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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

In the Matter of)	Docket No. 50-424-OLA-3
)	50-424-OLA-3
GEORGIA POWER COMPANY,)	5
et al.)	Re: License Amendment
)	(Transfer to Southern Nuclear)
(Vogtle Electric Generating Plant,)	
Units 1 and 2))	ASLB No. 93-671-01-OLA-3

GEORGIA POWER COMPANY'S BRIEF
ON THE INADMISSIBILITY OF THE OI REPORT
OR IN THE ALTERNATIVE
MOTION FOR CERTIFICATION TO THE COMMISSION

Introduction

Georgia Power Company ("Georgia Power") hereby submits this Brief on the inadmissibility of Intervenor's Ex. 39, Office of Investigations Report of Investigation ("OI Report"),¹ and the accompanying exhibits to that Report (Intervenor's Ex. 130). The OI Report and its exhibits are not admissible in this proceeding.

First, the report does not satisfy the Commission's standard of admissibility, 10 C.F.R. § 2.743(c). It is not reliable. Other members of this agency, including the Vogtle Coordinating Committee and the NRC Staff, have found that conclusions set out in the OI Report are not

¹ Intervenor's Ex. 39 also includes a Memorandum from Ben B. Hayes, Director, OI to Stewart D. Ebnetter, Regional Administrator, Region II, "Vogtle Electric Generating Plant: Alleged False Statements Regarding Test Results on Emergency Diesel Generators (Case No. 2-90-020R), Dec. 20, 1993, enclosing the OI Report dated Dec. 17, 1993.

supported by the evidence. Moreover, the OI Report and its exhibits are hearsay, and do not satisfy the standards under Fed. R. Evid. 803(8)(C) for admissibility under the public records exception to the hearsay rule. Second, admission of the OI Report and exhibits without a sponsor would deny Georgia Power its fundamental right to confront and cross-examine both the preparers of that report as well as interviewees from whom OI drew negative inferences. Finally, much of the report and the exhibits is merely repetitious and cumulative of the evidence that the parties are introducing independently in this proceeding. Georgia Power submits that the best evidence is the live testimony of witnesses, subject to the Board's scrutiny and questioning. The Board does not need OI's prior review of much of the same evidence; nor does the Board need the investigator's conclusions on the ultimate issues in this proceeding. Findings on these issues are for the Board to make.

Should this Board deem the OI Report and its exhibits admissible, Georgia Power moves in the alternative for certification of this issue to the Nuclear Regulatory Commission ("NRC" or "Commission"). Georgia Power believes that a prompt ruling on this matter is necessary to prevent detriment to the public interest and to prevent unusual delay or expense. 10 C.F.R. § 2.730(f); see 10 C.F.R. §§ 2.718(i); 2.786(g). Introduction of the OI Report and its exhibits, which represent thousands of additional pages, into evidence in this proceeding, would greatly complicate this record, with the potential of causing extensive delay, expense, and prejudice to Georgia Power. Georgia Power is greatly concerned that this will cause this proceeding to devolve into a dispute over and tangential litigation of the adequacy of the OI Report, rather than litigation of the underlying facts and real issues of this case.

Argument

A. The OI Report and Accompanying Exhibits Are Unreliable Hearsay and Do Not Satisfy the Commission's Standards on the Admissibility of Evidence

The standard for considering the admissibility of evidence in an NRC proceeding is set forth at 10 C.F.R. § 2.743(c):

Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted.

There is no question that the OI Report is hearsay. Intervenor offers the OI report in evidence to prove the truth of the matter asserted therein, that Georgia Power made false statements to the NRC with alleged careless disregard for the truth. Fed. R. Evid. 801(c).² While hearsay may be admissible in NRC proceedings in certain circumstances, the hearsay evidence offered must, at bottom, be reliable. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-367, 5 NRC 92, 121 (1977). See also Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 419 (1986).

There are several reasons why the OI Report is unreliable hearsay and should not be admitted into evidence into this proceeding. First, other members of the NRC -- namely the Vogtle Coordinating Committee and the NRC Staff -- have rejected the OI findings. The OI Report has therefore been discredited by its own sponsoring agency, and should be considered unreliable as a result.

² NRC adjudicatory boards will look to the Federal Rules of Evidence as guidance. See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 365 n.32 (1983).

The NRC's Vogtle Coordinating Group performed a detailed evaluation of the OI Report, and disagreed with nearly all of the principal findings in the OI Report.^{3/} The following examples of disagreements between the Coordinating Group and OI illustrate this point:

- The Coordinating Group disagreed with the OI conclusion that Mr. Bockhold deliberately withheld information from the NRC concerning problems or failures on the 1B diesel generator because he directed Mr. Cash to count only successful starts. The Coordinating Group concluded that incorrect information was presented as a result of the failure of Georgia Power personnel to exercise reasonable care in the collection of the start data, and not as a result of deliberate action by Mr. Bockhold. Coordinating Group Report at 13.
- The Coordinating Group could not support the OI finding that Mr. Hairston acted with a minimum of careless disregard in submitting information to the NRC in LER 90-006. Coordinating Group Report at 20.
- The Coordinating Group found insufficient evidence for OI's conclusion that Mr. Hairston acted with careless disregard in submitting the cover letter to LER 90-006 Rev. 1. Coordinating Group Report at 31.
- The Coordinating Group could not "identify evidence" to support OI's conclusion that Mr. McCoy acted with careless disregard in submitting the August 30, 1990 letter to the NRC. Coordinating Group Report at 39.
- The Coordinating Group could not find, as did OI, that Georgia Power submitted inaccurate information in its April 1, 1991 response to the Mosbaugh/Hobby 2.206 petition. Coordinating Group Report at 46-47.

These fundamental disagreements between the NRC's Office of Enforcement and OI illustrate that the OI Report is not reliable.

^{3/} See Memorandum from David B. Matthews to Thomas E. Murley, "Vogtle Coordinating Group Analysis," Feb. 9, 1994.

Second, the OI findings are unreliable because of the bias of the lead OI investigator in this matter, Larry L. Robinson. Mr. Robinson's partiality and close relationship with Intervenor illustrates that he has a personal interest in the investigation of the events following the March 20, 1990 site area emergency at Vogtle. In his analysis in the OI report, he ignored relevant information that is favorable to Georgia Power.⁴ His bias also shows in his excessive and blind reliance on self-serving statements by Intervenor. For example, in Allegation No. 6 concerning dewpoint readings, OI relies totally on an interview with Intervenor and on Intervenor's audiotape; OI did not interview a single Georgia Power witness on this issue. OI Report at 95-96.⁵

Further evidence of this bias is also provided in statements made by Mr. Mosbaugh in his deposition of August 24, 1994. In that deposition, Mr. Mosbaugh compared his discussions with Mr. Robinson to his discussions with his spouse. Mosbaugh Dep. Tr. 8/24/94 at 635-36. This testimony indicates the depth and intimacy of a relationship that has progressed far beyond professional standards of objectivity.

The potential applicability of the "public records" exception to the hearsay rule does not affect the argument above or allow an unreliable report to be introduced over objections. This exception provides that

⁴ See Letter to Board from M.A. Young, Oct. 27, 1994, enclosing Letter from A.H. Domby to M.A. Young, Aug. 31, 1994 re "NRC Office of Investigations' Review of Georgia Power Company Notice of Violation Reply, Vogtle Electric Generating Plant"; Letter from J. Lamberski to J.Y. Vorse, June 24, 1994.

⁵ Mr. Robinson admitted in his deposition and in an internal NRC memorandum that the OI conclusion on air quality would have to be revisited in light of evidence of which he was not aware when he made his investigation. Robinson Dep. Tr. 11/9/94 at 361-62; Letter to the Board from M.A. Young, Mar. 3, 1995, enclosing, inter alia, Memorandum from L.L. Robinson to J.L. Milhoan, Oct. 28, 1994, at 4. In that same internal memorandum, Mr. Robinson also admitted that the OI review did not consider the materiality of the various statements in question. Robinson Memorandum at 8, 9.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. R. Evid. 803(8)(C) (emphasis added). Thus, even if the hearsay evidence is an agency record, the evidence must be excluded if it lacks trustworthiness to satisfy the public records exception. Without the requisite trustworthiness, the document lacks the requisite reliability needed to satisfy the exception to the hearsay rule. Since the OI report "is not the kind of trustworthy report described in Rule 803," as demonstrated above,⁹ it should not be received into evidence in this proceeding. See Toole v. McClintock, 999 F.2d 1430, 1434-35, reh'g denied, 11 F.3d 169 (11th Cir. 1993); City of New York v. Pullman Inc., 662 F.2d 910, 914-15 (2d Cir. 1981), cert. denied, 102 S. Ct. 1038 (1982) (not error to exclude "interim" staff report in the form of a recommendation").

The OI Report also does not satisfy the public records exception to the hearsay rule because it has not been endorsed or accepted as the official position of the agency. A prerequisite of the public records exception to the hearsay rule is that the document in question must represent the findings of the agency. Figures v. Board of Pub. Utilities of the City of Kansas City, Kansas, 967 F.2d 357, 360 (10th Cir. 1992). As demonstrated above, the OI report clearly fails this test; neither the NRC's Office of Enforcement, the NRC Staff, nor the Commission have adopted the

⁹ It is not unprecedented that government reports would be considered untrustworthy. See United Air Lines, Inc. v. Austin Travel Corp., 867 F.2d 737, 742-43 (2d Cir. 1989) (affirming trial court ruling that government reports were untrustworthy because they did not reflect real concerns of the business world).

OI findings. To the contrary, the NRC Staff conducted further review through the Coordinating Committee, presenting (to the best of Georgia Power's belief) the Coordinating Committee's analysis to the Commission as the agency's basis for proposed enforcement, based its subsequent enforcement action on the Coordinating Group's position,¹⁷ and is now sponsoring the Coordinating Group's position in this proceeding. Since there has been so much disagreement within the agency on the OI findings, in no way can it be said that the OI findings represent the position of the agency.

For all of these reasons, the OI Report is unreliable and should not be admitted into evidence.

B. The Exhibits to the OI Report are Not Admissible

Like the OI Report, the exhibits to that report are also inadmissible en masse. These exhibits, which fill six large binders (four inches wide each), suffer from a number of evidentiary defects, including reliability.

For example, the OI exhibits include over twenty initial transcripts of tapes reviewed and edited only by Mr. Mosbaugh. The parties in this proceeding have taken an enormous effort to review relevant tapes and have made scores of transcript changes in order to produce accurate, stipulated transcripts. Introduction of the OI report would now inject into the record many tape transcripts that include only Mr. Mosbaugh's edits. These transcripts are clearly unreliable.

¹⁷ See Letter from J.L. Milhoan to C.K. McCoy, Feb. 13, 1995 (Modified NOV); Letter from J.L. Milhoan to H.A. Franklin, May 9, 1994 (NOV).

Second, the OI exhibits include only brief summaries of OI interviews of NRC personnel. These interviews were not transcribed. There is no indication that these interview of NRC personnel were even conducted under oath. Further, the summaries are extremely brief and do not appear to reflect any effort by OI to develop or consider exculpatory information. Georgia Power submits that these brief summaries are hearsay that lack sufficient indicia of reliability and are therefore not admissible over Georgia Power's objection.^{8/} For example, although Mr. McCoy told OI that a number of calls had been made to Mr. Brockman after April 19, 1990 relating to the diesel starts statements, the OI interview summaries for Mr. Brockman do not reflect a single question about any calls after April 19.

Third, the OI exhibits include lengthy transcripts of interviews of Mr. Mosbaugh, over four hundred pages in length. These statements are clearly hearsay -- they are not admissible against Georgia Power under the hearsay rule or under any other exception. Admitting this voluminous material would in essence allow another round of prefiled testimony by Intervenor, which would cover many of the same areas as were stricken by the Board in its May 11, 1995 Memorandum and Order. Further, Mr. Mosbaugh's interviews themselves contain hearsay and many other statements that are inadmissible, such as speculation and assertions irrelevant to the issues in this proceeding. Admitting these lengthy statements might necessitate a line by line review of the transcripts to identify these objections and require an enormous number of additional evidentiary rulings by the Board.

^{8/} Cf. Memorandum and Order (Motion to Strike Mosbaugh Testimony), May 11, 1995 at 15-21 (ruling as inadmissible untranscribed testimony).

The OI reports also contain transcripts of interviews, and in four cases summaries of untranscribed interviews, with other individuals. While some portions of these transcribed interviews might be admissible when later used to cross-examine a witness, it would not be appropriate to introduce all these transcripts into evidence as a block. Particular transcripts may contain inadmissible statements, such as multiple hearsay or speculation. The transcripts may also contain irrelevant material, such as questions and answers unrelated to the specific issues admitted in this proceeding. In view of these concerns, and to avoid many unnecessary evidentiary objections, the Board should not admit the OI exhibits en masse. Instead, the record of this proceeding should be developed through live testimony, with individual OI exhibits, or relevant portions thereof, being admitted only where that admission is demonstrated to be appropriate. See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 419 (1986) ("Where material facts appear legitimately in dispute and a witness with personal knowledge is readily available, that witness should be offered. Similarly, when a document is relied upon that is readily available, that too should be presented").

C. Admission of the OI Report and Exhibits Without Appropriate Sponsors Would Violate Georgia Power's Right To Confrontation and Cross-examination

The OI Report and its exhibits should not be admitted without proper sponsors. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1260 (1984) (evidence must be sponsored by a witness for admission).² Mr. Robinson or

² See also Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 477 (1982). In that case, the Appeal Board held that technical analyses, opinions and conclusions were the type of evidence that calls for sponsorship by an expert who can be examined on the reliability of the factual assertions and soundness of the scientific opinions found in the documents. It would seem equally appropriate to require sponsorship of an investigative report containing both factual assertions and opinions.

someone else from OI with knowledge of its preparation and contents would have to sponsor the report, and other individuals would have to sponsor the exhibits. Admission of the OI report and the exhibits without a sponsor would violate Georgia Power's right to confront and cross-examine the author of that report and the individuals making factual assertions in the record of this proceeding. 5 U.S.C. § 556(d) ("A party is entitled to . . . conduct such cross-examination as may be required for a full and true disclosure of the facts"). See Finlay Testing Laboratories, Inc., LBP-88-1A, slip op., 1988 NRC LEXIS 1 at *12 (Jan. 27, 1988) (Licensee in license suspension case has "constitutional rights of due process and confrontation of witnesses"); Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-90-25, slip op., 1990 NRC LEXIS 43 at *14-16 (evidentiary hearing required for party to confront Staff witness who expressed factual conclusions in affidavit).

Cross-examination and confrontation would clearly be required to obtain a full and true disclosure of the facts. As demonstrated above, the OI report is rife with inaccuracies that could only be brought to light under cross-examination. Without the confrontation and cross-examination of the author of the OI report, the probative value of that report will not have been challenged, and Georgia Power's procedural due process rights will have been violated.^{10/}

^{10/} See Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), LBP-78-26, 8 NRC 102, 165 (1978)(testimony found to have limited probative value where witness based testimony on other sources, and those sources were not available for cross-examination).

D. Admission of the OI Report Would Greatly and Unnecessarily Complicate the Record of the Proceeding and Would Cause Undue Prejudice to Georgia Power

Admission of the thousands of pages represented by OI report and its accompanying exhibits will greatly complicate the record, creating the potential to significantly delay this already lengthy proceeding. When the NRC Staff reviewed the OI Report to respond to Intervenor's request for admissions, the Staff found it necessary to clarify most of the assertions and representations in that report.¹³¹ If the OI Report is admitted, Georgia Power believes that it will need to review the record to ensure that all the evidence necessary to support these clarifications, or to put these statements in proper context, are included in the record. This could require calling additional witnesses, including Mr. Robinson, NRC personnel who were interviewed by OI (and whose interviews are only documented by extremely brief summaries in the OI Report), and perhaps others.

The last section of the OI Report, at pages 98-102, illustrates this problem. There, OI refers to 26 taped statements that it asserts relate to Georgia Power's "attitude" toward NRC. Many of these statements have nothing to do with the diesel generator issues in this proceeding. For example, the statements address matters such as a vibrating RHR pump, electrical separation, safeguards, and the like, and involve individuals who are not witnesses in this proceeding. The introduction of this material would expand the issues and may necessitate further witnesses to try to explain the context of statements never really investigated, and now five years old.

¹³¹ In its response, see NRC Staff Amended Response to Intervenor's First Request for Admissions of Fact, Feb. 14, 1995, the NRC Staff found it necessary to "clarify" most of OI's findings, and to include in many cases a statement that the Staff lacked the information to determine the truthfulness of the statement in the OI Report.

Georgia Power is very concerned that the introduction of the OI Report and exhibits will prove an unnecessary distraction, imposing considerable burden on the Board and on all of the parties. At a minimum, the record that the Board will need to review will be expanded by thousands of pages, and if the parties are permitted to cite to any portion of that record, there would be a great potential for the introduction in proposed findings of assertions that were never subjected to cross-examination and scrutiny by the Board. Georgia Power also submits that this proceeding may become mired in disputes concerning the accuracy, reliability, sufficiency, and weight to be afforded to the OI Report, rather than focusing on the testimony and the witnesses and the real facts at issue.

Georgia Power believes that introduction of the OI Report and exhibits, with this attended distraction and potential for delay, is unnecessary. All the parties in this proceeding are presenting, anew, the evidence they believe the Board needs to reach a proper decision. The Board can resolve the issues on the basis of this evidence, including the testimony of the witnesses whose credibility the Board has assessed. The OI Report would not contribute anything, other than perhaps the investigators' conclusions on the ultimate issues, but those ultimate findings are for the Board to make.

Further, Intervenor has made no attempt to use the admissions it elicited from the NRC Staff or from Georgia Power during discovery. Intervenor has available to it the NRC Staff's clarifications of the OI findings, that were developed with considerable time and effort at

Intervenor's insistence (as the result of a motion to compel). With the availability of these admissions, introduction of the OI Report appears entirely unnecessary.

E. In the Alternative, the Board Should Certify the Question or Refer the Question for Commission Review

Should this Board deem the OI Report and its exhibits admissible, Georgia Power moves in the alternative for certification or referral of this issue to the Commission. The presiding officer has the authority to certify or to refer questions to the Commission. 10 C.F.R. §§ 2.718(i); 2.786(g); 2.730(f). The presiding officer may refer a question to the Commission where a prompt decision "is necessary to prevent detriment to the public interest or unusual delay or expense." 10 C.F.R. § 2.730(f).

Georgia Power believes that this standard is clearly met in this case. A prompt ruling on this matter is necessary to prevent detriment to the public interest and to prevent unusual delay or expense. Introduction of the OI Report and its exhibits, which represent thousands of additional pages, into evidence in this proceeding, would greatly expand the record, thereby causing extensive delay, expense, and prejudice to Georgia Power. Once this Board has ruled on the admissibility of the OI Report, and the expansion of the record of this proceeding commences, no future Commission review would provide any relief to Georgia Power. Such a decision "must be reviewed now or not at all." Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981); citing Kansas Gas & Elec. Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408, 413 (1976).

Moreover, Georgia Power believes, if this Board does not exclude the OI Report, that this issue is one of fundamental importance that should be resolved by the Commission. Georgia Power believes that the introduction of the OI Report by Intervenor without NRC adoption and sponsorship is inconsistent with the NRC's practice and policy allowing the NRC Staff to determine what witnesses it intends to call. See 10 C.F.R. § 2.720(h). Georgia Power believes that introduction of the OI report would have much the same effect as a subpoena of NRC employees not designated as witnesses. It would allow an Intervenor to dictate the NRC's evidence. It would confuse the record by injecting intra-agency disputes into the proceeding instead of focusing on the facts and the real evidence. And in this case, it would be even more objectionable than a subpoena because it would inject opinions not adopted by the agency without affording the licensee any opportunity for cross-examination. Accordingly, if the Board decides that the OI Report and exhibits are admissible, it should refer its ruling to the Commission to resolve this important issue.

Conclusion

For all of the reasons stated above, the OI Report and its exhibits should not be admitted into evidence in this proceeding. In the alternative, the Board should certify the question of the admissibility of the OI Report for resolution by the Commission.

Respectfully submitted,



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Dated: May 18, 1995

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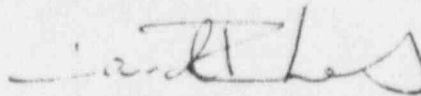
Before the Atomic Safety and Licensing Board

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et al.)	Re: License Amendment
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Units 1 and 2))	ASLBP No. 93-671-01-OLA-3

CERTIFICATE OF SERVICE

I hereby certify that copies of "Georgia Power Company's Brief on the Inadmissibility of the OI Report or In the Alternative Motion for Certification," dated May 18, 1995, were served upon the persons listed on the attached service list by deposit in the U.S. Mail, first class, postage prepaid, or where indicated by an asterisk by hand delivery, this 18th day of May, 1995.



David R. Lewis
Counsel for Georgia Power Company

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

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