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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair
Dr. James H. Carpenter
Thomas D. Murphy

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

INTERVENOR'S REQUEST TO STRIKE NRC STAFF'S RESPONSE TO
SUMMARY DISPOSITION OF THE ILLEGAL LICENSE TRANSFER ISSUE

On October 3, 1994, NRC Staff filed its Response in Support of Georgia Power Company's Motion for Summary Disposition of the Illegal License Transfer Issue ("Staff's Response"). This filing is defective and based on incompetent and inadmissible evidence. As a result, Intervenor respectfully requests that Staff's Response and the affidavit jointly submitted by Frederick R. Allenspach and Darl S. Hood be stricken for the reasons stated below.

I. AFFIANTS ARE INCOMPETENT

Staff failed to follow the requirements pertaining to the submission of an affidavit. The rules governing this proceeding provide:

Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein...

10 C.F.R. §2.749(b).

The affidavit submitted by Staff should be stricken in its entirety because the affiants have no first hand knowledge of any facts occurring between 1988 and 1990 and, as such, the affiants are incompetent to testify about any matters occurring between 1988 and 1990.

With respect to events occurring after 1990, the Affiants have first hand knowledge of two events, a "visit" to the Vogtle site on September 28, 1994 and a second "visit" to "corporate headquarters" in Birmingham, Alabama on September 29, 1994. See Affidavit at ¶26. The stated purpose of this visit was to discover evidence pertaining to this proceeding. On-site inspection is governed by 10 C.F.R. §2.741. Conducting an on-site inspection after the close of discovery is improper. Not only did this inspection occur after discovery was terminated by this Board, but neither NRC Staff nor GPC advised Intervenor that such an inspection was to occur.¹ Moreover, the inspection

¹ The purpose of a discovery cutoff date is to protect the parties from the continuing burden of producing evidence and to assure them adequate time to prepare immediately before trial. Whittaker Corp. v. Execuair Corp., 736 F.2d 1341 (1984 CA9 Cal).

itself was incompetently performed. Staff failed to inspect Georgia Power's Atlanta, Georgia corporate headquarters, where it's president and chief executive officer reside. Intervenor cannot fathom how Staff can determine the reporting relationship without visiting GPC's Atlanta headquarters.²

II. THE AFFIDAVIT REPRESENTS AN ATTEMPT BY STAFF TO PRESENT AN EXPERT OPINION BY NON-EXPERT WITNESSES

The Affidavit on page 4 is headed "Staff Position" and paragraphs seven through 28 draw inferences and conclusion from quoted segments of depositions taken in this proceeding. Placing Staff's position in an affidavit makes it no more or less accurate and does not comply with the requirements of an affidavit set out in 10 C.F.R. §2.749. Moreover, the affiants do not qualify as experts in the field of license transfer and cannot give "expert" testimony in this area. Neither Mr. Allenspach nor Mr. Hood have any discernable expertise concerning corporate functioning of a utility holding company and its subsidiaries, nor do they have any expertise with respect to

² In 1990 Intervenor and Marvin Hobby filed a 10 C.F.R. §2.206 petition concerning, inter alia, the illegal transfer of control. NRC Staff never investigated the allegation; never conducted an interview of any witnesses; never even contacted Mr. Hobby or his counsel after the §2.206 petition was filed to obtain additional information. Moreover, Mr. Hobby made specific allegations that Mr. McDonald had lied under oath concerning matters relating to license transfer, yet NRC Staff never conducted an investigation of this matter. NRC Staff could have produced a competent witness if it bothered to ever investigate the §2.206 petition, but Staff's failure to do so precludes Staff from relying on the testimony of the affiants.

license transfer matters before NRC or any other forum, such as the Federal Communication Commission or the Securities and Exchange Commission. They are essentially engineers; they have never held executive positions within a corporation and otherwise seem to have no knowledge or expertise concerning the organic functioning of a corporation or the laws pertaining to the operation of corporations or of a public utility holding company. Staff's failure to set forth the legal standards concerning license transfer renders Staff's interpretation of events meaningless and further demonstrates the total lack of expertise on the part of the affiants.³

III. NRC STAFF DID NOT DISCLOSE ITS EXPERT WITNESSES

A party must disclose to the other parties the identity of any person who may be used at trial to present expert opinion evidence under FRE 702, 703, or 705. Fed.R.Civ.P. 26(a)(2)(A). The disclosures of expert testimony must be made at the times and in the sequence directed by the court. Fed.R.Civ.P. 26(a)(2)(C).

When a party does not designate a person as an expert witness the court may refuse to hear the testimony of that witness. Prentiss & Carlisle v. Koehring-Waterous, 972 F.2d 6, 8 (1st Cir. 1992). The court in Prentiss held that while the employee of the defendant was listed as a witness, opposing

³ Intervenor is very concerned by Staff's inability to cite to relevant NRC or any other case law (e.g., Safety Light Corp. (Bloomsburg Site), LEP-90-7, 31 N.R.C. 116 (1990)). Staff's (and GPC's) failure to provide any case law is such an obvious flaw that Intervenor is concerned that the exclusion was intentional rather than inadvertent.

counsel did not have notice he was to give expert opinion evidence because he was not designated as an expert witness. Id. The witness, in performing and describing certain tests and their results, relied on knowledge in a technical area beyond an ordinary person's understanding and was therefore testifying as an expert. Prentiss, 972 F. 2d at 9; See also Rosemount, Inc. v. Beckman Instruments, Inc., 727 F.2d 1540, 1549 (Fed. Cir. 1984) (affirming district court's refusal to allow witness not listed as expert to testify concerning tests of a product involved in patent litigation).

In a more recent case, Chakales v. Hertz Corp., 152 F.R.D. 240 (N.D.Ga. 1993), the court refused to allow testimony of the plaintiff's medical services providers because they were not designated as experts. The plaintiff argued that since the providers were listed as fact witnesses the defendant's had notice of forthcoming expert testimony by these witnesses. Chakales, 152 F.R.D. at 242. Citing to Prentiss the court stated "Contrary to plaintiffs' position...all experts must be identified as such in adequate time for the opposing party to act upon the information." Id. (emphasis supplied).

At no time prior to October 4, 1994 did the NRC Staff designate Mr. Hood or Mr. Allenspach as expert witnesses. Accordingly, based on the Federal Rules of Civil Procedure and the supporting case law, their testimony should be excluded and

their affidavit stricken.⁴ This is particularly so inasmuch as Intervenor has been severely prejudiced by the last minute designation of these witnesses as experts. This prejudice stems not only from the lack of notice but also from the fact that the experts, in their affidavits, rely on "visits" or inspections of Licensee's premisses which were conducted after the close of discovery and without the notification of Intervenor to enable his presence and participation in such an inspection.⁵

Conclusion

For the foregoing reasons, Intervenor respectfully request that Staff's Response, including the affidavit, be stricken in its entirety.

Respectfully submitted,



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Dated: October 13, 1994

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⁴ At a later date should NRC Staff designate either individual as an expert, Intervenor would have the right to depose these individuals in their capacity as an expert at that time.

⁵ Intervenor and the Board should have received some form of notice that such an inspection was contemplated. Intervenor is troubled by Staff's actions.

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Re: License Amendment
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CERTIFICATE OF SERVICE

I hereby certify that INTERVENOR'S REQUEST TO STRIKE NRC STAFF'S RESPONSE TO SUMMARY DISPOSITION OF THE ILLEGAL LICENSE TRANSFER ISSUE was served via first class mail on October 13, 1994 upon the persons listed in the attached Service List; and that additional copies were served via facsimile that same day on persons identified with ("*").

By:

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