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February 4, 1994

UNNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-424-OLA-3
GEORGIA POWER COMPANY, <i>et al.</i>	)	50-425-OLA-3
	)	
(Vogtle Electric Generating Plant	)	Re: Licensee Amendment
Units 1 and 2)	)	(Transfer to Southern Nuclear)
	)	

NRC BRIEF ON RELEASE OF OI REPORT  
REQUESTED IN LICENSING BOARD ORDER  
OF FEBRUARY 1, 1994

Following a prehearing conference on January 27, 1994, this Licensing Board issued a Memorandum and Order, dated February 1, 1994, which provides in part:

2. By COB Friday, February 4, 1994, the Board and parties will receive any briefs that the parties may submit concerning Intervenor's request that the Board should release the entire OI Report, with or without protective orders, and whether the Board should conduct an in camera status briefing by the Staff (including the presentation of documents in camera) prior to determining whether to release allegedly privileged Staff documents.

This brief and the attached affidavit of James M. Taylor is submitted in response to that Order.

DISCUSSION

The Intervenor has requested that the Board order the release of an Office of Investigation (OI) Report No. 2-90-020R, that is presently being evaluated to determine whether an enforcement action should be commenced with respect to matters associated with the reporting of diesel generator starts by Georgia Power Company (GPC).

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Although it is a report on investigation into facts relevant to this proceeding, it is also a predecisional document upon which the NRC will, in part, determine whether to take enforcement actions. See attached Affidavit of James M. Taylor.

Predecisional documents upon which government decisions are formulated are privileged. See *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 150 (1975); *Carl Zeiss Stiftung v. V.E.B. Earl Zeiss, Jana*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd* 384 F.2d 979 (D.C. cir.), *cert. denied*, 389 U.S. 952 (1967). It has long been recognized that this privilege can prevent the release of documents sought in discovery in NRC proceedings. See *Long Island Power Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984); see also *Virginia Electric Power Co.* (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974); *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-33, 4 AEC 701 (1971).

The privilege on release of predecisional documents is a qualified privilege which can be overcome by a showing of an overriding need for the documents. *Shoreham, supra*. Once the privilege is properly invoked, the party seeking the documents has the burden of showing that overriding need. *Id.* See also 10 C.F.R. § 2.744(c)(3).

At the Prehearing Conference on January 27, 1994, the Staff indicated that the OI report reflected the views of only one NRC office. It was not the Staff position, Tr. 169, and it was made clear that the report may not ultimately reflect the Staff position. *Id.* The OI report is under Staff review, Tr. 171, and along with all the evidence collected by the Office of Investigations, the discovery that has occurred in this proceeding, and other information, will all be weighed together in arriving at an enforcement decision

*Id.* The OI report is an integral part of the material upon which the Executive Director for Operations will make his (the Staff's) recommendation as to whether an enforcement action is warranted. Thus, the report and the other materials sought are predecisional material, *see* Affidavit of James M. Taylor, attached, subject to the deliberative process privilege.

In addition, the Intervenor has not established an overriding need for the OI report. Mr. Mosbaugh, as a basis for his contentions, claimed he was privy to the misrepresentation on which his contentions are based. He has not introduced any evidence to show there is the "overriding" need for the report at this stage of the proceeding, before the Staff has determined whether to recommend to the Commission the initiation of enforcement actions. All we presently have are bare statements, which lack any support concerning the present need for the OI report. Plainly, the Intervenor has not sustained his burden.<sup>1</sup>

Where the Staff objects to the production of a document in discovery upon a claim that it is exempt from disclosure as a predecisional document or for other reasons, 10 C.F.R. § 2.744(c) provides the procedure to be followed in determining if the document should be released:

If the Executive Director for Operations objects to producing a record or document, the requesting party may apply to the presiding officer, in

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<sup>1</sup> Similarly, GPC has not sustained a burden of showing an "overriding" need for the factual attachment or exhibits to the report. The letters between GPC and the Staff are in the possession of GPC. To the extent copies of interviews with GPC employees and officers are sought, the matters sought are within the knowledge of such individuals, who can be contacted by GPC. Moreover, GPC had an attorney present at most of those interviews and, thus, cannot claim any lack of knowledge of the matters there discussed.

writing, to compel production of that record or document. The application shall set forth the relevancy of the record or document to the issues in the proceeding. The application shall be processed as a motion in accordance with § 2.730 (a) through (d). The record or document covered by the application shall be produced by the "in camera" inspection of the presiding officer, exclusively, if requested by the presiding officer, and only to the extent necessary to determine:

- (1) The relevancy of that record or document;
- (2) Whether the document is exempt from disclosure under § 2.790;<sup>2</sup>
- (3) Whether the disclosure is necessary to a proper decision in the proceeding;
- (4) Whether the document or the information therein is reasonably obtainable from another source.

Therefore, before any documents which the Staff has objected to producing are ordered produced in discovery, the documents must be examined *ex parte in camera* by the Board to determine if the documents should be released under the standards set out in that regulation. The Staff already has offered to provide the documents for such an examination. See Board Notification No. 94-1, January 3, 1994. Further, the Commission has indicated that should the Staff and Licensing Board disagree on the release or the disclosure of such investigative material after the material is presented by OI or the Staff to the Licensing Board in a transcribed *ex parte, in camera* session, the Board is to certify the record of that session to the Commission for a determination of

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<sup>2</sup> The matters to which objection has been made fall under 10 C.F.R. § 2.790(a)(5) being interagency memoranda relevant to the deliberative process. See *Shoreham*, 19 NRC at 1341. The exemptions in 10 C.F.R. § 2.790(a) to the release of information, are the same as in section 552(b) of the Administrative Procedure Act, 5 U.S.C. § 552(b).

whether the investigative material is to be released. See Commission's Statement of Policy: Investigations, Inspections and Adjudicatory Proceedings 49 Fed. Reg. 36,032, 36,033-34 (September 13, 1984); cf 10 C.F.R. § 2.744(d). The policy statement establishes procedures to be followed which would allow a Licensing Board to be apprised of investigatory matters which might affect a proceeding, and yet not cause those matters to be revealed in a premature manner so as to compromise the investigation. Those procedures are applicable here to guard against the premature disclosure of investigatory material so as not to compromise possible enforcement actions. Therefore, should the Board determine that there is a present need for the release of the documents sought in this proceeding, it should refer the record to the Commission for final resolution.

Further, as indicated in the attached affidavit of James M. Taylor, this predecisional material should not be made available to the other parties under a protective order. GPC is the subject of the possible enforcement action and release of the report to GPC would be contrary to the entire purpose of the privilege. Allen Mosbaugh is a principal involved in the incidents covered in the report, and the report should not be released to him either at this time. Further, it would be unfair and without purpose to release the report to Mr. Mosbaugh, but not GPC.

Notwithstanding the foregoing, much can be accomplished now even before the OI report is released. Tr. 179. GPC has proposed that they submit their corrections to the transcript of Mosbaugh tapes numbered 57 and 58 to the other parties and that these parties review these corrections to see if a transcript of tapes 57 and 58 can be stipulated

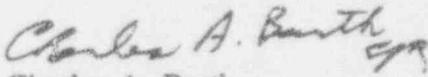
to by the parties. Staff counsel agreed to this. Tr. 158. Mr. Mosbaugh has six tapes which allegedly highlight wrongdoing. Again, the Staff is willing to review transcripts of those six tapes to see if a transcript of those tapes can be agreed upon. Other tapes may be relevant. There is a very large number of documents that will be relevant in addition to the OI Report. Staff counsel has suggested that the parties prepare lists of the documents and stipulate as to their authenticity. Tr. 201. The Board has suggested depositions be taken regarding the issues involving the alleged illegal take-over by Southern Nuclear Operating Company, Inc. (Tr. 219), and that discovery proceed on that issue. Tr. 215. The Staff has no objections to these actions. The Staff has further suggested that GPC and Intervenor proceed with their case prior to the Staff setting forth its position. Tr. 222.

#### CONCLUSION

The OI report contains opinions and recommendations which are now being reviewed by the Staff as but one element, albeit an important element, in the Staff's deliberative process by where it will reach a position on whether an enforcement action is warranted. It is exempt from disclosure. *See Shoreham, ALAB-773, supra*. No party has established a need for the report at this time. Discovery between GPC and Mr. Mosbaugh may proceed without the OI report. Some evidentiary stipulations (tapes 57 and 58, Mosbaugh's six tapes of highlights, and documents) may proceed now among all three parties. The Staff reiterates its offer to provide an *ex parte in camera*

presentation regarding the OI report by to the Licensing Board. Should the Board then determine the OI Report should now be released, it should refer the *in camera* record to the Commission.

Respectfully submitted,

  
Charles A. Barth  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 4th day of February 1994