Hobby illegal transfer issue) to include in the amended petition the alleged discrimination as an additional basis for the lack of character of the proposed transferee.⁴ Intervenor chose not to include it in his initial petition. The underlying facts concerning the alleged discrimination were known when the petition was filed as hearings were held in October-November 1990, years before the petition was filed. He should not be permitted to raise it now.

In addition, Mr. Hobby and several GPC/Southern Nuclear Officials, including Mr. Farley, testified in January 1995 about the elimination of Mr. Hobby's position and the relationship between GPC and Southern Nuclear in 1990. The Board has sufficient testimony to determine whether there were any misrepresentation to the NRC regarding who exercised control over nuclear operations at Vogtle. The Hobby decision is neither final or binding on the Board in this regard, nor is it probative on the issue of whether

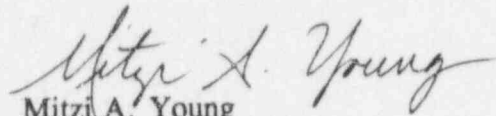
⁴ If Intervenor moves for the admission of this late-filed discrimination contention, the Staff does not believe that Intervenor can demonstrate any good cause for the failure to initially raise the character issue associated with the alleged discrimination against Hobby. See 10 C.F.R. § 2.714(a)(1)(i). The balance of the other factors also weigh against admission as the Hobby DOL issue is not probative of whether GPC either misrepresented or omitted information concerning the proposed transfer (§ 2.714(a)(1)(iii)) and admission near the close of the evidentiary record would broaden and delay the proceeding (§ 2.714(a)(1)(iii)).

there were misrepresentations regarding the proposed transfer or diesel generator information.⁵

CONCLUSION

In short, the Staff does not view the Hobby decision as having an impact on this proceeding as it not probative of an admitted issue in the proceeding and is not newly discovered.

Respectfully submitted,


Mitzi A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 13th day of October 1995

⁵ GPC has also informed the Staff that it plans to appeal the Hobby decision.

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)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO ORDER REQUESTING BRIEFS ON THE IMPACT OF THE HOBBY DOL DECISION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system; or as indicated by double asterisk, by facsimile this 13th day of October 1995.

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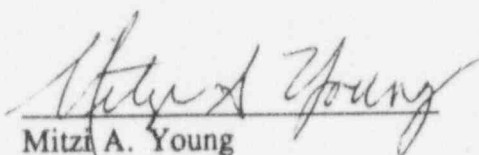
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