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October 14, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	Docket Nos. 50-424-OLA-3 50-425-OLA-3
GEORGIA POWER COMPANY, et al.	)	Re: License Amendment (Transfer to Southern Nuclear)
(Vogtle Electric Generating Plant, Units 1 and 2)	)	ASLBP No. 93-671-01-OLA-3

GEORGIA POWER COMPANY'S MOTION FOR LEAVE TO FILE A REPLY TO INTERVENOR'S RESPONSE TO GEORGIA POWER'S MOTION FOR SUMMARY DISPOSITION (ILLEGAL LICENSE TRANSFER)

Georgia Power Company ("Georgia Power") moves the Licensing Board for leave to file a reply to Intervenor Allen L. Mosbaugh's Response to Georgia Power Company's Motion for Summary Disposition of Intervenor's Illegal Transfer of License Allegation, dated October 4, 1994 ("Intervenor's Response"). Intervenor's Response is deficient for a number of reasons and Georgia Power believes good cause exists for the Licensing Board to waive the prohibition of 10 C.F.R. § 2.749(a) against the filing of a reply to Intervenor's Response.

Intervenor's Response is based on a misstatement of the law applicable to determining whether a prohibited transfer of control under the Atomic Energy Act and NRC regulations has occurred. Rather than presenting to the Board the proper legal standard and applying it to the facts of this case, Intervenor sets-up a legal standard by inappropriate reference to non-NRC case law. (Apparently, Intervenor believes the incorrect

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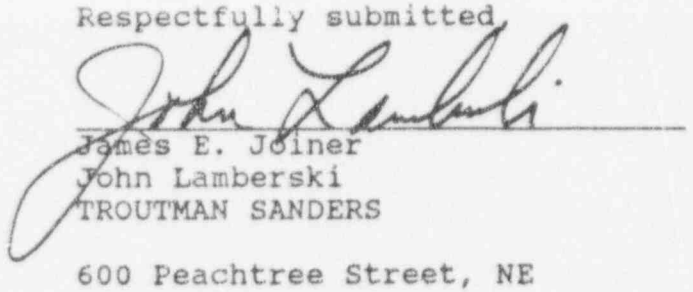
standard better suits his needs.) Intervenor's Response then recites numerous allegations -- repeating them more than once in most cases -- which he claims raise an inference that Georgia Power illegally transferred control of the Plant Vogtle operating license.

As a result, and because Intervenor has failed to comply with the requirements of 10 C.F.R. § 2.749, his Response is misleading. Georgia Power's Reply to Intervenor's Response attempts to bring back into focus the real issue to be decided by the Board. Georgia Power hopes, thereby, to assist the Board in wending its way through the morass created by Intervenor's Response.

Georgia Power further believes that its reply brief will facilitate the resolution of the illegal license transfer issue consistent with the Board's prior statements to the parties concerning alternative procedures for resolving this issue. Tr. 616. Also, in the interest of preserving the schedule established by the Board on this matter, Georgia Power is attaching its reply brief to this motion.

For the reasons stated above, Georgia Power Company moves the Licensing Board for leave to file Georgia Power Company's Reply to Intervenor's Response to Georgia Power's Motion for Summary Disposition (Illegal License Transfer)," dated October 14, 1994 and attached hereto.

Respectfully submitted,



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Dated: October 14, 1994

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GEORGIA POWER COMPANY'S REPLY TO
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MOTION FOR SUMMARY DISPOSITION (ILLEGAL LICENSE TRANSFER)

Georgia Power Company ("Georgia Power") hereby replies to Intervenor Allen L. Mosbaugh's Response to Georgia Power Company's Motion for Summary Disposition of Intervenor's Illegal Transfer of License Allegation, dated October 4, 1994 ("Intervenor's Response"). Intervenor's Response is deficient for several reasons.

First, the Response attempts to create a boundless legal standard of "involvement" for the Licensing Board to apply. Such a standard ignores the straightforward inquiry established by NRC precedent, which defines "control" as decision-making authority over corporate policy and the direction of licensed activities.

Second, the Response fails to address "Georgia Power's Statement of Material Facts as to Which There is No Genuine Issue to be Heard Regarding Intervenor's Illegal Transfer of License Allegation," dated August 24, 1994 ("Material Facts"). In so doing, Intervenor conveniently ignores the uncontroverted

evidence, presented in Georgia Power's filing and confirmed by the NRC Staff in its filing, of what the "SONOPCO project" was, and who within the project exercised control over licensed activities at Plant Vogtle.

Third, Intervenor's Response fails to set forth specific facts showing that there is a genuine issue of material fact. The Response presents a hodgepodge of allegations concerning matters which are not probative of the key factual issue which Intervenor seeks to raise -- whether Mr. Joseph Farley exercised decision-making authority over the NRC-licensed activities at Plant Vogtle.

Fourth, Intervenor's allegations are insufficient to establish a need for a hearing to determine whether the operating license was illegally transferred from Georgia Power to Mr. Farley. To establish the need for a hearing, Intervenor requests that the Board accept as reasonable "inferences" of a transfer of control to Mr. Farley solely on the basis of Mr. Farley's involvement with and discussions concerning the SONOPCO Project. However, the "inferences" are unreasonable leaps of logic and extrapolations which are not supported by Intervenor's evidence and would not be reasonable given that (1) authority to determine the policy of Georgia Power and to direct activities under the Plant Vogtle operating license was vested in and exercised by the nuclear officers of Georgia Power through formal action of the Georgia Power Board of Directors, and (2) such authority was never ceded or transferred to, or exerted by, Mr. Farley.

Georgia Power shows that, in light of the Material Facts and considering the "evidence" presented by Intervenor, no hearing is warranted on the factual basis of Intervenor's contention.

Significantly, Intervenor concedes that there was no direct evidence of delegation to, or exercise of authority by, Mr. Farley. Indeed, Intervenor's chief witness, Mr. Marvin Hobby, has admitted on several occasions that he has no personal knowledge of any events demonstrating that Mr. Farley was in control of licensed activities at Plant Vogtle. Intervenor's litany of examples contains not a single instance in which Mr. Farley, or others outside the Georgia Power nuclear operations chain-of-command, gave instructions to those officers regarding nuclear operations or otherwise directed licensed activities.

Notwithstanding the quantity of argument presented in his Response, Intervenor has failed to show that the factual record, considered in its entirety, is enough in doubt so that there is a reason to hold a hearing to resolve the issue. See Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-46, 18 N.R.C. 218, 223 (1983). Therefore, Georgia Power's Motion for Summary Disposition of Intervenor's Illegal Transfer of Licenses Allegation, dated August 24, 1994 ("Motion for Summary Disposition"), should be granted as there is no genuine issue of material fact to be heard.

I. DISCUSSION.

A. INTERVENOR ADVANCES A LEGAL STANDARD AT ODDS WITH NRC PRECEDENT.

As explained in Georgia Power Company's Motion to Strike Intervenor's Response to Georgia Power's Motion for Summary Disposition, dated October 14, 1994 ("Motion to Strike"), Intervenor has failed to advise the Board of the NRC case law concerning the prohibition against unauthorized transfers of control. Intervenor cites Safety Light Corporation (Bloomsburg Site Decontamination), ALAB-931, 31 N.R.C. 350, 364 (1990), in support of his argument that "recourse to federal case law interpreting Section 310(d) of the Federal Communications Act is appropriate." Intervenor's Response at 39 n.36. Intervenor then directs the Board to decisions of the Federal Communications Commission ("FCC") and the Securities and Exchange Commission ("SEC") as the appropriate source for standard of law to apply in this case. However, Intervenor failed to mention that the Safety Light Board set forth the applicable factors to consider in determining whether a prohibited transfer of control of an NRC materials license had occurred.[1/] After noting that the literal language prohibiting transfers of control in the FCA and the AEA is different, the Board held that its decision should be based on

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[1/] Intervenor also failed to mention that the language of the Federal Communications Act ("FCA") differs from the language of the Atomic Energy Act ("AEA"). Section 310(d) of the FCA prohibits "transfer of control of [the] corporation holding [the] ... license" whereas Section 184 of the AEA prohibits "transfer of control of [the] license."

> the plain meaning an[d] practical application of the terms of [the inalienability ... use of the Atomic Energy Act] themselves. Stated otherwise, the appropriate inquiry is whether, in reality, the 1982 sale of Safety Light or the 1980 restructuring of U.S. Radium effected, either directly or indirectly, a transfer of control of the [materials] licenses issued to U.S. Radium, as the concept of control is generally understood.[46]
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> [46] A shareholder is deemed to have control of a corporation "when she [or he] determines corporate policy, whether by personally assuming management responsibility or by selecting management personnel. In re N&D Properties, Inc., 799 F.2d 726, 732 (11th Cir. 1986). The authority to make the crucial policy determinations thus being the pivotal factor, it would appear to follow, as a general matter, that control of a license is in the hands of the person or persons who are empowered to decide when and how the license will be used.

Safety Light, ALAB-931, 31 N.R.C. at 364-65 (emphasis in original) (footnote in original).

Further, in addressing the differences between a Part 30 materials license and a Part 50 operating license, the Safety Light Board said:

> [A]lthough there are obvious differences between Part 30 and Part 50 licenses ... none of those differences is pertinent to the matter of where "control" of the license lies within the meaning of the Atomic Energy Act and the implementing regulations. In the instance of a corporate Part 30 or Part 50 licensee, that control is to be found in the person or persons who, because of ownership or authority explicitly delegated by the owners, possess the power to determine corporate policy and thus the direction of the activities under the license.

Safety Light, ALAB-931, 31 N.R.C. at 367 (emphasis added).

Accordingly, the crucial indicia of "control" over licensed activities with respect to Plant Vogtle, is ownership, or authority explicitly delegated by the owners, to determine corporate policy and the direction of the activities under the

license. Intervenor's Response ignores this critical holding of the Safety Light case -- something he should have disclosed to the Board. Instead, Intervenor attempts to steer the Board incorrectly in the direction of FCC and SEC case law, which Intervenor apparently views as more likely to achieve his desired result.

B. GEORGIA POWER OFFICERS, WHO HAD BEEN EXPLICITLY DELEGATED AUTHORITY, POSSESSED AND EXERCISED THE POWER TO DETERMINE CORPORATE POLICY AND THE DIRECTION OF ACTIVITIES UNDER THE PLANT VOGTLE LICENSE.

Georgia Power's Motion for Summary Disposition establishes through the affidavits of key Georgia Power officers that control over licensed activities during the relevant time period was vested by formal action of the Georgia Power Board of Directors in the Vice President - Plant Vogtle, Mr. McCoy, who reported directly to the Senior Vice President - Nuclear Operations, Mr. Hairston, who reported directly to the Executive Vice President - Nuclear Operations, Mr. McDonald, who reported directly to the CEO of Georgia Power, initially Mr. Scherer and then Mr. Dahlberg. Georgia Power Summary Disposition Motion at 12-14; Material Facts at ¶¶ 7-10. These persons decided when and how the license would be used. The NRC Staff, from first hand observation and experience at the Plant and through inspections of Georgia Power's nuclear organization, has confirmed Georgia Power's Material Facts.

Because Intervenor's Response fails to controvert Georgia Power's Statement of Material Facts, it should be deemed admitted by the Board. See 10 C.F.R. § 2.749(a).[2] By ignoring the NRC's rule in this regard, the Intervenor has also avoided narrowing any factual issues which are allegedly disputed. Thus, Intervenor essentially compels the Board to wrestle with argument, allegation and testimony without correlation to Georgia Power's Material Facts. Georgia Power suggests that the starting point of the Board's analysis should be the admitted Material Facts, and that review of those Facts demonstrates the continued control of Georgia Power over licensed activities.

C. INTERVENOR'S "EVIDENCE" FAILS TO DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER MR. JOSEPH FARLEY POSSESSED OR EXERTED THE POWER TO DETERMINE CORPORATE POLICY AND THE DIRECTION OF ACTIVITIES UNDER THE PLANT VOGTLE LICENSE.

Because Intervenor's Response fails to follow NRC rules, the Board must parse argument from fact, actual testimony from mischaracterized summation, and speculation from facts supported by testimony. Georgia Power's Motion to Strike attempts to identify the major misstatements and omissions in Intervenor's Response. Given that Intervenor's counsel is selecting portiors of depositions taken over six years -- many of them of the same

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[2] Intervenor's Response is also deficient because it was not accompanied by "a separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard." See 10 C.F.R. § 2.749(a); Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 N.R.C. 1245, 1259 (1982).

witnesses covering the same or similar topics -- additional sophistry no doubt has gone undetected. Georgia Power urges the Board to review carefully the underlying facts cited in Intervenor's Response in their entirety, without regard to Intervenor's tortured "spin" on them. Such a review will reveal that, while Mr. Farley was involved with the SONOPCO Project, his level of involvement falls far short of having decision-making authority over licensed activities.

Georgia Power has always acknowledged that Mr. Farley was "involved" with guiding the formation of Southern Nuclear. As Mr. Addison noted in his September 21, 1988 memorandum, Mr. Farley's leadership and insight were of immeasurable value.[3] Similarly, Georgia Power expressly informed the NRC of Mr. Farley's involvement in Southern Nuclear. Stip. 18, Exhibit 17 and Exhibit 19 at 27-28. Mere involvement with a licensee, however, is not the same as exertion of control over licensed activities.[4]

Rather than address Georgia Power's control as set out in the Material Facts, including the actions of various officers, managers and employees of Georgia Power who in reality did exert authority over day-to-day nuclear operations, Intervenor attempts

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[3] See Exhibit 10 to Stipulations Relating to Allegations of Illegal License Transfer, dated August 1, 1994 (hereinafter "Stip.").

[4] The day-to-day decisions of licensees necessarily involve the advice of outside experts, including reactor vendors, architect engineers, service companies, consultants, and so forth.

to demonstrate that Georgia Power was "excluded" from certain discussions or "lost" control of its Nuclear Operations department. For example, Intervenor quotes at length from the December, 1988 testimony of Mr. Robert Scherer, a former CEO of Georgia Power. Response at 14-15 and 21-22. That testimony actually supports the position taken in Georgia Power's Motion and set out in the Material Facts: the corporate general office staffs of Georgia Power and Alabama Power nuclear operations departments with some Southern Company Services personnel were consolidated in Birmingham in one central location with the responsibility of operating the nuclear plants of Georgia Power and Alabama Power. The Southern Nuclear Operating Company did not then exist, but would be responsible for the operation of the plants when, after requisite approval, it was incorporated.

Intervenor's only "evidence" in this regard is grounded in contortions of the testimony of Georgia Power witnesses which he has elicited over the years in his campaign against the Company.[5/] A favorite tactic of Intervenor has been to question Georgia Power witnesses repeatedly over a period of years on the same, or similar, questions and then contrast the differences in the testimony in an effort to convince the fact-finder that the

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[5/]Intervenor, Mr. Allen Mosbaugh, was employed at Plant Vogtle during the relevant time frame and never even visited the Georgia Power nuclear operations office in Birmingham. Intervenor's only witness that Mr. Farley directed Mr. McDonald concerning licensed activities, Mr. Hobby, has admitted that he has no personal knowledge of a single instance in which Mr. McDonald took his management direction from Mr. Farley. Hobby DOL Trial Tr. 239; Hobby Dep. at 50; Stip. 41(d).

witnesses should not be believed because their testimony does not "square" with prior statements.[6] As shown in Georgia Power's Motion to Strike, a review of the fuller text of these statements typically reveals that the question posed, as well as the answer given, is different. As set forth in Georgia Power's Motion to Strike, the credibility of Georgia Power witnesses cannot be called into question based on Intervenor's mischaracterizations and selective quotations of their testimony.

D. A HEARING IS NOT REQUIRED TO WEIGH COMPETING INFERENCES FROM THE EVIDENCE, AS NO REASONABLE INFERENCE CAN BE DRAWN FROM THE EVIDENCE THAT MR. FARLEY EXERCISED DECISION-MAKING AUTHORITY OVER PLANT VOGTLE OPERATIONS.

Intervenor's Response fails to show that the factual record, considered in its entirety, is enough in doubt so that there is a reason to hold a hearing to resolve the issue. Therefore, there is no genuine issue of material fact to be heard. See Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-46, 18 N.R.C. 218, 223 (1983).

For literally years, Intervenor's counsel has undertaken exhaustive discovery on the issues raised by the illegal license transfer allegation. Thousands of documents have been produced by GPC. Multiple depositions of Messrs. Scherer, Farley, Dahlberg, McDonald, Hairston and McCoy have been taken. The same questions have been asked over and over again. If there is

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[6] Given the number of witnesses Intervenor has questioned and number of times he has been able over the years to ask the same questions of the same witnesses, the fact that some inconsistencies in testimony exist is not surprising.

anything that can be said without contradiction in this case, it is that Intervenor's counsel has had ample opportunity to delve into the exercise of authority by these individuals over licensed activities at Plant Vogtle.

Intervenor now asks the Board to hold a hearing which Intervenor will undoubtedly attempt to stretch into a two or three-week parade of current and former GPC officials -- ostensibly to weigh competing inferences from the well documented evidence. Yet, there are no competing inferences to weigh, as Intervenor's proffered "evidence" fails to show that Mr. Farley made any decision affecting Plant Vogtle operations, or even that he impermissibly influenced a decision concerning licensed activities. At most, Intervenor has established only that Mr. Farley was aware of, or participated in discussions regarding matters concerning the operation of the nuclear plants. The Board should consider the following:

- Mr. Farley met with other Southern System executives to discuss matters concerning the operation of GPC's nuclear plants, but no action affecting the plants was taken by that group.
- Mr. Farley attended weekly staff meetings for the purpose of receiving information, but he gave no management direction concerning the plants in those meetings.
- Mr. Farley was asked for his opinion regarding certain personnel decisions, but the individuals in question

were ultimately selected by their respective Boards of Directors.

- Mr. Farley may have reviewed and "blessed" preliminary GPC nuclear operations budgets, but he did not approve or set them; those matters were decided by GPC executives.
- Mr. Farley discussed outage philosophy for Plant Vogtle with Georgia Power officers, but did not establish it.

What is conspicuously absent from Intervenor's proffered evidence is a showing that Mr. Farley improperly exerted decision-making authority over these or any other licensed activities at Plant Vogtle.

Intervenor cannot be permitted to equate mere involvement with control, as this approach is not supported by either the Safety Light case or the other authority relied upon by Intervenor. Even the FCC opinions and decisions cited by Intervenor predicate a finding of "control" not on a mere involvement (such as consulting), but on an improper delegation of actual decision-making authority over licensed activities. See e.g., Phoenix Broadcasting, 44 F.C.C. 2d 838 (1973) (prospective purchaser of an interest in a broadcast station planned to change the entire news format of the station and was to become "intimately involved in the programming and the commercial operation of the station and the hiring and firing of [station] personnel. . . ."). Mr. Farley's role in assisting in the prospective Southern Company nuclear subsidiary was limited

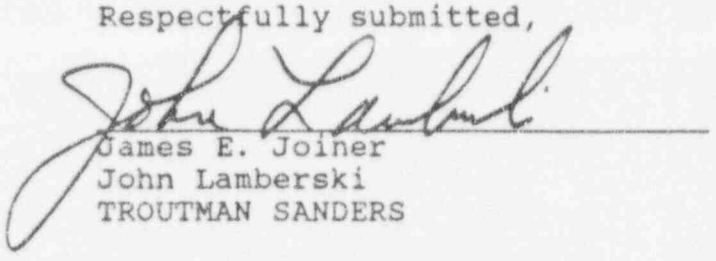
to providing advice and consultation in the formation of the new subsidiary; Messrs. McDonald and Hairston, both of whom were GPC officers, remained responsible for decisions affecting operations at Plant Vogtle.

In short, Intervenor's argument simply strains the bounds of reasonableness. If Mr. Farley's involvement were sufficient to establish an illegal transfer of control (which it is not), then utilities who rely on experts, including reactor vendors, architect/engineers, and their own service companies, run the risk of violating the Act's inalienability clause. Such a result is inconsistent with the mission of the NRC and the Atomic Energy Act to protect the public health and safety. Decisions by corporate officers, in particular by those whose responsibilities include the operation of nuclear plants, should be made with the full benefit of the industry's best available expertise.

II. CONCLUSION.

Based on the foregoing reasons, Georgia Power's Motion for Summary Disposition of Intervenor's Illegal Transfer of Licenses Allegation, dated August 24, 1994, should be granted as there is no genuine issue of material fact to be heard.

Respectfully submitted,



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Dated: October 14, 1994

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(Vogtle Electric Generating Plant, Units 1 and 2)	)	ASLBP No. 93-671-01-OLA-3

CERTIFICATE OF SERVICE

I hereby certify that copies of "Georgia Power Company's Motion for Leave to File a Reply to Intervenor's Response to Georgia Power Company's Motion for Summary Disposition (Illegal License Transfer)," dated October 14, 1994, and "Georgia Power Company's Reply to Intervenor's Response to Georgia Power's Motion for Summary Disposition (Illegal License Transfer)," dated October 14, 1994, were served by deposit with an express mail delivery service, and by facsimile where indicated with an asterisk, upon the persons listed on the attached service list, this 14th day of October, 1994.

John Lamberski

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