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October 26, 1994UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:  
Peter B. Bloch, Chair  
Dr. James H. Carpenter  
Thomas D. MurphyOFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

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 RESPONSE TO GEORGIA POWER'S MOTION  
TO STRIKE INTERVENOR'S RESPONSE TO SUMMARY DISPOSITION

## I. INTRODUCTION

On October 14, 1994, Georgia Power Company ("Georgia Power") filed a Motion to Strike Intervenor's Response to Georgia Power's Motion for Summary Disposition ("Motion"). This Motion is a thinly disguised reply to Intervenor's response to Georgia Power's summary disposition. Because 10 C.F.R. §2.749a prohibits the filing of a response, Georgia Power has employed the tactic of filing a motion to strike as a reply. The fact that the Motion is a reply is readily apparent by the first argument presented on page 3 of the Motion (Improper Legal Standard). A review of this argument and Intervenor's response set forth herein demonstrates that Georgia Power merely sought to set forth a legal argument to counter the fact which it failed to do in its opening brief. The fact that Licensee disagreed with Intervenor's legal argument does not provide a sufficient reason

to file a motion to strike. More troubling is that even in this Motion to Strike, Georgia Power's argument to strike Intervenor's legal analysis is itself misleading as demonstrated below.

Intervenor is also concerned by the tone of the pleading (i.e., accusing Intervenor's counsel of intentional misrepresentations). A review of this reply will demonstrate that the misrepresentations attributed to Intervenor were not made and the Board was not misled. In essence, Georgia Power has simply modified an old legal adage to suit its means: when weak on the facts, argue the law; when weak on law, argue the facts; and when weak on both attack the lawyer who points it out. Rather than admit that a genuine issue of fact and law exists and that the issue of improper transfer of control is ripe for hearing, Georgia Power, no doubt out of frustration, assails scurrilous accusations at Intervenor's counsel.

## **II. LICENSEE'S CLAIMS OF MISREPRESENTATION ARE FALSE**

Georgia Power's counsel apparently does not know the difference between facts and factual inferences. To obtain summary disposition, the Board must adopt factual inferences in favor of Intervenor. Licensee's counsel repeatedly refuses to allow Intervenor to draw inferences from factual information against Georgia Power because in its counsel's mind there is some support on the record for a different conclusion (and more often than not because Licensee's counsel misinterprets facts and fails to point out where the record is supportive of Intervenor).

Ultimately, Intervenor believes that Troutman Sanders knows its arguments are flawed. The most compelling evidence to support this conclusion is that Troutman Sanders has itself admitted on the record that, once the SONOPCO project was formed, there was no longer a nuclear operations under Georgia Power's control. This admission occurred during the course of a Section 210 proceeding brought by John Fuchko and Gary Yunker against Georgia Power in 1989 -- before the issue of illegal license transfer was raised by Mr. Hobby. During the course of the Fuchko and Yunker proceeding, Georgia Power was represented by Troutman Sanders attorney, Jesse P. Schaudies. See Hearing Transcript, Fuchko and Yunker, DOL Case Nos. 89-ERA-9 and 89-ERA-10 case, at p. 2 (January 3, 1989) (attached as Exhibit A). In his capacity as an officer of the court, Mr. Schaudies made a point of clarification on the record to the Administrative Law Judge (ALJ), stating that Georgia Power was no longer in control of its nuclear operations:

MR. SCHAUDIES:

Your Honor, as a point of clarification, there are no jobs other than one interface position which is held by Marvin Hobby that are nuclear jobs within Georgia Power that are not under the ambit of SONOPCO. Now, I say under the ambit of SONOPCO because technically the employees at Hatch and Vogtle are Georgia Power employees because of the delay in creating SONOPCO because of the lack of SEC approval. But those are jobs that are responsible back through the administrative and technical support offices of Southern Company Services which is under the SONOPCO project and located in Birmingham, Alabama. There is not a nuclear organization within Georgia Power any longer.

Hearing Transcript, Fuchko and Yunker, DOL Case Nos. 89-ERA-9 and 89-ERA-10 case, at pp. 316-317 (Exhibit A).<sup>1</sup>

Intervenor's factual inferences are adequately supported and, in fact, represent a logical, cohesive and compelling picture that Georgia Power lost control of its nuclear operations once The Southern Company established the SONOPCO project and vested it with the authority to operate Georgia Power's nuclear plants.

Below Intervenor responds to all of the assertions set out in Licensee Motion.

1. Georgia Power misleads the Board about the proper legal standards related to transfer of control of a license (I.B.1.)<sup>2</sup>

On pages 3-5, Georgia Power states in it's Motion that Intervenor misrepresented the legal standard concerning transfer of control of a license and that Georgia Power argues that Intervenor advances a legal standard at odds with NRC precedent

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<sup>1</sup> Mr. Schaudies' statement is consistent with the deposition testimony of Georgia Power's then Chief Executive Officer, Mr. Scherer, given during the course of the Fuchko and Yunker DOL proceeding. See Intervenor's Response to Georgia Power's Motion for Summary Disposition at pp. 21-22 ("Right now the relationship is that SONOPCO will operate the generating plants...[because it] exists in reality in Birmingham...with the responsibility of operating the nuclear plants of the various operating companies"); and pp. 15-16 ("executive management of the SONOPCO operation" had the responsibility to reorganize and staff Georgia Power's nuclear operations).

<sup>2</sup> Intervenor hereafter abbreviates part, section and subsection of the motion to strike in accordance with the following example: Part I, Section B, Subsection 1, as "I.B.1".



because the Safety Light case<sup>3</sup> is based on statutory language contained in the Atomic Energy Act ("AEA") which is different from the statutory language contained in the Federal Communications Act ("FCA"). What is most troubling is that Georgia Power's argument is based on an extensive quotation from the Safety Light case, but Georgia Power excluded from the excerpt key findings made in the Safety Light case which defeats Georgia Power's argument. GPC deleted the following key section of Safety Light which explains how the difference between the language in the AEA and FCA statutes should be resolved:

Had the intent been to make the reach of section 184 more limited than that of section 310(d) of the Communications Act (as the USR Companies would have it), the high probability is that this intent would have been disclosed in committee reports or in the debate on the House or Senate floor. This is especially so inasmuch as there is no cause to believe that Congress would have desired certain transfers of total ownership of licensed radio stations to require prior agency approval in circumstances where identical transfers of total ownership in corporations holding nuclear licenses would not require such approval. Indeed, given the manifest public health and safety implications of activities under nuclear licenses, it is reasonable to assume that Congress would have been even more interested in clothing this Commission with the authority to pass advance judgment on the acceptability of transactions such as those now in issue.

Safety Light, 31 N.R.C at 364 (emphasis supplied).

Essentially, Georgia Power intentionally ignored the Appeals Board's holding that public health and safety concerns at nuclear power plants require stricter prohibitions against transfer of

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<sup>3</sup> Safety Light Corp. case, (Bloomsburg site), ALAB-931, 31 N.R.C 350 (1990).

control than those established under the FCA. Georgia Power's assertion that FCA case law should not apply is frivolous because the AEA is modeled after the FCA and it would be unnatural not to rely on applicable FCA case law.<sup>4</sup> The fact that the FCA statutory provision is less stringent than that contained in the AEA leaves only one logical argument: that case law interpreting the FCA provision sets forth a minimal threshold on what constitutes transfer of control under the AEA.<sup>5</sup>

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<sup>4</sup> The natural inclination towards order in the legal system encourages the presumption of consistency. The forces that work to create sufficient incidence of congruence among statutes on different and dissimilar subjects are customary and established approaches to interpreting the design of statutory provisions. Sutherland Stat. Const. §53.01 (5th Ed.). The courts continue to "consider common law principles as relevant sources of guidance for the construction of statutes." Sutherland Stat. Const. §53.02 (5th Ed.). It is an extension of the same practice "to construe new legislation in the light of analogous but unrelated prior legislation." *Id.* Employing the principle of analogy allows for the interpretation of statutes which are not specifically related but which "apply to similar persons, things, or relationships." Sutherland Stat. Const. §53.03 (5th Ed.). In doing so the court is able to give effect to the likely intent of the lawmakers and "establish a more uniform and harmonious system of law." *Id.* Uniform laws are commonly construed in light of provisions contained in other uniform laws. Sutherland Stat. Const. §53.04 (5th Ed.). Interpretations of similar but unrelated statutes may be considered relevant. *Id.* Statutes that deal with public policy considerations should be construed in favor of the public's interest. "A narrow construction should not be permitted to undermine the public policy sought to be served." Sutherland Stat. Const. §56.01 (5th Ed.). Public policy is a manifest display of the values and norms of society and has a place in the decision making process. *Id.* The fact that the AEA's alienation of control provision is based on the FCA, demonstrates that Intervenor's use of well established FCA case law interpreting the control provision is sound in all respects.

<sup>5</sup> Georgia Power's argument is also flawed because it incorrectly states that the Safety Light case and not case law interpreting the FCA provides the exclusive criteria determining whether a prohibited transfer of control of an NRC license has occurred. Motion at p. 4. Safety Light specifically states that

2. Facts and arguments are within the admitted contention (I.B.2.)

Georgia Power asserts that Intervenor advances arguments that are outside the admitted contention. The two arguments in question are: 1) the creation and operation of a Southern Nuclear Operating Company as a division of The Southern Company violating the Public Utilities Holding Company Act of 1935; and 2) Mr. Ed Addison's involvement in GPC's nuclear operations represented an early rooting of improper control by The Southern Company.

Georgia Power states in its response that "[t]hese aspects of Intervenor's Response have nothing to do with the contention in this proceeding." Reply at p. 6. These issues have a great deal to do with the contention. They show that dealings regarding nuclear operations were not being conducted by Georgia Power officials and that the organization created to handle these dealings was set up in defiance of the laws regulating such entities.

Georgia Power asserts that allegations regarding Mr. Addison have nothing to do with SONOPCO because the events in question occurred several years before the SONOPCO project began. Reply at p. 6. The events occurred in 1986, within one year of The

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the analysis applies explicitly to the actual sale of the licensed company. Safety Light at p. 365 ("Insofar as the 1982 sale is concerned, we discern no room for reasonable doubt that a transfer of control took place.") The Board explicitly stated that it was not deciding the issues related to the indirect transfer of control. Safety Light, 31 N.R.C. at 368 ("In view of the foregoing, we need not decide whether the corporate restructuring that occurred in 1980 similarly involved a transfer of control.")

Southern Company's creation of a Phase I organization whose function was to implement the creation of SONOPCO. Intervenor believes this to show an early intent on the part of Southern officials to make decisions concerning the nuclear operations at Plant Vogtle.

Next, Georgia Power asserts that the approval of its 1990 budget by the Southern Company Management Council, Dahlberg's disagreement with the proposed budget and Addison's statement, 'That's it. That's the budget,' " has nothing to do with the admitted contention. Considering the fact that control over finances and budgets are key indicia of control, it is incredible that Georgia Power should advance such an argument. Intervenor supports his admitted contention by asserting these facts.

As stated in a previous filing of Intervenor, requiring an intervenor to seek leave to adjudicate facts clearly relevant to an admitted contention was not contemplated under the recent amendment to §2.714, as articulated in the Statement of Considerations set forth by the Commission in the Federal Register. In this respect, the Statement of Considerations explains that the purpose for the amendment was to end the practice of a petitioner "filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or Staff" and that this would be accomplished by requiring an intervenor to set forth "some alleged fact or facts in support of its position sufficient to indicate that a genuine issue of material fact or law exists."

54 Fed. Reg. at 33170 (emphasis added).<sup>6</sup> The Commission goes on to state that once "some factual basis for its position" is established and a contention admitted, an intervenor "will continue to be able to develop the facts necessary to support its case" (i.e., the admitted contention) 54 Fed. Reg. at 33171 (emphasis added). This is what Intervenor has done. In the course of discovery Intervenor uncovered and developed evidence supporting the admitted contention and has presented it as part of his rebuttal to GPC's Motion for Summary Judgment.

**3. Issues not previously identified  
(I.B.3.)**

Georgia Power asserts on page 7 that Intervenor's comments about Addison were not previously identified. Licensee states that interrogatory responses 21-40 should have encompassed mention of Mr. Addison. The fact that Georgia Power does not point to a particular response and addressing the issue makes it difficult for Intervenor to pin down Georgia Power's argument. Nonetheless, Intervenor did not learn of these facts until Mr. Hobby<sup>\*</sup> revealed them to Intervenor's counsel while providing information to questions raised in response to Georgia Power's motion for summary disposition. To the extent Georgia Power believes the facts set out in Intervenor's reply to summary disposition are relevant to any interrogatory request, Intervenor

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<sup>6</sup> The Commission specifically did not state that an intervenor was required to set forth all alleged facts known in support of a contention. To the contrary, the Statement of Considerations indicates just the opposite (i.e., stating that an intervenor need only set forth "some alleged facts"; must make a "minimal showing"; and present a "minimal basis.")

will incorporate his reply in a supplemental response to interrogatories related to alienation of control.

**4. Georgia Power mischaracterizes testimony concerning its involvement in selecting McDonald (I.B.4.a.)**

Georgia Power claims that "Intervenor's assertion that GPC management was not involved in the decision to name McDonald an executive vice president of Georgia Power is false, and is not supported by the record." Motion at p. 8. To support this assertion Georgia Power relies on deposition testimony of Mr. Farley. Georgia Power correctly notes that Mr. Farley did testify that the "...request came to me from [Georgia Power's] Mr. [Grady] Baker..." to allow McDonald to join Georgia Power, Motion at pp. 8-9. But Georgia Power ignores Mr. Baker's testimony that when he made the request for McDonald to come to Georgia Power, Mr. Farley denied it. Baker Dep. 15 (Baker's request "[d]enied in that no affirmative response was ever received by me...Farley didn't really care to do that. he was very satisfied with Alabama's situation"). Specifically, Farley did not allow McDonald to arrive at Georgia Power until after the Southern task force "recommended that Mr. Farley be made the executive head of the [SONOPCO] organization." Baker Dep. 16. Farley had the power and ability to prevent McDonald from playing any role at Georgia Power until he approved and, ultimately, Farley's approval came when it suited his reorganization plans as the de facto Chief Executive of SONOPCO.

**5. Licensee confuses a phantom "matrix" organization**



with a functioning SONOPCO project  
(I.B.4.b)

The Motion, at section I.B.4.b confuses a "matrix" organization with a separately functioning "SONOPCO project" and in so doing misinterprets the intent of Intervenor's claim that The Southern Company's U-1 Securities and Exchange Commission ("SEC") filing does not mention the formation of the SONOPCO project. Under the Public Utilities Holding Act of 1935, before The Southern Company could establish a stand-alone entity to function as a de novo or de facto nuclear subsidiary, written approval from the SEC had to be obtained. On June 22, 1988 The Southern Company filed its Form U-1 application. Therein it states that:

Southern anticipates implementing the SONOPCO operating structure in a transitional process involving three phases...The initial phase will be to form a matrix organization in which key management personnel will be shared between APC and GPC pursuant to shared management agreements...No changes in corporate structures will be needed to accomplish this pooling of management resources.

Stipulation Exhibit 6 at p. 4.

The Southern Company and its subsidiaries materially mislead the SEC. First, the petition states that "Southern anticipates" that "the initial phase will be to form a matrix organization identified in Exhibit B-2 of the U-1 filing (Stip. Ex. 6). The fact is that a "matrix organization" as described in the U-1 filing had already been implemented." By May of 1988 Mr.

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<sup>7</sup> The only remaining step at the time the U-1 filing was made was to complete the separation of GPC's nuclear operations into two separate projects (previously Georgia Power's nuclear



McDonald was already functioning as a GPC and Alabama Power Company (APC) nuclear operating executive vice president at both GPC and APC (see Exhibit B-2, U-1 filing, Stip. Ex. 6); Mr. Hairston was already functioning as a both a GPC and APC nuclear operating senior vice president (as depicted in Exhibit B-2 of the U-1 filing); and the three project officers had likewise already been selected (Mr. McCoy for plant Vogtle, Mr. Beckham for plant Hatch, and Mr. Jack Woodard for plant Farley.<sup>8</sup> Thus, there was no "anticipation" of the formation of a matrix organization and the assertion that The Southern Company "will be" forming such an organization structure was false because such an organization structure had already been formed without providing any notice to the SEC.<sup>9</sup> In actuality, at the time of the U-1 filing, the organizational structure was more accurately depicted in Exhibit B-3 to the U-1 filing (i.e., with Farley as SONOPCO's CEO; McDonald as its COO; Long as the its technical services officer; McCrary as its administrative services officer; McCoy as the Vogtle project officer; Beckham the Hatch project

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operations had a single line of management from the plant to GPC's CEO; under the "project" concept, plant Hatch would have its own project vice president, Mr. Beckham, and plant Vogtle would be headed by Ken McCoy as its project vice president).

<sup>8</sup> See Stip. Ex. 5, and Stip. Ex. 11 ("Sonopco Project Organization" chart).

<sup>9</sup> It should also be noted that the B-1 exhibit is also inaccurate because it fails to denote the existence of Southern Company Services. Moreover, Southern Company Services was excluded as one of the companies authorizing the U-1 filing even though the SONOPCO project vice presidents would be technically employed by Southern Company Services, as would Mr. Farley.

officer; and Woodard as the Farley project officer). In essence, the U-1 filing is materially misleading because it fails to mention the fact that, at the time of the U-1 filing, The Southern Company had already established a SONOPCO project and that this project organization was fully functional. Intervenor correctly states that "[n]o mention of the interim formation of a SONOPCO project is discussed in the [U-1] SEC filing." Indeed, the failure to admit the existence of the SONOPCO project in the U-1 filing is understandable as to do so would constitute a violation of the Public Utilities Holding Company Act of 1935.

6. A reasonable factual inference establishes that Georgia Power misled NRC Staff about the status of SONOPCO (I.B.4.c.)

Georgia Power does not contest the fact that it advised NRC Region II that the location of Georgia Power's corporate offices would not be decided until after SEC approval for SONOPCO was obtained. Motion at p. 10. The fact remains that the decision about SONOPCO's location was made in 1987 by Addison and Farley and was implemented before SEC approval for SONOPCO was obtained. The reasonable inference to be drawn therefrom is that Georgia Power misled the NRC about the status of the SONOPCO project to avoid regulatory oversight.

Georgia Power also argues that Intervenor's assertion that "NRC was not advised that a 'SONOPCO project' would be formed" is false based on the content of Enclosure 1 of Stip. Ex. 9, which in pertinent part states that "[a] project organization had been established for each plant" and a "Transition Organization" chart

was given to the NRC. Motion at p. 10. Georgia Power is misleading this Board. The "project organization" and the "Transition Organization" chart do not relate to the SONOPCO project. This is obvious inasmuch as in the organization chart Mr. Hobby is identified as Georgia Power's manager of administrative support. Mr. Hobby was never part of the SONOPCO project management. The transitional organization identified by Georgia Power was never intended to function as the SONOPCO project organizational structure. The "project organization" identified in Stip. Ex. 9 refers to the bifurcation of the plant Hatch and plant Vogtle corporate management which was implemented soon after Mr. McDonald's arrival in April of 1988. In November of 1988, the actual interim SONOPCO project organizational structure was implemented. As such, the "interim" organization identified to the NRC should have remained in place until after SEC approval was obtained, as Georgia Power had led the NRC to believe. Instead, by November 1988 the SONOPCO project "interim" organization was established (this structure was, in reality, the final SONOPCO structure). As such, Georgia Power did not disclose the fact that a project organization would be established in Birmingham and that this project organization would not resemble the "transitional organization" identified during the July, 25, 1988 meeting with the NRC.

7. Dan Smith's observations did lead him to conclude that McDonald reported to Farley (I.B.4.d.)

The Motion at I.B.4.d. asserts that the observations of Dan Smith, a high-ranking Oglethorpe Power manager, did not lead him to conclude that McDonald reported to Farley. Licensee ignores the fact that Mr. Smith, in his own handwriting, stated that McDonald's statements to the NRC Commissioners at the Vogtle licensing hearing did not present the "true picture" (Commissioner Carr "should be concerned if the true picture were presented!") and the described reporting relationship existed "on paper only." See Intervenor Exhibit 13. The fact that Georgia Power provided Mr. Smith with an organization chart does not negate his observations inasmuch as Smith's observations occurred when he was well aware that the "on paper" McDonald was supposed to report to Dahlberg. The fact remains that Oglethorpe specifically asked where Farley fit into the organization structure. More importantly, the organization chart provided did not offer what Oglethorpe needed. Oglethorpe specifically requested that it receive "an organizational presentation by SONOPCO on the reporting chain up through the Board of Directors for Mr. George Hairston, Mr. R. P. McDonald, Mr. Joe Farley...[and] how Mr. Farley fits into the picture and who he reports to up through the Board." Stip. Ex. 33. No such presentation was ever made to Oglethorpe. Instead, GPC's vice president Fred Williams wrote a memorandum to Mr. Hobby (who had given Williams a confidential memorandum on April 27, 1989 questioning whether McDonald did, in fact, report to Dahlberg, see Stip. Ex. 34). This memo responded to Hobby's rather than

Smith's questions. See Stip. Ex. 35 ("In response to your questions"). Moreover, the organizational chart presented was entitled "Proposed General Organization": the final version edition was never produced.

Finally, Georgia Power attempts to portray Mr. Smith as a friendly witness. Mr. Smith was and continues to be an adverse witness. Mr. Smith's employer, Oglethorpe, is one of the licensed owners of plants Hatch and Vogtle. Mr. Smith was well aware that his testimony could adversely affect Oglethorpe's interest in establishing Southern Nuclear, and that Oglethorpe's interests with respect to Southern Nuclear were and are in common with Georgia Power's.

8. Hearsay evidence is admissible.  
(I.B.4.e.)

Georgia Power states on page 11 of its Motion that Mr. Johnson's testimony is not admissible because he stated that "it was a rumor that the budget was approved" and therefore lacks first-hand knowledge about the budget's approval. Mr. Johnson's testimony is not hearsay inasmuch as at least one source of the information came from a Georgia Power manager in the Budgeting Department, Mr. Wallace. See Attached affidavit of Marvin Hobby. Moreover, even if Mr. Johnson's testimony were hearsay, it would be admissible where there are circumstantial indicia of its truthfulness.<sup>10</sup> Richardson v. Perales, 402 U.S. 389, 410

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<sup>10</sup> Intervenor's counsel has located an additional document as further indicia of the truthfulness of Mr. Hobby's and Mr. Johnson's learning from Georgia Power's budgeting management that Dahlberg did not approve the SONOPCO budget. See September 11,

(1972); Calhoun v. Bailar, 626 F.2d 145, 148 (9th Cir. 1980); Hoska v. Department of the Army, 677 F.2d 131, 138 (D.C.Cir. 1982).

Finally, Georgia Power's hearsay argument is specious. The rules governing this proceeding specifically "encourage the use of informal procedures consistent with the Administrative Procedure Act (Title 5 of the United States Code). See 10 C.F.R. §2.756. The Administrative Procedure Act allows for the admission of hearsay testimony and it has become a "hornbook rule" that administrative agencies are not bound by the rules of evidence concerning the admissibility of hearsay. See Schwartz, Administrative Law, §7.2, at p. 346 (1984 ed.). "The rule is so well settled today that it takes an express statute to bind the agency to evidentiary rules." Id., at p. 346 (footnote omitted).

9. GPC's inability to draw a factual inference about Farley's involvement with the establishment of a nuclear operating philosophy (I.B.4.f.)

At I.B.4.f. GPC asserts that Intervenor's assertion that it "appears that Mr. Farley oversaw the introduction of GPC's nuclear operating philosophy" is improper. This assertion conveniently ignores Intervenor's factual underpinning, which is

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1989 memo from Whitney to Townley, Re: Nuclear Cost Comparisons (copy attached as Exhibit C). This document demonstrates that Dahlberg was presented with a high-level comparison of SONOPCO's cost as compared with the nuclear industry average, and that SONOPCO's costs were 5-30% above comparable industry averages. Significantly, the memo states that the nuclear budget was prepared by "SONOPCO" and "shown" to Georgia Power.

stated on pages 32-33 and 51-52 of Intervenor's Brief. Therein, Intervenor states that:

Mr. Farley specifically discussed his involvement with the establishment of a nuclear operating outage philosophy for the SONOPCO project, stating that the philosophy was developed during a SONOPCO project 'retreat' headed by Farley that was attended by all SONOPCO project executives (Dahlberg was excluded).

This factual assertion is based on Mr. Farley's statements under oath during the course of his July 25, 1994 deposition. Georgia Power failed to submit an affidavit from Mr. Farley challenging the accuracy of this assertion.<sup>11</sup> As the acting chief executive of the SONOPCO project, Mr. Farley's heading up a SONOPCO project retreat where the introduction of the project outage philosophy was established demonstrates that Farley "oversaw the introduction of GPC's nuclear operating philosophy."

10. Farley headed Georgia Power's nuclear operations and he is correctly identified as such in the On-Call Project Manager list (I.B.4.g.)

Georgia Power's Motion at pp. 12-13 states that Intervenor's claim that the "On-Call Project Manager" telephone list identifies Mr. Farley as the head of GPC's nuclear management is incorrect. The facts at the close of discovery had established that Mr. Farley was to be contacted.<sup>12</sup> It was not until after

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<sup>11</sup> On October 13, 1994 Intervenor's counsel submitted an affidavit rectifying GPC's concern that citation to an untranscribed deposition would not constitute admissible evidence. GPC fails to acknowledge this fact and instead acts as if the oral statement of Mr. Farley does not constitute an admission by a party opponent.

<sup>12</sup> See Intervenor's Motion to Reopen Discovery, filed October 24, 1994, for a more detailed discussion of this issue.



the close of discovery Licensee first asserted that its response to Intervenor's §2.206 petition was wrong. Georgia Power cannot in good faith assert that Intervenor's interpretation of the On-Call Project Manager list is inaccurate when Licensee's statements about the persons to be contacted and the procedures governing the persons to be contacted has, by Georgia Power's own admission, been misstated. It would be detrimental to this proceeding to give any weight to GPC's recent statements regarding these procedures.

11. Georgia Power's reliance on Dahlberg's deposition testimony does not establish his role in approving the move of Georgia Power's nuclear operations to Birmingham and does not rebut the reasonable inference that the decision was made by Farley and Addison (I.B.4.h.)

Georgia Power asserts that Intervenor cannot support its factual assertion that "[i]f McDonald and Scherer were not involved in the decision to move GPC's nuclear operations, the decision apparently rested with Farley and Addison." Motion at p. 13. Georgia Power exclusively relies on Mr. Dahlberg's testimony to support this assertion. Dahlberg's testimony does not rebut Intervenor's contention that Farley and Addison made the decision for the following reasons:

- 1) Before Dahlberg was employed by Georgia Power he was the Southern Company Services representative on the Phase II task force established by The Southern Company. Mr. Dahlberg's involvement with the location of SONOPCO occurred during his "task force" participation and was not done as a Georgia Power manager. See Dahlberg April 6, 1994 Dep. at 58 (Dahlberg was

"not sure" whether he reviewed the decision to relocate nuclear operations to Birmingham as a member of the SONOPCO project "task force");

2) Mr. Dahlberg was not in the line of management that oversaw nuclear operation until after nuclear operations were moved to Birmingham. As such, there was no reason to believe he had any role in making the decision. Moreover, the two Georgia Power executives who would have contacted Dahlberg would apparently be the Georgia Power executives over nuclear operations, who at the time were Scherer and McDonald. If McDonald and Scherer were not consulted, it is illogical to believe that Dahlberg was. Indeed, if Dahlberg was consulted, it would have been by either Farley or Addison and this consultation would have occurred during the phase II SONOPCO task force which Dahlberg was a member of before he joined Georgia Power.

12. Georgia Power's observation concerning the selection of SONOPCO project vice presidents does not square with the entire record and does not change the fact that Farley made the selection  
(I.B.4.i.)

Georgia Power states that Intervenor should have mentioned that the SONOPCO project vice president of administrative services, Mr. McCrary, was a Southern Company Services position and that the undisputed evidence indicates that Southern Company Services ultimately selected the individual to fill this position. Motion at p. 14. Mr. Farley was not a Southern Company Services employee and should not have been involved with McCrary's selection for a Southern Company Service position.

Georgia Power also asserts that McDonald's deposition testimony establishes "that the Southern Company Services Board ultimately selected [McCrory] to fill this position" (citing McDonald 5/7/90 DOL Dep. at pp. 12-13. There are two problems with this assertion. First, McDonald was not a member of the Southern Company Services Board and cannot testify to what that board did. Second, and more troubling, is the fact that McDonald's 5/7/90 Hobby deposition testimony contradicted his testimony in the Fuchko and Yunker DOL proceeding. In the latter proceeding McDonald testified that he did not select the vice president of administrative services; that he did not know who made that selection; that he did not make this selection; and that he could only speculate as to how McCrory was selected. McDonald 12/21/88 DOI Dep. at pp. 12-13. McDonald's testimony at the two proceedings cannot be reconciled. If he selected McCrory and was personally involved with the Southern Company Services vote, then his testimony in the Yunker and Fuchko proceeding is false.

Finally, Southern Company Service's role in staffing the SONOPCO project was omitted from Southern's U-1 SEC filing (Stip. Ex. 6), a point Georgia Power conveniently ignores.

13. Georgia Power's assertion that the Hobby DOL proceeding does not support the proposition that Hobby was concerned that Farley was heading GPC's nuclear operations  
(I.B.4.j.)

Georgia Power states that Intervenor's assertion that Marvin Hobby identify Farley as the head of GPC's nuclear operations is not supported by the record of the Hobby DOL case. This is not the case. See, e.g., Hobby DOL Exhibit 22 (Intervenor Exhibit 14); Hobby Tr. 161 (Intervenor Exhibit 31); also see Hobby Tr. 373, 494, 529, 649 (attached as Exhibit D). Georgia Power also asserts that the DOL proceeding does not support Hobby's claim that George Head shared his concern about to whom McDonald was reporting. This is also false. See, e.g., Hobby DOL Exhibit 22 (Intervenor Exhibit 14 at p. 4) ("When George [Head] told me that, I said something like if McDOnald report[s] to Dahlberg why in the hell can't Bill [Dahlberg] just tell him what to do and why does Bill have to go and straighten it out with Joe Farley? George said, 'well, I guess we have just got the answer as to who McDOnald really reports to"). The record in the Hobby DOL case supports the assertion that Head believed McDonald reported to Farley. The fact remains that Mr. Head signed the memo along with Mr. Hobby reporting a concern about the reporting relationship between Farley and McDonald. The fact remains that a Georgia Power executive instructed Hobby to destroy the memo when it was presented, and George Head counseled Hobby not to destroy the original. At the hearing Mr. Hobby testified as follows:

Mr. Williams took the [April 27, 1989 Hobby/Head] memo, he read the memo, he turned to me and he told me to destroy the memo...I told Mr. Williams I was raising a regulatory concern. I knew he didn't have a lot of nuclear experience. I said to him that I was raising a regulatory concern and he should not tell me to destroy all copies...He again told me to go and get rid of the memo, get rid of all copies of the memo...we went over to his blackboard in his office and we discussed the organizational setup...Mr Williams and I got into a discussion at that time about why Mr. Dahlberg didn't just pick up the phone and tell McDonald what to do... Mr. Williams said to me that one of the problems was that Mr McDonald was very close to Mr. Farley, and that if Mr. Dahlberg and Mr. McDonald came to an impasse it would go to Mr. Farley, and that The Southern Company board was divided between support for Mr. Farley and support for Mr. Addison, that Mr. Addison could not get Mr. Farley fired, and Mr. Farley could not get Mr. Addison fired, and that the Southern board was at a stalemate...I went back to Mr. Head, and I told him that Mr. Williams had instructed me to destroy all copies of the memo. Mr. Head informed me that ...I was to keep the original.

Hobby DOL Tr. 151-154 (attached as Exhibit D).

Georgia Power further asserts that Mr. Hobby did not have personal knowledge of a single instance where McDonald received management direction from Farley. Georgia Power ignores the fact that Mr. Hobby's position within the company -- general manager of NOCA -- was the only remaining "interface position" between Georgia Power and SONOPCO (see Exhibit A hereto at p. 316, "there are no jobs other than one interface position held by Marvin Hobby that are nuclear jobs within Georgia Power that are not under the ambit of SONOPCO") and that from this perspective Mr. Hobby was able to determine that the reporting relationship between McDonald and Dahlberg was not what it should have been, and that circumstantial evidence demonstrated to Hobby that McDonald did not receive management directive from Dahlberg. In

this respect, Georgia Power ignores the fact that circumstantial evidence is often judged to be more persuasive than eye witness testimony. See, e.g., Ellis Fischel State Cancer Hospital v. Marshall, 629 F.2d 563, 566 (8th Cir. 1980, cert. denied, 450 U.S. 1040 (1981)). The fact that Hobby did not witness the interactions does not detract from his observation of the circumstances that caused him to conclude that McDonald reported to Farley.

14. McDonald did refuse to follow Dahlberg's instructions until he was instructed to do so by Farley (I.B.4.k.)

Georgia Power asserts that the record of the DOL case does not support Intervenor's claim concerning McDonald's refusal to follow Dahlberg's instructions about preparing performance indicators for Georgia Power's rate case before the Public Service Commission. Motion at p. 15. Georgia Power's only argument is the assertion that the ALJ in the Hobby case found that Dahlberg had directed McDonald to work on rebuttal testimony and that McDonald eventually complied. The ALJ did not make a finding that McDonald complied before he was instructed to do so by Farley -- which is the fact in question in this proceeding.<sup>13</sup>

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<sup>13</sup> It should also be noted that the ALJ's decision is not a final order of the Secretary of Labor and may not be construed as binding on this tribunal. Even if it were a final order, Intervenor was not a party to that proceeding and, as such, neither collateral estoppel or res judicata attach..

15. Georgia Power's admission that it failed to identify any nuclear officers in its annual SEC 10-K report supports a factual inference that Georgia Power was out of touch with its nuclear operations (I.B.4.1.)

Georgia Power asserts at page 15 of its Motion that the fact that it failed to identify any nuclear officers in its annual 10-K form does not give rise to an inference that Georgia Power was out of touch with its nuclear operations. The 10-K form was personally signed by Mr. Franklin, Georgia Power's president and CEO. A factual inference can be drawn to show that Mr. Franklin was unable to detect that the 10-K form failed to adequately depict his nuclear operations executives. Moreover, Georgia Power fails to state why the error was made.

16. The Edwards memo is admissible evidence (I.B.4.m.)

Georgia Power asserts that the Edwards memo (Intervenor Exhibit 20) is not an admissible document based on privilege. Georgia Power's privilege argument is frivolous. The party asserting privilege has the burden of proving all the elements of the privilege, "including confidentiality, which is not presumed." Hartford Fire, 109 F.R.D. at 327. When there has been a disclosure of privileged communication there is no justification for retaining the privilege. Cheeves 128 F.R.D. at 129. Additionally, the voluntary disclosure of privileged attorney client communication also constitutes a "waiver of the privilege as to all other such communications on the same subject matter." Id.; See also Hartford Fire, 109 F.R.D. at 327 (Any



voluntary disclosure inconsistent with the confidential nature of the attorney client relationship waives the privilege.)

The memo in question was requested by Mr. Hobby from GPC's counsel. The purpose of this memo was to allow Hobby to share with Oglethorpe changes Georgia Power wanted in the text of a draft document Oglethorpe was going to transmit to Georgia Power. Georgia Power knew that Hobby would share the information in the memo with Oglethorpe, and Hobby planned from the outset to show the memo to Oglethorpe's Dan Smith. See Affidavit of Marvin Hobby at ¶ 5 (attached hereto as Exhibit B); and Smith Dep. at 55-56. ("Q: Your best recollection is that you received comments from Troutman Sanders? A: I would have expected that we did, yes...I think we asked for it, and I think we got it.")<sup>14</sup>

Based on the process employed by Oglethorpe and Georgia Power, the memo was never intended to be privileged or confidential (the document itself does not contain any marginalia comment indicating that it should be consider either confidential or privileged). The fact that Oglethorpe reviewed the document demonstrates that Georgia Power's claim of privilege is not well taken.

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<sup>14</sup> It should be noted that the ALJ in the Hobby proceeding erred during the hearing. The ALJ asserted that he ruled to exclude the Edwards memo during the prehearing conference. The transcript of that conference demonstrates, however, that the ALJ did not find the memo inadmissible but actually ruled it just the opposite. At the hearing the ALJ did not entertain discussion about the memo; GPC never filed a written motion to exclude the document; and a factual argument about its admissibility was never presented to the ALJ. It is well settled that attorney-client privilege is wholly lost once the privileged information is communicated to a third party.

17. Mr. Farley was involved with Georgia Power's rate case (I.B.4.n. and I.B.5.1.)

Georgia Power questions Intervenor's assertion that "[Mr. Farley] prepared testimony to the Georgia Public Service Commission with respect to matters pertaining to GPC's rate case..." Licensee was unable to locate support for this proposition. In this respect, Mr. Farley testified that he and Mr. McDonald personally reviewed all rate case data requests. Farley DOL Dep. at 119. Moreover, the record demonstrates that Mr. Farley was involved with the development of performance indicator testimony for the Georgia Power rate case and was copied on memos concerning GPC's rate cases. Intervenor Exhibit 32. Moreover, with respect to testimony concerning performance indicators, the decision to present the testimony was jointly made by Farley and McDonald. Intervenor Exhibit 29 (deposition testimony of Johnson at p. 39). Indeed, Mr. Farley was so involved with the rate case that, during the 1989 rate case, he personally contacted Georgia Power's rate case group in Atlanta to complain that the SONOPCO project was inappropriately being blamed for delays in rate case filings and that Hobby was to blame for any such delays. Farley DOL Dep. p. 112.

18. Farley advised Mr. Dahlberg to terminate Mr. Mosbaugh (I.B.4.o.)

On page 17 of its Motion, Georgia Power correctly notes that Intervenor did not identify the deposition in which Mr. Farley testified he advised Mr. Dahlberg to terminate Mr. Mosbaugh. The

testimony was elicited in Mr. Farley's untranscribed July 25, 1994 deposition.

19. The record supports Intervenor's assertion that Farley initiated staffing changes at Georgia Power's Nuclear Operations Contract Administration group stationed in Atlanta.  
(I.B.4.p.)

Licensee asserts on page 18 that Intervenor's reliance on William Evans' statement that "Farley was going to make the call" about staffing matters for Georgia Power's Nuclear Operations Contract Administration (NOCA) group should not be considered because Evans was not involved in the staffing decision. This argument is frivolous. Mr. Evans was relaying the message from Grady Baker who was involved in the decision (NOCA report to George Head who reported to Grady Baker). More importantly, Evans had corporate responsibility to resolve such matters in his capacity as the coordinator of the Corporate Concerns program. In his official capacity, Mr. Evans and his boss, Mr. Lee Glenn, were personally involved in resolving the problem. Evans was specifically told to call Hobby to tell him that Farley would decide on the staffing issue as part of his job responsibilities.

Georgia Power goes on to argue that Mr. Michael Barker's testimony at the Hobby hearing supports the conclusion that Dahlberg rather than Farley made the decision.<sup>15</sup> Barker's conversation with Dahlberg occurred in June of 1989. The record demonstrates that on May 8, 1989 Mr. Evans called Hobby and told

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<sup>15</sup> Adverse inferences are to be drawn in Intervenor's favor Licensee's factual based argument is improperly made.

him that Farley would make the call. Mr. Dahlberg's statement to Barker was made a month later, after Farley decided that NOCA should be disbanded. Dahlberg's testimony at the Hobby hearing was that he had a discussion with George Head and agreed on the number of persons to staff NOCA (Head approved the position that Mr. Barker sought and Head authorized Hobby to fill the position). Hobby Hearing Tr. 358. Mr. Dahlberg testified that the only thing he could recall was that he authorized Mr. Head to form the group, and that between May 1, 1989 and November of 1989, he did not recall any conversations about the staffing of NOCA. Hobby DOL Tr. 358, 360 (Exhibit D). If Dahlberg had made the decision to disband NOCA and halt the transfer of employees into it, he would have recalled some discussions after he authorized Head to staff the group. Dahlberg's failure to recall these events demonstrates that Farley made the call to prohibit Mike Barker from transferring into NOCA.

20. Dahlberg exhibited a lack of knowledge about nuclear operations.  
(I.B.4.q.)

On pages 18-19 Georgia Power challenges Intervenor's assertion that Mr. Dahlberg demonstrated a near total lack of knowledge regarding GPC's nuclear operations. Mr. Dahlberg's deposition testimony speaks for itself.

21. Scherer was not informed at the time the decision was made to move Georgia Power's nuclear operations to Birmingham  
(I.B.5.a.)

Georgia Power at page 19 of its Motion states that Intervenor incorrectly asserts that Mr. Scherer was not told of

the decision to locate Southern Nuclear in Birmingham (citing to page 12 of Intervenor's Response). At that point in the brief Intervenor sets out events occurring in 1987 concerning Addison's and Farley's decision about where to locate Southern Nuclear. Intervenor correctly states that Scherer was not informed about the decision to locate Southern Nuclear in Birmingham at that juncture. The portion of Scherer's testimony relied upon by Georgia Power clearly demonstrates that the decision to move Georgia Power's nuclear operations was not made by Scherer.

22. Corrections made by Addison affect his  
credibility as a witness  
(I.B.5.b.)

Georgia Power asserts on page 20 of its Motion that Addison's corrections cure Intervenor's inference. Mr. Addison made the comment attributed to him, that in hindsight he chooses to change it does not negate Intervenor's inference.

23. A factual inference should be drawn that Georgia power  
knew Oglethorpe would intervene before the SEC  
(I.B.5.c.)

Georgia Power asserts that Intervenor did not adequately support his assertion that Georgia Power knew that Oglethorpe would intervene before the SEC unless they came to an agreement about the organization of SONOPCO. Intervenor believes there is adequate support for this assertion based on the fact that Oglethorpe and Southern system executives and managers were negotiating these issues for months before the U-1 filing was made.

24. Farley did initiate SONOPCO project staff meetings  
(I.B.5.d.)

Georgia Power states that McDonald or Farley initiated SONOPCO project staff meetings and implies that somehow Intervenor's assertion that Farley initiated staff meetings was not properly supported. Motion at p. 20-21. The record establishes that Mr. Farley initiated SONOPCO project staff meetings. The fact that McDonald also initiated some of these meetings does not refute this fact.

25. Dahlberg did state during his deposition that the SONOPCO project board was functioning prior to incorporation  
(I.B.5.e.)

Georgia Power asserts at pages 21-22 of its Motion that Dahlberg's changes in his testimony negate his assertion that a SONOPCO project board of directors was functioning prior to the incorporation of Southern Nuclear. First, Dahlberg's change in testimony is not believable. But, more importantly, Dahlberg failed to change the testimony he gave on page 135, where he described in detail what was discussed at the SONOPCO project board meetings he attended.<sup>16</sup> Moreover, this response was the last question asked by Intervenor's counsel and, after Licensee's counsel requested a break, Georgia Power failed to ask Dahlberg whether he had misstated the fact that a SONOPCO project board had been established:

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<sup>16</sup> A copy of Mr. Dahlberg's corrections to the deposition are attached hereto as Exhibit E.

A: Duringg [SONOPCO's] formation we would get periodic reports like at board meetings talking about the development of the organization, and we hired a new human resources VP or we added somebody in purchasing and those type of things. But I don't know of any study Georgia Power did of the organization.

Q: The board meetings you're referring to are the SONOPCO project board meetings?

A: Yes.

MR. KOHN: I have no further questions.

MR. LAMBERSKI: Give us a moment.

(Brief break)

MR. WITHROW: Let's go back on the record...No questions.

Dahlberg Dep. p. 135.

Dahlberg testified to the existence of a SONOPCO project board and Georgia Power's counsel was painfully aware of his admission at the time it was made but chose not to ask Dahlberg to alter his testimony on the record.

26. Farley's share in McDonald's performance appraisal was equal to Dahlberg's (I.B.5.f.)

Georgia Power states on page 23 of its motion that  
Intervenor incorrectly states that "McDonald's evaluation was prepared by Mr. Harris, APC's president, and Dahlberg was only asked if he wanted input into this evaluation...Mr. Farley was involved in preparing the performance of Mr. McDonald." The record supports this assertion. In fact, Mr. Farley testified that 1) "Mr. Harris prepared it" (i.e., it was written by Harris); 2) the "paperwork was basically discussed with Mr. Dahlberg" (i.e., Dahlberg did not write the review); and 3)



Farley was told what "they were proposing" and asked if he "had any comments" (i.e., Farley concurred with the proposed evaluation before it was issued).

27. Farley's testimony about his involvement with the budget is not taken out of context  
(I.B.5.g.)

Georgia Power at page 23 of its Motion asserts that Intervenor should not have deleted the following statement from Farley's deposition testimony: "...I did not make the decision. That's a matter for Georgia Power Company and for Alabama Power Company." Because Mr. Farley was not an officer of Georgia Power or Alabama Power, he does not have first-hand knowledge about whether Georgia Power or Alabama Power actually approved the budget or voted on the budget. Mr. Farley has admitted to doing the best he could in trying to manage Georgia Power's nuclear budget and he "blessed" the budget before it was transmitted to Georgia Power. Deleting the portion of his testimony about which he is not competent to testify is not selective editing.

28. Licensee's reliance of Franklin's deposition testimony  
\* (I.B.5.h.)

Georgia Power cites to a portion of Franklin's deposition testimony to claim that an assertion raised by Intervenor's counsel is incorrect. Licensee failed to present a copy of Mr. Franklin's deposition with its Motion. Intervenor does not have a copy of this deposition, and Licensee's assertion may not be supported by the entire deposition. Intervenor is unable to determine the accuracy of Licensee's assertion, and the failure

to provide a copy of the deposition to the Board precludes further discussion.

**29. Farley did select SONOPCO project vice presidents (I.B.5.i.)**

Georgia Power asserts at page 14 of its Motion that Intervenor fails to mention that the vice president of administrative services for the SONOPCO project was employed by Southern Company Services. This fact is only relevant inasmuch as the U-1 SEC filing fails to denote the role Southern Company Services would play in the make-up of SONOPCO. Finally, Georgia Power's support for the assertion that the Southern Company Board made the ultimate selection is based on deposition testimony of McDonald. As stated in section 33 below, Mr. McDonald's testimony is not credible. Moreover, Georgia Power's reliance on Mr. McDonald's testimony as to what the Southern Company Services Board did is speculative at best because McDonald was not an employee of Southern Company Services, let alone a member of its board.<sup>17</sup> Hobby DOL Tr. 640.

**30. Georgia Power mischaracterizes Scherer's recollection of events (I.B.5.j.)**

Georgia Power charges that Intervenor mischaracterizes the testimony Mr. Scherer gave in his June 18, 1994 deposition. In doing so, GPC claims that "Mr. Scherer, who, having been in

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<sup>17</sup> Mr. Dahlberg was so confused at to reporting relationships within the SONOPCO project that he believed that Mr. McDonald was an officer of Southern Company Services ("SCS"), and therefore reporting to SCS management, presumably Mr. Farley. Hobby DOL Tr. 323.

retirement for nearly six years, simply could not recall the events of 1988." Motion at p. 25. Although Mr. Scherer retired in May of 1989, he was able to recall several important events. Scherer 6/8/94 Dep. at p. 5. He remembered events that had occurred well over six years before. For example, he remembered the retirement in 1983 of Mr. Vogtle and the events that led up to Mr. Addison being given the position of president of Georgia Power. Id. at pp. 12, 15-18. Mr. Scherer also has considerable knowledge concerning not only the structure of Georgia Power and The Southern Company system but also the procedures involved in the election of board members and executive officers.

Intervenor asserts that having no knowledge of an event is different from not recalling one. Mr. Scherer, in his deposition, testified in response to the questions put to him that he did not know. Id. at 81. Furthermore, when asked if he was involved in the selection of Mr. McCrary as a vice president, he responded "No, no." Id. at pp. 80-81. It is a reasonable inference that Mr. Scherer did not know of these events because he was not consulted about them and was thereby left out of the loop.<sup>18</sup>

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<sup>18</sup> Mr. Scherer could not remember some things. When asked whether any individual within GPC's Nuclear Operations management was promoted after Mr. McDonald became executive vice-president of Nuclear, Mr. Scherer testified he could not recall. Id. at p. 81. Mr. Scherer is a highly sophisticated individual who knows the difference between not knowing and not remembering a fact.

31. Farley was a key negotiator with Oglethorpe  
(I.B.5.k.)

Georgia Power asserts on page 26 that Intervenor statement that " [t]he key negotiations between GPC and Oglethorpe were conducted by Farley" is a mischaracterization of Mr. Farley's testimony. Mr. Farley testified that it was his opinion that between "September and December of '89" the "most important" negotiations with Oglethorpe occurred "between me and Mr. Stacey." Farley DOL Dep. 97. That other persons may have engaged in negotiations does not refute the fact that Mr. Farley played a key role in the negotiations and was the key negotiator, at least between September and December of 1989.

32. Farley's role in Public Service Commission data requests indicates that he was involved in determining whether SONOPCO would respond  
(I.B.5.l.)

See No. 17. *supra*, for a discussion on Mr. Farley's role.

33. Intervenor correctly concludes that McDonald's testimony is contradictory  
(I.B.5.m.)

Georgia Power's Motion argues that Intervenor's characterization of Mr. McDonald's DOL deposition testimony is strained. Motion at p. 27. Georgia Power claims that a reasonable reading of Mr. McDonald's testimony would indicate that "he did not 'select' Messrs. McCrary and Long, but that he was 'involved' with their selection." *Id.* Intervenor did not characterize Mr. McDonald's testimony, he simply quoted from the transcripts which speak for themselves. Intervenor's Response pp. 66-67. Intervenor stands by his assertion that the

contradictions in Mr. McDonald's testimony call his credibility into question.

Mr. McDonald has testified on the issue of whether or not he selected Messrs. McCrary and Long on at least three occasions. First, in a deposition in the Fuchko DOL proceeding, when asked who selected them he testified that he did not. McDonald 12/21/88 DOL Dep. at pp. 12-13. He further testified as follows:

Now let me qualify my statement, in saying that I don't know. The selection of those people is under the authority and responsibility of the Southern Company Services. I imagine in the normal course of events that selection is officially made by the President of Southern Company Services. There may have been other arrangements that I am not aware of, but I think that that was true.

Id. (emphasis added).

A short time later he testified in a deposition for the Hobby DOL proceeding that he selected both Mr. Long and Mr. McCrary for their positions and that he personally requested the Board of Directors to consider them for their positions. McDonald DOL Dep. at pp. 11-13.<sup>19</sup> McDonald's testimony is

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<sup>19</sup> A third attempt by McDonald to explain his role in their selection occurred at the Hobby DOL proceedings, where McDonald testified as follows:

Q: And did you select Mr. McCrary?  
A: No, I did not.  
Q: Did you play any role in selecting Mr. McCrary?  
A: I had an advisory role in it, yes.  
Q: And who is the vice president of technical services?  
A: Mr. Long.  
Q: And did you select Mr. Long?  
A: No. I had an advisory role.  
Q: You had an advisory role in both situations?

contradictory. Based on Mr. Farley's testimony and first-hand knowledge of McDonald's role in selecting McCrary and Long, it appears that McDonald's testimony in the Yunker and Fuchko deposition is false. This is particularly disturbing given that this testimony was given within months after Long and McCrary were selected, and McDonald's recollection of the events had to be clear in his mind, yet he testified that he had no discernable role in their selection, an assertion which is obviously not true.

34. Georgia Power has materially misled the Board  
about Dahlberg's reversal in testimony  
(I.B.5.n.)

Georgia Power asserts at pages 27-30 of its Motion that Dahlberg's testimony is not contradictory but only reflects differences in the questions posed. This assertion strains the meaning of Mr. Dahlberg's testimony beyond reason. Dahlberg testified on June 10, 1994 that he "knew from Oglethorpe that there was a concern about the reporting relationship which I had some obligation to explain to them and did." Yet, on May 8, 1990 Mr. Dahlberg testified as follows:

Q: [Reading from the Hobby/Head April 27, 1989 memo]  
'...Oglethorpe Power is so concerned that it has formally requested confirmation that Mr. McDonald receives his management direction from and reports to Mr. Dahlberg...If this is not the case, we are in violation of our license and could experience some significant repercussions from the NRC -- including revocation of the licenses;' do you see that?

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A: Correct.

DOL Tr. 627 (McDonald).

A: Uhm-hum.

Q: Did anyone ever bring that concern to your attention?

A: No.

Dahlberg DOL Dep. at 56. This testimony, together with Dahlberg's April 6, 1990 deposition testimony demonstrates that Dahlberg's testimony is contradictory.

35. Intervenor can properly rely on adverse statements made by Georgia Power and Southern Nuclear management ( I.B.6.a-e).

Georgia Power argues on pages 30-32 that Intervenor cannot rely on untranscribed depositions. This argument is defective inasmuch as Georgia Power cannot reasonably argue that statements made by these witnesses in the presence of Intervenor's counsel do not constitute an admission by a party opponent. There is no doubt that the weight of such evidence can be questioned, but not with respect to a motion for summary disposition where all questions are to be resolved in favor of the party opposing summary disposition. The amount of factual information counsel is forced to digest could conceivably result in an inaccurate recollection, but at the present time Intervenor's counsel believes his recollections are accurate and reliable and has submitted his affidavit in good faith. Georgia Power is free to obtain the depositions and to the extent any such deposition is placed into the record, Intervenor will voluntarily withdraw any factual inference not supported by the deposition testimony. In sum, the oral statements of the witnesses constitute admissible



evidence from the individual who overheard the statement regardless of whether that statement was transcribed or not.

36. Intervenor materially complied with 10 C.F.R. § 2.749 (I.B.7.)

Georgia Power asserts that Intervenor's Response did not comply with 10 C.F.R. §2.749(a) because Intervenor did not make reference to Georgia Power's Statement of Material Facts as to Which There Is No Genuine Issue to Be Heard Regarding Intervenor's Illegal Transfer of Licenses Allegation (Georgia Power's Statement of Facts"). Motion at p. 33. Intervenor's filing set forth his statement of facts in his Reply, between pages 10 and 36, that set out the material facts in dispute in this proceeding. Moreover, Georgia Power's Statement of Facts does not represent a good faith effort to identify to the Board facts Georgia Power really knew to be undisputed. Georgia Power knew at the time of filing that Intervenor has set forth information concerning contested facts in a host of prior pleadings, including Intervenor's §2.206 petition; answers to interrogatory responses; Intervenor's Amended Petition to Intervene; and in Intervenor's objections to Georgia Power's request for stipulations. The purpose of filing Georgia Power's Statement of Facts is to allow the tribunal and the opposing party to determine what facts are genuinely in dispute. Georgia Power's filing does not attempt to do this. For example, Licensee states that the version of the phases employed in the formation of SONOPCO is not in dispute. See Georgia Power's Statement of Facts at ¶ 1A-C. Georgia Power acknowledged in its

August 1, 1994 Stipulations Relating to Allegations of Illegal License Transfer that both Intervenor and NRC Staff did not agree with Georgia Power's facts concerning the phases employed to establish SONOPCO) were not in dispute. Stip. ¶4, fn. 1. Another example concerns Georgia Power's assertion that the reporting relationship between McDonald and Dahlberg was not in dispute. See Georgia Power's Statement of Facts at ¶10. Yet, Georgia Power knew that Intervenor contested the reporting relationship between McDonald and Dahlberg as this was included in responses to Georgia Power's interrogatory questions, i.e., Intervenor's Response to the First Request for Document by Georgia Power, at Response No. 39, and was contested as far back as Intervenor's Amended Petition to Intervene wherein Intervenor specifically stated that Georgia Power's nuclear plants were operated by a SONOPCO project Board and that the reporting relationship was such that "[d]irectly under Farley was Mr. R. P. McDonald"). Indeed, Georgia Power filed requests for stipulations and Intervenor worked diligently with counsel for Licensee to agree on the undisputed facts. The actual undisputed facts contained in Georgia Power's Statement of Fact is almost exclusively set out in the joint Stipulation.

In sum, Intervenor set forth a statement of the facts in dispute in as abbreviated a form as reasonable in the body of his Reply and the meaning and intent of 10 C.F.R. §2.749a was met.

Conclusion

For the foregoing reasons, Licensee's Motion to Strike should be denied.

Respectfully submitted,



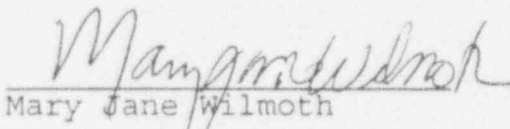
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served via first class mail (with additional service via facsimile, where indicated by an asterisk "\*"), on October 26, 1994 upon the persons listed in the attached Service List.

By:

  
Mary Jane Wilmoth

Dated: October 26, 1994

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

DOCKETED  
USNRC

94 OCT 31 A9:54

In the Matter of )

GEORGIA POWER COMPANY )  
et al., )

(Vogtle Electric Generating )  
Plant, Unit 1 and Unit 2) )

Docket Nos. 50-424-OLA-3  
50-425-OLA-3

Re: License Amendment  
(transfer to Southern Nuclear)

ASLBP No. 93-671-01-OLA-3

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BEFORE THE  
U. S. DEPARTMENT OF LABOR

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JAN 03 1989

In the Matter of:

JOHN M. FUCHKO and  
GARY A. YUNKER

Complainants

versus

GEORGIA POWER COMPANY

Respondent

OFFICE OF  
ADMINISTRATIVE LAW JUDGES  
HAMPTON, VIRGINIA

Case No. 89-ERA-9  
89-ERA-10

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1371 Peachtree Street  
Atlanta, Georgia  
Tuesday, January 3, 1989

The above-entitled matter convened for hearing  
pursuant to Notice at 9:19 a.m.

BEFORE:

DANIEL SARNO, Administrative Law Judge

APPEARANCES:

On behalf of the Complainant

LAURIE FOWLER, Attorney  
Route 2, Box 186  
Alto, Georgia 30510

SANDRA MICHAELS, Attorney  
Suite 1720, 40 Marietta Street  
Atlanta, Georgia 30303

BRIAN SPEARS, Attorney  
Suite 400, 233 Mitchell Street  
Atlanta, Georgia 30303

APPEARANCES (continued):

On behalf of the Respondent:

JESSE P. SCHAUDIES, JR., Attorney  
Troutman, Sanders, Lockerman & Ashmore  
1400 Candler Building  
Atlanta, Georgia 30043-7101

1 may be qualified for, yourself?

2 MR. SCHAUDIES: I'm sorry, Your Honor, I didn't --

3 JUDGE SARNO: I asked if he has explored with these  
4 other individuals like Mr. Melton other jobs that the  
5 individuals may be qualified for?

6 THE WITNESS: Yes, Mr. Melton and Mr. Faglier are  
7 the experts in my opinion in that area within Georgia Power  
8 Company.

9 JUDGE SARNO: Is it fair to say that all the jobs  
10 they'd be qualified for as far as Mr. Melton is concerned  
11 would be in the non-nuclear area?

12 THE WITNESS: I don't think so.

13 JUDGE SARNO: There are certain jobs that they'd be  
14 qualified for in your Company you're telling me that are in  
15 the nuclear area?

16 THE WITNESS: I don't think there are any jobs that  
17 are immediately available that they are directly qualified for  
18 if I understand the information that I've received from our  
19 personnel experts.

20 JUDGE SARNO: That are in the nuclear area?

21 THE WITNESS: In any area, sir.

22 MR. SCHAUDIES: Your Honor, as a point of  
23 clarification, there are no jobs other than one interface  
24 position which is held by Marvin Hobby that are nuclear jobs  
25 within Georgia Power that are not under the ambit of SONOPCO.



1 Now, I say under the ambit of SONOPCO because technically the  
2 employees at Hatch and Vogtle are Georgia Power employees  
3 because of the delay in creating SONOPCO because of the lack  
4 of SEC approval. But these are jobs that are responsible back  
5 through the administrative and technical support offices of  
6 Southern Company Services which is under the SONOPCO project  
7 and located in Birmingham, Alabama. There is not a nuclear  
8 organization within Georgia Power any longer.

9 JUDGE SARNO: I see. So essentially if they stay in  
10 Georgia Power, with the present jobs that they have right now,  
11 they could not be whistle blowers in the nuclear area ever  
12 again, is that correct, because they would not be privy to any  
13 information?

14 THE WITNESS: I don't know.

15 JUDGE SARNO: Continue. Go ahead, proceed.

16 MR. SCHAUDIES: I have no further questions of this  
17 witness?

18 JUDGE SARNO: Any?

19 MS. FOWLER: Just a couple.

20 RE CROSS EXAMINATION

21 BY MS. FOWLER:

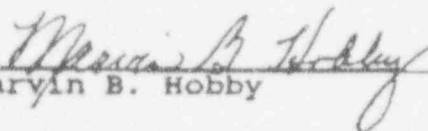
22 Q Mr. Kist, you don't know anything about the  
23 qualifications and backgrounds of the Georgia Power Company  
24 employees who weren't offered SONOPCO positions, do you?

25 A Not firsthand. Excuse me, you said were not or

## A F F I D A V I T

Under the pains and penalties of perjury, I, Marvin B. Hobby, do submit that the following is true and accurate to the best of my knowledge and belief.

1. In the August - November, 1989, time period, I was employed as Assistant to the Senior Vice President and General Manager of Nuclear Operations Contract Administration for Georgia Power Company. During this period, I was authorized by senior management of the Company to enter into discussions with Oglethorpe Power Corporation aimed at resolving differences between the two companies over the proposed Southern Nuclear Operating Company.
2. My primary contact with Oglethorpe Power for these discussions was Mr. Dan Smith, Program Director of Power Production.
3. During the course of these discussions, Mr. Smith and I revised the Managing Board Agreement. It was agreed that, even though Mr. Smith and I had jointly worked on the proposal, our final proposal would be sent by Oglethorpe Power to Georgia Power as "Oglethorpe's proposal."
4. To ensure that our proposal had as great as possible chance of acceptance, each of us discussed our progress with our respective managements several times and we had our respective law firms look over the proposed agreement prior to it being forwarded to Georgia Power.
5. During this time, I asked the Troutman Sanders law firm to review our proposal and made it clear to them that why I was asking them to review this proposal prior to Oglethorpe formally transmitting it. On October 25, 1989, Mr. Robert Edwards sent me his comments on our working document in memorandum form. I took his memorandum to a meeting I had with Mr. Smith and, in my presence, Mr. Smith was shown the document and we discussed several of Mr. Edwards' comments.
6. Throughout my discussions with Mr. Smith, I reviewed his legal firm's comments and positions, and he reviewed those I had received from Georgia Power's law firm.

  
\_\_\_\_\_  
Marvin B. Hobby

October 23, 1994  
Atlanta, Georgia

September 11, 1989

(F)

To: Chuck Whitney  
From: Dave Townley  
Re: Nuclear Cost Comparisons

At your direction and for the purpose of providing Mr. Dahlberg a high-level comparison of nuclear costs among SONOPCO plants, the nuclear industry, and GPC coal plants, I have assembled the following information. The information is presented as millions of dollars, dollars per installed capacity (Kilowatt of net design rating), and dollars per unit of energy (Kwh).

Company budget projections and Utility Data Institute (UDI) data were the sources of information. After working with the information for only a short period, it became evident that precise comparisons to industry plants and even among SONOPCO plants is extremely difficult. Differences in accounting and reporting practices are common so differences in seemingly comparable numbers may not be as they appear. For this comparison, I have at least tried to put SONOPCO plants on a comparable basis. Mine was a brief effort and more could be done to increase the precision of the adjustments needed for comparisons. However, for the stated purpose, this information should be useful. For notes on the major assumptions or adjustments in this comparison, see the attached page.

The numbers used for the 1990 Budget were those presented to Georgia Power during mid-August. During the course of this work, I understand that budget reviews are still underway and that reductions to the August SONOPCO budgets will be presented. I chose, at this time, to use budget numbers that had been shown to GPC. Overall, it appears from this comparison if the August proposal for 1990 budgets hold and the units operated as the 1989 Energy Budget projects, SONOPCO plants could be 5-30% or more above the comparable industry averages. Of course, lower budgets or better operating performance could improve this statistic. Also, excluding fuel, Georgia will require \$400 million to operate 4000 MWs of nuclear capacity while \$240 million will be required to operate over 12,000 MWs of coal capacity.

Many thanks go to Mr. Don Procter for his assistance in assembling the UDI data and to Mr. Tom Peacock for preparing the presentation of the information (numerically and graphically). For further questions regarding this data, Mr. Peacock (x.7350) can coordinate the response.

cc: Don Procter  
Tom Peacock

Exhibit C, page 1 of 1

they recognized that there was a problem there.

MR. KOHN: Your Honor, is it possible I could take a short recess for one minute or two?

JUDGE WILLIAMS: All right. Off the record.

(A brief recess.)

JUDGE WILLIAMS: Okay.

BY MR. KOHN:

Q. After you and Mr. Head signed the memo, what did you do?

A. I took the memo down to Mr. Fred Williams, and I hand delivered it to him.

Q. And what happened then?

A. Excuse me. I'd like to back up and say one other thing that I forgot. Maybe I did say it, I'm not sure.

Mr. Williams said one of the purposes for asking for the memo was that he had been asked by Mr. Dahlberg to go to Birmingham and discuss with the SONOPCO people some of the problems.

In addition, Mr. Williams was going to brief Mr. Dahlberg in preparation for Mr. Dahlberg's May 5th meeting. I'm not sure I made that clear.

Q. Okay. And after -- all right. Now you're in a meeting with -- you've brought the memo to Mr. Williams. What occurred during that meeting?

A. Mr. Williams took the memo, he read the memo, he

1 turned to me and he told me to destroy the memo. Excuse me.  
2 He said for me to destroy all copies of the memo.

3 He said that Oglethorpe Power had been raising  
4 this concern about who Mr. McDonald reported to, and he said  
5 there is a possibility that Oglethorpe Power may try to sue  
6 the company over this.

7 He said "We cannot have that memo in our files, I  
8 want you to destroy all copies of it."

9 Q. Did Mr. Williams raise during the meeting his trip  
10 to Birmingham?

11 A. Mr. Williams after he told me to destroy it, I  
12 told Mr. Williams I was raising a regulatory concern. I  
13 knew he didn't have a lot of nuclear experience. I said to  
14 him that I was raising a regulatory concern and he should  
15 not tell me to destroy all copies.

16 We talked about that for another couple of  
17 minutes, and then Mr. Williams handed me back the original,  
18 but he kept a copy, and he told me that he was going to  
19 Birmingham the next day and he was going to discuss some of  
20 the problems with the people at SONOPCO, but he assured me  
21 that he was not going to give them a copy of the memo that  
22 he kept, and he said he would not retain that copy in his  
23 files.

24 He again told me to go and get rid of the memo,  
25 get rid of all copies of the memo.



1 Q. What's the best you can recollect about the  
2 conversation centering around the regulatory concern?

3 A. Mr. Williams told me that it was his understanding  
4 that the NRC had been briefed on the SONOPCO concept, and he  
5 said if anybody from NRC raises a concern we'll show them an  
6 organizational chart.

7 Q. Did you have further discussions about the SONOPCO  
8 organization?

9 A. Yes, sir. As I recall, Mr. Williams and I did  
10 discuss -- I think we went over to his blackboard in his  
11 office and we discussed the organizational setup over a few  
12 minutes, I don't recall how long.

13 Q. And did Mr. Williams express to you a belief  
14 regarding The Southern Company board?

15 A. Mr. Williams and I got into a discussion at that  
16 time about why Mr. Dahlberg didn't just pick up the phone  
17 and tell Mr. McDonald what to do.

18 Mr. Williams did discuss with me the fact, or Mr.  
19 Williams said to me that one of the problems was that Mr.  
20 McDonald was very close to Mr. Farley, and that if Mr.  
21 Dahlberg and Mr. McDonald came to an impasse it would go to  
22 Mr. Farley, and that The Southern Company board was divided  
23 between support for Mr. Farley and support for Mr. Addison,  
24 that Mr. Addison could not get Mr. Farley fired, and Mr.  
25 Farley could not get Mr. Addison fired, and that the

1 Southern board was at a stalemate.

2 He also discussed with me the fact that there was  
3 a lot of interest in the system about who would replace Mr.  
4 Addison as president of The Southern Company when he  
5 retired, and that nobody wanted to bring up this kind of  
6 problem which would require -- which would cause Mr. Addison  
7 to make a decision between Mr. Dahlberg and Mr. Farley.

8 Q. And who was in attendance at your meeting with Mr.  
9 Williams?

10 A. Just Mr. Williams and me.

11 Q. And what happened after the meeting ended?

12 A. I went back to Mr. Head, and I told him that Mr.  
13 Williams had instructed me to destroy all copies of the  
14 memo.

15 Mr. Head informed me that I could do exactly as  
16 Mr. Williams indicated, but that I was to keep the original.

17 Q. And what date was this?

18 A. April 27th, 1989.

19 Q. And what was Mr. Head doing at Georgia Power  
20 Company at that time?

21 A. He was senior vice president.

22 Q. He was changing over?

23 A. Mr. Head was in the process of retiring. He  
24 retired May the 1st.

25 Q. Did you have further discussions with Mr. Williams



1 Q. Is he a vice president of SONOPCO or the SONOPCO  
2 project?

3 A. I'm sorry?

4 Q. Is he a vice president of SONOPCO or the SONOPCO  
5 project?

6 A. There is no corporate entity SONOPCO, it is a  
7 project.

8 I think Mr. McCreary, and I would have to double  
9 check, is probably an officer of Southern Company Services  
10 for the SONOPCO project, and his duties with respect to that  
11 project is the administrative part of the business, the  
12 personnel part, human resources, those type parts of the  
13 organization.

14 Q. Okay. And would you be surprised if Mr. McDonald  
15 didn't think that Mr. McCreary reported to him?

16 A. Would I be surprised if --

17 Q. You think that Mr. McDonald is an officer of  
18 Southern Company Services; right?

19 A. Yes, sir, I believe so.

20 Q. Okay. Now, if he's an officer of Southern Company  
21 Services and Mr. McCreary is underneath him, then you would  
22 be surprised if Mr. McDonald would think that Mr. McCreary  
23 didn't report to him? That would be an illogical assumption  
24 on Mr. McDonald's part?

25 A. I'm not sure it would be illogical.

1 A. Are you asking me if Mr. Hobby chose the people, or  
2 the number, or what are you asking me?

3 Q. I'm asking you whether you knew Mr. Hobby had the  
4 authority to interview and staff positions at the contract  
5 administration group.

6 A. I didn't know that for sure.

7 You know, when Mr. Head met with me as I recall it  
8 he had an organizational proposal, we discussed it, and I  
9 said as best I recall I thought there were too many, we  
10 reduced it, we agreed on some number.

11 How he physically did that, whether he interviewed  
12 them all himself, whether he asked Marvin to, whether he  
13 hired a headhunter, whether he used the corporate psychology,  
14 I don't know. All I know is I authorized Mr. Head to form  
15 the group.

16 Q. If you authorized Mr. Head to staff the group, then  
17 Marvin Hobby would obviously have the authority to interview  
18 people for that.

19 A. I don't know, Mr. Kohn. All I know is what I  
20 authorized Mr. Head to do.

21 Q. Were you aware that the staffing of the contract  
22 administration group was going to increase and that Mr. Hobby  
23 was going to hire someone part-time from the Vogtle project,  
24 increase the size of his staff?

25 A. No, sir.

1 Q. Do you know if your administrative assistant was  
2 advised of that fact?

3 A. No.

4 Q. Did you discuss that with Mr. Head?

5 A. Not that I recall.

6 Q. Okay. Now, the SONOPCO budgets that you were  
7 referring to, their -- you said that the nuclear operations  
8 contract administration group was initially envisioned to  
9 play a role to monitor those budgets; correct?

10 A. That's correct.

11 Q. Okay. And the nuclear budget is normally approved  
12 in a management council meeting; correct?

13 A. All budgets are.

14 Q. Okay. But the 1990 budget, the nuclear budget  
15 could not be approved at the management council; isn't that  
16 correct? It was not approved by the management council?

17 A. That is not correct.

18 Q. The 1990 budget was approved by the management  
19 council?

20 A. I believe so, yes. All the budgets were approved  
21 by the management council.

22 Q. And you had a particular disagreement with Mr.  
23 McDonald over the 1990 budget?

24 A. I think I disagreed with everybody over the 1990  
25 budget, and we were trying to make reductions, and we had a

1 number of discussions about the SONOPCO budget as well as the  
2 budgets for the other organizations.

3 Q. Okay. And wasn't there a particular problem with  
4 the 1990 budget where you felt there was a \$50 million  
5 discrepancy in nuclear operations?

6 A. No, sir.

7 MR. JOINER: Your Honor --

8 JUDGE WILLIAMS: Okay. Why are we asking him about  
9 budgets?

10 MR. KOHN: I'll move on, your Honor, and I may not  
11 have any further questions.

12 THE WITNESS: My answer was no, I'm not familiar  
13 with that.

14 BY MR. KOHN:

15 Q. And other than activities occurring in the November  
16 1989 time frame, you had no prior discussion about the  
17 staffing or functions of nuclear operations?

18 Let me rephrase that a little more.

19 Between May 5th or May 1st and November '89, you  
20 didn't have any discussions about the staffing of NOCA?

21 A. Of what?

22 Q. Nuclear operations contract administration.

23 A. Not that I recall.

24 MR. KOHN: I have no further questions, your Honor.

25 JUDGE WILLIAMS: Any redirect?

1 are addressed in that memo?

2 A. No.

3 Q. Was there any discussion in that meeting about Mr.  
4 Hobby's involvement in Fuchko/Yunker?

5 A. No.

6 Q. Mr. Evans, did anyone ever tell you that Mr. Hobby  
7 was concerned that Mr. McDonald did not receive his  
8 management direction from Mr. Dahlberg, that instead received  
9 it from Mr. Farley?

10 A. I did not hear that from anyone other than Mr.  
11 Hobby. He mentioned that to me in passing one day.

12 Q. To your knowledge has that concern ever been raised  
13 by any official connected with the Nuclear Regulatory  
14 Commission?

15 A. To my knowledge it has not.

16 Q. To your knowledge has it ever been raised by anyone  
17 connected with Oglethorpe Power Corporation?

18 A. To my knowledge it has not.

19 Q. When Mr. Hobby told you about this concern  
20 regarding Mr. McDonald's reporting relationship to Mr.  
21 Farley, were you concerned at all that Mr. McDonald didn't  
22 report to Mr. Dahlberg?

23 A. I was not concerned because I was aware that he in  
24 fact did.

25 In this time frame were in the 1989 rate case, and

1 A. No, sir.

2 Q. To your knowledge, Mr. Boren, was this memorandum  
3 or the concerns expressed in the memorandum a factor in any  
4 way in the decision to eliminate Mr. Hobby's position?

5 A. No, sir, it was not.

6 Q. Mr. Boren, are you familiar with a Department of  
7 Labor proceeding involving a Mr. Fuchko and a Mr. Yunker?

8 A. What I read in the papers.

9 Q. Has anybody ever told you that Mr. Hobby contends  
10 that Mr. Pat McDonald gave false or inaccurate testimony in  
11 that proceeding?

12 A. No, sir.

13 Q. Was that subject discussed in any of your meetings  
14 with Mr. Williams or Mr. Evans or in any of the management  
15 council meetings?

16 A. No, sir, it was not.

17 Q. To your knowledge, Mr. Boren, was Mr. Hobby's  
18 involvement in the Fuchko/Yunker proceeding a factor in any  
19 way in the decision to eliminate his position?

20 A. No, sir, it was not.

21 Q. Mr. Boren, did Mr. Hobby ever state to you that he  
22 believed that Pat McDonald reported to Mr. Farley instead of  
23 to Mr. Dahlberg?

24 A. Yes, sir, he kind of complained about that.

25 Q. And when did those conversations take place?



1 Dahlberg, or whether Mr. McDonald reported to Mr. Farley?

2 A. No, I don't.

3 Q. Now, do you recall testifying at your deposition in  
4 this case?

5 A. Yes.

6 Q. Let me have you identify, Mr. Evans, what this is,  
7 the first cover page and then look at Page 12. What is that  
8 document?

9 A. This is my deposition regarding this case.

10 Q. And could you read for me Lines 7 through 15,  
11 please?

12 A. Question: "Mr. Glenn indicated that he had  
13 discussed with Mr. Hobby a concern regarding whether Mr.  
14 McDonald was reporting to Mr. Dahlberg or Mr. Farley. Do  
15 you have an independent recollection of any type of  
16 conversations along that line with Mr. Hobby?"

17 Answer: "Yeah, I seem to recall that that was  
18 probably the subject or a portion of our discussion."

19 Q. Thank you. Now, was it your understanding that  
20 after you received the information from Mr. Hobby and you  
21 wrote up what's marked at Tab Number 20 that Mr. Baker was  
22 going to go to SONOPCO and talk with them about the concern  
23 that you prepared?

24 A. That was my understanding of why the document was  
25 being prepared.



1 an advisory one?

2 A. I am not an officer or a member of the Southern  
3 Company Services organization. Therefore, I have no position  
4 to make a selection.

5 Q. Does anyone at Georgia Power Company think that you  
6 are a member of that group?

7 A. Not that I know of.

8 Q. Do you know if there's any confusion that people  
9 would believe that you are employed by that group?

10 A. Not that I know of.

11 Q. Isn't it true that you requested the board of  
12 directors to consider Mr. McCreary for the position?

13 A. I advised the presidents, the CEO of Alabama, the  
14 CEO of Georgia and the CEO of Southern Company Services that  
15 I thought those individuals would be good and could  
16 adequately fill those positions.

17 Q. Isn't it true that you were the only one who  
18 requested that Mr. McCreary be selected to that position?

19 A. I don't know.

20 Q. How about Mr. Long's position?

21 A. I don't know.

22 MR. COLAPINTO: Thank you.

23 We have no further questions, your Honor.

24 JUDGE WILLIAMS: Any redirect?

25 MR. JOINER: No, your Honor.

1 after nuclear operations after Mr. O'Reilly was relieved of  
2 his duties, and then after we had had some problems with some  
3 INPO reports Mr. Scherer took over the operations directly,  
4 and he directed that Pat McDonald would report directly to  
5 him looking after nuclear operations, so there was a letter  
6 put out to that effect, so I had no reason to suspect he was  
7 not reporting to him, and he did report him on issues. What  
8 he reported to him, I don't know, I was not privy to that.

9 Q. Okay. Mr. Head, did you personally ever discuss  
10 Mr. Hobby's concern that Mr. McDonald didn't report to Bill  
11 Dahlberg with Mr. Dahlberg or with anybody else for that  
12 matter?

13 A. No, no one other than -- Mr. Hobby and I talked  
14 about it, he's talked to me one time, but I did not discuss  
15 it with anyone else.

16 Q. And why didn't you --

17 A. Well, I had no reason to believe that it wasn't so.  
18 As I said, the memo, Mr. Scherer had put out a memo saying  
19 that he reported to him.

20 Q. Okay. Do you know, Mr. Head, whether Oglethorpe  
21 Power Corporation had voiced a concern about the reporting  
22 structure at SONOPCO or who --?

23 A. They did not voice a concern to me, no. I think  
24 Mr. Hobby probably had mentioned a couple of times they had  
25 voiced some concern, but not about the reporting structure.

Deposition of A. W. Dahlberg

Date Taken June 10, 1994

PAGE	LINE
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## CORRECTIONS

SEE ATTACHED

Sworn to and subscribed before me,  
this the 23<sup>rd</sup> day of June, 1974

NOTARY PUBLIC

My Commission Expires \_\_\_\_\_

(SIGNATURE)



Exhibit E, page 1 of 3

Corrections to Deposition of A. W. Dahlberg, III, June 10, 1994

<u>Location</u>	<u>Error</u>	<u>Correction</u>
Page 10, Line 12	will	omit "will"
Page 26, Line 11	Glen	Glenn
Page 36, Line 17	Hariston	Hairston
Page 37, Line 21	Hariston	Hairston
Page 38, Line 2	pulled	poll
Page 38, Line 5	pulled	poll
Page 40, Line 11	Beckman	Beckham
Page 40, Line 13	After	And
Page 40, Line 21	Hariston	Hairston
Page 41, Line 1	Beckman's	Beckham's
Page 41, Line 6	Hariston	Hairston
Page 41, Line 10	Hariston	Hairston
Page 43, Line 25	Hariston	Hairston
Page 55, Line 15	Hariston	Hairston
Page 56, Line 6	absolutely on dates	absolutely certain on dates
Page 63, Line 17	our position	opposition
Page 79, Line 3	Bore	Boren
Page 89, Line 3	Hariston	Hairston
Page 91, Line 2	Hariston	Hairston
Page 91, Line 23	Hariston	Hairston
Page 92, Line 21	Hariston	Hairston
Page 93, Line 2	Hariston	Hairston
Page 95, Line 21	that	they
Page 122, Line 4	Hariston	Hairston

Deposition of Mr. A. W. Dahlberg

Date Taken June 10, 1994

PAGE LINE

CORRECTIONS

SEE ATTACHED

Sworn to and subscribed before me,  
this the 23rd day of August, 1994

Patricia Wilson

NOTARY PUBLIC

My Commission Expires August 10, 1994

Adam  
(SIGNATURE)

**Bul & Associates**  
COURT AND  
DEPOSITION  
REPORTERS

Exhibit E, page 1 of 3



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Page 40, Line 13	After	And
Page 40, Line 21	Hariston	Hairston
Page 41, Line 1	Beckman's	Beckham's
Page 41, Line 6	Hariston	Hairston
Page 41, Line 10	Hariston	Hairston
Page 43, Line 25	Hariston	Hairston
Page 55, Line 15	Hariston	Hairston
Page 56, Line 6	absolutely on dates	absolutely certain on dates
Page 63, Line 17	our position	opposition
Page 79, Line 3	Bore	Boren
Page 89, Line 3	Hariston	Hairston
Page 91, Line 2	Hariston	Hairston
Page 91, Line 23	Hariston	Hairston
Page 92, Line 21	Hariston	Hairston
Page 93, Line 2	Hariston	Hairston
Page 95, Line 21	that	they
Page 122, Line 4	Hariston	Hairston

LocationErrorCorrection

Page 132, Line 12

add "not" at  
beginning of line

Page 132, Lines 13-14

should read "At one  
time a task force  
looked at creating  
SONOPCO. Once SONOPCO  
was formed as a  
legal entity and had  
to have a Board, I was  
a member . . . "

Page 132, Line 17

counsel

council