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April 21, 1993

UNITED 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. Murphy

In the matter of

GEORGIA POWER COMPANY,
et al.

(Vogtle Electric Generating
Plant, Units 1 and 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

MEMORANDUM AND ORDER
(Ruling on Stay Request and on Scheduling)

We have decided, after weighing the relevant factors, to deny the request for a stay originally filed by Georgia Power Company, et al., (Applicant) before the Nuclear Regulatory Commission (Commission). On the other hand, utilizing our powers as Presiding Officer, we have decided to establish a schedule that will not require any answers to discovery requests prior to May 1, 1993, and that will defer depositions of Applicant's officials until after audio tapes that were made of their conversations are transcribed and made available to them.

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We continue to urge the parties to negotiate stipulations that will minimize the cost of discovery. We urge the Staff and Mr. Mosbaugh (Intervenor) to negotiate mutually acceptable ways of conducting discovery with respect to their overlapping interests,¹ so that they may avoid unnecessary duplication of discovery that would be unduly costly to Applicant. Similarly, the Staff and Applicant should negotiate mutually acceptable ways of conducting discovery with respect to their overlapping interests, so that they may avoid unnecessary duplication of discovery that would be unduly costly to Intervenor.

I. Procedural History

On February 19, 1993, this Board issued LBP-93-5, 35 NRC ____, admitting Allen L. Mosbaugh as a party to this case and commencing discovery (Order Admitting Party). On March 4, 1993, Applicant responded to this Order by filing before the Commission both an Appeal² and an Application for a Stay (Applicant Appeal, Applicant Stay). On March 16, 1993, the Staff of the Nuclear Regulatory Commission (Staff) filed its response to the Appeal and the Request for a Stay (Staff

¹These parties can consider the possibility that the unconventional step of including Georgia Power in these negotiations might assist them in arriving at a single, mutually agreeable solution.

²It simultaneously filed both a Notice of Appeal and a Brief in Support of its Appeal.

Appeal Response; Staff Stay Response).³ Then, on March 18, 1993, the Commission issued CLI-93-06, referring the consideration of the Request for a Stay to this Licensing Board (Commission Referral). Following that referral, on March 22, 1993, Intervenor filed its response to the Application for a Stay (Intervenor Stay Response).

The Licensing Board scheduled a telephonic prehearing conference for April 1, 1993, for oral argument that would assist it in determining the Stay motion and making scheduling decisions; but one day prior to that date Applicant informed us by facsimile transmission that the Department of Justice had closed the investigation of Georgia Power that had been part of Applicant's basis for seeking the Stay.⁴ The Board immediately requested the parties to confer about the continuing usefulness of the scheduled conference, which was then postponed by agreement of the parties until April 15, 1993. Just prior to that conference, on April 13, the Staff filed pursuant to Board authorization, "NRC Staff Response to the Licensing Board Questions Regarding Scheduling and Discovery."

³The Staff also filed before us its Response to Licensing Board Memorandum and Order (Admitting Party), on March 8, 1993; and Intervenor filed a Scheduling Statement ("Petitioner's Scheduling Statement") on that same date.

⁴On April 1, intervenor transmitted a March 30, 1993 letter to Applicant's Counsel from the Department of Justice. The letter indicates that the case against Georgia Power is closed but that the Department reserves the opportunity to reopen the investigation in the future "should sufficient facts develop."

The Board held a telephonic scheduling conference on April 15, 1993. Tr. 117-151. During that conference, Applicant asserted that it continued to request the grant of a Stay. Tr. 125-27. Staff, on the other hand, abandoned its support of the Stay and requested that discovery requests be handled on an item by item basis. Tr. 141, lines 13-20; see also Tr. 143, lines 3-7; Tr. 144.

II. Stay Request

A. Legal Requirements

Applicant correctly states the criteria for granting a stay pending an appeal, derived from 10 CFR § 2.788(e) and from Public Service Company of New Hampshire, (Seabrook Station, Units 1 and 2)), CLI-90-3, 31 NRC 219, 257 (1990):

(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

Applicant also correctly states that the most crucial of the four factors is the existence of irreparable injury.⁵ In addition, the Staff has pointed out that a stay can be granted by the Commission through its inherent discretionary supervisory authority. Pacific Gas & Electric Co. (Diablo

⁵Applicant Stay at 3.

Canyon Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 (1986).⁶ It also states that the movant has the burden of proof in establishing that a stay should be granted. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

We note that the Stay arguments addressed a situation in which a criminal investigation was ongoing. That investigation is closed, and the only ongoing investigation is a civil investigation by the NRC Office of Investigation.

One of Applicant's principal arguments for the Stay was that permitting discovery to go forward during the ongoing criminal investigation would unfairly prejudice both its defenses and its employees' defenses to any criminal prosecution. It cited SEC v. Dresser Industries, Inc., 628 F. 2d 1368, 1378-9 (D.C. Cir. 1980)(Dresser) and United States v. Kordel, 397 U.S. 1, 90 S. Ct. 763 (1970)(Kordel). In response, Intervenor questioned whether Applicant can appropriately assert a privilege that is analogous to the Fifth Amendment on behalf of one or more employees that may or may not wish to seek such protection. Intervenor's Stay Opposition at 4-5. Intervenor also argues that Applicant has an affirmative obligation to disclose criminal or felonious acts. Id. at 5: 10 CFR § 73.71, Appendix G (as amplified in

⁶Staff Stay Response at 3.

NUREG-1304 . . .); Regulatory Guide 5.62, Reporting of Safeguards Events, Section 2.2, at Example 2.⁷

After studying the cited legal precedents, we have concluded that even the pendency of a criminal investigation would not require the granting of a stay of all discovery. In Kordel, the Supreme Court upheld a criminal conviction that occurred after the government had simultaneously pursued civil and criminal remedies against the same company and had used evidence from the civil case in the criminal case. Initially, the defendant corporation had sought a stay of the civil proceeding, and the stay was denied. Then the corporate officers provided testimony, knowingly waiving their Fifth Amendment rights despite the pendency of a criminal proceeding. Because of the waiver, it was held to be entirely permissible to use their testimony in the subsequent criminal case. The only apparent restriction on simultaneous proceedings was the Court's recognition that the government's interrogatories were found to have been filed in good faith in the civil proceeding; this implies that "bad faith", however determined, could block simultaneously proceeding in a civil and criminal context. In this case, however, there is no reason to doubt the good

⁷The Board also notes that the quality assurance regulations require Licensee to seek the root cause of alleged deficiencies that come to its attention. Pt. 50, Appendix B, I ("assuring that an appropriate quality assurance program is established and effectively executed" and verifying correct performance), II, XVI-XVII.

faith of the government, particularly since this proceeding is brought by an outside intervenor and not by the government itself, and the government is merely pursuing its authorized rights as a party.

In Dresser, the D.C. Circuit held that the Securities and Exchange Commission was entitled to the enforcement of a subpoena issued in a civil investigation of the corporate use of funds to make "questionable foreign payments" to obtain foreign business. The court was presented with the argument that this subpoena would unfairly broaden the government's rights of investigation under the rules of criminal procedure in a simultaneous grand jury inquiry. The court held, however, that simultaneous enforcement of the subpoena was appropriate.

We find that these cases are determinative. Applicant's claim for a stay is weaker than it once was, since it was based on the alleged effects of a criminal investigation against it. Even in that posture, the courts have refused stays. Now that the pending criminal investigation has been closed, Applicant's claim for a stay is still weaker. Nor has Applicant suggested even colorable authority that a civil case should be stayed because of a pending civil investigation.

B. Criteria for a Stay

Although we have addressed the legal underpinning for Applicant's case in the previous section, there are four criteria for a stay, and the purpose of this section of our opinion is to weigh all four factors before determining whether or not to grant the pending request for a stay.

1. Likelihood of Prevailing on the Merits

We have studied the grounds for error asserted by Applicant in its Stay motion and have concluded that none of the grounds is likely to prevail on appeal.

The first asserted ground is that Mr. Mosbaugh's residence 35 miles from Vogtle for a week a month does not constitute sufficient contacts to be the basis for standing.⁸ The principal case cited in support of this proposition is Florida Power & Light Company (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989), which denied standing to an intervenor in an amendment case. The intervenor in that case lived 40 miles from the facility, and the Commission denied standing because it found that the risks of the particular amendment at issue were

⁸We did not discuss allegedly false statements made by Mr. Mosbaugh concerning his residence in this proceeding because we did not consider that controversy relevant to our acceptance of the undisputed facts concerning Mr. Mosbaugh's contacts with the plant at the present time. Applicant's Stay Request at 7, footnote 8. We note that Applicant's appeal has not challenged our findings concerning those facts.

limited risks that were not risks to the general public. In Applicant's view, the risks in this case likewise involve a paperwork transfer of authority that does not affect operations or the general public; consequently, it considers the pending amendment not to involve risks to the general public.

We were well aware of Applicant's view when we admitted Mr. Mosbaugh as a party. We stated that view in LBP-93-5, 37 NRC ___ (February 18, 1993), slip op. at 2, and 3-4. We rejected that view only after extended consideration of the legal requirements for an amendment (Id. at 7-9) and after recognizing that we had to choose between Applicant's view that there was no increase in risk and Intervenor's view that it is enough to allege that the transfer could not be effected because the recipient of operating authority is lacking in character and competence to operate a nuclear power plant safely. We concluded, slip op., p. 2, that:

We would not deprive [intervenor] . . . of his right to intervene because the material safety deficiencies he has alleged may already be occurring.

We also concluded, slip op., p. 21, that Intervenor had alleged a safety risk to himself because, "The risk of non-safety conscious management is as great as many other risks that could be adjudicated in an operating license case."⁹

⁹With respect to risks to the public from the operation of a nuclear power plant, the Commission has said that residence — presumably "full-time" residence — fifty miles (continued...)

We note that the Staff, which initially opposed admission of Mr. Mosbaugh, has changed its opinion and agrees with the Board's position. Thus, it appears to have been persuaded by our opinion to support our position on the merits. Staff Appeal Response at 6-9.

We conclude that Applicant is unlikely to succeed on the merits of its appeal.

2. Irreparable Injury

Initially, Georgia Power alleged that it was irreparably injured because discovery in this case would prejudice its defense of a criminal investigation ongoing against it and some of its employees. Above, beginning on page 5, we discussed the legal precedent concerning the validity of this argument, and we concluded that Applicant was not entitled to a stay even if the criminal investigation were ongoing. We also concluded that there was less claim for a stay in the present posture, where only a civil investiga-

⁹(...continued)

from a plant is enough to establish standing. In this case, Intervenor resides 35 miles from the plant for one week per month; consequently, there is no direct guidance as to whether to admit Mr. Mosbaugh. However, in search of a rationale with which to act, we asked the parties how to compare these conditions to full-time residence at 50 miles, and no one was able to suggest a reasonable way to compare these risks. Tr. 52-59. We concluded, in our discretion, that Mr. Mosbaugh had enough exposure to Vogtle to be admitted as a party. (Because we admitted Mr. Mosbaugh of right, we have not considered whether he could have been admitted under our discretionary authority to permit intervention.)

tion s ongoing. Therefore, we conclude that Applicant has not carried its burden of proof concerning irreparable injury.

We conclude that there is no irreparable injury to Georgia Power from proceeding with discovery. We note that the decision to proceed does not deprive Georgia Power or other parties of the right to assert applicable privileges, although matters already adjudicated may affect future rulings.

3. Effect on Other Parties

Both Intervenor and the Staff seek to proceed with discovery. Because there is an interest in fair and efficient adjudication, their interest in timely adjudication is an important one. In this case, there is the added interest that our adjudication could affect other pending matters that could have an immediate impact on the plant's operation.¹⁰ Although it is not our job in this license amendment case to decide directly whether Vogtle should continue to operate, it is appropriate to recognize Intervenor's interest in a timely adjudication that could affect other cases in which continued operation is an issue.

¹⁰Intervenor is part of a pending 10 CFR § 2.206 petition, and we also note that the Commission requested relevant information from the Staff in February 1992. Georgia Power Company, et al. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-3, 35 NRC 63, 65 (1992).

4. The Public Interest

The public's interest is broad. In addition to desiring an adequate assurance of safety in the operation of nuclear power plants, it encompasses timely adjudication and also the avoidance of placing unnecessary burdens on potential defendants in an enforcement action. On balance we consider the public interest to favor moving forward with this case and denying the stay request.

5. Conclusion

We conclude, after balancing all the factors, that it is not appropriate to grant a stay of discovery pending determination of the appeal. We therefore shall deny Applicant's Request.

III. Consideration of a Schedule

Apart from consideration of Applicant's motion for a stay, we have broad authority to regulate the course of the proceeding before us, in the twin interests of fairness and efficiency. 10 CFR § 2.718.

Because of our concern that the expensive process of discovery not be commenced unnecessarily, we consider it to be appropriate to defer the parties' obligations to respond to all discovery requests before May 1, 1993. This will not provide any real succor for the parties, but it will recognize the appropriateness of the delay in discovery that has

occurred during the consideration of the pending stay motion. It will also provide a few more days in which the Commission could act, thereby clarifying the status of the case.

We also have wrestled with the question placed before us by the parties about whether or not to defer depositions of Applicant's officials until after audio tapes and transcripts become available. These tapes appear to be essential evidence. They were made by Mr. Mosbaugh, generally without informing people with whom he was conferring that the tapes were being made. There are about 76 such tapes, with some of them being as long as two hours. Counsel for Applicant, Tr. 134.

An argument we seriously weighed about these tapes is that we might expect greater candor from Georgia Power's officials if they had to be deposed prior to seeing the tapes or transcripts of them. Their candor would result from their fear of direct contradiction in their own words in the transcript of the tapes.

However, we have decided that fairness and efficiency both dictate that depositions not be conducted until after the tapes become available. These extensive tapes, portions of which may be admissible in evidence, represent an extensive informal discovery process already undertaken by Intervenor. In the course of the taped discussions, the "deponents" had no knowledge that their words were being

preserved, so they had no right to object to questions based on relevance or the form of the questions and they were not on notice that their communication could be used in a formal legal setting. Given Mr. Mosbaugh's beliefs about Georgia Power's actions, we understand his motives for this way of proceeding, and without seeing the evidence, we have no opinion at this time about the usefulness of these tapes. However, it is clear to us, after extensive reflection, that Intervenor already has extensive evidentiary information accumulated through this technique and that it is not in need of a further procedural advantage. To the contrary, we have concluded that it would be unfair to Georgia Power officials to have them testify again before they have access to the tapes and transcripts of their prior conversations. We also are impressed that this way of proceeding would be most efficient for this proceeding and would avoid the necessity for repeated depositions of the Georgia Power officials, once before the tapes are available and again after. Hopefully, this also will reduce the volume of the deposition transcripts and simplify the job of the Board in sifting evidence.

Because of this determination, we have an increased interest in expediting the availability of the tapes and transcripts. One copy is known to be in the possession of the Office of Investigation of the Nuclear Regulatory

Commission.¹¹ They will object to releasing that evidence during their continued investigation. Tr. 141. On the other hand, Mr. Mosbaugh retained a copy of the tapes, and his copies would be available for discovery had he not turned them over to a Congressional committee, as his counsel represents that he has done. Tr. 142-3. We therefore shall require that counsel for Mr. Mosbaugh request the return of his copies of the tapes from the Congressional committee and that he report to us on his efforts and the response he has received, in a document that is received by us and the parties by May 14, 1993.

With the exceptions just noted, discovery (including document discovery) may proceed at its normal pace. We will reach further determinations concerning discovery deadlines only after we have ruled on the first round or rounds of claims of privilege and are more fully informed about the dates on which documents will become available.

We note that there is an apparent discrepancy in the representations of Staff Counsel, at Tr. 129-130, and paragraph five of an affidavit filed with us by Mr. Ben Hayes, appended to the NRC Staff's Response to Licensing Board Memorandum and Order (Admitting Party). We shall ask the Staff to explain this apparent discrepancy.

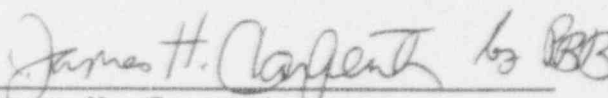
¹¹Transcripts have been made either of some of the tapes or all of the tapes. Tr. 141-2.

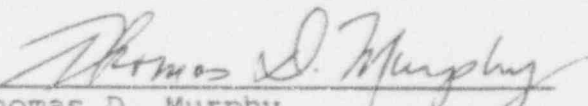
IV. Order

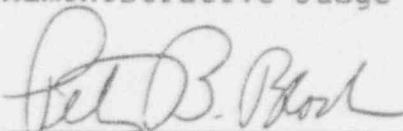
For all the foregoing reasons and upon consideration of the entire record in this matter, it is this 21st day of April, 1993, ORDERED, that:

1. The Application for a Stay filed by Georgia Power, et al., before the Commission on March 4, 1993, is denied.
2. Parties shall not be required to file answers to discovery requests or to provide witnesses for depositions prior to May 1, 1993. In all other respects, discovery may proceed.
3. Counsel for Mr. Allen Mosbaugh shall make a good faith, earnest request for the return of Mr. Mosbaugh's copies of the tapes he has made from the Congressional committee to which he has given those tapes. He shall report to us on his efforts and the response he has received, in a document that is received by us and the parties by May 14, 1993.
4. Staff of the Commission shall file an explanation of the apparent discrepancy concerning the affidavit of Mr. Ben Hayes in a document that is received by us and the parties by May 14, 1993.

THE ATOMIC SAFETY AND LICENSING BOARD


James H. Carpenter
Administrative Judge


Thomas D. Murphy
Administrative Judge


Peter B. Bloch
Chair

Bethesda, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

GEORGIA POWER COMPANY, ET AL.

(Vogtle Electric Generating Plant,
Units 1 and 2)

Docket No.(s) 50-424/425-DLA-3

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (RULING ON STAY ...) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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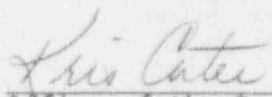
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Docket No.(s)50-424/425-OLA-3
LB M&O (RULING ON STAY ...)

C. K. McCoy
V.President Nuclear, Vogtle Project
Georgia Power Company
Post Office Box 1295
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Dated at Rockville, Md. this
22 day of April 1993


Office of the Secretary of the Commission