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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY  
DOCKETING SERVICE  
BRANCH

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

GEORGIA POWER COMPANY'S BRIEF CONCERNING  
NRC STAFF RELEASE OF CERTAIN INVESTIGATORY MATERIAL

I. INTRODUCTION.

On January 27, 1994, an informal prehearing conference was held to discuss the status of this case and procedures and schedules to resolve it. During that conference, Michael Kohn, counsel for Intervenor, expressed his position that, in order to proceed with his case, he needed to see the NRC Office of Investigations ("OI") report concerning certain statements made by Georgia Power Company ("GPC") to the NRC in 1990 with respect to the condition of the Plant Vogtle diesel generators following the March 20, 1990 site area emergency (OI Case No. 2-90-020R). Tr. 157-59. Mr. Kohn stated that the NRC Staff was required to release the report under NRC regulations at 10 C.F.R. §§ 2.744(b) and 2.790(a) and 10 C.F.R. Part 2, Appendix A, § IV.D. Tr. 157-58, 206.

The NRC Staff opposed Mr. Kohn's position that the OI Report

should be released. The Staff asserted that the report was pre-decisional and that its release at this time may be used to damage the reputations of personnel of GPC and Southern Nuclear.<sup>1/</sup> Tr. 168-69. The Licensing Board suggested that potential adverse public reaction could be avoided with a protective order which would restrict the parties from disclosing the report to the general public. Tr. 161-62, 175. The Board also was interested in the parties views on whether it should review the OI Report in camera before ruling on whether the report should be released. Tr. 225-26.

The Board requested that the parties submit briefs on the issues of (1) whether the NRC Staff should be required to release the OI Report, including its exhibits, and (2) whether the Board should review such OI Report in camera. Tr. 227. The Board also required that the NRC Staff make a decision by February 18, 1994 of whether it will voluntarily release the factual material contained in the OI Report and its exhibits, and that, if the Staff decides not to voluntarily release such material, the Board may later request briefs on that matter. Tr. 228-30.

## II. DISCUSSION.

### A. Legal Principles.

Discovery against the NRC Staff was discussed in detail in

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<sup>1/</sup> NRC Staff counsel also stated that release of the OI Report prior to a final Staff decision on enforcement action may damage the reputation of the NRC, that the OI Report could be characterized as one-sided and that it may even be wrong. Tr. 169-70.

Georgia Power Company's Motion to Compel NRC Staff Production of Documents, dated August 9, 1993, at 8-10.<sup>2/</sup> In short, under the NRC's Rules of Practice, if a document is relevant and not covered by an exemption under 10 C.F.R. § 2.790, it must be produced. Further, even if the document is covered by an exemption, it must be produced if necessary to a proper decision in the proceeding. 10 C.F.R. § 2.744(d). Thus, the applicability of an exemption must be weighed against a litigant's need, and is equivalent to traditional privilege in civil proceedings.

Consumers Power Co. (Palisades Nuclear Power Facility), ALJ-80-1, 12 N.R.C. 117, 119-20 (1980).

The deliberative process exemption<sup>3/</sup> protects from discovery governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 N.R.C. 1333, 1341 (1984). The U.S. Supreme Court has observed the purposes of the exemption.

The point, plainly made in the Senate Report, is that the "frank discussion of legal or policy matters" in writing might be inhibited if the discussion were made public; and that the "decision" and "policies formulated" would be the

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<sup>2/</sup> Generally, a party serves a request for production of documents on the Staff and, if the Staff objects to the production, the requesting party must apply to the Presiding Officer, in writing, to compel production. 10 C.F.R. § 2.744(c).

<sup>3/</sup> This exemption is captured by 10 C.F.R. § 2.790(a)(5) which exempts "[i]nteragency or intraagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Commission."

poorer as a result. S Rep No. 813, p 9. See also HR Rep No. 1497, p 10; EPA v Mink, [410 U.S. 73, 87, 93 S. Ct. 827 (1973)]. As lower courts have pointed out, "there are enough incentives as it is for playing it safe and listing with the wind," Ackerly v Ley, 137 US App DC 133, 138, 420 F2d 1336, 1341 (1969), and as we have said in an analogous context, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances ... to the detriment of the decision making process." United States v Nixon, 418 US 683, 705, 41 L Ed 2d 1039, 94 S Ct 3090 (1974) (emphasis added).

National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 150-51, 95 S. Ct. 1504, 15\_\_ (1975) (footnote omitted).

The deliberative process privilege, also known as the executive privilege, is not absolute.

The [deliberative process] privilege may be invoked in NRC proceedings. It is a qualified privilege, however, which can be overcome by an appropriate showing of need. A balancing test must be applied to determine whether a litigant's demonstrated need for the documents outweighs the asserted interest in confidentiality. In this respect, the government agency bears the burden of demonstrating that the privilege is properly invoked, but the party seeking the withheld information has the burden of showing that there is an overriding need for its release.

Shoreham, supra, ALAB-773, 19 N.R.C. at 1341 (citations omitted).

To the extent that the requested documents contain purely factual material, such material "must be segregated and released unless 'inextricably intertwined' with privileged communications, or the disclosure of such factual material would reveal the agency's decisionmaking process." Id. at 1342 (citations omitted).

In determining the need of a litigant seeking the production of documents covered by the [deliberative process] privilege, an objective balancing test is employed, weighing the importance of the documents to the party seeking their production and the availability elsewhere of the information contained in the documents against the government interest

in secrecy.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 N.R.C. 1144, 1164-65 (1982) citing United States v. Leggett & Platt, Inc., 542 F.2d 655, 658-59 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977).

B. The OI Report.

The OI Report was issued by OI on December 17, 1993 and is currently being reviewed by the NRC Staff to determine whether enforcement action is appropriate. Board Notification 94-02 dated January 3, 1994. The OI Report presumably contains the opinions, conclusions and analysis of OI based on a review of the evidence which was collected during the investigation.

1. The Predecisional Nature of the OI Report.

In order to determine whether the OI Report should be released at this time, the Licensing Board must initially determine whether the OI Report is exempt under the deliberative process privilege. Other than factual attachments and appendices, which we believe the NRC Staff will decide to release, the balance of the OI Report appears to be the kind of predecisional document which is protected by the deliberative process privilege. It contains OI's opinions, conclusions, analysis and, possibly, recommendations concerning the matters investigated by OI. It is predecisional because the NRC Staff, as a whole, has neither completed its review of the OI Report nor, apparently, the relevant evidence on which it should be based. Until the

Staff has completed such review, the Staff does not know what decision it will reach concerning whether to take enforcement action. Tr. 169.

Although the OI Report will be disclosed eventually in any event, it is possible that if the report is released prior to the completion of the Staff's review and enforcement decision, the quality of the Staff's decision will suffer. For example, the NRC Staff may be hurried into making a final decision if the OI Report is released prematurely to Congress or the media. Therefore, the OI Report should be exempt from disclosure pursuant to the deliberative process privilege during the period of time that it takes the NRC Staff to review its accuracy and sufficiency and reach a decision on whether to recommend enforcement action.

2. The Need for In Camera Review by the Board.

In camera review is not necessary at this time. It would serve none of the purposes normally served by in camera review and could be prejudicial.

Pursuant to 10 C.F.R. § 2.744(c), in camera review is appropriate "only to the extent necessary to determine ... relevancy ... whether the document is exempt ... whether disclosure is necessary to a proper decision in the proceeding [and] whether the document or the information therein is reasonably obtainable from another source." In this case there is no dispute that the OI report is relevant. There is no reasonable basis to dispute that it is privileged. Further, there is no need to review the document at this juncture to determine whether it is necessary

for a proper decision, because it is expected to be released after the Staff makes its decision on enforcement. Thus, only a short further delay in production is expected, and the report should be available long before a decision on the merits is reached in this proceeding. Finally, assuming the Staff decides to release the interview records and other factual exhibits, the factual information in the report will be available from another source. Consequently, none of the bases set forth in § 2.744(c) is applicable at this time.

GPC also submits that in camera review at this juncture could be prejudicial. Release of OI's opinions before they have been reviewed by the Staff for accuracy and sufficiency could create misrepresentations. This should be avoided.

### 3. Intervenor's Need for the OI Report.

Although exempt from disclosure, the OI Report should nonetheless be released if Intervenor establishes that its need for the report outweighs the asserted interest in confidentiality. Shoreham, supra, ALAB-773, 19 N.R.C. at 1341. In GPC's opinion, Intervenor cannot carry this burden at this time because (1) Intervenor currently has access to almost all relevant factual information with the exception of interview records that GPC believes will soon be released, (2) Intervenor will receive the OI Report shortly anyway and will then have his "road map" for the hearing, and (3) the delay in Intervenor's receipt of the report will not adversely harm Intervenor because there are other activities which Intervenor has agreed to perform, at GPC's

suggestion, in the interim to expedite this proceeding.

GPC believes that the parties have access to all relevant factual information with the exception of records of OI interviews of GPC and NRC personnel, which only the NRC possesses. Presumably, such OI records will soon be voluntarily released by the Staff. Additionally, GPC assumes that the OI Report will be released to the parties once the Staff has made its enforcement decision. Intervenor has not established that it has a compelling need to receive the report now, as opposed to the date when the Staff makes a decision on enforcement. As was made clear during the conference, Intervenor simply wants the OI Report at this stage of the proceeding in order to use it as an aid in preparing his case.<sup>4/</sup> Intervenor will not be hindered from so using the OI Report if production of the report is delayed until the Staff makes a final decision on enforcement. Furthermore, Intervenor will not be idle during the time that he awaits the OI report. GPC has provided the parties with marked-up copies of the NRC transcripts of Mr. Mosbaugh's tape nos. 57 and 58 and also proposed a number of stipulations concerning the allegation of illegal license transfer for the parties to consider. Intervenor does not need the OI Report to proceed with these activities.

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<sup>4/</sup> Counsel for Intervenor stated "[t]he report will be a significant road map to us as to where the documents are, what is important. ... The OI investigative report will provide Intervenor with a road map of what -- and the direction we want to follow as to what transcripts are relevant." Tr. 159, 189.

4. Use of a Protective Order to Prevent Release of the OI Report to the General Public.

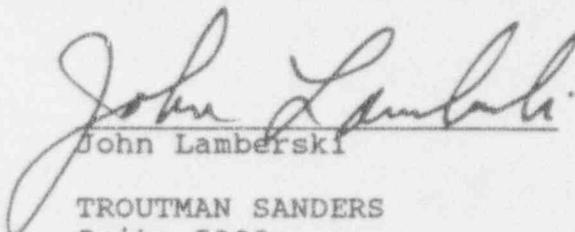
GPC is concerned that releasing the OI Report prior to the Staff's review of the accuracy and sufficiency of the report and decision on enforcement could result in harm to the interests of GPC and Southern Nuclear as well as certain of their individual employees. As a matter of fairness, the Board should not allow the release of the OI Report to the general public until such time as the NRC Staff, as a whole, has made a decision on the matters addressed by the report.

Accordingly, in the event the Board decides that the OI Report should be released, GPC moves the Board for a protective order pursuant to 10 C.F.R. § 2.740(c), restricting the parties from disclosing the contents of the OI Report to any person who is not a party to this proceeding. Such a protective order appears to be appropriate under the circumstances of this case in order to prevent undue harm to GPC and Southern Nuclear personnel.

### III. CONCLUSION.

For the reasons stated above, GPC requests that the Licensing Board (1) decline to review the OI Report in camera, and (2) deny Intervenor's request that the OI Report be released prior to the date when the NRC Staff makes a final decision on whether to take enforcement action. In the alternative, if the Board orders that the OI Report be released prior to the date when the NRC Staff makes a final decision on whether to take enforcement action, GPC moves the Board for a protective order restricting the parties from disclosing the contents of the report to any person who is not a party to this proceeding.

Respectfully submitted,

  
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Dated: February 4, 1994

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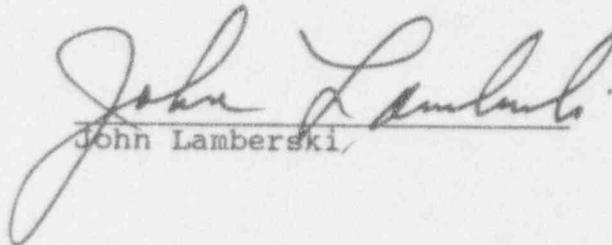
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Georgia Power Company's Brief Concerning NRC Staff Release of Certain Investigatory Material" was served by express mail upon the persons listed on the attached service list, this 4th day of February, 1994.

  
John Lamberski

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