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August 4, 1993

Mr. James Y. Vorse
Nuclear Regulatory Commission
Office of Investigations
Region II Field Office
101 Marietta Street, Suite 2900
Atlanta, GA 30323

Re: NRC Office of Investigations
Proposed Use of Polygraph Examinations

Dear Mr. Vorse:

This letter is written on behalf of this firm's client who has been interviewed by your Office, as well as clients of Messrs. Kirwan, Morris and Hendrix with their express permission. The purpose of this letter is to respond to your July 27, 1993 letters to Messrs. Lamberski, Kirwan, Morris and Hendrix and to explain why we have advised our clients to decline the request to subject themselves to polygraph examinations.

On July 20, 1993, Messrs. Larry Robinson, John Lamberski, and Arthur Dombay discussed your Office's desire to subject present or former Georgia Power Company employees, including a former employee who submitted allegations to the NRC, to polygraph examination. Mr. Robinson agreed to provide a letter memorializing your request, as you have done. Your letter states that the polygraph examination will be used to determine the "veracity" of prior compelled sworn testimony. In prior discussions your representative similarly indicated the belief that polygraph examinations would reliably detect "deception" on the part of the examinees. However, your representative was frank and forthright in discussions relative to his limited personal knowledge of such methods and, apparently, its limited historic use by OI.

Also, during this conversation, Mr. Robinson stated that the NRC's Office of Enforcement will weigh the decision of our clients, based on advice of counsel, not to subject themselves to these examinations. We suggest that the clients' decisions are of no factual or legal consequence, since no evidence supports the proposition that the physiological changes recorded during a polygraph examination are unique to "deception" and polygraph evidence, absent special situations which are not present in your investigation, is inadmissible in legal proceedings.

The legislative history of the Employee Polygraph Protection Act of 1988 and the statements of U.S. Department of Justice Manual (1989-2 Supplement) at Section 9-13.300 forcefully and convincingly put to rest the lay misperception that a polygraph can determine "deception" or "veracity." The legislative history of the 1988 Act's background states:

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There is little debate over the ability of these components of the polygraph instrument to accurately register these physiological changes [blood pressure, respiration patterns and electrical conductivity of the skin]. But there is no evidence to support that these physiological changes recorded during an examination are unique to deception. Anger, fear, anxiety, surprise, shame, embarrassment, and resentment are some of the physiological states which can cause identical changes. At best, the polygraph can claim to measure changes indicative of stress; but neither the machine nor the examiner can distinguish whether deception or another state of mind caused the stressed response with an acceptable degree of certainty. Despite the popular perception that the machine is a "lie-detector," most experts agree that it is not. In addition to the charted responses, most examiners base their conclusion on the conduct of the examinee, the natural inclinations of the examiner, and on statements made during the examination.

Senate Report 100-284 to P.L.100-347, pages 41-42.

Similarly, the Department of Justice in its Manual has stated its agreement with the following conclusion reached by the Committee on Governmental Operations of the U.S. House of Representatives:

There is no "lie detector." The polygraph machine is not a "lie detector," nor does the operator who interprets the graph detect "lies." The machine records physical responses which may or may not be connected with an emotional reaction - and that reaction may or not be related to guilt or innocence. Many, many physical and psychological factors make it possible for an individual to "beat" the polygraph without detection by the machine or its operator.

The consensus of the scientific and legal communities, then, is that these examinations lack scientific validity. The American Medical Association reportedly concluded that the polygraph can provide evidence of deception or honesty in a percentage of people that is "statistically only somewhat better than chance." Senate Report 100-284, supra at page 41. Thus, the evidentiary reliability of polygraph examinations is not based upon scientific validity and, accordingly, lacks trustworthiness.¹

The potential use of any polygraph results by the NRC's Office of Enforcement is highly questionable. While I obviously cannot speak to that Office's view of polygraphs, I can address the NRC's standard on admissible evidence. Only relevant,

¹ The Senate amendment originally proposed for the Employee Polygraph Protection Act of 1988 initially provided that employees or any prospective employee of a nuclear power plant could be polygraphed by licensees to determine honesty. Nevertheless, the U.S. House and Senate conferees did not adopt this exception to the general prohibition of employers' use of polygraphs, in job-related reviews. Finger-printing for unescorted personnel and a criminal history records check were believed "much more likely to provide accurate, verifiable information about an applicant than could be obtained from a lie detector test." House Conference Report No. 100-659, page 13.

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material, and reliable evidence is admissible in adjudicatory proceedings which address enforcement actions. 10 CFR § 2.743(c). As observed by the Department of Justice, the federal Court of Appeals which have considered the admission of unstipulated polygraph examinations have uniformly held the results as inadmissible. These legal realities, based on due process considerations rooted in our Constitution, underscore the inappropriateness of your request for polygraph examinations.

Your investigation has addressed in minute detail certain activities and events which occurred over three years ago. Mr. Robinson, personally, has been involved extensively in the NRC's review of this matter since the summer of 1990. Interviewees, in contrast, have not dedicated a substantial portion of their efforts over the last three years to this issue. It is only natural that recollections may not be as precise as at a time more proximate to these events². Moreover, Company employees are now privy to information and facts that they were not aware of in 1990. In answering questions today, it is impossible for them to separate their 1990 knowledge of events as occurred from knowledge possessed today and obtained over the past three years.

You have in your possession contemporaneous tape recordings of some relevant events or actions. From those tapes, and assuming a balanced review, reasonable inferences relative to intent can be drawn with respect to the allegation which you are reviewing. The general demeanor of certain witnesses can also be ascertained by statements in the relevant tapes retained by your Office, and in the other tapes, which OI apparently considers as irrelevant, previously provided to Georgia Power Company. The collection and review of this evidence is far more probative than any polygraph examination. Moreover, if evidence of "veracity" becomes pivotal in your agency's ultimate resolution of this matter, I respectfully suggest that further review by a different Office or forum is the appropriate method of determination, not polygraphs.

In closing, I renew Georgia Power Company's offer to provide Mr. Robinson with information, including documents and transcripts of portions of tapes which your Office apparently did not retain or transcribe, and which are material, reliable and relevant to your inquiry. For example, relevant information is contained on some of the 201 tape recordings provided to Georgia Power Company in October, 1991. The NRC returned the originals of the 201 tapes to Mr. Mosbaugh and apparently did not transcribe any of the conversations on those tapes. Also, a number of highly relevant documents were provided to the Incident Investigation Team in March and April, 1990. These contemporaneous documents should be carefully reviewed and weighed by your Office during your investigation, since both NRC and Georgia Power Company witnesses can not reasonably be expected to recall the fine level of detail sought by some of Mr. Robinson's questions.

² Without belaboring the point, the Office of Investigations consciously decided to forego interviews in 1991, based on "strategic and technical" considerations.

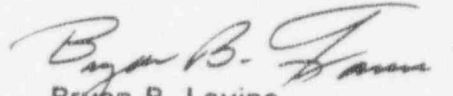
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Our clients look forward to an objective examination of all the evidence and a timely resolution of this matter. Please feel free to contact me at your convenience.

Very truly yours,


Bryan B. Lavine

BBL:cks

cc: Mr. Larry Robinson
Richard W. Hendrix, Esq.
Bruce H. Morris, Esq.
Bruce P. Kirwan, Esq.
Arthur H. Domby, Esq.
John Lamberski, Esq.

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