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November 2, 1995

James Lieberman, Director
Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: October 4, 1995 Predecisional Enforcement Conference concerning Hobby v. Georgia Power, 90-ERA-30; Vogtle Nuclear Plant Docket Nos. 50-424 and 50-425

Dear Mr. Lieberman:

As you are aware, a predecisional enforcement conference was held in the Nuclear Regulatory Commission's Region II office on October 4, 1995 concerning the August 4, 1995 Decision and remand Order of the U.S. Secretary of Labor in Hobby v. Georgia Power Co., 90-ERA-30. I wish to extend gratitude to the NRC for transcribing the conference and opening it to the public. On behalf of Marvin Hobby I herewith respond to the presentation made on behalf of Georgia Power Company. I trust your office will distribute the enclosed to the appropriate persons within the agency.

Thank you for providing Mr. Hobby the opportunity to be heard. Your attention to this matter is greatly appreciated.

Very truly yours,

Michael D. Kohn

Enclosure

cc:
Stewart Ebneter (with enclosure)

IE14 Ron Jean Lee
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BEFORE THE UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)
	)
GEORGIA POWER COMPANY	)
	)

RESPONSE TO PREDECISIONAL ENFORCEMENT CONFERENCE PRESENTATION OF GEORGIA POWER COMPANY AND REQUEST FOR IMPOSITION OF ENHANCED PENALTIES

I. INTRODUCTION

On October 24, 1995, a predecisional enforcement conference (hereinafter "Conference") was held in the Region II offices of the U.S. Nuclear Regulatory Commission ("NRC"). The Conference was convened to address the August 4, 1995 Decision and Remand Order issued by the U.S. Secretary of Labor ("Secretary") in Hobby v. Georgia Power Co., 90-ERA-30 (hereinafter "Hobby"), which found that the sole reason Marvin B. Hobby was terminated by Georgia Power Company ("GPC" or "Georgia Power") executive management was because he engaged in activity protected pursuant to 42 U.S.C. § 5851. The Secretary determined that the sole motivating factor for the termination was to retaliate against Mr. Hobby's internal whistleblowing activity. The decision and implementation of the termination was carried out by officers of Georgia Power who held positions of Vice President or above, including GPC's President and CEO. In addition, the Secretary determined that GPC discriminated against Mr. Hobby by taking away his office, parking privileges and employment badge and restricting his access within the corporate offices to four floors of a 24 story building. Again, this

discrimination occurred at the level of Vice President or higher. Pursuant to 10 C.F.R. Part 2, App. C, Supplement VII(A), Example 4, NRC is to issue a Level I violation where "[a]ction by senior corporate management in violation of 10 C.F.R. § 50.7 or similar regulations against an employee" has occurred. The removal of Mr. Hobby's office, parking privileges; restricting his access within the corporate offices; the decision to terminate as well as carrying out the decision to terminate Mr. Hobby constitute actions by the most senior corporate management thereby warranting the imposition of a Level I violation. Additionally, pursuant to 10 C.F.R. § 50.7(c), NRC Staff is authorized to revoke or suspend Georgia Power's license, and to issue civil penalties (NRC has statutory authority to issue $100,000 in civil penalties each day the violation continues, see 10 C.F.R. Part 2, App. C. Supplement VII(A)(3)).

Georgia Power's presentation consisted of oral presentations made by Mr. George Hairston, III (President, Southern Nuclear Company and Executive Vice President, Georgia Power Company) and Fred D. Williams (Senior Vice President, Georgia Power Company) and presenting slides to NRC Staff during the Conference that were also produced as handouts to Staff. The presentation, which was open to the public, was transcribed.

Sections II and III of this pleading addresses Georgia Power's request to delay enforcement action until such time as Georgia Power files an appeal of the Hobby decision.

Sections IV and V of this pleading concerns Georgia Power's attack on the findings made by the Secretary of Labor. These sections include allegations that Georgia Power made false and misleading statements and otherwise provided inaccurate and incomplete information to NRC Staff during the Conference with the intended purpose of misleading NRC about the validity of the Hobby decision and as to whether a violation of 10 C.F.R. § 50.7 had, in fact, occurred.[1]

Sections VI and VII address the appropriate enforcement action necessary in response to a violation of 10 C.F.R. § 50.7.

II.
FINALITY OF THE SECRETARY'S DECISION

Georgia Power requested NRC Staff to defer enforcement action until such time as Georgia Power appeals the Hobby decision. Transcript of Enforcement Conference (hereinafter "Conference Tr.") 14. According to Georgia Power, the Hobby decision will not become ripe for appeal until after the remand on damages is concluded and the Secretary issues a decision with respect to damages. See Conference Tr. 41. Georgia Power's assertion as to the appealability of the Secretary's decision is erroneous; the failure to have filed an appeal precludes Georgia Power from relitigating the facts before the NRC.

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[1] The submission of false information during the Conference would constitute a Severity Level I violation under 10 C.F.R. Part 2, App. C, Supplement VII(A), Example 1. The act of providing false information to NRC Staff to deflect enhanced enforcement action warrants imposition of the most severe sanctions set forth in 10 C.F.R. § 50.7(c)

1. Statutory Construction

The statutory construction of § 5851(b)(2)(A) demonstrates that the Hobby decision constituted an appealable final order of the Secretary of Labor. Carolina Power and Light Co. v. U.S. Dept. of Labor, 43 F.3d 912 (4th Cir. 1995), specifically addressed the requirement that an order issued by the Secretary pursuant to 42 U.S.C. § 5851(B)(2)(A) triggers the appeal provision set forth in § 5851(c). The Court concluded that a determination by the Secretary that a violation of the act occurred issued pursuant to 42 U.S.C. § 5851(b)(2)(A) constitutes a final appealable order. In reaching this conclusion, the Court observed:

> Under this section [42 U.S.C. § 5851(b)(2)(A)], the Secretary must take one of three actions: he must grant relief, deny relief, or enter into a settlement with the parties. Macktal v. Secretary of Labor, 932 F.2d 1150, 1153 (5th Cir. 1991). After the Secretary takes action, § 211(c) stipulates that '[a]ny person adversely affected or aggrieved by an order issued under subsection (b) of this section may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred.' 42 U.S.C. § 5851(c)(1).

43 F.3d at 914. And that:

> Congress wrote the E[nergy] R[eorganization] A[ct] in such a way that the Secretary of Labor's only option is to issue an order that is inherently 'final' in nature. Assuming that a complaint is not terminated by virtue of a settlement, the Secretary must either issue an order providing relief to the complainant or an order denying the complaint. 42 U.S.C. § 5851(b)(2)(A). Whichever decision is made by the Secretary will have the effect of being the final administrative action taken on the matter. The ERA makes no allowances for appellate review other than in those instances when a person has been 'adversely affected or aggrieved by an order issued under subsection (b).' Id. at § 5851(c).

43 F.3d at 914.

The Carolina Power Court specifically cites to Monterey Coal Co. v. General Mine Safety and Health review Comm'n, 635 F.2d 291 (4th Cir. 1980) and Fieldcrest Mills, Inc. v. Occupational Safety and Health review Comm'n, 545 F.2d 1384 (4th Cir. 1976), observing that the Court "steadfastly adhere to this line of cases, and we believe that it controls the outcome today." Id. at 915. Indeed, this line of cases supports the conclusion that a final determination of the Secretary of Labor that a violation occurred issued pursuant to § 5851(b)(2)(A) constitutes a final appealable order. A review of the Monterey Coal and Fieldcrest Mills cases demonstrates that the remand order being appealed was an order remanding the case for a "trial on the merits." A trial on the merits was concluded in Hobby and a final agency decision on the merits was issued by the agency. Indeed, the Monterey Coal and Fieldcrest Mills cases demonstrate that it is imperative for the Court to carefully analyzed the implementing statute. Based on the statute under consideration,[2] the Court concluded that final agency action is triggered when a decision is rendered requiring the violator of the statute to abate certain practices or when other specific relief is ordered against the violator:

> 'Unless and until petitioner is aggrieved, or adversely affected, by an order requiring it to abate certain practices, or granting other relief against it, appeal to this court is improper. The requirement that further proceedings be conducted is not the kind of adverse effect contemplated by the statute.'

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[2] The Carolina Power & Light court determined that the statute under consideration was essentially identical to § 5851.

Fieldcrest Mills, 545 F.2d at 1386 (quoted citation omitted). Indeed, a specific adverse effect contemplated in 42 U.S.C. § 5851(b)(2)(A) is a determination that a violation occurred and an affirmative order requiring reinstatement of an aggrieved terminated employee. See 42 § 5851(b)(2)(B). In Hobby, the Secretary determined that a violation occurred and specifically ordered Georgia Power to abate the violation. See Hobby at pp. 26-28 (Georgia Power engaged in "unlawful retaliation," "[a]ccordingly, Respondent is ORDERED to offer Complainant reinstatement").

Moreover § 5851 contains an additional provision demonstrating the finality of a decision of the Secretary that a violation occurred. Specifically, § 5851(e)(1) provides that

> Any person on whose behalf an order was issued under paragraph (2) of subsection (b) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

Logic and reason compel the conclusion that any order issued under §5851(b)(2)(A) constitutes an appealable order if the party thereto has the statutory authority to seek enforcement of that order in federal district court. Granting a complainant the right to file a civil enforcement action to force relief ordered by the Secretary constitutes final agency action, as defined by the Supreme Court in Abbott Laboratories v. Gardner, 387 US 136, 152, 18 L.Ed.2d 681, 87 S.Ct. 1507 (1967) and Franklin v. Massachusetts, 500 U.S. ___, 112

S.Ct. 2767, 120 L.Ed. 636, 647-48 (1992) and as defined in Carolina Power and Light, supra.

Finally, the underlying purpose for enacting § 5851 mandates immediate appealability of any final determination of the Secretary of Labor that a violation of the act has or has not occurred. A core underlying purpose of Congress' enactment of § 5851 was "to prevent the Nuclear Regulatory Commission's channels of information from being dried up by employer intimidation." Deford v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983). Also see In Re Five Star Products, Inc., 38 N.R.C. 169, slip op. at 12 (Oct. 21, 1993). The Secretary of Labor has reasoned that any interpretation of § 5851 must be read "in conjunction with" these explicit statements of congressional purpose. Egenrieder v. Metropolitan Edison Co./GPU., 85-ERA-23, order of remand by SOL, at 7-8 (April 20, 1987). According to the Secretary, the U.S. Department of Labor "does not simply provide a forum for private parties to litigate their private employment discrimination suits" because the legislation was enacted to "expose not just private harms, but health and safety hazards to the public." Polizzi v. Gibbs & Hill, Inc., No. 87-ERA-38, order of SOL, at 2-3, (July 18, 1989). Also see, Doyle v. Hydro Nuclear Services, 89-ERA-22, D&) of SOL, at p. 6 (March 30, 1994)(The clear "congressional intent" behind § 5851 is to "protect public health and safety"); accord, Brock v. Richardson, 812 F.2d 121, 124 (3d Cir. 1987). Thus, the necessity of triggering the immediate appeal of a final determination by the Secretary that a violation has or has not occurred flows from the

public health and safety aspect of the legislation because a final determination implicates issues related to honest and open communication between a licensee and the Commission and the chilling effect illegal discrimination will necessarily have on such communication.

Due to the fact that the final amount of damages to be awarded flow from the private aspect of the litigation and are collateral to the core function of the provision, a determination of finality must flow from every final decision as to whether a violation of the act has or has not occurred. Indeed, the construction and legislative history of § 5851 is an instance where the statute imposes special considerations on the determination of finality.

2. Case Law

Administrative decisions may constitute final appealable decision irrespective of whether related issues remain subject to further adjudication. 2 Am. Jur. 2d, Administrative Law § 382 (1995).[3] Appropriate factors to be considered to determine whether an administrative decision is final for the purpose of appeal is set forth in Franklin v. Massachusetts, 500 U.S. ___, 112 S.Ct. 2767, 120 L.Ed. 636 (1992).

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[3] Similarly, federal district court actions may become final whether or not a final award of attorneys fees was determined. For example, in McQuarter v. City of Atlanta, 724 F.2d 881 (11th Cir. 1984), the Court determined the award of attorneys fees under 42 U.S.C. § 1983 is collateral to the underlying action and the clock for filing an appeal commenced running irrespective of whether a final determination of attorneys fee remained pending.

> To determine when an agency action is final, we have looked to, among other things, whether its impact 'is sufficiently direct and immediate' and has a direct effect on . . . day-to-day business." Abbott Laboratories v. Gardner, 387 US 136, 152, 18 L Ed 2d 681, 87 S Ct 1507 (1967). An agency action is not final if it is only 'the ruling of a subordinate official,' or 'tentative.' Id., at 151, 18 L Ed 2d 681, 87 S Ct 1507. The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.

Id. at 120 L.Ed. 647-648.

Factors pertaining to the Hobby decision require affirmance that the order constituted final agency action for the purpose of appeal. In this respect: 1) the impact of the order could not have a more direct or immediate impact on Georgia Power's day to day business - immediate reinstatement constitutes a direct impact; 2) The decision was not made by a subordinate official, i.e., the ALJ, it is made by the final agency authority and final decision maker contemplated in the implementing statute[4]; and 3) Under 42 U.S.C. § 5851(b)(2)(A), the Secretary's determination that a violation occurred constitutes the completion of the decisionmaking process articulated by the Supreme Court in the Franklin decision.

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[4] Indeed, the main thrust of Georgia Power's argument is that a lower official of the agency, the ALJ, agreed with it. The Secretary's decision is the final action and it is this decision that triggered Georgia Power's right to appeal.

3. Georgia Power's Legal Authority

In a brief requested to by filed by the Atomic Safety and Licensing Board, Georgia Power specifically addressed the issue of whether the Hobby decision is an appealable order of the Secretary.[5] The legal authority relied upon by Georgia Power demonstrates that the order was appealable, contrary to Georgia Power's assertion to the contrary. GPC's Brief at p. 4.

The first case relied upon by Georgia Power is Carolina Power & Light Co., supra. Contrary to Georgia Power's assertion, this case specifically articulates that the statutory construction of § 211 demonstrates that any order issued pursuant to § 5851(b)(2)(A) determining that a violation of the act has occurred constitutes final agency action ripe for appellate jurisdiction.

The second case cited is Sun Shipbuilding & Dry Dock Co. v. Benefits Review Board, 535 F.2d 758, 760 (3d Cir. 1976). This case concerns the interpretation of the workers compensation programs set forth in the Harbor Workers' Compensation Act seeking benefits for loss of hearing. The Court concludes that final agency action under this statute requires a final order on damages. The Court specifically notes that this case did not present "an instance where the statute or the Board's regulations imposed special considerations on the determination of finality." Id. Indeed, not only did the case not present an instance where the underlying

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[5] See In re Georgia Power Co., ASLBP No. 93-671-01-OLA-3, October 13, 1995 Brief entitled "Georgia Power Company's Position on the Effect of Department of Labor Case No. 90-ERA-30" ("GPC's Brief").

statute presents, as does 42 U.S.C. § 5851(b)(2)(A), that a final determination of the Secretary of Labor that a violation occurred represents final agency action, but the underlying statute in question (33 U.S.C. § 921) specifically provides that a remand order may not be considered final agency action. In this respect, 33 U.S.C. § 921(b)(4) states that "[t]he Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action," and 33 U.S.C. § 921(c) states that only the "final order" is subject to appeal. Thus, the specific statutory construction of Longshoreman's and Harbor Workers Compensation Act demands that issuance of remand orders by a Benefits Review Board are necessarily interlocutory in nature and do not constitute a "final decision" of that Board.

Finally, the underlying purposes of the statutes are totally different. Title 33 U.S.C. § 921 concerns workers compensation claims where determinations of the actual physical harm suffered and adequacy of the compensation represent the core purpose of the act. This is not true with respect to 42 U.S.C. § 5851, where the core purpose of the Act is to ensure public health and safety. The stated purpose, intent and construction of § 5851 demonstrates that this statute represents "an instance where the statute...imposes special consideration on the determination of finality" such that the final determination as to monetary compensation and other remedies do not effect the finality of the decision. Sun Shipbuilding & Dry Dock Co., 535 F.2d at 760.

The third case relied upon by Georgia Power is Washington Metropolitan Area transit Auth. v. Office of Workers' Compensation Programs, 824 F.2d 94, 95-9 (D.C.Cir. 1987). This case also concerns the appealability of a Benefits Review Board remand order under 33 U.S.C. § 921(c). Again, based on the statutory construction of this act, the court held that remand orders of a Benefits Review Board do not constitute final orders of the Board for the purpose of appeal.

Finally, Georgia Power cites to Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 744 (1976). This case concerns the jurisdiction requirements of 28 U.S.C. § 1291 which set forth facts that must be satisfied before a court of appeals can exercise jurisdiction over a federal district court action. The jurisdictional requirements under § 1291 have precious little to do with 42 U.S.C. § 5851. Indeed, this provision would only become applicable following the issuance of a final decision by a district court in a proceeding brought pursuant to 42 U.S.C. §§ 5851(d)-(f) (the statutorily permitted civil enforcement mandamus actions contained in the Energy Reorganization Act ("ERA") whistleblower provisions). Thus, this case is totally inapplicable to a determination as to the appealability of a decision issued pursuant to 42 U.S.C. 5851(b)(2)(A).

III.
COLLATERAL ESTOPPEL

Georgia Power's plea to delay enforcement action until an appeal of the Hobby decision should likewise be ignored because, irrespective of whether the order constitutes a final decision of the Agency, collateral estoppel attaches to the Secretary's decision. "The mere fact that the damages award to the plaintiff have not been yet calculated...does not prevent use of a final ruling on liability as collateral estoppel." Metromedia Co. v. Fugazy, 983 F.2d 350, 366 (2nd Cir. 1992)(emphasis added).

Collateral estoppel, unlike appealability under 28 U.S.C. § 1291, does not require a judgment which ends the litigation and leaves nothing for the court to do but execute the judgment. Id.; See, Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945). "Finality...may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." Zdanok v. Glidden Company, Durkee Famous Food Division, 327 F.2d 944, 955 (1964).

The Hobby decision represents the final pronouncement of the Department of Labor that a violation of the ERA was perpetrated by the highest-ranking Georgia Power executives. It would be improper for NRC Staff to re-litigate final determinations of the Department of Labor. Collateral estoppel applies; NRC Staff should not consider the same factual arguments Georgia Power raised or should have raised before the Secretary.

IV.

CREDIBILITY OF THE WITNESSES

Four slides presented at the Conference (as reflected in the hand out) addressed credibility determinations of the Secretary of Labor.[6] The portion of the handout corresponding to these four slides juxtapose a quote from the recommended decision of the ALJ with a contrary finding reached by the Secretary in the Hobby decision. Georgia Power asserts that these portions of the ALJ's and Secretary's decisions constitute "credibility determinations." This assertion is false because all of the findings presented in the four slides represent factual disputes and do not reflect "credibility" determinations made by either the ALJ or the Secretary. Factual-based disputes between an ALJ's findings and the final decision of the Secretary of Labor are subject to a different standard of review on appeal than credibility disputes. The Secretary may reject any factual holding of an ALJ as long as the Secretary points to other evidence in the record. See NLRB v. Interboro Contractors, Inc., 388 F.2d 495, 499 (2d Cir. 1988). The Court of Appeals must defer to the final determination of the agency, not that of the ALJ. Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1437 (9th Cir. 1986).

According to Georgia Power, "the linchpin of the Secretary's ruling was his conclusion that the decision to eliminate Mr. Hobby's position occurred in a management council meeting on November the 7th...1989." Conference Tr. 33-34. In reaching this

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[6] The first of these slides is headed "THE SECRETARY OF LABOR IMPROPERLY MADE CREDIBILITY DETERMINATIONS."

decision, GPC asserts that "the Secretary basically said that Mr. Hobby's testimony was to be believed and that the testimony of the Georgia Power witnesses should be discredited." Conference Tr. 31, li. 10-13. We ask NRC Staff to carefully review the Hobby decision to determine whether the Secretary credited Mr. Hobby's testimony with respect to anything that happened during a Management Council meeting or with respect to who made the decision and when the decision was made. A careful review will reveal that every fact relied upon by the Secretary concerning who, when and where the initial decision was made to terminate Mr. Hobby is exclusively derived from the testimony of Georgia Power's own executives and officers who testified at the hearing.[7]

The Secretary's findings with respect to contradictory and conflicting testimony presented by Georgia Power's own witnesses has nothing to do with the credibility of or testimony from Mr.

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[7] The Secretary's discussion about when, where and who made the initial decision to terminate Mr. Hobby begins with the first full paragraph of page 18 of the Hobby decision and continues on to the end of page 26. During the course of this discussion the Secretary twice cites to the testimony of Mr. Hobby, but not with respect to who, when and where the decision was made.

The first citation is found on page 24. The Secretary states "it is uncontroverted that Complainant discussed the problems and showed his April 27 memo to Adams, who responded, '[t]his is a mess.'" Hobby Trial Tr. 164 (emphasis added). Because this testimony was uncontroverted, Mr. Hobby's credibility is a non-issue.

The second citation is found on page 25. The Secretary relied upon Mr. Hobby's testimony to establish that "Complainant had declined employment with SONOPCO on two prior occasions in 1988." Hobby Trial Tr. 82-83. Again, this factual assertion is not based on controverted evidence; there is no dispute as to whether Georgia Power asked Mr. Hobby to join the SONOPCO project in 1988 nor that Mr. Hobby declined that offer.

Hobby.[8] The Secretary need only point to other evidence on the record which supports the conclusion; the Secretary "may reject the [ALJ's] findings even though they are not clearly erroneous, if the other evidence provides sufficient support for the [Secretary's] decision." NLRB v. Interboro Contractors, Inc., 388 F.2d 495, 499 (2d Cir. 1967). Because the Secretary's findings with respect to pretext turn exclusively on the testimony of GPC's witnesses; and because the ALJ did not address or analyze this testimony, Georgia Power cannot set forth a valid issue on appeal.

If GPC is troubled by "credibility determinations" of the Secretary, this consternation must eminate from the testimony of GPC's own witnesses because it is this testimony which is conflicting and contradictory and the basis for the Secretary's findings.

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[8] That the Secretary of Labor's findings differ from the ALJ's is not surprising considering that the ALJ totally ignored Mr. Baker's testimony about what occurred during the November 7, 1989 Management Council meeting. The failure of the ALJ to address this testimony -- after it was highlighted in Complainant's post-hearing brief, required the Secretary to reevaluate the evidence. See Director, Office of Workers' Comp. v. Congleton, 743 F.2d 428, 429-30 (6th Cir. 1984) ("An ALJ's conclusory opinion, which does not encompass a discussion of the evidence contrary to his findings, does not warrant affirmance.").

V.

MATERIALLY FALSE AND MISLEADING STATEMENTS

During the Conference, Georgia Power presented factual assertions as to why the violation cited by the Secretary of Labor was improper.[9] The presentation contained information Georgia Power and Southern Nuclear officials knew or should have known to be materially false and misleading when made. This course of conduct is the most recent manifestation of the closed, deceptive and adversarial attitude previously identified in NRC's Office of Investigations Report of Investigation, Case No. 2-90-020R, dated December 17, 1993.[10] It is a manifestation of an imbedded

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[9] The assertions were presented by Messrs. Hairston and Williams. 10 C.F.R. Part 2, App. C IX notes that "oral information may in some situations be inherently less reliable than written submittals because of the absence to reflect or an opportunity for management review." In the instant case the brunt of the statements were read from prepared text and therefore there was an opportunity to reflect and conduct necessary management review.

[10] In addition to finding that high-level managers intentionally submitted material false information to NRC, the report includes the following observation:

> It is also concluded from the combination of the above findings, and the overall review, by OI, NRC, of the numerous audio tape recordings of internal GPC conversations regarding their communications with the NRC on a range of issues, that, at least in the March-August 1990 time frame, there was evidence of a closed, deceptive, adversarial attitude toward NRC on the part of GPC senior management. This attitude fostered a noticeable degree of frustration on the part of various Technical Support and Engineering personnel with respect to the GPC provision of information, not known to NRC, that had the potential of resulting in NRC enforcement action.

Id., at pp. 102-103.

corporate culture that winning is everything and that Southern Company and its subsidiaries will do anything it takes to win.

The false statements made during the presentation cover a wide latitude of issues, including who decided to create NOCA; the purpose of NOCA; who decided to eliminate NOCA and when that decision was made. A selected few are set forth below.

1. GPC misled NRC Staff about who created NOCA and why it was stationed in Atlanta, Georgia.

During the Conference Georgia Power presented a "series of overheads" addressing improper credibility decisions made by the Secretary of Labor. Conference Tr. 32. The overheads presented a "side-by-side comparison of several conflicting credibility determinations made by Judge Williams and the Secretary of Labor." Conference Tr. 33. The first overhead, entitled "THE SECRETARY OF LABOR IMPROPERLY MADE CREDIBILITY DETERMINATIONS," provides the following quote from the ALJ's recommended decision:

> [Mr. Hobby] declined to transfer [to Birmingham]. Instead, he designated a job for himself which he could perform at the Atlanta headquarters of Georgia Power, i.e., manager of a contract administration group. He then sold the idea to Mr. Head, whom he respected and with whom he apparently had a good relationship. Mr. Baker reluctantly went along with the idea because he did not have anything else for the Complainant to do. Mr. Dahlberg's approval was based, in part, on his belief that incorporation of SONOPCO would occur in a matter of months. (ALJ at 40)

This assertion is contrasted by the following excerpt from the Secretary of Labor's decision:

> The ALJ erred in finding that Complainant designated NOCA as a means to stay in Atlanta...Dahlberg testified that he established NOCA in Atlanta because that is were he is located. (SOL at 22, Fn. 13)

The presentation of this slide stands for the proposition that the ALJ correctly determined that NOCA was created to give Mr. Hobby something to do in Atlanta. Making this assertion to NRC Staff represents a material false statement. The truth as to who created NOCA and who's idea it was is set forth in testimony presented by Georgia Power in hearings conducted before the Atomic Safety and Licensing Board in the matter of Georgia Power Co., et al., ASLBP No. 93-671-01-OLA-3 (hereinafter "ASLB"). Therein, Mr. A.W. Dahlberg testified as follows:

> Q: Who made the decision to set up NOCA?
>
> A: I did.
>
> Q: And who did you consult on that?
>
> A: Mr. Baker, Mr. Head...probably Mr. Scherer [GPC's Chairman of the Board].
>
> * * *
>
> Q: So whose idea was that [to establish NOCA]? What did that come from?
>
> A: To have this organization. It was mine.

ASLB Tr. 1193, 1197 (January 4, 1995)(emphasis added).

Mr. Hobby was not an officer of Georgia Power; he had no authority to establish NOCA or name himself as its General Manager. It was Georgia Power's highest level management who determined that NOCA should be established. According to Mr. Dahlberg, GPC's then

President and CEO, the decision to establish NOCA was made by him.[11] The Secretary of Labor correctly realized that "[t]he ALJ erred in finding that Complainant designed NOCA as a means to stay in Atlanta." Hobby p. 22 at Fn. 13. To assert before NRC Staff that Georgia Power challenges this finding by the Secretary is to state that Mr. Dahlberg's testimony before the ASLB is false.

2. GPC mislead NRC Staff about the timing of when the decision to terminate Mr. Hobby was made and who made that decision.

According to Mr. Hairston, "Georgia Power had a legitimate, nondiscriminatory reason for eliminating Mr. Hobby's position in 1990." Conference Tr. 14. The factual basis for this assertion was presented by Mr. Hairston:

> Fred Williams, after review Mr. Hobby's organization, recommended to his boss, Mr. Dwight Evans, that the position of Mr. Hobby be eliminated because it was unnecessary. Mr. Evans agreed, and on December 29, 1989, the proposed elimination of the position was presented to the management council. No one disagreed with Mr. Williams' recommendation.

Conference Tr. 19, li. 25 to Tr. 20, li. 7 (emphasis added).

This assertion is extremely troubling in light of prior testimony of Mr. A.W. Dahlberg. During the Hobby trial Mr.

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[11] In prefiled testimony submitted before the ASLB, by Mr. Dahlberg, states that NOCA was formed because he "envisioned the need for a small group in Georgia Power's general office to provide an interface between Georgia Power and, ultimate, a new Southern Subsidiary. The group was to perform certain planning, performance monitoring and data gathering/reporting functions." Prefiled Testimony of A. William Dahlberg, III, dated December 27, 1994, at p. 12, li. 25, to p. 13, li. 3. And that "staffing decisions concerning NOCA were mine to make and I exercised them exclusively." Id. at p. 14, li. 5-6.

Dahlberg testified that the Management Council did not consider the elimination of Mr. Hobby or his position:

> Q: Did you know during the management council meeting that you were going to be discussing the elimination of Marvin Hobby's job?
>
> A: We did not discuss the elimination of Marvin Hobby's job. I've testified to that about three times already.
>
> Q: No time in the management council meeting was the elimination of Marvin Hobby's job on the -- was Marvin Hobby's job, or the elimination of Marvin Hobby's job discussed in a management council meeting?
>
> A: No.

Hobby Trial Tr. 354-355 (Dahlberg).

Mr. Dahlberg further testified that the recommendation to eliminate Mr. Hobby's position was, to the best of his recollection, made some time in 1990. Hobby Trial Tr. 346. Moreover, Mr. Williams testified that he did not make a formal recommendation to terminate Mr. Hobby's position until some time after January 1, 1990. Hobby Trial Tr. 411.

For Georgia Power's story to hold together, Mr. Evans had to be clairvoyant because Mr. Williams did not make the recommendation until some time after January 1, 1990 -- how else could Mr. Evans tell the Management Council what Mr. Williams recommendation was in December of 1989?

Finally, because Mr. Dahlberg's and Mr. Williams testimony does not support the timing as to when the decision was made to eliminate Mr. Hobby's position, Georgia Power provides a brief snippet from Mr. H. Grady Baker's testimony. The key testimony, according to GPC is as follows:

Q; ...is your testimony that the meeting in which Mr. Evans spoke occurred after the meeting in which the performance and potential was evaluated?

A: Yes.

See GPC Slide (emphasis supplied by GPC)(quoting Hobby Trial Tr. 708-709).

Georgia Power misleads NRC Staff about the actual scope and unequivocal nature of Mr. Baker's testimony concerning the timing and decision reached concerning the termination of Mr. Hobby:

Q: And its your recollection that on the management council meeting the elimination of Marvin Hobby's job was an agenda item?

A: There was an agenda item to consider a number of jobs, I believe, and his was one of those on the list to be considered.

Q: So it had already been determined by that [November 7, 1989] management council meeting that there was no place in Georgia Power for Marvin Hobby?

A: I believe that's it.

JUDGE WILLIAMS. [Interrupting]
Wait a minute...You're asking not eliminating the job, but eliminating Mr. Hobby. I mean I'm confused. Which was discussed and which decisions were made?

A: As I recall, your Honor, the decision was that Mr. Hobby could not make a significant contribution to Georgia Power Company, and that we would separate Mr. Hobby.

* * *

I am testifying beyond and shadow of a doubt that Marvin was discharged from Georgia Power Company because he didn't have the ability to make any significant contribution to Georgia Power Company, and that is the only reason he was discharged. That is my testimony.

Hobby Trial Tr. 704-705, 710.

It is clear from the testimony of GPC's own corporate officers that the explanation of events offered by Mr. Hairston is a pretext.[12] The Secretary of Labor correctly surmised that: "Williams and Evans simply provided Respondent [Georgia Power] with a post-hoc explanation for implementing the November 7 decision." Hobby at 18.[13]

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[12] The opening statement made by GPC in the Hobby trial asserted that the only reason he was terminated was because his position was eliminated, and that there was never a decision to terminate Mr. Hobby:

> ...the decision was not that Marvin Hobby should be discharged, not that Marvin Hobby should be terminated, but rather there is not a need for the position of general manager Nuclear Operations Contract Administration, and that job should be eliminated as not necessary...This was Mr. Williams' decision.

Hobby Trial Tr. 40 (statement of James E. Joiner).

Mr. Baker's testimony reveals that this initial assertion was the pretext Georgia Power concocted to justify the termination. As Mr. Baker testified, "beyond any shadow of a doubt" that "the only reason" Mr. Hobby was terminated is because "he didn't have the ability to make any significant contribution to Georgia Power Company." Id. at Tr. 710. Also see testimony of Thomas Boren (Hobby was not the "type" of leader GPC wanted in the "pipeline for the next decade") Id. at Tr. 483-484. The testimony of Mr. Baker and Mr. Boren leave little doubt that the termination decision was made at or prior to the November 7th Management Council meeting and that the elimination of the position of General Manager, NOCA, was the pretext used to eliminate Mr. Hobby.

[13] Mr. Hairston at the Conference asserted that the Hobby decision should be ignored because "the Secretary basically said that Mr. Hobby's testimony was to be believed and that the testimony of the Georgia Power witnesses should be discredited...Georgia Power contends that under the circumstances presented here, this is improper..." Conference Tr. at 31. Contrary to this assertion, on the key issue as to who made the decision and when the decision was made, the Secretary did not credit Mr. Hobby's testimony because Mr. Hobby gave none. All of the evidence which contradicts GPC's proffered excuse for terminating Mr. Hobby came from GPC's own witnesses. It was the

(continued...)

3. GPC mislead NRC Staff by asserting that "Mr. Hobby had an ill-defined role that really did not have a definitive job description."

During the Conference, Mr. Williams asserted that the reason he asked Mr. Hobby to draft the April 27, 1989 memo was because

> ...trying to get an idea of just what [NOCA] thought their role was going to be. They're the ones that crated this job. They're the ones that were pushing it and saying they were having problems getting people to cooperate with them. I said what are your defined responsibilities? All we had was a one-sheet, Bill Dahlberg, essentially, memo saying, we're creating NOCA. So we asked him to say, all right, Mr. Hobby, tell me what you think your functions are. Bring those to me and let me understand what you think your role is going to be because I think your role already exists, and so he was putting that together.
>
> Instead, what he brought me was this [April 27, 1989 memo]...so here he was in an ill-defined role that really did not have a definitive job description.

Conference Tr. 44-46 (emphasis added).

Mr. Williams assertion that Mr. Hobby was in an "ill-defined" job that did not have a "definitive job description" and that the only documentation concerning what NOCA was to do was set forth in a one page memo from Mr. Dahlberg is false. Mr. Williams was aware that a position description and responsibilities were set forth in a Position Questionnaire and other required forms needed to create

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[13] (...continued)
testimony of Mr. Dahlberg and Mr. Baker that destroyed GPC's argument -- Not Mr. Hobby's. If GPC chooses to appeal this issue (the central issue of the case) and claim that the Secretary made improper credibility determinations, then GPC will have to argue that the Secretary should not have believed the testimony of Mr. Baker, GPC's then Senior Executive Vice President and Mr. Dahlberg, GPC's then President and CEO (and current CEO of the Southern Company as well as a current member of Southern Nuclear's and Georgia Power's boards of directors). That should be a most interesting brief and one that NRC should certainly read.

a new job within the company. In this respect, the position description upon which Mr. Hobby's job and pay level were established and approved, sets forth the major responsibilities Mr. Hobby was to perform. It provides that the General Manager of NOCA was:

1. To manage all aspects of the contract with SONOPCO to achieve the safe, dependable, and cost effective operations of our nuclear power plants.

2. To establish goals, accountabilities, and budgets for nuclear operations that supported Georgia Power Company's Business Management Plan.

3. To monitor nuclear operations to ensure performance is supportive of GPC's Business Management Plan.

4. To serve as the primary interface between Georgia Power Company and SONOPCO and between Georgia Power Company and Joint Owners in nuclear operation matters.

5. To be the primary interface with other Company functions including top management and with the Public Service Commission on matters related to nuclear operations including budget, financial planning, prudency and performance.

Hobby, Complainant's Exhibit ("CX") 13 at p. 2.[14]

The problem was not that Mr. Hobby's role was ill-defined, the problem was that SONOPCO project management would not allow Mr. Hobby to perform his job.[15]

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[14] Mr. Williams was certainly aware of the position description as he was the company representative present when the document was introduced at the Hobby trial.

[15] Whether NOCA constituted a safety organization or whether its function played a role in the safe operation of Georgia Power's nuclear plants is irrelevant to whether a violation of 10 C.F.R. § 50.7 occurred. Indeed, had a janitor found a piece of paper in the trash indicating that GPC had illegally transferred control and was terminated for raising this concern, that janitor would equally be entitled to protection pursuant under § 211 of the ERA.

(continued...)

4. GPC's presentation mislead NRC Staff about the function NOCA was envisioned to perform.

During the Conference, Mr. Williams responded to questions raised by NRC Staff concerning the purpose of NOCA. The following dialogue occurred during the Conf rence:

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[15](...continued)

Nonetheless, the difficulty assessing NOCA's safety significance stems from what NOCA was envisioned to do and what NOCA was allowed to do. Georgia Power's then President and CEO testified that he established NOCA to provide the Atlanta corporate office information about the performance and safety factors of Georgia Power's nuclear plants. ASLB Tr. 1200 (Dahlberg). Moreover, Mr. Hobby testified that NOCA was specifically established to provide information and advise Mr. Dahlberg on matters pertaining to safety and budgeting. Mr. Hobby was to review SALP reports, NRC evaluations and INPO evaluations, and was otherwise to trend various factors related to nuclear operations, such as availability of GPC's nuclear units, the number of reactor trips; safety system availability, accumulation of nuclear waste, radiation exposure, industrial safety, and reactor operator training and retraining. See ASLB Tr. 2290-2291; 2295; 2386 (Hobby). Also see ASLB proceeding deposition of H. Grady Baker, Jr., (April 8, 1994) at p. 64 ("The function was Marvin to keep an eye on the nuclear company."). The chief executive of a licensee is free to establish any organization in addition to organizations mandated by NRC regulations or requirements. NOCA was a specific organization established by GPC's CEO to make sure that GPC's senior executives in Atlanta (and the joint owners) were adequately informed about safety factors and other significant information concerning nuclear operations represents. Observations, including the fact that SONOPCO project management would not allow him and NOCA to perform its intended function, caused him to conclude that GPC may have improperly transferred control of its nuclear operations to SONOPCO project without first obtaining written consent from the Commission. The Secretary of Labor correctly observed that Mr. Hobby's complaints about the lack of cooperation from SONOPCO project was tantamount to the criticism of Mr. Hobby's protected complaint about the reporting structure. If Georgia Power's top management established NOCA to perform an oversight function, raising concerns about the inability to perform the oversight function as a result of interference from SONOPCO project management constitutes protected activity.

MR. MERSCHOFF: I have two questions on that. One, you said the purpose of NOCA was to oversee contract between Southern Nuclear and Georgia Power. Was that the sole purpose of it?

MR. WILLIAMS: That's correct.

* * *

...the only responsibility NOCA could possibly have would then be to administer the contract between Southern Nuclear when it became Southern Nuclear instead of a project and us at Georgia Power Company, and that would have had to have been my department then...

Conference Tr. 25-28.

The assertion that NOCA was formed solely to oversee the contract between Southern Nuclear and GPC is false and contrary to sworn testimony presented by the person who formed NOCA, GPC's then CEO and President, Mr. Dahlberg. According to Mr. Dahlberg:

A: At that time, it [SONOPCO] was a new organization for us. We were transferring our general staff to Birmingham, and I think all of us had a concern about exactly how it was going to work. And I thought it would be necessary to set up a contract group to look at the performance of that organization.

* * *

Q: [by Judge Bloch] And when you set it [NOCA] up, part of their function was to gather information not just about their performance of the units, but about safety factors?

A: That's correct.

ASLB Tr. 1196, 1199-1200.

Thus, the function of NOCA, as described by Mr. Dahlberg, was to monitor the performance of the plants, and gather information about safety factors. None of these activities required the incorporation of Southern Nuclear. Moreover, these responsibilities could not be carried out by Mr. Williams' group because they had no nuclear expertise whatsoever. Indeed, Mr.

Williams' statement to NRC Staff that administering the contract between Southern Nuclear and Georgia Power "would have had to have been my department" is directly refuted by Mr. Hobby's position description and the testimony of Mr. Dahlberg.

5. Mr. Williams' assertion that he had forgotten about the April 27, 1989 memo cannot be true.

During the Conference, Mr. Williams asserts that he had forgotten about the April 27th memo by the time Mr. Hobby had filed his claim with the U.S. Department of Labor; and that Mr. Hobby's testimony during the Hobby trial that Williams statement made on January 10, 1990 to the effect that the memo resulted in Hobby's termination were not true. Conference Tr. 24-25. A careful analysis of the Hobby hearing record demonstrates that Mr. Williams' denial is not credible. The record establishes the following:

a) Mr. Hobby provided the memo to Mr. Williams on April 27, 1989. On April 28, 1989 Mr. Williams and a Troutman Sanders lawyer, Mr. Robert Edwards, traveled to Birmingham to meet with SONOPCO project management. On April 28th, following the meeting and upon Williams' return to Atlanta, Mr. Hobby called Mr. Williams to learn how SONOPCO management reacted to the issues Mr. Hobby had raised. The conversation was memorialized in a daily note book maintained by Mr. Hobby. Therein it states that "Edwards worried about memo...get rid of orig[inal]." Hobby, CX 12 (April 28, 1989 entry).

b) On June 8, 1989, Mr. Hobby confidentially wrote to Admiral E. P. Wilkinson, the former President and CEO of INPO (who was Mr. Hobby's mentor) stating that he had been instructed by Mr. Williams to destroy the April 27, 1989 memo. Hobby Trial Tr. 151-152, CX. 22. Georgia Power is unable to provide a reasonable explanation why Mr. Hobby would, within weeks of submitting the memo to Mr. Williams, state in writing to Adm. Wilkinson that he was instructed to destroy a memo that had been signed by Mr. Head (a Georgia Power Senior Vice President) and by Mr. Hobby. He made this factual statement to Adm. Wilkinson because it was true.

c) Admiral Wilkinson testified at the hearing that Mr. Hobby discussed with him over the phone that Mr. Williams had instructed Mr. Hobby to destroy the memo. Adm. Wilkinson further testified that he advised Mr. Hobby to only destroy copies of the memo but that he should not destroy the original. Hobby Trial Tr. 555.

d) Mr. Williams admitted that he showed a copy of the memo to his assistant. Hobby Trial Tr. 417-418.

e) Mr. Williams testified that he showed the memo or at a minimum discussed the contents of the memo with Mr. Dahlberg, GPC's President and CEO. Hobby Trial Tr. 418, 458.

f) Mr. Williams falsely testified on direct examination that he only discussed the memo with two people, his assistant and Mr. Dahlberg. Hobby Trial Tr. 418. He denied recalling that he spoke with a Troutman Sanders attorney, Mr. Edwards,

about the memo. Id. at 470. Mr. Edwards, on the other hand, recalled such discussion and the fact that Williams confided that he was "disappointed" with Mr. Hobby. Id. 778. GPC's Senior Executive Vice President, Grady Baker also testified that he spoke with Williams about the memo. Id. 682.

The significance of the memo is established by the fact that Mr. Williams' discussed it with GPC's President and CEO; with GPC's Senior Executive Vice President; with a company attorney; and with his personal assistant. Why would Mr. Williams' discuss a memo with the highest level executives of the company if he had dismissed the memo as 1) not being responsive to the information he requested; 2) being "replete with errors," 3) after Mr. Hobby allegedly agreed to reconsider its submission; and 4) if Mr. Williams considered the "whining" nature of the memo to moot its content. The only logical answer is that Mr. Williams went to such lengths because he knew the memo raised significant concerns that needed to be brought to the attention of Georgia Power's executive management.[16]

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[16] Mr. Williams assertion that the April 27, 1989 memo set forth facts that were not true or that the memo was non-responsive to the information Mr. Williams had requested is not believable. Mr. Williams neglects to state that the April 27, 1989 memo was co-signed by a Senior Vice President, George Head (Williams was subordinate to Mr. Head). Mr. Head, to whom NOCA reported since its inception, testified that he was quite familiar with the issues set forth in the memo and that he had raised these issues with Mr. Dahlberg. See Hobby Trial Tr. 646, 652, 657. It is difficult to believe that Mr. Head would counter-sign the April 27th memo if it were non-response or factually deficient to the issues Mr. Williams needed to address.

6. Georgia Power materially mislead NRC Staff concerning the motivation behind the relocation of Mr. Hobby's office as well as the motivation behind restricting his access in the building and revoking his executive parking privileges.

When NRC Staff (Ms. Watkins) questioned Mr. Williams about the basis for revoking Mr. Hobby's executive parking privilege and building access, Mr. Williams asserted that he took the action out of "a concern from the standpoint of nuclear safety." Conference Tr. 48, li. 14.[17] According to Mr. Williams, "I needed him to sign in every day just in my area for what I considered security reasons from the standpoint of the company and our nuclear program and other programs." Conference Tr. 50. The first question is: What aspect of nuclear safety was addressed by limiting Mr. Hobby's access within in GPC's Atlanta, Georgia headquarters? Obviously none. GPC's "nuclear program" was transferred to SONOPCO project's Birmingham offices in November of 1988. The only remaining aspect of Georgia Power's "nuclear program" remaining in Atlanta was NOCA. At the time Mr. Hobby was removed from his office and when his badge and executive parking privilege were revoked, NOCA had been disbanded and the employees previously reporting to Mr. Hobby were

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[17] Significantly, when he was deposed prior to testifying at the Hobby trial he failed to mention a "nuclear safety" concern. Indeed, during his deposition, there was no mention of shredding documents or of learning that some "unauthorized" persons had entered the executive parking lot with Mr. Hobby. See May 8, 1990 Deposition of Fred Williams, pp. 68-71. This deposition occurred just three months after the fact. It stands to reason that this latest assertion represents a post hoc rationalization.

moved to a different floor.[18] From a security standpoint, how would leaving Mr. Hobby in his office compromise GPC's nuclear program?[19] To paint Mr. Hobby as a bona fide nuclear security risk is outlandish and conduct NRC Staff simply should not tolerate.

According to Georgia Power, there were two triggering events which caused Mr. Williams and Mr. Boren to conclude that Mr. Hobby was a threat to nuclear security and/or that required him to move out of his office, revoke his executive parking privilege, and to confiscate his employment badge. They are: 1) that Mr. Hobby was requested to destroy nuclear safeguards documentation pursuant to the requirements of GPC's nuclear safeguards program; and 2) Mr. Boren alleged that Mr. Hobby was seen leaving from the executive parking garage with several gentlemen he did not recognize. These assertions are discussed in detail below.

1. Nuclear safeguards.

Mr. Hobby and GPC's former head of nuclear security were the only two people in Georgia Power's Atlanta offices cleared for safeguards. Pursuant to regulations, the safeguard documents had to be destroyed in the presence of two cleared individuals and every document destroyed had to be logged. SONOPCO project

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[18] Prior to becoming GPC's General Manager of NOCA, Mr. Hobby had been placed in charge of both Plant Hatch's and Plant Vogtle's nuclear security programs.

[19] Asserting that nuclear safety was the basis for the discriminatory action is extremely surprising, given GPC's assertion at the Conference that Mr. Hobby and his job had absolutely nothing to do with nuclear safety.

management stated that they did not want to retain the safeguards documents that remained locked in a safe in the Atlanta offices and authorized the destruction of the safeguards materials. Significantly, before Mr. Hobby's employment badge was confiscated, before his office moved, and before his executive parking privilege revoked, Georgia Power knew that Mr. Hobby had acted responsibly and appropriately. This is confirmed by the testimony of Mr. Williams:

> Q: okay. And as a result of shredding those documents, you took away his employment badge and moved his office -- correct? -- so you could keep closer contact, closer observation on Mr.Hobby?
>
> A: That's correct.
>
> Q: Now, before you did those drastic steps [taking away Hobby's employment badge and moving his office], Mr. Williams, hadn't you already spoken with a Mr. Lukehart and Mr. Hobby, and didn't both of them tell you that the documents that were being shredded were specific safeguards documents which the NRC by regulation states that only Marvin Hobby and Mr. Lukehart could shred, and that every document which was shredded had to be logged in before it was shredded and had to be logged out after it was shredded. Isn't that the truth?
>
> A: Yes, sir, it was later found out that he had the right to, or he had the responsibility to do that. As far as his position with the company, however, we eliminated the position. That still gave me concerns, and I thought maybe I should have more control over his everyday functioning, and I think that's only natural on my part.

Hobby Trial Tr. 473-474 (emphasis added).

This testimony establishes that before Mr. Hobby's office was moved and his employee badge confiscated, Mr. Williams already knew that the shredding of safeguards materials did not provide a basis

for the action taken.[20] Examination of the above testimony reveals that the only reason Mr. Williams testified that he went ahead with the adverse action against Mr. Hobby was because Mr. Hobby's position of General Manager of NOCA had been eliminated. Mr. Williams knew the handling of the safeguards materials was authorized and proper and that it provided no legitimate basis for the discriminatory conduct.[21]

2. Executive Parking.

First, NRC Staff should be cognizant of the fact that Mr. Hobby was completely authorized to escort anyone he wished to or from the executive parking lot. Whether Mr. Hobby chose to do what he was authorized to do provides no legitimate basis to strip him of his executive parking privilege. The right to escort persons was a privilege of employment and Mr. Hobby did not have to request permission to escort persons prior to the time he engaged in protected activity and he certainly did not need permission after he engaged in protected activity. The alleged incident is a ruse.

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[20] Mr. Hobby informed Mr. Williams about the shredding of the safeguards material on February 2, 1990; Mr. Hobby was moved from his office of February 9, 1990. See Complainant's Exhibit 29 (Hobby Calendar entry of February 9th).

[21] Mr. Williams also testified that he had an "investigation performed" to determine why Mr. Hobby was shredding safeguards documents and that he "was given a report back on the investigation." Mr. Williams further testified that he never went back to talk with Mr. Hobby about the incident. Hobby Trial Tr. 474.

Second, if Mr. Boren has a legitimate concern about security, then he should have called Mr. Hobby and inquired about the incident. Neither Mr. Boren nor anyone else at Georgia Power did so.[22] Moreover, Mr. Boren stated that he did not see Mr. Hobby entering the building with these person; he rather saw him leaving the building.[23] As far as Boren knew, Mr. Hobby was doing a favor to someone else in the office by escorting a visitor on his way out of the building. Because Mr. Boren never bothered to find out who or why Mr. Hobby was allegedly escorting someone out of the building, he could not have a bona fide security concern.

Third, during the Conference Mr. Williams asserted that the taking of Mr. Hobby's executive parking privilege occurred at the same time his office was moved ("The combination of those two things [shredding nuclear documents and coming in through our executive garage] and the fact that we had eliminated his job, I suggested to Mr. Hobby, you need to move on up to the floor where I was..."). Conference Tr. 49-50. This assertion is false; removing him from his office and taking his executive parking privilege and employee badge represent two separate acts. The

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[22] When this assertion first emerged, Mr. Hobby vigorously attempted to reconstruct the observation Mr. Boren had that he was exiting with persons Mr. Boren did not know. We know of no such incident during the time frame in question. Of course, whether or not this event occurred, is irrelevant because Mr. Hobby was authorized to escort persons through the executive garage. Nonetheless, we mention this fact because we doubt that the incident actually occurred and it may well represent a total fabrication on the part of Mr. Boren.

[23] According to Boren: "I was coming in from the executive garage one day and saw Mr. Hobby leave with several gentlemen that I did not know." Hobby Trial Tr. 496.

taking of Mr. Hobby's executive parking privilege and employee badge occurred Ten (10) days after he was removed from his office.

The record demonstrates that the decision to revoke Mr. Hobby's executive parking privilege and take his employee badge was made by Mr. Boren (GPC Senior Vice President) and it was a separate and distinct action occurring two weeks after Mr. Hobby's office was moved. The timing is established by the contemporaneous entries Mr. Hobby made in his pocket calendar (See, Hobby, CX 29, entries of February 9, 1990 and February 19, 1990), as well as testimony presented by Mr. Hobby (Hobby Hearing Tr. 217).[24]

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[24] Mr. Boren's testimony further indicates that the decision to mover the office was made by Mr. Williams whereas the decision to take his employee badge and executive parking was his. The testimony of Mr. Boren (GPC Senior Vice President) is as follows:

> Q: Mr. Boren, did you have any involvement in the decision to change Mr. Hobby's parking privileges from the executive parking garage to the managers' parking lot, and the decision to ask Mr. Hobby to turn in his employee identification badge?
>
> A: Yes, sir, I did.
>
> Q: And what was your role in that?
>
> A: I was coming in from the executive garage one day and saw Mr. Hobby leave with several gentlemen that I did not know...its been my experience as the senior officer to whom human resources reports that when you get someone in that kind of situation that you wanted to basically control access, entrance and exits to the building, who came, who went, that sort of thing, and by parking in the executive garage he had no -- there was no one to control who went in and who went out.
>
> By having him park in the managers' lot which is in the front of the building as opposed to inside the building he had to come by the security guards, and if he had any guests with him they had to sign in. The other way then did not have to sign in.

(continued...)

Finally, when responding to the question why he moved Mr. Hobby's office, Mr. Williams' stated:

> I considered security reasons from the standpoint of the company and our nuclear program and other programs, and all I'd asked him to do during that period of time was to find another job...he just sat out his time. I said, <u>there's no reason, then, for you to be going anywhere else in the building</u>.

Conference Tr. 50.

This statement is striking for a few reasons. First, if there was no reason for Mr. Hobby to be going anywhere else in the building, then why move his office and force him to relocate to another part of the building?

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[24](...continued)

> I thought it was just prudent management from looking at a potential labor problem here to make sure I knew who went and who came...
>
> <u>I called Mr. Williams and expressed a concern about that, and then after talking to him he basically made the change with Mr. Hobby in terms of his parking restricting access</u>.

* * *

Q: And what was the reason for moving Mr. Hobby's office?

A: From the 14th floor to the 19th floor?

Q: Right.

A: One of the reasons, is you know, there are a lot of sensitive documents, and we were going through a process of shredding and so forth, there were some concerns associated with that. That's part of the reason for moving it up there. That decision was Mr. Williams's decision.

Q: <u>So you were only involved with the parking privileges and the badge, and Mr. Williams made the decision about moving the office on his own</u>?

A: <u>Yes</u>.

<u>Hobby</u> Trial Tr. 496-497, 507-508(emphasis added).

Second, during the Hobby trial Mr. Williams testified that after he eliminated Mr. Hobby's job he would continue to employ Mr. Hobby as an employee working directly for Mr. Williams, essentially as a contract employee until he left the company, to assist with the negotiations on the nuclear operating agreement between Georgia Power and Oglethorpe Power.[25] If that were Mr. Williams true motive, then moving Mr. Hobby to his floor could be viewed as fostering a closer working relationship during the remaining months Mr. Hobby was available to continue working on the nuclear operating agreement. To the contrary, Mr. Williams told Mr. Hobby that his only assignment was to find another job and he precipitously removed Mr. Hobby from the nuclear negotiations. So the question remains, why would Mr. Hobby need to be located on the same floor as Mr. Williams if he had to find a job outside of Mr. Williams' department? The answer is found in the pictures of the office Mr. Hobby was forced to vacate and the office to which Mr. Williams thrust upon him. Copies of pictures of the office Mr. Hobby vacated can be found as Attachment 1 this pleading; pictures of the office to which Mr. Hobby was relocated are appended as

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[25] Mr. Williams testified as follows:

> ...Mr. Boren and I talked, and what we agreed to do since Mr. Hobby was interested in pursuing some other area such as the medical school is that we...would continue him as an employee of Georgia Power working for me, which was not unusual, its like contracting somebody, because I still had some work going on in these [nuclear] negotiations, and he had been involved in the nuclear negotiations with us that he could do.

Hobby Trial Tr. 431.

Attachment 2. The office to which he was relocated was apparently used for storage; it contained a broken credenza which would tear your pants if you turned the wrong way in your chair.[26] Indeed, the office given to Mr. Hobby was far less accommodating that the offices Mr. Williams provided to the employees some eight levels below Mr. Hobby in seniority -- employees Mr. Hobby used to supervise. Mr. Hobby's old office, on the other hand, remained vacant for no less than eight months.[27] In sum, Georgia Power mislead NRC Staff about the reasons Mr. Hobby was instructed to vacate his office and about why his company badge was confiscated and executive parking privilege revoked. None of these actions were remotely based on nuclear safety considerations nor were they based on helping Mr. Hobby find a job or for any other legitimate reason.

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[26] See testimony of Marvin Hobby, Hobby Trial tr. 212-231, which states:

> When I moved into the office the previous tenant had not cleared it out very much I guess, there were boxes in there, there were storage boxes in there. I didn't know what all the material was. There was one chair in there for me to sit in, there was a telephone and a metal credenza that was broke, you tore your pants if you turned wrong, and that was the office that I was moved to.

[27] The uncontested testimony at the Hobby hearing was that the office remained vacant as of the date of the trial. Hobby Trial Tr. 213. Whether it remains vacant is a question only GPC can answer.

3. Motivation for the Discrimination

The pictures of the office Mr. Hobby was forced to vacate as compared to the pictures of the office Mr. Hobby was assigned by Mr. Williams demonstrate that the act of moving Mr. Hobby was about retaliation and humiliation; it was to show Mr. Hobby and everyone else what happens to someone when they raise questions about nuclear operations. Day in and day out, the employees Mr. Hobby previously supervised and everyone else on the 19th floor got to see "Mr. Hobby's office" -- including guests from Oglethorpe Power, with whom Mr. Hobby had negotiated. It sent a powerful message to every employee who saw or heard about what occurred that the raising of a regulatory concern will not be tolerated. Moreover, ten days later, the message was reinforced when Mr. Hobby's executive parking privilege and employee badge were confiscated. Mr. Hobby was limited to four floors of the building (1, 2, 3 and 19). Again, this sent a message to Mr. Hobby and all other employees who saw Mr. Hobby, for the first time, being forced to parking in the outside lot and having to sign in at the front desk like a visitor to the corporate offices. The humiliation to Mr. Hobby is obvious. It sent a clear message that any individual who took action deemed inappropriate by management can expect to receive hostile and discriminatory treatment.

VI.

THE NEED FOR ENHANCED ENFORCEMENT

As indicated earlier, violations of Section 211 (formally Section 210) of the ERA committed by senior management of a licensee generally require imposition of a Level I violation. See 10 C.F.R. Part 2, App. C, Supplement VII(A), Example 4. We believe that the discriminatory action taken against Mr. Hobby had and continues to have a chilling effect on GPC and Southern Nuclear employees. The actions taken by senior GPC management after knowing that Mr. Hobby was going to file a complaint with the Department of Labor (i.e., the taking of his office, employee badge and executive parking two months prior to his scheduled departure) clearly telegraphed to GPC employees that the filing of a complainant with the U.S. Department of Labor is not acceptable behavior and that you will be retaliated against for taking such action. No action on the part of Georgia Power has lessened the chilling effect flowing from this conduct.[28]

Since the issuance of the Secretary of Labor's decision, Georgia Power has not made any attempt to offer Mr. Hobby reinstatement or attempt to discuss the matter with him or his counsel. Moreover, false and misleading information was provided

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[28] Georgia Power stated during the Conference that they do not intend to take any action to rectify the chilling effect resulting from the termination of Mr. Hobby:

> We do not believe that there is a need for us to take action to make sure that Georgia Power and Southern Nuclear employees knows that [they are encouraged to identify and report safety concerns].

Conference Tr. 35, li 5-8.

to NRC Staff during the Conference. These actions represent the clearest indication that Georgia Power, on its own accord, will not take corrective action or otherwise attempt to mitigate the harm resulting from a violation of 10 C.F.R. § 50.7.[29]

Mr. Hairston insisted that no chilling effect can result from the termination of Mr. Hobby because Mr. Hobby and his group (NOCA) were not involved with the safe operation of GPC's nuclear plants.[30] This assertion rings hollow for a number of reasons. First, Mr Hobby was a high-level manager within Georgia Power's nuclear operations department before he was named as General Manager of NOCA. When he became General Manager of Nuclear Operations Contract Administration, he remained in constant contact with nuclear employees and managers stationed at the SONOPCO project. Moreover, NOCA, by Georgia Power's own admission, was established to function as the chief interface between GPC's

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[29] On October 3, 1995 -- the day before the enforcement conference and two months after the Secretary issued his order, Georgia Power's President and CEO, Mr. H. Allen Franklin issued a letter to all GPC officers and nuclear employees. It states that "it is Georgia Power's longstanding policy to encourage its employees to identify and to report compliance concerns. No retaliation for raising a compliance concern will be tolerated." Yet, Mr. Hobby remains unemployed while Mr. Williams was promoted to the position of Senior Vice President. Moreover, this letter fails to discuss the findings of the Secretary and fails to indicate how the retaliation identified in the Secretary's decision will be addressed.

[30] According to Mr. Hairston:

> Mr. Hobby and his group [NOCA] had no relation or effect upon the safe operation of Georgia nuclear power plants. Thus, there has not been and there will not be any chilling effect as a result of Mr. Hobby's case.

Conference Tr. 15, li. 1-5.

corporate offices and the SONOPCO project. Discriminating against the person filling that position would necessarily have a chilling effect on employees and managers within the SONOPCO project (now Southern Nuclear Operating Company).

Second, according to Georgia Power, GPC's President and CEO is the chief officer over GPC's nuclear plants. In 1990 that position was held by Mr. Dahlberg. The Secretary of Labor's decision indicates Mr. Dahlberg was directly involved with the retaliatory act of discharging Mr. Hobby. Today, everyone within the Southern System knows that Mr. Dahlberg was promoted to the position of CEO of The Southern Company.[31] The perception that discrimination in violation of 10 C.F.R. § 50.7 was carried out by the current CEO of The Southern Company should have a profound chilling effect on every employee and in particular, GPC's and Southern Nuclear's executive management.

Finally, Mr. Hairston takes solace in the fact that employees interviewed during inspections conducted in May-June, 1995 of GPC's and Southern Nuclear's safety concerns programs indicated that they would report safety concerns and that they had confidence that their management would adequately resolve the concern.[32] Could it

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[31] Similarly, Mr. Williams, who carried out the termination and the person who made misrepresentation to NRC Staff during the Conference, was promoted to Senior Vice President.

[32] We believe that there are additional inadequacies associated with the Quality Concern program that are not identified in the NRC inspection report. For example, the program authorizes destruction of documentation. Additionally, the programs specifically require involvement of attorneys when a question of illegality or other significant matter arises thereby shielding the (continued...)

be that employees are intimidated and otherwise programmed to the point where they will not reveal there true feelings to NRC inspectors? I have had access to only one quality concerns file, that being the concerns filed by Mr. Allen L. Mosbaugh, former Assistant General manager of plant Vogtle. It should be noted that the inspection of the quality concerns program did not reveal that the concerns raised by Mr. Mosbaugh were taken from the quality concerns coordinator and were thereafter investigated by the General Manager, Mr. Bockhold, who had been accused of wrongdoing. The inspection also did not reveal that none of the allegations raised by Mr. Mosbaugh that were investigated by the plant Vogtle Quality Concerns program and GPC Corporate Concerns program were never closed. Moreover, it was learned that the files had been removed from plant Vogtle and the Corporate office to the offices of GPC's counsel.[33] A very significant aspect of this quality concerns file pertains to one allegation Mr. Mosbaugh raised concerning whether the plant Vogtle General Manager intimidated members of the plant Vogtle Plant Review Board in order to influence the vote on reinstating a safety-related system that did not comply with Regulatory Guide requirements. When one alternate member of the PRB was asked whether the General Manager's presence

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[32](...continued)
investigative records from inspection or disclosure due to the imposition of the attorney-client privilege. Finally, the programs do not offer adequate independence from licensee's management.

[33] Obviously, an inspection by the NRC resident of the files would never reveal a deficiency when the files are removed from the plant site.

during the PRB meeting had, in fact, intimidated him such that he changed his vote, he advised the Quality Concerns Coordinator, Mr. Lyons, that he was intimidated and, had the General Manager not been present he would probably have changed his vote.[34] When Mr. Mosbaugh came to the conclusion that the Quality Concerns program failed to resolve his concern and he raised it with NRC and the matter was included in a NRC Special Team Inspection conducted in August of 1990. A report of the inspection was issued in November of 1991. See Vogtle Special Team Inspection report Nos. 50-424, 425/90-19 (November 1, 1991). Therein, the inspection team reported that sworn testimony:

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[34] A copy of a portion of the Quality Concerns file is appended as Attachment 3. This document contains the notes of the Quality Concerns Coordinator with respect to questions asked of an alternate member of the plant PRB and the response to the questions. The document reflects the following:

> Question: At the time did you feel any undue pressure to force the vote early?
>
> Answer: Williams answer was yes. He said at the time he was sitting right next to George Bockhold [former plant General Manager]. Because of his presence Williams said he did not think there was 'true candid discussion.' He went on to say, had George not been there he would have probably voted No. I asked him Why? Williams agreed with Mosbaugh that the unit did not meet Regulatory Guide criteria...I felt it only proper to inform Williams that my asking these questions was at the request of George Bockhold and that a response was expected. Because of his response to [the above] question I asked if he preferred that I not tell him or wished to change his response. Williams seemed to be very honest and said no...

> confirmed that on one occasion an alternate voting member felt intimidated and feared retribution or retaliation because the general manager was present at the meeting and the PRB member knew the general manager wanted to have the temporary modification approved. However, the testimony also indicated that the PRB member did not alter his vote and felt comfortable with how he had voted.

Id. p. 20 (copy of pages 19-22 of the report are appended as Attachment 4).

Assuming this testimony came from Mr. Williams, it is clear that his statements to NRC differ from the statement he provided to the Quality Concerns Coordinator.[35] This incident represents an example where an Assistant General Manager raised a concern with the Quality Concerns program that intimidation of PRB members was occurring; where the Quality Concerns Coordinator documented that a voting member of the PRB was intimidation to the point where he changed his vote. Yet, the Quality Concern was never closed and a final report was never issued. Thereafter, when NRC inspectors inquired into the matter they were presented with facts contrary to the facts documented in the Quality Concerns file. Clearly, documenting actual intimidation or the real effect a violation of 10 C.F.R. § 50.7 is difficult and, under the right circumstances, particularly where the work force fears retaliation, may not be possible.

Finally, the manner in which the inspection is conducted can greatly effect the results. Factors such as who was present when

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[35] The NRC inspectors apparently were not provided a copy of Mr. Williams' Quality Concerns statement inasmuch as this statement is not referenced in the report.

the employees were questioned; who selected the employees and who knew the employees were speaking with NRC inspectors will greatly effect the outcome. Nonetheless, it is highly significant that some employees indicated that they were not satisfied with the thoroughness of the Quality Concerns investigations and the adequacy of the identity protection program at plant Hatch.

VII.
ENFORCEMENT ACTION REQUESTED

NRC must take appropriate action to wake-up the Southern Company and its nuclear subsidiaries. Issuance of a Level I violation and a significant monetary civil penalty is essential to that goal. Georgia Power refuses to comply with the Secretary's order and failed to seek a stay of that order. It is therefore essential that the enforcement action include a $100,000 a day penalty until such time as Georgia Power offers to reinstate Mr. Hobby. Finally, to foster open communication and to otherwise address the past and present chilling effect associated with the termination of Mr. Hobby, we request NRC Staff to instruct Georgia Power to reprint the Secretary of Labor's decision in its entirety in publications circulated to its employees located in GPC's corporate offices and at plants Hatch and Vogtle as well as Southern Nuclear's corporate offices.

CONCLUSION

For the foregoing reasons, NRC Staff should conclude that a violation of 10 C.F.R. 50.7 has occurred and take appropriate enforcement action.

Respectfully submitted,

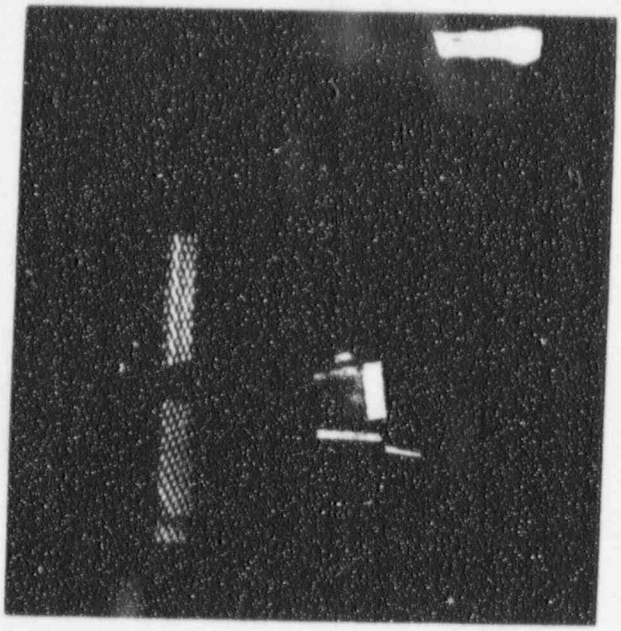
Michael D. Kohn
Kohn, Kohn and Colapinto, P.C.
517 Florida Ave., N.W.
Washington, D.C. 20001
(202) 234-4663

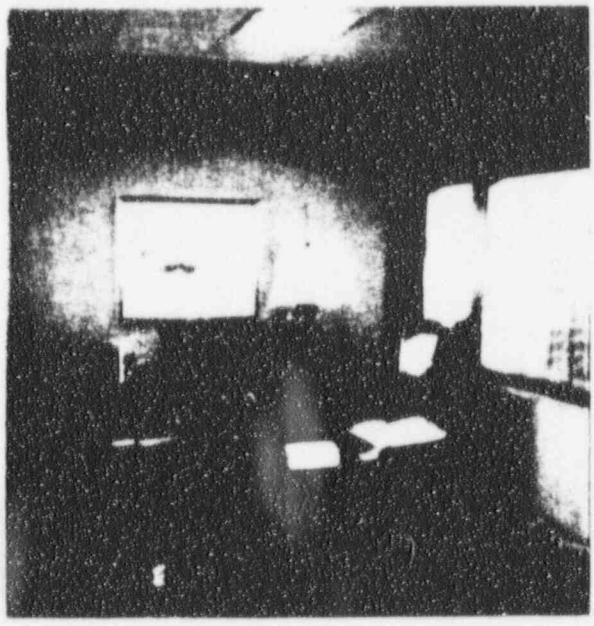
Attorney for Marvin B. Hobby

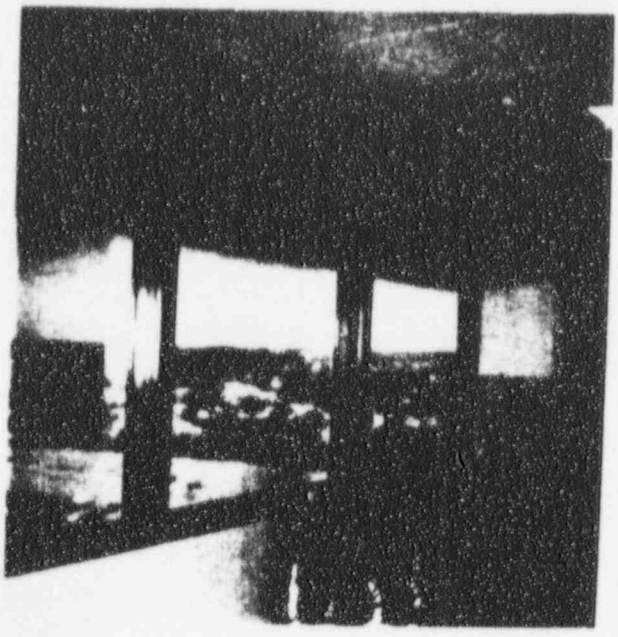
Dated: November 2, 1995

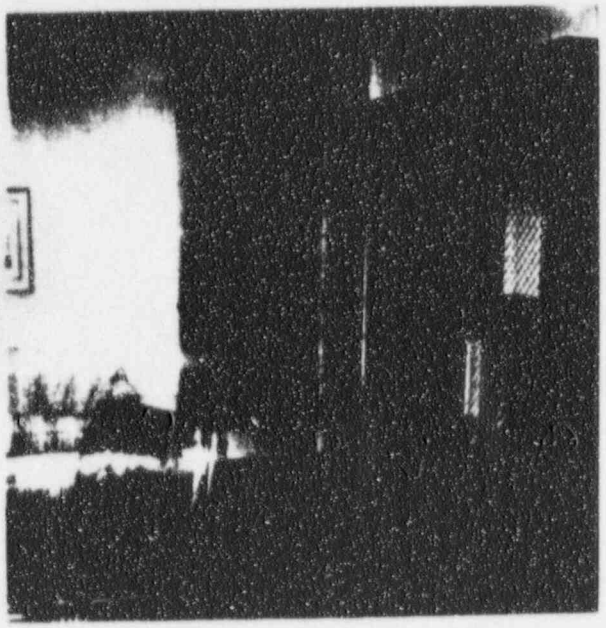
C:\FILES\521\NRC

ATTACHMENT 1

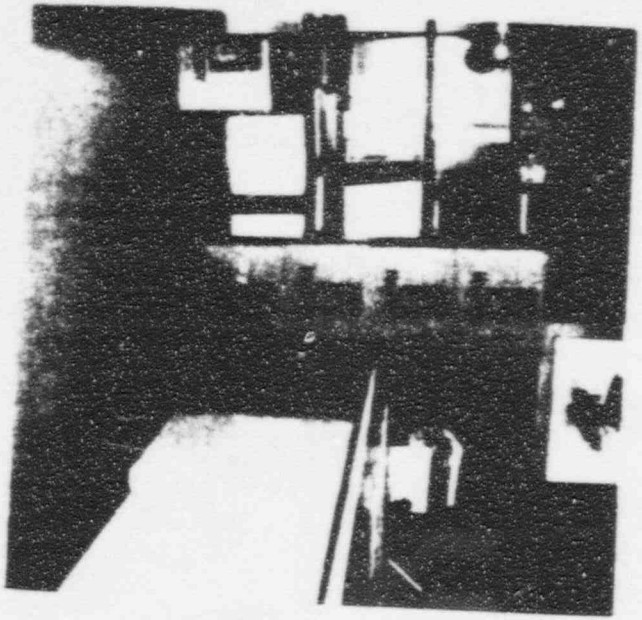


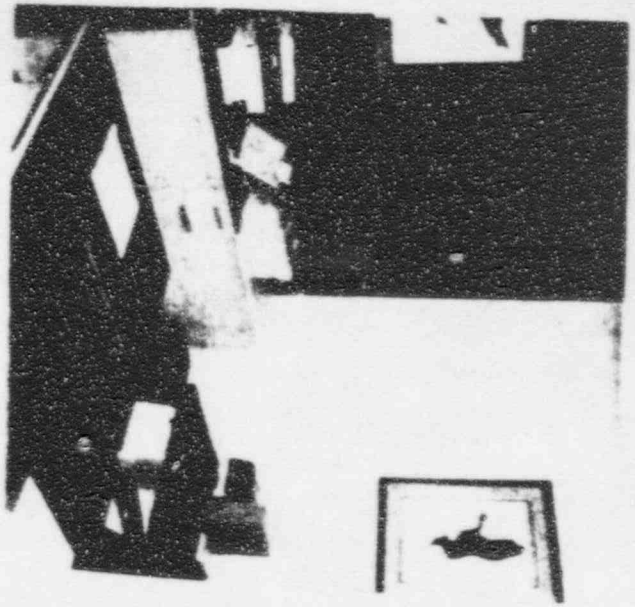


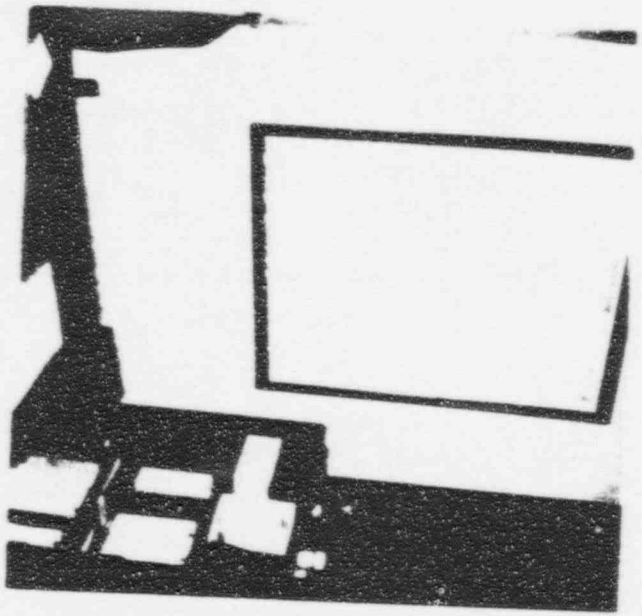




ATTACHMENT 2







ATTACHMENT 3

The following comments were made to me by T.C. Williams. As a voting participant in the February 8, 1990 PRB meeting William was asked:

1. Question: Understanding Mosbaughs concern over the use of the FAVA system, did you have any comments about putting the unit into service?

Answer: Williams began by stating that on the date of the meeting (2/8/90) there were actually two PRB meetings. He only attended the afternoon meeting. In the morning meeting there was a lot of detailed discussion of which he missed out on. Some of this discussion consisted of verifying pipe thickness, the need for schedule 80 pipe and if anyone had verified this. They also called the vendor and asked if the pipe was schedule 80 and he said it was. Another call was placed to Tom Quinn of Engineering and asked if he could verify this. Williams said at the time of voting while he was not knowledgeable of the details he had no comments. He said he was fairly knowledgeable of ...

with the FAVA system since he assisted Engineering in the writing of procedures for the units hydro test.

2. Question: At the time did you feel any undue pressure to force the vote early?

Answer: Williams answer was yes. He said at the time he was sitting right next to George Bockhold. Because of his presence Williams said he did not think there was "true candid discussion." He went on to say, had George not been there he would have probably voted NO. I asked why? Williams agreed with Mosbaugh in that the unit did not meet Regulator Guide criteria. I told him that I did not understand; that if he felt this way why then did he vote in favor of it's use? He explained that those items brought before PRB are reviewed from a safety and health standpoint. Considering this and the placement of impengement barriers he did not feel the safety and health of the public was at risk, resulting in a yes vote.

At this point in our discussion I felt it only proper to inform Williams that my asking these questions was at the request of George Bockhold and that a response was expected. Because of his response to my second question I asked if he preferred that I not tell him or wished to change his response. Williams seemed to be very honest and said no, that the general feeling was that George wanted to know the truth. In closing Williams said if George wanted to discuss this further with him that he had no reservations about this and willing to meet with him.

W. D. Lyon
2/23/90

ATTACHMENT 4

UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION II
101 MARIETTA STREET, N.W.
ATLANTA, GEORGIA 30323

Exhibit 83, page 1 of 1

NOV 01 1991

Docket Nos. 50-424, 50-425
License Nos. NPF-68, NPF-81

Georgia Power Company
ATTN: Mr. W.G. Hairston, III
Senior Vice President -
Nuclear Operations
P. O. Box 1295
Birmingham, AL 35201

Gentlemen:

SUBJECT: VOGTLE SPECIAL TEAM INSPECTION REPORT NOS. 50-424,425/90-19
SUPPLEMENT 1

This refers to the inspection conducted by a Special Inspection Team on August 6 through 17, 1990. Previous correspondence associated with this inspection was transmitted to you on January 11, 1991. As discussed in the Inspection Summary of that document, the results of the allegation followup team would be the subject of separate correspondence. This report includes, in part, the results of that followup team. The inspection included a review of activities authorized for your Vogtle facility. At the conclusion of the inspection, these findings were discussed with those members of your staff identified in the enclosed inspection report.

Areas examined during the inspection are identified in the report. Within these areas, the inspection consisted of selective examinations of procedures and representative records, interviews with personnel, and observation of activities in progress.

The inspection teams' review of the allegations identified several additional weaknesses in operational polices and practices. These are identified in the inspection summary of the enclosed inspection report.

The inspection findings indicate that certain activities appeared to violate NRC requirements. The apparent violation associated with failure to provide accurate information to the NRC during the inspection is under consideration for escalated enforcement action. Accordingly, a Notice of Violation for this issue is not being issued at this time, and a response to this subject is not required. However, please be advised that the number and characterization of violations described in the enclosed Inspection Report associated with this subject may change as a result of further NRC review. You will be advised by separate correspondence of the results of our deliberations on this matter. We will contact you at a later date to arrange an enforcement conference to discuss this issue.

The additional violation described in this report, references to pertinent requirements, and elements to be included in your response are described in the Notice of Violation.

9111200033 2pp.

You are required to respond to this letter and Notice and should follow the instructions specified in the enclosed Notice when preparing your response to the violations. In your response, you should document the specific actions taken and any additional actions you plan to prevent recurrence. After reviewing your response to this Notice, including your proposed corrective actions and the results of future inspections, the NRC will determine whether further NRC enforcement action is necessary to ensure compliance with NRC regulatory requirements.

In accordance with 10 CFR 2.790(a), a copy of this letter and its enclosures will be placed in the NRC Public Document Room.

The responses directed by this letter and the enclosed Notice are not subject to the clearance procedures of the Office of Management and Budget as required by the Paperwork Reduction Act of 1980, Pub. L. No. 96.511.

Should you have any questions concerning this letter, please contact us.

Sincerely,

Ellis W. Merschoff, Acting Director
Division of Reactor Projects

Enclosures:
1. Notice of Violation
2. NRC Inspection Report
   50-424,425/90-19,
   Supplement 1

cc w/encls:
R. P. McDonald
Executive Vice President-Nuclear
Operations
Georgia Power Company
P. O. Box 1295
Birmingham, AL 35201

C. K. McCoy
Vice President-Nuclear
Georgia Power Company
P. O. 1295
Birmingham, AL 35201

W. B. Shipman
General Manager, Nuclear Operations
Georgia Power Company
P. O. 1600
Waynesboro, GA 30830

(cc w/encls cont'd - see page 3)

that GPC did not have a basis for their statements and misrepresented the air quality in the licensees written response to the CAL, was not confirmed.

2.6 Reportability of Previous System Outages

An allegation indicated that VEGP failed to immediately notify the NRC as required by 10 CFR 50.72 when VEGP identified that both trains of the containment fan coolers (CFCs) had been previously inoperable at the same time on Unit 1.

Discussion

The inspection team's review of plant records indicated that this condition occurred when EDG #1A was declared inoperable when tape (used when the EDG was being painted) was found on the EDG fuel rack. The tape kept the fuel injector piston from moving and injecting fuel into the EDG. With EDG #1A inoperable, the equipment associated with the Train A was also inoperable. In the process of investigating the installation of the tape, VEGP identified that this condition existed during a period when the Train B containment fan coolers were also in a degraded condition for maintenance.

During the performance of Surveillance Procedure 14623-1, Train B containment fan cooler (CFC) 1-1501-A7-003 failed to start in slow speed. LCO 1-90-560 was initiated at 1:15 a.m. on June 19, 1990, and maintenance on the CFC was initiated. The CFC was returned to operable status on June 19, 1990, at 2:15 p.m. Approximately 9 hours later [on June 19, 1990, at 11:59 p.m. (LCO 1-90-562)], EDG #1A was determined to be inoperable because the tape had been installed on the fuel rack. On July 17, 1990, VEGP issued LER 90-014 to identify the previously unrecognized violation of the LCO in accordance with 10 CFR 50.73.

Conclusion

Based upon the fact that VEGP did not become aware that both trains of CFCs were simultaneously inoperable until after the Train B CFC fan had been returned to service, the immediate notification requirements of 10 CFR 50.72 were not applicable. The allegation that VEGP failed to immediately notify the NRC upon discovery of the previously degraded condition of the CFCs was not confirmed.

2.7 Intimidation of Plant Review Board Members

An allegation indicated that PRB members were allegedly intimidated and pressured by the general manager in a PRB meeting. The meeting occurred in February 1990, to determine the acceptability of the safety analysis for the installation of the FAVA microfiltration system.

Discussion

As discussed in Section 2.1 of this inspection report, several safety evaluations were performed for the installation of a temporary modification which installed the FAVA microfiltration system. Discussions with PRB members indicated that during the review of these safety evaluations, various PRB members had expressed reservations on several occasions concerning the acceptability of the installation of the FAVA system.

Despite these reservations, the inspection team's review of the PRB Meeting minutes associated with this temporary modification identified few instances of the PRB members documenting their dissenting opinions. Specifically, PRB meeting 90-15 (dated February 8, 1990) documented one PRB member's negative vote and dissenting opinions regarding the acceptability of exempting the temporary modification from regulatory requirements and the adequacy of the system's safety evaluation. PRB Meeting 90-28 (dated March 1, 1990) indicated that information and issues regarding the FAVA system's safety analysis were presented to the PRB and that the general manager solicited written comments and questions from other members for resolution. The only other example was in PRB meeting 90-32 (dated March 6, 1990) which identified a dissenting opinion related to the acceptability of voting on the FAVA system installation when the PRB member who raised the initial questions and concerns on the operation of the FAVA system was not present.

Discussions with the PRB members indicated that during the various PRB meetings concerning the installation of the FAVA system, the PRB members felt intimidated and pressured by the presence of the general manager at the PRB meeting. The sworn testimony confirmed that on one occasion an alternate voting member felt intimidated and feared retribution or retaliation because the general manager was present at the meeting and the PRB member knew the general manager wanted to have the temporary modification approved. However, the testimony also indicated that the PRB member did not alter his vote and felt comfortable with how he had voted. In addition, the PRB member was not aware of any occasions on which he or any other PRB member had succumbed to intimidation or feared retribution.

The inspection team verified that the general manager was informed following this meeting that several PRB members viewed his presence as intimidating. As a result, on March 1, 1990, the general manager met with all PRB members to reiterate the member's duties and responsibilities. He specifically told the members that his presence at PRB meetings must not influence them and that alternates should be selected who would feel comfortable with this responsibility. He also addressed the difference between professional differences of opinion and safety or quality concerns, and their respective methods for resolution.

Conclusion

The inspection team concluded that in one case a PRB voting member felt intimidated and feared retribution because the general manager was present at the PRB meeting. However, this member stated that he did not change his vote in response to this pressure and the general manager met with the PRB to allay fears. Based on the testimony, the inspection team concluded that retribution did not occur. Nevertheless, this confirmed event and the absence of dissenting opinions in the PRB meeting minutes indicate that there was a potential for an adverse effect on open discussions at the meeting. The licensee needs to ensure that PRB members freely and openly express their technical opinions and safety concerns.

2.8 Personnel Accountability

As a result of several comments and questions by the licensed operators to the inspection team, the team reviewed the method used to rate the performance of the shift superintendents (SS) and unit shift supervisors.

Discussion

The operations manager stated that the SS reported directly to the operations manager and that he personally prepared their performance appraisals. The inspection identified that the SS reported to the Unit Superintendent (US), and that the US personally prepared the performance appraisals of the SS.

The personnel accountability system, first used in 1989, was a pay-for-performance methodology. Annual pay increases and a percentage of the Operations Department bonus were dependent on their ratings in accountability categories. Each accountability category was subdivided into performance categories. Most of the performance categories were based upon group performance. Once these are eliminated, any differential in pay will result from eight performance categories. Implementation of the plan in 1989 could result in up to an $8,000-a-year difference in bonus pay to a SS. The performance categories and their relative weights are:

-	Personnel safety	4.1%
-	Regulatory compliance	10.2%
-	ESFAS actuation	12.2%
-	Reactor trips	10.2%
-	MWO performance	4.1%
-	Special projects	8.2%
-	Personnel development	30.6%
-	Training	20.4%

Therefore, 51 percent will be associated with personnel development and training and 32.6 percent will be associated with the number of LERs, and violations [i.e., regulatory compliance (10.2 percent), ESFAS actuation (12.2 percent) and reactor trips (10.2 percent)].