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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD '92 APR 17 AIO:19

In the Matter of)
)
ALABAMA POWER COMPANY)
)
(Joseph M. Farley Nuclear Plant,)
Units 1 and 2))
)

OFFICE OF SECRETARY
OF INVESTIGATION & SERVICE
Docket Nos. 50-348-CivP
50-364-CivP

(ASLBP NO. 91-626-02-CivP)

NRC STAFF'S MOTION IN LIMINE TO EXCLUDE
TESTIMONY SUBMITTED BY ALABAMA POWER COMPANY

INTRODUCTION

The NRC Staff hereby moves the Licensing Board to exclude portions of Alabama Power Company's (APCo's) pre-filed surrebuttal testimony. The testimony in question seeks to introduce evidence that (a) is irrelevant in that it concerns the safety significance of an actual failure of equipment at the Farley Nuclear Plant found by the NRC Staff to be in violation of the Equipment Qualification Rule, 10 C.F.R. § 50.49, or (b) is unreliable in that it regards statements by unidentified persons which APCo witnesses appear to proffer as substantive evidence.

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DISCUSSION

A. Irrelevant Testimony

In a Motion¹ filed on February 4, 1992, the NRC Staff moved this Board to exclude portions of APCo's pre-filed direct testimony concerning the safety significance of certain equipment at issue in this proceeding. The NRC Staff argued that because safety significance is inherent with respect to each item required to be environmentally qualified pursuant to 10 C.F.R. § 50.49, the regulation does not require evaluation of (a) equipment operability or (b) the effect of an individual piece of equipment's failure on an associated system as an element for establishing the violation. The NRC Staff also maintained that, in determining a civil penalty, the Modified Enforcement Policy directs the NRC not to consider refinements on operability arguments such as the actual time the equipment is required to be operable, administrative measures or controls available to ensure the safety function is accomplished, the degree to which the operability of a system is affected, or that through additional analyses or testing the equipment may be demonstrated to be qualified or qualifiable. Thus, the issue of safety significance or operability of an individual piece of equipment or system found in violation of the requirements of 10 C.F.R. § 50.49, as presented in portions of APCo's pre-filed direct testimony, is irrelevant to an enforcement action brought pursuant to the Modified Enforcement Policy for such a violation.

¹NRC Staff's Motion in *Limine* to Exclude Irrelevant Testimony Submitted by Alabama Power Company, February 4, 1992.

In considering the NRC Staff's February 4, 1992 Motion, the Board concluded that they will be in the best position to decide this issue after the evidentiary record has been fully developed, and reserved ruling on the NRC Staff's motion as part of the Board's initial decision. The Board added that if the NRC Staff lodged an objection to any APCo cross-examination question or answer on the same ground as that specified in its February 4th Motion, the Board would permit the answer to be recorded, subject to later disposition in the Board's initial decision. Tr. 8-9.

In Volume II of APCo's pre-filed surrebuttal testimony at p. 228-29, Q&A 152, Mr. Sundergill offers testimony regarding the safety significance if the GEMS level transmitters with reduced silicone oil levels did not function, which he further states is "explained in detail on page 203 of my direct written testimony." The testimony on page 203 of Mr. Sundergill's pre-filed direct testimony is among that testimony included in the NRC Staff's February 4, 1992 Motion. On the same grounds as explained in the NRC Staff's February 4th Motion, the pre-filed surrebuttal testimony of Mr. Sundergill in Q&A 152 should also be excluded.

B. Unreliable Testimony

In Volume II of APCo's pre-filed surrebuttal testimony at Q&A 61 (page 90), Q&A 63 (pages 95-96), and Q&A 65 (page 97), Messrs. Love and Jones appear to proffer, as substantive evidence, testimony in the form of unspecified discussions they had, at unspecified times, with an individual or individuals identified only as "one of the lead electricians who installed these seals in the field" (page 90), "one of the lead electricians who helped make these seals"

(page 95), and "one of the electricians in the field " (page 97).

Although hearsay evidence is generally admissible in administrative proceedings, there is a requirement that the hearsay evidence be reliable. The Appeal Board has held that, Expert testimony in hearsay form is most unreliable.¹⁶⁵

¹⁶⁵ Only 'reliable evidence' may be admitted in our proceedings. 10 CFR § 2.743(c).

Tennessee Valley Authority (Hartsville Nuclear Plant Units 1A, 2A, 1B, and 2B) ALAB-367, 5 NRC 92, 121, (1977). Messrs. Love and Jones appear to proffer, as substantive evidence, the details regarding several operations involved in the installation of the Chico A Raychem Seals at Farley that are based not on their personal knowledge, but rather on the "recollections" relayed to them by an unidentified person or persons. To the extent that these statements to the APCo witnesses by unknown experts are being proffered by the APCo witnesses as substantive evidence of how the seals were installed, the evidence is unreliable and, therefore, inadmissible for that purpose in this proceeding.

C. Summary

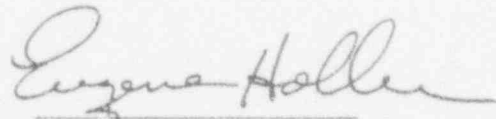
As set forth above and in the NRC Staff's February 4, 1992 Motion, 10 C.F.R. § 50.49 does not require the evaluation of equipment operability or the consequence of the failure of equipment as an element for establishing the violation, and the Modified Enforcement Policy prohibits the NRC from considering those matters in assessing a civil penalty. Thus, the issue of safety significance or operability for an individual piece of equipment or system found not

to be in compliance with the requirements of 10 C.F.R. § 50.49 is irrelevant to an enforcement action for a violation of 10 C.F.R. § 50.49. Also, hearsay evidence that is unreliable may not be admitted in NRC proceedings. For these reasons, the pre-filed surrebuttal testimony regarding the safety significance of the GEMS level transmitters in Q&A 152 should be excluded as irrelevant and the surrebuttal testimony regarding the installation of the Chico A Raychem Seals that is based on the recollections of the unknown experts in Q&As 61, 63, and 65, to the extent that the statements are proffered as substantive evidence of how the seals were in fact installed, should be excluded as unreliable.

CONCLUSION

For the foregoing reasons, the APCo pre-filed surrebuttal testimony regarding the safety significance of the GEMS level transmitters in Q&A 152 should be excluded from the evidence in this proceeding, and the surrebuttal testimony regarding the installation of the Chico A Raychem Seals that is based on the recollections of the unknown experts in Q&As 61, 63, and 65 should be excluded as substantive evidence regarding how the seals were actually installed.

Respectfully submitted,



Richard G. Bachmann
Eugene Holler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 16 day of April, 1992

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION IN *LIMINE* TO EXCLUDE TESTIMONY SUBMITTED BY ALABAMA POWER COMPANY" in the above-captioned proceeding have been served on the following by facsimile or as indicated by an asterisk by overnight express mail, or as indicated by a double asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 16th day of April, 1992:

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

Dr. James H. Carpenter
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Peter A. Morris*
Administrative Judge
10825 South Glen Road
Potomac, MD 20854

Nicholas S. Reynolds, Esq.
David A. Ropka, Esq.
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20005

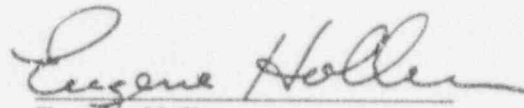
Office of the Secretary**
U.S. Nuclear Regulatory Commission
Washington, DC 20555
Attn: Docketing and Service Section

Office of Commission Associate
Adjudication *
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

James H. Miller, III, Esq.
Balch & Bingham
P.O. Box 306
Birmingham, AL 35201

Atomic Safety and Licensing
Board Panel**
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Adjudicatory File (2)**
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U.S. Nuclear Regulatory Commission
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Eugene Holler
Counsel for NRC Staff