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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

SERVED OCT 23 1995

Before Administrative Judges:  
Peter B. Bloch, Chairman  
Dr. James H. Carpenter  
Thomas D. Murphy

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

Re: License Amendment  
(Transfer to Southern  
Nuclear)

ASLBP No. 93-671-01-OLA-3

MEMORANDUM AND ORDER  
(Intervenor Motions; Effect of Hobby Decision)

Allen Mosbaugh (Intervenor) has filed five motions to which Georgia Power Company et al. (Georgia Power) has responded. The Staff of the Nuclear Regulatory Commission (Staff) has responded to several of these motions.<sup>1</sup>

<sup>1</sup>Intervenor's Motior to Complete Discovery Against NRC Staff's Expert Witnesses (Management Panel), October 5, 1995 (Staff Discovery Motion); Georgia Power Company's Response to Intervenor's Motion to Conduct Further Discovery Against the NRC Staff, October 12, 1995 (Georgia Power Response to Staff Discovery Motion); NRC Staff Opposition to Intervenor Motion for Discovery Against Staff Management Panel, October 19, 1995 (Staff Response to Staff Discovery Motion); Intervenor's Motion to Admit Exhibit II-247 (Transcript of Tape 99B), October 5, 1995 (Tape 99B Motion); Georgia Power Company's Response to Intervenor's Motion to Admit Exhibit II-247 (Transcript of Tape 99B), October 12, 1995 (Georgia Power's Response About Tape (continued...))

D502

I. Staff Discovery Motion

Intervenor has requested the opportunity to conduct additional discovery of Staff witnesses Roy P. Zimmerman and Luis A. Reyes. The alleged occasion for this discovery is that Staff had represented to the Board that these witnesses would not testify as "experts." Intervenor alleges that, to the contrary, the testimony given by these witnesses was expert testimony.

We acknowledge that the argument of Intervenor is both clever and novel. He argues that if a government witness testifies concerning conclusions reached from a set of facts that the Staff witness is no different from any other expert and that intervenor must be able to obtain discovery of every piece of information that helped to form the expert's opinion. Hence, Intervenor reasons, the standard privileges for government witnesses, including the protection for pre-

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<sup>1</sup>(...continued)

99B); NRC Staff Response to Intervenor's Motion to Admit Exhibit II-247, October 19, 1995 (Staff Response About Tape 99B); Intervenor's Motion to Conduct Discovery Related to Dew Point Instruments, October 6, 1995 (Dew Point Instruments Motion); Georgia Power Company's Response to Intervenor's Motion to Conduct Discovery Related to Dewpoint Instruments, October 13, 1995 (Georgia Power's Dewpoint Instrument Response); NRC Staff Response to Intervenor Motion to Conduct Discovery Related to Dew Point Instruments, October 19, 1995 (Staff's Dewpoint Instrument Response); Intervenor's Motion to Strike the Affidavit of Harvey Handfinger, October 5, 1995 (Handfinger Strike Motion); Georgia Power Company's Response to Intervenor's Motion to Strike the Affidavit of Harvey Handfinger, October 12, 1995 (Handfinger Strike Response); Intervenor's Motion to Admit Certain Admissions of Georgia Power, October 6, 1995 (Admit Admissions Motion); Georgia Power Company's Response to Intervenor's Motion to Admit Certain Admissions of Georgia Power, October 15, 1995 (Admit Admissions Response).

decisional documents and even attorney-client privilege, is waived with respect to any document that contributes to the government expert's opinion.

We have decided to deny this motion based on arguments presented by the other parties. Georgia Power states:

Georgia Power Company ("Georgia Power") hereby responds to and opposes Intervenor's motion<sup>2</sup> to conduct additional discovery against the NRC staff. Intervenor was afforded an opportunity to depose the NRC Staff's management panel months ago (in April)<sup>3</sup> and declined to take advantage of the opportunity. Because Intervenor failed to take advantage of this opportunity in a timely manner, the Board should not allow Intervenor's attempt to delay completion of this proceeding, especially now, after all the witnesses have finished testifying and the parties are busy preparing proposed findings.

Nor should the Board accept Intervenor's excuse that he was not interested before in conducting the depositions without access to certain documents (relating mainly to the issuance of the issuance of a modified Notice of Violation ("NOV") and settlement discussions). The Board previously ruled that Intervenor had not demonstrated good cause for any reopened discovery based on the modification of the NOV. Memorandum and Order (Motion to Reopen Discovery), dated March 30, 1995, at 4-6. The Board subsequently considered Intervenor's request for clarification (in effect a motion for reconsideration) and rejected Intervenor's argument that the management panel should be considered expert witnesses somehow required to produce these additional privileged and predecisional documents. Memorandum and Order (Request for Clarification), dated April 4, 1995, at 4. Intervenor's current motion is yet another motion for

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<sup>2</sup> Intervenor's Motion to Complete Discovery Against NRC Staff's Expert Witnesses (Management Panel) (Oct. 5, 1995).

<sup>3</sup> Letter from M. Young to M. Kohn (March 29, 1995).

reconsideration -- in effect, Intervenor's third bite at the apple.<sup>4</sup>

The Staff Response to Staff Discovery Motion, at 3-4, provides further detailed argument concerning why Intervenor's present motion is not timely:

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 26n 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).<sup>5</sup> Subsequently, Intervenor canceled the April 25, 1995 deposition and the Staff responded that the canceled deposition would not be rescheduled. See Letter from M. Kohn to M. Young, dated April 24, 1995 (attached [to Staff Response to Staff Discovery Motion]); Letter from M. Young to M. Kohn, dated April 25, 1995 (attached [to Staff Response to Staff Discovery Motion]).

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<sup>4</sup> Georgia Power Response to Staff Discovery Motion at 1-2.

<sup>5</sup>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.

We conclude that this matter of discovery was fully decided at an earlier date and cannot be reopened now. There has been no adequate showing of cause. Although the Staff witnesses testified that they were "expert" witnesses, the nature of their prefiled testimony made their role perfectly clear at a much earlier date. The witnesses use of this legal term does not create the kind of surprise that could require reopening a closed issue.

## II. Transcript of Tape 99B

Intervenor requests the opportunity to supplement for our record the version of Tape 99B that has been offered into evidence by Georgia Power. It is the settled rule of our case that they be permitted to do this, as has been correctly pointed out by the Staff.<sup>6</sup> Additionally, we grant Staff's Motion, contained in Staff Response About Tape 99 at 1. Consequently, the Staff's version of Intervenor's Exhibit II-247 shall be marked as Exhibit II-247A and shall be admitted into evidence. (Staff shall file one original and two copies of this exhibit with the Secretary with a cover letter citing this portion of our decision as directing the marking and admission into evidence.)

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<sup>6</sup>Staff Response About Tape 99B at 2.

### III. Dewpoint Instruments Motion

Intervenor requests further discovery with respect to an Affidavit of Michael Dwyer Duncan, dated September 19, 1995 (GPC Exhibit II-201 or Duncan Affidavit). We agree with the Staff<sup>7</sup> on the disposition of this motion:

The Motion should be denied. When the [Duncan Affidavit] . . . was identified at hearing, the Board indicated that Intervenor consider the Staff's testimony concerning the Alnor VP-2466 before deciding whether more discovery was needed. Bloch, Tr. 14474. The testimony of the Staff on September 21, 1995, supports the GPC position reflected in GPC Exhibit II-201, that no vendor record exists showing any "as found" data was taken on the Alnor when it was received by the vendor. Skinner, Tr. 14642-14643. Consequently, the correction supplied by Mr. Duncan would appear to be appropriate.

In addition, Intervenor has not shown that the expansive discovery he seeks is likely to develop any further probative information or any admissible evidence on this matter or that information regarding instrument VP-1114 is responsive. Georgia Power has responded to discovery on this matter and Intervenor does not show that those answers were incomplete or unresponsive. . . .<sup>8</sup>

We have studied the Affidavit of Michael Dwyer Duncan carefully, both to learn what it says and what it does not. We note, from page 2, that "Alnor Instrument Company . . . has no records of the condition of VP-2466 as received prior to the calibration of VP-2466 on May 15, 1991." From

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<sup>7</sup> Staff Dewpoint Instrument Response, at 2.

<sup>8</sup>Judge Bloch also observed that if the documentation attached to the Duncan Affidavit was valid, there would be nothing else that could be said on the issue. Tr. 14657. Intervenor does not show that the discovery sought is likely to dispel the validity of the information appended to the affidavit.

Exhibit B, page 1 of 5, we note that Georgia Power sought "documentation of ratio as well as 'as found.'" Moreover, on page 3 of 5, there is a list of prices that appeared to include \$120 for data -- perhaps as-found data -- "if reqt [requested]."

How, we ask, is this relevant to the contention that Georgia Power misrepresented whether or not there was a defective dew point instrument in April 1990? Arguably, it provides some weak corroboration that the dew point instrument, at some point, needed a repair. This weakly suggests that it needed a repair in April 1990. However, for the most part, the question of whether or not Georgia Power misrepresented information in April 1990 is unaffected. The question is the same we have had for many months: what does the testimony and documentary evidence show about whether the Alnor VP-2466 was defective in April 1990 and about whether Georgia Power adequately disclosed what it knew to the Nuclear Regulatory Commission.

As a result, we have determined that Intervenor has not shown good cause for conducting further discovery at this time. Further discovery shall be denied.

#### IV. Handfinger Strike Motion

Intervenor moves to strike the testimony of Harvey Handfinger, as contained in GPC Exhibit II-208. Georgia Power does not oppose the motion, though it considers the

Handfinger affidavit to be responsive to a concern expressed by the Board.

Georgia Power states<sup>9</sup>

The [Harvey Handfinger] Affidavit explains that the only reason a Class C cleanliness data sheet was included in one of the MWOS is that there was a work item (removal of the air and lube oil lines to the air start distributor) which called for Class C cleanliness. . . . Georgia Power reads this Affidavit as stating that there was no requirement to attach cleanliness data sheets to the other MWOS.

We have decided to limit the purpose of GPC II-208 to the text we have just cited (minus the sentence deleted and replaced by us with an ellipsis). To that extent, the affidavit is responsive to the Board's request. Whether or not Georgia Power ever intended its use for that purpose, the exhibit may not be used to show that "the procedures on cleanliness and housekeeping were complied with" or that cleanliness procedures or house-keeping procedures were equivalent or that housekeeping procedures were adequate for air start valve repair work.

V. Admit Admissions Motion

On August 11, 1995, Intervenor was questioning Mr. Mark Ajluni, an employee of Georgia Power. The Board noticed that Intervenor was systematically going through certain answers to admissions that had been filed by Georgia Power. The apparent purpose of this procedure was to assure that

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<sup>9</sup>Handfinger Strike Response at 2.



there was a transcript reference to the sections of the admissions that Intervenor intended to rely on. The procedure, however, seemed totally pointless to the Board. We knew what was being done and so no purpose to continuing with the sterile procession of events.

At that point, as Georgia Power states,

. . . Judge Bloch suggested to Intervenor that, in lieu of questioning Mr. Ajluni about numerous responses contained in Intervenor Exhibit II-168, he could file a list of the admissions which he planned to refer to and then state them for the record. The end result would be that the listed admissions could then be used in the parties' findings without having had to refer to them in questioning a witness, in this case Mr. Ajluni.

The following day, Intervenor served on the Board and the parties Intervenor's Motion to Admit Certain Admissions and Sections of the OI Report into Evidence (August 11, 1995). Intervenor's August 11 Motion covered Georgia Power responses which not only constituted admissions (with and without clarifications), but also those which constituted denials and refusals to either admit or deny. Georgia Power objected to the August 11 Motion except as it applied to pure admissions or admissions with clarifications<sup>10</sup> on the ground that, under federal practice and procedure, such responses simply are not "admissions" and, therefore, they are not admissible. Georgia Power's Response at 1. Georgia Power's Response also objected to introducing a number of Georgia Power responses which admitted (and, in one case, neither admitted nor denied) that the OI Report accurately paraphrased statements from tapes 57 and 58, the stipulated transcripts of which have already been admitted into evidence, on the ground that such responses were cumulative, non-probative, and not the best evidence. Georgia Power's Response further stated it was not appropriate to admit, as the sole basis for Georgia Power's denials or refusals to admit or deny,

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<sup>10</sup> Georgia Power Company's Response to Intervenor's Motion to Admit Certain Admissions and Sections of the OI Report into Evidence (August 22, 1995) ("Georgia Power's Response") at 2 argued that, for each admission, the related OI Evidentiary Finding and any supporting referenced documentation should also be admitted at the same time.

the Response's general identification of conflicting information which precluded an admission or, in the case of a refusal to admit or deny, an admission or denial. "Other or more specific bases for denial may exist, but given the excessive number of requests for admission -- one for each OI Evidentiary Finding -- Georgia Power's ultimate position on a particular Finding is not necessarily reflected in these responses." Georgia Power's Response at 2.<sup>11</sup>

Subsequently, the Board ruled that admissions are in evidence. The remaining question, therefore, is the status of denials by Georgia Power and of reasons given for denials.

We find that it is not necessary to rule on this matter as an abstract proposition. Instead, we rule that Intervenor is in precisely the same situation as he would have been in had he continued with the sterile procession of events in which he was engaged and to which Georgia Power was not making any objection. We note that Georgia Power also did not make any objection to our idea of substituting a motion for the sterile procession of events.

By way of clarification, we agree with Georgia Power that where there are agreed transcripts of tape-recorded conversations, these are authoritative and other transcripts may not be relied on by the parties. We also agree with Georgia Power that an admission by Georgia Power that a finding fairly reflects a portion of the OI interview transcript is not identical to an admission that the facts contained in that admission are true.

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<sup>11</sup>Admit Admissions Response at 3-5.

We would caution intervenor to use the evidence we have admitted with caution. For these admissions or denials to be part of a pattern of misrepresentation must mean that Intervenor has evidence that Georgia Power knew the admissions were false at the time it filed them. We do not know of any evidence, at this time, that would support such an argument.

#### VI. Hobby Decision

The Board refrains from ruling on the effect on this proceeding of the ruling by the Secretary of Labor in the Marvin Hobby Case, Department of Labor Case No. 90-ERA-30, October 3, 1995. The arguments of the parties will be considered with respect to specific findings of fact that may be argued to be required by the Secretary's decision.

VI. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is this 23rd day of October, 1995, ORDERED, that:

1. Allen Mosbaugh (Intervenor) shall not be permitted additional discovery with respect to witnesses Roy P. Zimmerman and Luis A. Reyes, who were called by the Staff of the Nuclear Regulatory Commission (Staff).

2. Both Intervenor and the Staff may file their versions of Tape 99. Intervenor may mark and have received into evidence its Exhibit II-247, pursuant to the accompanying Memorandum. Staff may mark and have received into evidence Intervenor's Exhibit II-247A. Intervenor and Staff shall make appropriate filings<sup>12</sup> with the Secretary of the Nuclear Regulatory Commission and shall also serve the Board and parties.

3. Intervenor may not conduct any further discovery concerning the condition of Georgia Power's dewpoint instruments.

4. Georgia Power's exhibit GPC II-208, shall remain in evidence, but its use shall be limited to questions concerning whether or not cleanliness data sheets were

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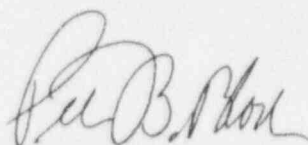
<sup>12</sup>Proper filing of additional evidence requires sending a letter to the Secretary of the NRC explaining precisely what is being added to the record and the basis for adding the material to the record, accompanied by one original and two copies of the Exhibit or portion of an Exhibit that is being filed.

required to be attached to Maintenance Work Orders (MWOs). Cross-examination shall not be permitted.<sup>13</sup>

5. Intervenor may refer to Georgia Power's responses to admissions just the same as if each had been presented to Mr. Mark Ajluni for his on-the-record comment.

6. The Board refrains from ruling on the effect on this proceeding of the ruling by the Secretary of Labor in the Marvin Hobby Case, Department of Labor Case No. 90-ERA-30, October 3, 1995.

FOR THE ATOMIC SAFETY AND LICENSING BOARD



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Peter B. Bloch  
Chairman

Rockville, Maryland

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<sup>13</sup>If Intervenor is not satisfied with the limitation placed on this affidavit, he should promptly notify the Board and the affidavit will be promptly struck in its entirety.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of

GEORGIA POWER COMPANY, ET AL.

(Vogtle Electric Generating Plant,  
Units 1 and 2)

Docket No.(s) 50-424/425-OLA-3

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (INTERVENOR MOTIONS;..) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this  
23 day of October 1995

  
Office of the Secretary of the Commission