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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of:)

ALABAMA POWER COMPANY)

(Joseph M. Farley Nuclear
Plant, Units 1 and 2))

Docket Nos. 50-348-CivP

50-364-CivP

(ASLBP No. 91-626-02-CivP)

ALABAMA POWER COMPANY'S RESPONSE
TO THE NRC STAFF'S MOTION TO EXCLUDE
CERTAIN SURREBUTTAL TESTIMONY

On April 16, 1992, the NRC Staff filed a "Motion In Limine" to exclude from Alabama Power Company's Surrebuttal Testimony certain responses that the Staff believes to be irrelevant or unreliable. For the reasons stated herein, Alabama Power Company requests that the Board deny the Staff's motion in its entirety.

I. IRRELEVANT TESTIMONY

The Staff has argued in its "Motion In Limine" that certain testimony of Mr. James E. Sundergill regarding the lack of safety significance of the low levels of silicone oil in the GEMS level transmitters is irrelevant. As the Staff notes, this testimony is in further explanation of page 203 of Mr. Sundergill's Direct Testimony in which he explains that the level transmitters at issue "provide only a redundant indication." As Mr. Sundergill explains in both his Direct Testimony and his Surrebuttal Testimony, Farley Nuclear Plant has a Reactor Water Storage Tank level indication

that is the "primary means" of obtaining the information provided by the GEMS transmitters. Since Mr. Sundergill's Surrebuttal Testimony again explains that even if the GEMS transmitters failed in a design basis event, no safety significance attaches, the Staff seeks to have this testimony excluded for the same reasons stated in a motion to strike filed on February 4, 1992.¹

On February 6, 1992, Alabama Power Company filed with the Board a response to the Staff's prior motion to exclude Direct Testimony explaining the lack of safety significance of certain of the alleged violations at issue in this enforcement hearing. In that response, Alabama Power Company discussed in great detail why consideration of actual safety significance is relevant in this enforcement action and why the Board must find safety significance to the alleged violations before imposing any civil penalty. Alabama Power Company's response also specifically discussed testimony related to the GEMS transmitters in the Attachment, at page 3. Alabama Power Company refers the Board to that explanation in its February 6, 1992 response and adopts that discussion as its response to the Staff's current motion.

¹"Motion In Limine to Exclude Irrelevant Testimony Submitted by Alabama Power Company," dated February 4, 1992.

II. UNRELIABLE TESTIMONY

A. Comments of Plant Electrician

The Staff has also sought to exclude as unreliable certain surrebuttal testimony proffered by Mr. Jesse E. Love and Mr. David H. Jones regarding installation of the Chico A/Raychem seals. This testimony refutes allegations made by Mr. Wilson regarding what he believes to be deficiencies in Alabama Power Company's installation instructions and methodology. Mr. Wilson argues that the instructions did not require the electrician to perform sufficient surface preparation when installing the Raychem seals and, therefore, the seals were unqualified. He speculates that the pipe fittings used at Farley Nuclear Plant might have "burrs or sharp edges that could cut the Raychem material," but that the Farley installation instructions did not specifically require that these burrs or edges be smoothed prior to application of the Raychem material. Mr. Wilson also claims that since the installation instructions did not specifically require the electrician to "perform a visual inspection" to confirm that the Chico material actually filled the pipe nipple to the requisite level, the installation instructions must be deficient.

These issues were presented by the Staff for the first time at the hearing in February 1992. Subsequent to the hearing, Mr. Jones and Mr. Love spoke with one of the electricians who actually

installed the equipment to determine whether the Staff's new concerns had application to Farley Nuclear Plant. This conversation with the electrician, among other things, shows that the Staff's speculation regarding the Raychem installation practices is simply baseless. This testimony is clearly relevant. Furthermore, Alabama Power Company maintains that it is admissible.

The Staff has acknowledged that hearsay testimony is generally admissible in administrative proceedings. Alabama Power Company agrees. Hearsay evidence is admissible in administrative proceedings, both under the Administrative Procedure Act, 5 U.S.C. § 556(d), and NRC rules of practice, 10 C.F.R. § 2.743(c). Wisconsin Elec. Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78 5 AEC 319, 332 (1972). By longstanding practice, hearsay evidence is generally admissible in NRC adjudicatory proceedings. E.g., Philadelphia Elec. Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 279 (1987); Duke Power Co., (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 411-12 (1976) ("[E]ven were we to agree that [the witness's] testimony was entirely hearsay, evidence of that character is generally admissible in administrative proceedings.")

The Staff would exclude the testimony nonetheless, arguing that it is unreliable. However, the Staff argues that it is unreliable solely because it is "based not on their [the witnesses'] personal knowledge, but rather on the 'recollections'

relayed to them by an unidentified person or persons" -- i.e., precisely because it is hearsay. Such circular reasoning provides no reasonable basis for excluding the testimony of Mr. Jones and Mr. Love that speaks directly to concerns on qualification presented by Mr. Wilson at the February hearing. The fact that this evidence is communicated to the Board through the testimony of Mr. Love and Mr. Jones does not automatically render it unreliable. Thus, the nature of this evidence offered by Mr. Love and Mr. Jones only affects the weight the Board should place on the evidence and not its admissibility.²

Further, had the Staff raised these issues at the 1987 inspection, in the inspection report, in the notice of violation, or in the order imposing civil penalty, or even in its Direct Testimony, the electrician consulted by Mr. Jones and Mr. Love may well have been on Alabama Power Company's witness list so he could provide written Direct Testimony in this proceeding to inform the Board that Mr. Wilson's new concerns are groundless. Instead, the Staff withheld these new concerns, or even created them for purposes of this enforcement action, raising them for the first time at the February hearing. Interestingly, the Staff used

²Though Alabama Power Company believes that Mr. Jones and Mr. Love's testimony on these issues is completely reliable, Alabama Power Company would be happy to have the Plant electricians execute affidavits stating under oath what they told Mr. Jones and Mr. Love. However, Alabama Power Company believes that this is unnecessary since the testimony is reliable and since the Staff is welcome to cross-examine Mr. Jones and Mr. Love to challenge the credibility and reliability of their testimony on these issues.

similar conversations as the basis for certain of its Rebuttal Testimony. For example, on page 9 of the Staff's rebuttal testimony on V-type taped splices, Mr. Paulk testifies that a Wyle Laboratories test was conducted in a certain manner. He bases this testimony on "discussions that I had with the Wyle person in charge of the test." Apparently the Staff has no difficulty concluding that statements made to Mr. Paulk are reliable, but feels compelled to challenge the reliability of statements made to Alabama Power Company witnesses.

The experts sponsoring testimony in this proceeding are "known." The Alabama Power Company experts are relying on hearsay, in part, as the basis for their expert opinions concerning the installation of the Chico A/Raychem seals. Most importantly, however, the witnesses will be available for cross-examination, at which time they can be questioned about the reliability of the hearsay at issue. Thus, the Surrebuttal Testimony at issue should be ruled admissible and should not be excluded by the Board as unreliable. Alabama Power Company submits that the Board should admit such evidence and assign to it whatever weight the Board deems appropriate.

B. Comment of Bechtel Test Engineer

The Staff has also challenged the reliability of Mr. Love's and Mr. Jones' Surrebuttal Testimony on page 95 of Volume II. In

that testimony, the Alabama Power Company witnesses respond to a challenge by Mr. Wilson regarding the significance of pouring the Chico compound into the pipe nipple versus using a tygon tube installation methodology. Mr. Wilson claimed in his Rebuttal Testimony that since a quality control inspector's notes on the Bechtel test qualifying the Chico A/Raychem seals says the Chico compound was "poured" into the nipple, no other method for placing the compound into the nipple is acceptable.

The Staff believes that Alabama Power Company's testimony conveying to the Board the recollection of an electrician involved in the Bechtel test is unreliable and should be stricken from the record. In that testimony, Mr. Love and Mr. Jones state that "in our conversation with one of the lead electricians who helped make these seals, he stated that his recollection of the 1981 tests was that the Chico was added by injection" (the same method as used in the field at Farley Nuclear Plant). Though Alabama Power Company sees no significance between "pouring" and "injecting" the Chico compound into the nipple, Mr. Wilson obviously does. Nevertheless, since Mr. Wilson has raised the issue, Mr. Love and Mr. Jones are providing the Board with the recollection of a test participant who remembers that the Chico was not "poured," but rather "injected" into the pipe nipple during the Bechtel test.

Since Mr. Wilson is the one who raised the issue of how the pipe nipple was filled with the Chico compound during the Bechtel

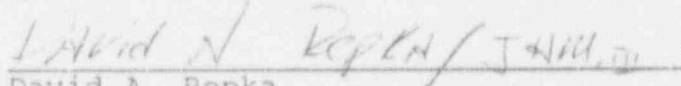
test, it is indeed ironic that the Staff now seeks to have stricken from the record a statement made by an eye witness to that test who has a recollection that addresses Mr. Wilson's concern. Though the Staff is troubled that this is unreliable testimony, it nevertheless is consistent with and is corroborated by Mr. Love's own recollection of the testing methodology. (Vol. II, page 95 of Alabama Power Company's Surrebuttal Testimony). Mr. Love's corroborating testimony clearly shows that the recollection of the test engineer is reliable. Furthermore, the Staff will have an opportunity to cross-examine the witnesses on this testimony if it wishes to challenge the reliability of this testimony. As a result, Alabama Power Company submits that the Board should accept this testimony and give to it whatever weight the Board believes is warranted.

III. CONCLUSION

For the foregoing reasons, the NRC Staff's Motion should be denied in all respects. Moreover, Alabama Power Company would welcome an opportunity for oral argument on this matter at the beginning of the hearing on May 18, 1992.



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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "ALABAMA POWER COMPANY'S RESPONSE TO THE NRC STAFF'S MOTION TO EXCLUDE CERTAIN SURREBUTTAL TESTIMONY" relating to the above-captioned proceeding have been served by Federal Express on the following as indicated by an asterisk and otherwise by deposit in the United States Mail, First Class, this 24th day of April, 1997:

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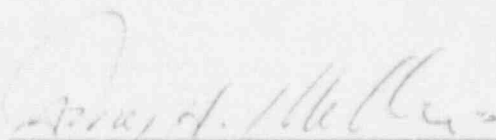
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