

17222

October 19, 1995

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'95 OCT 20 A10:05

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

NRC STAFF OPPOSITION TO INTERVENOR MOTION
FOR DISCOVERY AGAINST STAFF MANAGEMENT PANEL

INTRODUCTION

During the September 27, 1995, testimony of NRC Staff witnesses Roy P. Zimmerman and Luis A. Reyes (Management Panel), counsel for Intervenor argued that Intervenor had been denied discovery against the NRC Staff because Intervenor had relied on the Staff's assertion that its Management Panel would not be testifying as experts. *See* Tr. 15257-15262. Judge Bloch (1) ruled that Intervenor could file a written motion explaining the relief sought for being "improperly" denied discovery of the Staff management panel and (2) noted that neither Mr. Reyes (whose testimony was based on his professional experience and interactions with GPC) nor Mr. Zimmerman (who relied on his NRC and other expertise) were subject to discovery as experts. Tr. 15264-15265.

On October 6, 1995, Intervenor filed "Intervenor's Motion to Complete Discovery Against NRC Staff's Expert Witnesses (Management Panel)" (Motion), seeking permission to conduct additional discovery against the NRC Staff. As grounds for the motion, Intervenor argued that it "became obvious that the NRC Management Panel was

providing expert testimony" and that Intervenor "had unfairly been denied discovery against the Staff" due to the Staff's previous statements that the panel was not testifying as experts. Motion at 3. For the reasons set forth below, the Motion should be denied.

BACKGROUND

The instant motion stems from Intervenor's abandonment of discovery against the Management Panel in April 1995. On March 22, 1995, Intervenor filed a motion that, *inter alia*, argued that Intervenor should be granted discovery against the panel as "experts" because the panel lacked "first-hand knowledge of any of the underlying facts pertaining to Phase II" (diesel generator reporting). Motion to Complete Discovery Against Staff, dated March 22, 1995, at 7-8. Intervenor also filed "Intervenor's Notice of Deposition of Roy P. Zimmerman and Luis A. Reyes," dated March 22, 1995 (Notice), arguing that these witnesses had information "concerning the factual basis and reasoning employed by NRC Staff" as to the character and integrity issue and requesting production of:

All documents they have created or reviewed that relate to the character and integrity of the corporations involved in the proposed transfer of the license or for which the witness bases any statement of fact or opinion in any draft or pre-filed testimony or other documents related to the position of the Agency concerning the character and competence of the licensee; Southern Nuclear or any employee or former employee thereof.

Notice at 1-2. By letter of March 29, 1995, the Staff agreed to make the Management Panel available for a one day deposition on April 25, 1995, but objected to the document request as seeking privileged predecisional information, attorney work product information and attorney-client communications. Letter from M. Young to M. Kohn,

dated March 29, 1995, at 3-4. The Staff further stated that the factual information considered by the Staff had either been distributed to the parties or was otherwise publicly available. *Id.* at 4. The Board ruled that Intervenor had not shown good cause to reopen discovery based on the February 1995, Modified Notice of Violation (NOV), that it would be contrary to public policy to expose settlement negotiations to discovery, and the Staff's offer to make the Management Panel available for an April 25, 1995 deposition made that discovery issue moot. Memorandum and Order (Motion to Reopen Discovery), dated March 30, 1995 (March 30 Order), at 2-7.

Intervenor subsequently asked for clarification of the Board's March 30 Order arguing that the panel's expert witness status rendered the privileges asserted inapplicable. Intervenor's Request for Clarification of the Board's March 30, 1995 Memorandum and Order (Motion to Reopen Discovery), dated April 2, 1995, at 3-4. The Staff argued that (1) Intervenor's acceptance of Staff's offer to make the panel available on April 25, 1995 and Intervenor's possession of the panel's prefiled testimony rendered the discovery request moot and (2) stated that the panel was not testifying as "experts." Staff Opposition to Intervenor's Motion to Complete Discovery Against the Staff, dated April 3, 1995. The Board denied Intervenor's motion for clarification, noting that Intervenor relied on Rule 26 of the Federal Rules of Civil Procedure without reference to NRC procedural regulations, Intervenor offered no support for its classification of the panel as experts and the Staff denied that the panel was providing expert testimony.

Memorandum and Order (Request for Clarification), dated April 4, 1995 (April 4 Order).¹ Subsequently, Intervenor cancelled the April 25, 1995 deposition and the Staff responded that the cancelled deposition would not be rescheduled. See Letter from M. Kohn to M. Young, dated April 24, 1995 (attached); Letter from M. Young to M. Kohn, dated April 25, 1995 (attached).

DISCUSSION

Intervenor's motion should be denied as it is a late motion for reconsideration of the Board's prior discovery ruling or as an untimely request for discovery without good cause. In essence, it is an untimely attempt to discover the basis for the panel's opinions and seeks settlement information protected by public policy.² Contrary to Intervenor's

¹ The Board also indicated that Intervenor was to be provided with updated responses to his timely-filed interrogatories. April 4 Order at 2. The Staff reviewed Intervenor's discovery requests and determined that the Modified NOV was not within the scope of timely-filed interrogatories and that the Staff's March 29, 1995 letter updated matters that were within the scope of such requests. Letter from J. Hull to the Licensing Board, dated April 12, 1995.

² The Motion (at 4) contains a broad request for the identification and production of:

1. All correspondence related to the Notice of Violation (NOV), the Office of Investigations Report on Case No. 2-90-020R, dated December 17, 1993 (OI Report) and settlement negotiations that was not previously produced that concerns (a) Georgia Power Company (GPC) and/or its counsel and (b) individuals (and/or their counsel) who received a Demand for Information (DFI individuals).

2. All documents directly and indirectly related to analyzing evidence or which concerns any settlement of the matters described in (1) above; and

3. Any discussions/meetings between GPC or its counsel, and/or the DFI individuals or their counsel, that related to the NOV, OI Report and/or settlement negotiations that were recorded.

(continued...)

assertion (Motion at 3), it was not obvious during the hearing that the panel was providing expert testimony. These individuals are not "experts" in a recognized field concerning character and integrity. They are NRC managers who, like many NRC employees, have considerable experience in dealing with licensees. They were both involved in the decisions leading up to enforcement action taken against GPC and have daily responsibilities for the regulation of activities at Vogtle. Mr. Reyes also has direct personal knowledge about the performance of GPC during the 1990 period. Mr. Zimmerman relied on information available to him as an NRC manager responsible for Vogtle. *See* Tr. 15267 (e.g., the OI Report, the NOV and Modified NOV, discussions with the Vogtle Coordinating Group, and testimony at hearing). The Staff maintains that they are not testifying as "experts" but as managers experienced in NRC licensing issues and involved in decisions concerning whether to allow the proposed license transfer. Neither individual was specifically employed to provide expert testimony on the character and integrity issue. *See* Fed. R. Civ. P. 26(a)(2)(B). Rather, their testimony concerned issues within the scope of their routine employment.³

²(...continued)

Inasmuch as the evaluations used by the panel were identified at pages 3-4 of their prefiled testimony, *ff.* Tr. 15256, and such information was available in early April 1995, the request is clearly an attempt to gain information regarding settlement discussions. The need for such discovery, even if permissible, is not apparent as Intervenor has failed to show that either witness was involved in such negotiations or based his opinions on facts only exchanged in settlement discussions.

³ Mr. Zimmerman's belief that he was testifying as an expert on character and integrity (Tr. 15258) does not establish that he is an "expert" in the legal sense.

It is not credible that Intervenor would want to discover the basis for the Staff's testimony only if the panel consisted of "experts," particularly where the positions stated by the panel are adverse to those of Intervenor. It is more likely that, after receipt of the Staff's prefiled testimony, Intervenor realized that he already possessed the information on which the panel's testimony was based and would not likely succeed in obtaining privileged attorney-client, work product and predecisional information, especially on the eve of the April 1995 hearings.⁴ If Intervenor wanted to know the basis for the panel's views, including whether they met his definition of "experts," he should have deposed the panel in April. There is no justification for waiting until the panel took the stand months later. Intervenor's claim that information was unfairly withheld is erroneous.

Intervenor's current misapplication of the "experts" term is an attempt to undo his decision not to pursue discovery and to decline the Staff's deposition offer over five months ago. Intervenor has not shown that he was denied access to information that formed the basis for the panel's opinion, particularly since the information was publicly available and Intervenor probed the basis for the panel's testimony at last month's hearing. *See* Tr. 15267-15274, 15297-15310.

Contrary to Intervenor's assertion (Tr. 15261), the NRC Rules of Practice do not support the requested discovery of experts and disclosure of privileged information.

⁴ It is notable that Intervenor expressed no interest in deposing Messrs. Matthews, Skinner and Hood during the discovery period even though these individuals lacked first-hand knowledge of many of the facts surrounding GPC diesel generator communications and primarily relied on audio tapes, tape transcripts and other documents to form their opinions.

Discovery is expressly limited to any matter, not privileged, which is relevant to the subject matter involved in the proceeding. 10 C.F.R. § 2.740. In addition, discovery against the Staff is on a different footing as there must be a demonstration that the information is necessary for a proper decision and not reasonably obtainable from another source. See *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96, 97-98 (1981); 10 C.F.R. §§ 2.270(h)(2), 2.744, 2.790.⁵ Discovery is permissible after the start of hearings only if the presiding officer determines that the movant has established good cause. See 10 C.F.R. § 2.740(b)(2). Discovery may be denied where there is no reason to delay the proceeding by allowing additional evidence on a matter already addressed in the record. See *Illinois Power Co.* (Clinton Nuclear Station, Units 1 and 2), ALAB-340, 4 NRC 27, 31-36 (1976) (discovery denied upon a balancing of delay of the proceeding against the timeliness of the request, the relationship of the information to unresolved questions in the proceeding and the overall importance of the information to a sound decision).

If Intervenor wanted to structure his case in consideration of the basis for the panel's testimony in the proceeding, he should have completed discovery against the panel during the scheduled April 25, 1995 deposition -- regardless of whether the panel was providing expert testimony. The artifice of whether these government managers fit Intervenor's concept of "experts" does not excuse Intervenor's failure to pursue the

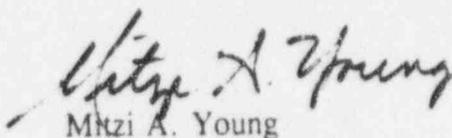
⁵ While the Federal rules provide guidance, a Board should determine that the circumstances warrant application of Federal procedure. See *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565, 568 n.13 (1977).

matter in a timely manner, particularly where, prior to the dissemination of the panel's prefiled testimony and their testimony at hearing, the Staff had waived its predecisional privilege with respect to certain information and released exhaustive information/documents on which they relied to Intervenor.⁶ There is no reason to grant the untimely relief Intervenor seeks as the information is not necessary to a proper decision in this proceeding.

CONCLUSION

The Board should deny the Motion. Intervenor has not shown (1) that the panel was testifying as "experts" on character and integrity issue, (2) that he was improperly denied discovery against the Staff, and (3) that there is good cause for his untimely motion or an record need for the information sought.

Respectfully submitted,



Mtzi A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of October 1995

⁶ Even if Messrs. Reyes and Zimmerman were testifying as experts and the Federal Rules were applied, service of prefiled testimony that identifies the basis for the panel's opinions would satisfy the intent of the rules as Intervenor would have had information identifying the basis for the opinions given months before the witnesses took the stand. See Fed. R. Civ. P. 26(a)(2).

KOHN, KOHN, & COLAPINTO, P.C.
ATTORNEYS AT LAW

517 FLORIDA AVENUE, NW
WASHINGTON, DC 20001-1850
(202) 234-4663 • FAX (202) 482-4145

• ADMITTED IN NY
• ADMITTED IN MA
• ADMITTED IN NJ
• ADMITTED IN PA

44-24-1995-10
KOHNS & COLAPINTO
ATTORNEYS AT LAW
517 FLORIDA AVENUE, NW
WASHINGTON, DC 20001-1850
(202) 234-4663

April 24, 1995

Via Facsimile

Mitizi A. Young, Esq.
Office of the General Counsel
One White Flint North
Stop 15B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

RE: License Amendment (transfer to Southern Nuclear)
Docket Nos. 50-424-OLA-3; 50-425-OLA-3

Dear Mitizi:

Today we briefly spoke on the phone concerning the commencement of the Zimmerman/Reyes depositions. As I indicated during our phone conversation, Intervenor has cancelled the commencement of the depositions but, at a later date, may renew his request to commence these depositions.

For the record, Intervenor is postponing the depositions for three main reasons:

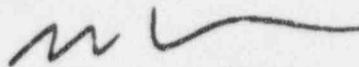
- 1) NRC's witnesses are not subject to sequestration. A most important objective Intervenor must accomplish with the deposition concerns their views following the presentation of evidence by Licensee and Intervenor. Based on the testimony presented to date, Intervenor is currently of the opinion that he does not need to depose either Mr. Zimmerman or Mr. Reyes, but will not be in a position to adequately assess this until after Licensee's witnesses have finished testifying. It was intervenor's hope that all of Licensee's witnesses would have completed their testimony at the close of Phase II, Part 1. Because we did not accomplish this goal, commencing the depositions at this point would be premature;
- 2) A majority of the issues contained in Intervenor's prefiled testimony await the Board's ruling. Intervenor plans to question the witnesses on the entire scope of this proceeding. It is premature for Intervenor to determine the exact scope until the Board issues its ruling.

Page 2
April 24, 1995
Kohn to Young

- 3) After the Board granted Intervenor's request to depose Messrs. Zimmerman and Reyes, Staff requested that the Board issue an order prohibiting Intervenor from calling Mr. Robinson as a witness because he lacked first-hand knowledge with respect to the underlying facts of this proceeding. Intervenor believes that neither Mr. Zimmerman nor Mr. Reyes have first-hand knowledge about the underlying facts of this proceeding. Intervenor plans to clarify whether Staff has the discretion on the one hand to produce witness without first-hand knowledge, while on the other hand deny Intervenor's request to produce Mr. Robinson because he lacks first-hand knowledge.

For the reasons outlined above, Intervenor is postponing the depositions of Messrs. Zimmerman and Reyes.

Yours truly,



Michael D. Kohn

cc: Ernest Blake, Esq.

C:\FILES\301\LETTERS\YOUNG.1



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

April 25, 1995

BY FACSIMILE

Michael D. Kohn, Esq.
Kohn, Kohn and Colapinto, P.C.
517 Florida Avenue, N. W.
Washington, D.C. 20001

In the Matter of
GEORGIA POWER COMPANY, et al.
(Vogtle Electric Generating Plant, Units 1 and 2)
Docket Nos. 50-424-OLA-3, 50-425-OLA-3

Michael
Dear Mr. Kohn:

This is to acknowledge receipt of your letter cancelling the April 25 joint deposition of Messrs. Zimmerman and Reyes. Your letter, however, implies that the Staff agreed to offer these individuals at a later date.

As I indicated on the phone, Mr. Reyes had already arrived from Atlanta and it would not be possible to postpone the deposition due to the deponents' busy schedules. I stated that the deposition should either proceed on April 25 or not at all. You chose to cancel. Therefore, the Staff will not be making these individuals available for a later deposition.

Sincerely,

Mitzi A. Young
Mitzi A. Young
Counsel for NRC Staff

cc: Service List

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'95 OCT 20 A10:05

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

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF OPPOSITION TO INTERVENOR MOTION FOR DISCOVERY AGAINST STAFF MANAGEMENT PANEL" 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 19th day of October 1995.

Peter B. Bloch, Chairman*/**
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555
Fax: 301-415-5599

Thomas D. Murphy*
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555
Fax: 301-415-5599

Dr. James H. Carpenter*/**
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555
Fax: 301-415-5599
and
933 Green Point Drive*
Oyster Point
Sunset Beach, North Carolina 28468
Fax: 910-579-3466

James E. Joiner, Esq.**
John Lamberski, Esq.
Arthur H. Domby, Esq.
Troutman Sanders
NationsBank Building, Suite 5200
600 Peachtree Street, N. E.
Atlanta, Georgia 30308
Fax: 404-885-3900

David R. Lewis, Esq.
Ernest Blake, Esq.**
Shaw, Pittman, Potts and Trowbridge
2300 N Street, N. W.
Washington, D. C. 20037
Fax: 202-663-8007

Michael D. Kohn, Esq.**
Stephen M. Kohn, Esq.
Kohn, Kohn and Colapinto, P.C.
517 Florida Avenue, N. W.
Washington, D. C. 20001
Fax: 202-462-4145

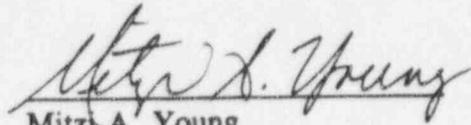
Office of Commission Appellate
Adjudication*
Mail Stop: O-16 G15
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Adjudicatory File* (2)
Atomic Safety and Licensing Board
Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Atomic Safety and Licensing Board
Panel*
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Office of the Secretary* (2)
Attn: Docketing and Service
Mail Stop: O-16 G15
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Director, Environmental Protection
Division
Department of Natural Resources
205 Butler Street, S. E., Suite 1252
Atlanta, Georgia 30334


Mitzi A. Young
Counsel for NRC Staff