



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

August 8, 1986

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

Dear Mr. Miller:

In your May 6, 1986 letter you advised that your firm had been retained to represent all past and present officers, managers, and employees of the Alabama Power Company "for all matters, formal and informal, that are related to the investigation being conducted ... at the Joseph M. Farley Nuclear Plant (FNP)." In addition, you requested that investigative interviews be scheduled through the offices of Balch & Bingham and proposed eight "terms and conditions" to govern the agency's investigation at the Farley plant.

In a letter to the Commission dated July 10, 1986 you supplemented your May 6 letter modifying one of the eight "terms and conditions" and adding at least one more.

As you know, the Nuclear Regulatory Commission is authorized under the Atomic Energy Act of 1954, as amended, to make such investigations as it deems necessary or proper to assist in its administration or enforcement of the Act. 42 U.S.C. § 2201(c). Under the regulations of the Commission, the Office of Investigations has been charged with the responsibility to conduct such necessary investigations. 10 CFR § 1.36(b). In response to the May 6 letter, we acknowledge that at the present time all interviews are voluntary, subject to the issuance of a subpoena. Moreover, absent an actual conflict of interest, we have no objection to your firm's presence during interviews of Alabama Power Company's officers, directors, and senior-level managers.

This office recognizes each interviewee's right to be accompanied by counsel of his or her free and informed choice, but looks with disfavor upon arrangements for attorney representation or interview documentation which have the clear potential to interfere with our ability to conduct a full, thorough, confidential, and effective investigation into alleged violations of Commission rules and regulations by licensees or their employees. The NRC's public health and safety mandate requires no less. In our view, the pre-investigation "terms and conditions" proposed by you, the apparent pre-selection of your firm by Alabama

Power to personally represent each of its employees individually, and your asserted multiple representation of all such employees, past and present, and the Alabama Power Company itself, presents a clear interference with the NRC's investigation and a potential conflict of interest. Accordingly, after consultation with our Office of the General Counsel, we have concluded that the wholesale subjugation of our investigation at the Farley plant to the conditions set out in your letters would frustrate the conclusion of an objective and comprehensive investigation. Our concern in this matter is heightened by your admission to Mr. Robert Burch, the OI field investigator assigned to this case, that information developed during the course of individual interviews will be immediately shared with the company and/or other potential interviewees.

In this regard, the Office of Investigation's position, arrived at in consultation with the Office of the General Counsel, on the "terms and conditions" proposed in your letter follows:

1. OI will conduct its interviews in the locations it deems the most appropriate for the resolution of the investigation. This may be either in the State of Alabama, or without. This may be either on or off the plant site and if onsite, either in the resident inspector's spaces or licensee-supplied spaces. If OI desires to use licensee-supplied spaces, OI will make a reasonable request for such accommodations. A conference room such as you mention would probably be suitable; however, an interviewee's desire for confidentiality/anonymity may dictate the interview location.
2. We do not object to the attendance of an attorney who represents the interviewee and does not represent the company. If Alabama Power Company wishes to retain independent counsel for its employees we certainly would not object.
3. In a voluntary (non-compelled) interview, OI will entertain reasonable requests by the interviewee for a third-party presence. But, as the purpose of the interview will be to determine the interviewee's personal understanding of events or circumstances, which may or may not be precisely the perception of other individuals, the addition of a technical expert in these circumstances would not be useful. Moreover, contrary to your assertion we do not anticipate that these interviews will be highly technical.

4. OI may elect to take no signed statement, but simply write up the results of the interview; seek a signed sworn or unsworn statement; or record the interview in a verbatim stenographic transcript. OI considers the significance and the complexity of the issues, among other things, in deciding the mode of recordation for a particular interview. Statements to be signed by interviewee are provided to the interviewee for review and signature, but normally not for retention (to protect the integrity of the investigation). Verbatim transcripts are normally not provided for review and correction, inasmuch as "accuracy" is the responsibility of the stenographer and either a tape recording or recorders' notes are available for backup.

OI will determine and make arrangements for the mode of recordation.

5. The record of the interview will be part of the official investigatory file. Its dissemination to other agencies or other entities will be in accordance with the law.

6. OI agrees that documents and things about which an interviewee is questioned will be identified and made part of the record. This is necessary to assure a clear and accurate record and obtain meaningful information. The interviewee will be given an opportunity to review the item during the course of the investigation.

7. OI agrees that questions must be material and relevant to the investigation, but the materiality will be solely determined by the investigator, not the witness, his attorney, or the attorney for Alabama Power.

8. OI agrees that attendance at a voluntary interview may be terminated by the interviewee at any time and for any reason. Obviously that would not be so if the person is present under compelled process.

9. OI will determine whether multiple interviews are appropriate.

Investigations, if they are to have any value to the government, the licensee, or the public must be conducted in a fashion which will insure that the integrity of the investigative results have not been compromised. In my judgment, many of your proposals would preclude such a result. In this regard the government has the obligation to

provide an environment of confidentiality for all witnesses which individuals may, independently, later elect to waive. Your proposals are not at all compatible with these goals.

We intend to continue with our investigation consistent with the terms stated in the letter. We continue to solicit the full and complete cooperation of the Alabama Power Company and its employees and managers assigned to the Farley plant. Please do not hesitate to contact us should you have any questions regarding this matter.

Sincerely,

Original signed by
B. B. Hayes

Ben Hayes, Director
Office of Investigations

bcc: OI Field Office Directors
OI:HQ Staff

Distribution:

s/f Farley NP

c/f

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NOTE: Fax to James Vorse, OI:RII--August 7, 1986

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BHays
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