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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of)

GEORGIA POWER COMPANY)
et al.,)

(Vogtle Electric Generating)
Plant, Unit 1 and Unit 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

INTERVENOR'S BRIEF CONCERNING THE RELEASE OF
NRC OFFICE OF INVESTIGATIONS REPORT, No. 2-90-020R

In accordance with the Atomic Safety and Licensing Board's February 1994 Memorandum and Order, Intervenor, Allen L. Mosbaugh, through counsel, hereby submits his brief concerning the releasability of the NRC-OI Report No. 2-90-020R.

Facts

On December 17, 1993 the Nuclear Regulatory Commission Office of Investigations (OI) completed a nearly four-year review of allegations provided to OI by Intervenor Allen Mosbaugh and issued its final report on these allegations. The official OI Report on this matter is numbered OI Case No. 2-90-020R (hereinafter "OI Report"). See January 3, 1994 Memorandum of Steven A. Varga, Director, Division of Reactor Projects - I/II, Office of Nuclear Reactor Regulation (Board Notification 94-1) (hereinafter, "Board Notification 94-1").

Through a memorandum dated January 3, 1994, the NRC Staff declined to produce a copy of the OI Report purportedly in conformity with the Commission's Statement of Policy; Investigations, Inspections, and Adjudicatory Proceedings, 49

Fed. Reg. 36032 (September 13, 1984. Board Notification 94-1, p. 1).

Mr. Mosbaugh's allegations, which were the subject of the withheld OI Report, are considered "very serious" by the NRC Staff. Affidavit of James Lieberman, January 24, 1994, ¶ 3 (hereinafter, "Lieberman Affidavit"). The documentation supporting these allegations is "very extensive and complex" and reviewing various documents and tapes is a "time consuming process." Id. ¶ 4. Given the nature of Mr. Mosbaugh's contentions, the NRC Staff is relying upon the OI Report as a "principal source" for their position in this proceeding. Id., ¶ 2. In fact, the NRC Staff is "reviewing" various "documents and facts" "such as the report of the Office of Investigations" in preparing for the positions it will take before the ASLB Board. Id., ¶ 4.

On January 24, 1994 the NRC Staff moved that the Board issue a stay of proceedings and requested the right to withhold various documents from release to the parties, including withholding release of the OI Report. As support for this motion the NRC Staff filed one affidavit signed by Mr. James Lieberman. According to the Lieberman Affidavit, the NRC Staff based its motion to withhold the OI Report on the following grounds:

Revelation at this time to the public at large of the Report of the Office of Investigations, the documents generated by its investigation and the various tentative views of members of NRC Staff which are reviewing the entire matter, might unduly interfere with the Commission's orderly deliberative process under 10 C.F.R. Part 2, Appendix C. It is my judgment that this course is necessary to protect the

Commission's deliberative process in performing its regulatory function under the Atomic Energy Act, as amended, and to protect the reputations of the persons and corporations alleged to be involved in wrongdoing.

Lieberman Affidavit, ¶ 4.

The OI Report is not a confidential document and, according to the NRC Staff, "sooner or later it will be released" to the general public. Official Transcript of the Atomic Safety and Licensing Board proceedings, Georgia Power Company, et. al., 50-424-OLA-3 and 50-425-OLA-3 (January 27, 1994), p. 169 (hereinafter, "Tr. __"). However, the NRC Staff requested that the release of the report be delayed until the Staff could formulate its position.

The NRC Staff conceded that its present "schedule" for Staff action on (and eventual release of) the OI Report would "not be met" and the Staff could not speculate as to when their review of the OI material would be completed. Lieberman Affidavit, ¶ 4.

The NRC Staff did not provide an affidavit from the Executive Director of Operations supporting the non-disclosure of the OI Report. Additionally, neither Mr. Lieberman nor the Executive Director of Operations executed an affidavit stating that they had actually read the complete OI Report and, except for the paragraph quoted in full above, no affidavit was furnished giving more specific concerns about the consequences of disclosure of the OI Report.

Like the NRC Staff, the Intervenor views the OI Report as a "principal source" of information on the "complex" contentions pending before the Board. The OI Report -- which incorporates a

factual review of thousands of hours of taped conversations, thousands of documents, scores of extensive sworn deposition testimony and the fruits of a nearly four-year investigation, is the most "significant road map" to this case. Tr. 159. Without access to the OI Report Intervenor's ability to identify the witnesses he must depose, the most appropriate questions to ask at the depositions, the tape segments with relevance to the proceedings, the documents with relevance to the proceedings, among other matters, would be prejudiced. Tr. pp. 158-159 & 206.

Although Mr. Mosbaugh filed the initial allegations which caused the OI to write its report, Mr. Mosbaugh has not had access to the extensive work products of the OI's investigation or to facts the OI uncovered during that investigation. Tr. 209. Unlike Georgia Power Company's representatives, Mr. Mosbaugh was not present during the numerous depositions and interviews conducted by OI in 1993.

Without access to the OI Report, the ability of the Intervenor to adequately prepare for discovery and the hearing in this matter will be prejudiced. Likewise, Intervenor will not be able to properly respond to any dispositive motions the parties may file, will not be able to file his own dispositive motions and will not be able to adequately participate in much of the pre-trial stipulation process necessary to properly adjudicate this case.

NRC Regulations Governing the Release of the OI Report

Discovery in ASLB licensing proceedings is very broad. For example, the Commission's Statement of Policy; Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36032 (September 13, 1984) requires that all parties to NRC licensing hearings (including NRC Staff), even without being formally requested to make a disclosure, "disclose to the boards and other parties all new information they acquire which is considered material and relevant to any issue in controversy." 49 Fed. Reg. at 36032. The exceptions to this rule are very narrow. Id.

Additionally, it is well settled that discovery in licensing proceedings is available to the parties to obtain the fullest possible knowledge of the issues and facts. South Carolina Electric & Gas Co., (Virgil . Summer Nuclear Station, Unit 1), ALAB-642, 13 N.R.C. 881, 889 (1981). The burden is upon the party attempting to withhold a document from discovery to demonstrate that discovery should not be had. Boston Edison Co., (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 N.R.C. 579, 583 (1975).

The general policy statement of the NRC concerning the releasability of NRC documents is set forth in 10 C.F.R. Part 2, App. A IV (d), which states in relevant part:

In general, staff documents that are relevant to a proceeding will be publicly available as a matter of course unless there is a compelling justification for their non-disclosure. Therefore, document discovery directed at the staff will be restricted, as provided in § 2.744...

This general policy statement is consistent with the provisions set forth in 10 C.F.R. § 2.740(b)(1), which acknowledge that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceedings...

The regulations governing document production by NRC Staff in licensing proceedings are codified in 10 C.F.R. § 2.744. Under this section, NRC documents must be produced if: (1) they are relevant to a proceeding; and (2) they are not exempt from production under the specific exemptions listed in 10 C.F.R. § 2.790.

However, even if a document is exempt from production under 10 C.F.R. § 2.790, the document still must be produced if "its disclosure is necessary to a proper decision in the proceeding." 10 C.F.R. § 2.744(d).

In pertinent part, 10 C.F.R. § 2.744(d) states:

Upon a determination by the presiding officer that the requesting party has demonstrated the relevancy of the record or document and that its production is not exempt from disclosure under § 2.790 or that, if exempt, its disclosure is necessary to a proper decision in this proceeding, and the document or the information therein is not reasonably obtainable from another source, he shall order the Executive Director for Operations, to produce the document.

In its moving papers NRC Staff's only legal ground for withholding the release of the NRC OI Report was to "protect the Commission's deliberative process in performing its regulatory function." Lieberman Affidavit, ¶ 4. A deliberative process exemption is recognized under 10 C.F.R. § 2.790(a)(5) which

allows the NRC Staff to withhold "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Commission." Under case law, this exemption covers the "executive privilege" and allows for the withholding of documents related to the "deliberative" process. NRLB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

As is fully set forth below, the NRC Staff cannot justify withholding the OI Report under the deliberative process privilege.

Documents Not Covered Under the
Deliberative Process Exemption
Must be Immediately Released

The NRC Staff sought to withhold a variety of documents from release under the deliberative process exemption. These documents include not only the OI Report, but also the "documents generated by its [OI's] investigation and the various tentative views of members of NRC Staff." Lieberman Affidavit, ¶ 4.

It is incontestable that factual information contained in the OI Report, the documents generated by the OI investigation and information contained in documents constituting the "tentative views" of NRC Staff are fully discoverable and outside the scope of the deliberative process exemption. Without question, the deliberative process exemption "does not include purely factual material." J.R. Norton Co., Inc. v. Arizmendi, 108 F.R.D. 647, 648 (S.D. Calif. 1985). As explained in Environmental Protection Agency v. Mink, 410 U.S. 73, 91 (1973):

It appeals to us that Exemption 5 [which includes the deliberative process exemption] contemplates that the public's access to internal memoranda will be governed by the same flexible common-sense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies. And, as noted, that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents.

Under numerous cases interpreting the deliberative process exemption in the context of civil discovery, and the Mink line of cases under the Freedom of Information Act, documents that consist of factual material cannot be withheld under the deliberative process exemption. Further, documents containing both exempt deliberative process material and purely factual material must be reviewed, redacted where appropriate and released.

Under the law, NRC Staff must release all the exhibits belonging to the OI Report and work products of the OI and NRC Staff which consist purely of factual information. As for documents which may contain both deliberative process material and factual material, the NRC Staff must review each such document and release any portion of the document that contains factual information that can be segregated. If there is any question as to whether a document contains segregable factual material that can be segregated, the document should be shown in camera to the Board for a determination as to whether all or part of the document may be released. Mink, supra., at 88.

The main issue before this Board is whether NRC Staff can rely upon the deliberative process exemption to withhold all or part of the OI Report. As set forth below in the Argument section, the NRC Staff cannot so rely on Exemption 5 and must unconditionally release the OI Report in its entirety.

Argument

I. NRC STAFF CANNOT WITHHOLD THE OI REPORT UNDER THE DELIBERATIVE PROCESS EXEMPTION

Under the case law concerning the deliberative process or "executive privilege" exemption, the NRC Staff cannot legally withhold production of the OI Report.

As a threshold matter, the deliberative process exemption must be "narrowly construed" and, as stated above, does not include "purely factual material." J.R. Norton Co., Inc. v. Arizmendi, 108 F.R.D. 647, 648 (S.D. Calif. 1985) (citations omitted). Furthermore, the privilege is not absolute and the "burden of persuasion rests on the party seeking to prevent disclosure." King v. Conde, 121 F.R.D. 180, 191 (E.D.N.Y. 1988).

With these factors in mind, a "court must determine" whether the moving party "made a substantial threshold showing that disclosure of specific information would result in specific harm to identified important interests" in order to determine whether the privilege has been appropriately invoked. If such a showing cannot be made, the "question" of release of the material is "resolved in favor of direct disclosure." King v. Conde, 121 F.R.D. 180, 190 (E.D.N.Y. 1988). If and only if such a "threshold showing" can be made a Court must then invoke a

"balancing test" reviewing the "interests favoring and disfavoring disclosure." Under the balancing test, a court "must also consider the value of appropriate protective orders and redactions." Id., pp. 190-91.

In this case, the NRC Staff cannot satisfy the threshold requirements to invoke the deliberative process exemption. Even if they could satisfy these requirements, the balancing test review would force them to fully disclose the OI Report.

A. The NRC Staff Cannot Demonstrate that the Release of the OI Report Would Result in Any Specific Harm

To be covered by the deliberative process exemption, an agency must establish that the document is both "deliberative" and that a specific harm would result if the document is released. King, supra. The alleged harm must be reviewed in the context of the purposes of protecting "deliberative" information.

The "deliberative process" exemption does not allow an agency to withhold all internal agency memoranda. The exemption covers "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer." Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). Under Coastal States, in order to "test" whether the "disclosure of a document is likely to adversely affect" the purposes of the privilege, a court must review the material:

To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication

within the agency; 'Human nature teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process.'

Coastal States, 617 F.2d at 866 [quoting from U.S. v. Nixon, 418 U.S. 683, 705 (1974)].

In this case, the justification for invoking the deliberative process exemption is nonexistent. The NRC Staff admits that the OI Report will become public. The OI, which drafted and reviewed the final OI Report, knew that such reports are regularly publicly released. The OI Report is not a private or confidential document containing "candid" or "personal" remarks. It is the final and official report of the NRC Office of Investigations. Its public release will not "stifle honest and frank communication" inasmuch as the authors and persons who approved the contents of the report "expect(ed) public dissemination of their remarks."

Furthermore, the OI did not engage in the type of speech normally considered part of the privileged deliberative process. There was never any doubt by those who produced the report about the document's future release to the public and consequently the speech contained in the document was not the type of "candid" and "personal" speech generally covered under the exemption. The fact that the NRC Staff has conceded that the OI investigation is complete, that the report is an official and final OI report and that the report will, at some point, be publicly released,

completely negates any claim the NRC Staff may have to a deliberative process exemption. Id., p. 866.

Significantly, the U.S. Supreme Court has rejected attempts to defer the disclosure of materials under the deliberative process exemption. For example, in Federal Open Market Committee v. Merrill, 443 U.S. 340, 353-54 (1979), a federal agency argued that the "immediate" release of a document would "undermine the effectiveness" of the agency. The Court completely rejected this approach and held that such an argument was "fundamentally at odds" with the purposes of the exemption.

Finally, the NRC Staff even failed to articulate any "precise and certain reasons" for "preserving the confidentiality" of the OI Report. Smith v. F.T.C., 403 F. Supp. 1000, 1001 (D. Del. 1975) (citations omitted). Because the NRC Staff has conceded that the OI Report will not remain confidential, it would be almost impossible for the Staff to meet its burden under Smith and the cases cited therein.

Simply stated, NRC Staff cannot meet their burden of demonstrating that the disclosure of the report would "adversely affect the purposes of the privilege." Consequently, the Staff cannot meet its threshold requirements under the deliberative process exemption.

B. The NRC Staff Cannot Meet Its Burden Under the Balancing Test to Justify Withholding the Report

Even assuming that the NRC Staff could meet its burden of proof and demonstrate that the OI Report is subject to the deliberative process exemption, the NRC Staff cannot meet the

balancing test required under such circumstances. Lundy v. Interfirst Corp., 105 F.R.D. 499, 502, N. 8 (D.D.C. 1985), adopting the five-part test in re Franklin National Bank Securities Litigation, 478 F. Supp. 577, 583 (E.D.N.Y. 1983) (hereinafter, the "Franklin test").

The Franklin test applies in circumstances where a court considers "whether material that ordinarily falls within the scope of the privilege should be disclosed." U.S. v. Hooker Chemical and Plastics Oorp., 114 F.R.D. 100, 102 (W.D.N.Y. 1987). The five factors are:

(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the "seriousness" of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

In re Franklin, supra., 478 F.Supp. at 583 (citations omitted).

As set forth below, using the five Franklin criteria, the NRC Staff must release the OI Report:

1) The relevance of the evidence to be protected: The OI Report will be perhaps the single most important piece of evidence in this entire proceeding. It provides a factual review of an extremely complex matter and integrates in that review thousands of hours of tape recordings, thousands of pages of documents, the results of numerous interviews and sworn depositions and the fruits of a nearly four-year investigation.

Significantly, the OI Report, including its factual findings and conclusions, is fully admissible evidence in this proceeding.

The U.S. Supreme Court had ruled that investigatory reports, even those parts which "state a conclusion or opinion," are fully admissible into evidence "as long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement." Beech Aircraft Corp. v. Rainey, 109 S.Ct. 4349, 45-46 (1988). Accord., Distaff, Inc. v. Springfield Contracting Corp., 984 F.2d 108, 111 (4th Cir. 1993); United Airlines v. Austin Travel Corp. 867 F.2d 737, 743 (2nd Cir. 1989); Puerto Rico Ports Auth. v. m/v Manhattan Prince 897 F.2d 1, 8 (1st Cir. 1990), Bank of Lexington v. Vining-Sparks Securities 959 F.2d. 606, 616 (6th Cir. 1992); O'Dell v. Hercules, Inc. 904 F.2d 1194, 1204 (8th Cir. 1990); Moss v. Ole South Real Estate, Inc. 933 F.2d 1300, 1307 (5th Cir. 1991).

Thus, under Beech, the OI Report is not merely discoverable material, it constitutes perhaps the single most important piece of evidence in this case.

Just as NRC Staff is presently relying upon the report to formulate its position before this Board, the Intervenor needs the report, not only as evidence, but to prepare for his case. Given the "extensive" and complex" documentation relevant to this case, even the NRC Staff is forced to concede that their "principal source" of information relevant to this case is the OI Report. Lieberman Affidavit ¶¶ 2 and 4. Without immediate and complete access to the OI Report, Intervenor will not be able to properly prepare for a hearing.

2) The availability of other evidence: Inasmuch as the CI Report is admissible evidence, no other similar piece of evidence will exist. The report is unique. The office responsible for evaluating the type of misconduct alleged in this proceeding carefully reviewed the extensive record and wrote a comprehensive report concerning these allegations.

Moreover, it is simply not the case that because Mr. Mosbaugh was the original alleged he already has had access to most of the material used by OI. GPC terminated Mr. Mosbaugh in September 1990. Since that date, Mr. Mosbaugh's access to information has been severely limited. Additionally, Mr. Mosbaugh turned in his original tapes to the OI back in 1990. Except for a small number of extracted conversations, Mr. Mosbaugh has not had possession of his own tape recordings since 1990.

Significantly, Mr. Mosbaugh's counsel in this proceeding has never had access to those original tapes.

Furthermore, the OI has collected thousands of pages of materials, to which Mr. Mosbaugh may or may not have had access. Likewise, the OI has conducted scores of interviews and sworn depositions, which Mr. Mosbaugh did not attend and to which Mr. Mosbaugh has not had access. Georgia Power Company was able to attend most, if not, all of these interviews and depositions and was able to learn which aspects of Mr. Mosbaugh's allegations OI felt were most significant.

In any event, the scope and size of the OI investigation renders it impossible for Mr. Mosbaugh to reconstruct that inquiry and obtain his evidence from elsewhere.

3) The seriousness of the litigation and the issues involved: Once again, the NRC Staff concedes that the OI Report concerned a "very serious matter." Lieberman Affidavit, ¶ 3. In fact, the concerns raised in this proceeding are among the most serious ever raised before the NRC. Given the public health and safety concerns implicated, and the level of management implicated in the allegations, the public interest demands an expeditious resolution of this proceeding. Any delay in the release of the OI Report will not only prejudice the public interest, but will delay this proceeding. See, e.g., King v. Conde, 121 F.R.D. 180, 195 (E.D.N.Y. 1988) (weighing the "importance to the public interest" as a significant factor supporting disclosure).

4) The role of the government in the litigation: In this case the government is not merely an outside party that has been requested to provide information to parties in a private dispute. The government is itself a party to this proceeding and subject to significant regulatory requirements to provide the intervenor with full and complete information. One of the roles of the NRC Staff in this litigation is to adhere to its "duty to disclose" all potentially relevant information to the Intervenor. See, e.g., Statement of Policy; Investigations, Inspections, and

Adjudicatory Proceedings, 49 Federal Register 36032 (September 13, 1984).

5) The possibility of future timidity by government employees who will be forced to recognize that their secrets are violable: Because the OI Report is a non-confidential, final and official report, there was no expectation of confidentiality when the OI approved its contents. The OI officials responsible for the report unquestionably knew that their report would become a public document. Consequently, there is absolutely no possibility that the OI Report's release would cause "timidity" in future government employees.

As can be seen, the application of all five Franklin test criteria in this case supports the immediate and unconditional release of the OI Report.

II. NRC STAFF'S ASSERTION OF THE DELIBERATIVE PROCESS EXEMPTION WAS PROCEDURALLY DEFECTIVE

In order to assert a "deliberative process privilege" an agency must follow certain procedural steps. None of these steps was properly followed in the NRC Staff's motion of January 24, 1994. The procedural requirements necessary for an agency to invoke executive privilege in civil discovery were spelled out by the U.S. Court of Appeals for the District of Columbia Circuit in Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 405, N.11 (D.C.Cir. 1984):

Assertion of the deliberative process privilege, like the state secrets privilege, requires a formal claim of privilege by the head of the department with control

over the information. That formal claim must include a description of the documents involved, a statement by the department head that she has reviewed the documents involved, and an assessment of the consequences of disclosure of the information.

Under NRC regulations, the "head of the department" with the authority to invoke executive privilege is the Executive Director of Operations. 10 C.F.R. § 2.774(c). In this case, the Executive Director of Operations failed to file an affidavit supporting the withholding of the OI Report.

Next, the "department head" did not assert in his affidavit that he had "reviewed the documents involved." The failure of the "head of the applicable agency" to invoke the executive privilege doctrine without "actual personal consideration" negates an agency's ability to invoke that privilege. Smith v. F.T.C., 403 F. Supp. 1000, 1016 (D. Del. 19745), citing to U.S. v. Reynolds, 345 U.S. 1, 7-8 (1953). In this case, not only did the appropriate head of the agency fail to file an affidavit, the official who executed the supporting affidavit failed to affirm that he had even read the report.

Finally, and most significantly, the "head of the department" failed to properly state an "assessment of the consequences" of releasing the OI Report. There "must be a demonstration of 'precise and certain reasons for preserving' the confidentiality of the governmental communications." Smith v. F.T.C., 403 F. Supp. 1000, 1016 (D. Del. 1975)(citations omitted). The requirement that an agency provide "precise and certain reasons" for withholding a document are very clear: "Any

attempts to invoke executive privilege in the absence of this specific factual showing are actually attempts to interfere with the proper functioning of the judicial branch of our government by appropriating the means of this decision to the executive branch." Id.

In this case, the NRC Staff has failed to properly identify any "precise and certain reasons" for keeping the OI Report confidential. The Lieberman affidavit merely offers a conclusory statement that the release of the report will harm the NRC's deliberative process. The affidavit fails to provide any sufficient detail as to how this so-called interference would occur or how this so-called interference would in fact impact on the agency's deliberations.

By refusing to provide Intervenor with access to the OI Report, the NRC Staff is frustrating Mr. Mosbaugh's ability to obtain due process through Congressionally mandated licensing hearings. The NRC Staff is, therefore, "appropriating the means" for the parties to properly participate in this proceeding.

III. THE NRC STATEMENT OF POLICY SUPPORTS FULL DISCLOSURE OF THE OI REPORT

In Board Notification 94-01 the NRC Staff states that they are relying upon the Commission's Statement of Policy: Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36032 (September 13, 1984) to justify withholding the release of the OI Report to Intervenor. However, a review of the

Statement of Policy demonstrates that under NRC requirements, the OI Report must be immediately released to the parties.

The Statement of Policy addresses the tension between two NRC policies. On the one hand, the NRC has a requirement that "all parties" to "NRC adjudicatory proceedings, including NRC Staff" are under a "duty to disclose" to the "other parties" all new "information they acquire which is considered material and relevant to any issue in controversy in the proceeding." At the same time the NRC has a policy to protect the identity of "confidential sources" and prevent the "compromising" of "ongoing" investigations. 49 Fed. Reg. at 36032-33.

In addressing this tension the NRC Commission created two exceptions to "duty" to disclose. Materials that fell into the two categories could be temporarily withheld from the parties until a Board review. These two categories, consistent with Commission policy, were narrowly defined. They allow for the temporary withholding of material which would (1) compromise the identity of a confidential source and/or (2) would compromise an "ongoing investigation." Id.

In this case, the OI Report does not even fall into the category of documents that may be temporarily withheld under the Statement of Policy. There is no allegation whatsoever that portions of the OI Report must be withheld to protect the identity of a confidential allegor. Furthermore, the NRC factual investigation into Mr. Mosbaugh's allegations are now closed. The OI investigation is complete and the OI Report has been

officially approved and is now a final report. As stated in Board Notification 94-01:

Notice is also provided that the NRC Office of Investigations (OI) has completed its investigation of an allegation that GPC made false statements to the NRC regarding diesel generator testing conducted after the March 20, 1990 Site Area Emergency. On December 17, 1993, the OI issued its report . . .

Board Notification 94-01, p. 1.

On the basis of the policy statement alone, the NRC Staff is required to produce a copy of the OI Report.

Even assuming that the OI Report contained the identities of confidential informants, that the OI investigation was still "ongoing" and that release of OI investigative materials could "compromise" the "ongoing" investigation, Intervenor is still entitled to Board review of the OI materials, in camera. The purpose of such in camera review is to insure that the "general rule" favoring "full disclosure" is followed and that "any limits on disclosure to the parties should be limited in both scope and duration to the minimum necessary." 49 Fed. Reg. at 36033.

In this regard, should the Board be inclined to place any restrictions whatsoever on the release of the OI Report, or allow NRC Staff to make any redactions concerning the contents of the report, Intervenor requests that the Board conduct the in camera review required under the Statement of Policy. Such an in camera review should include an in camera presentation by OI, as deemed appropriate under the circumstances.

However, under the terms of the Statement of Policy, and under the law governing the release of deliberative process

materials, such an in camera review is not necessary and the OI Report should be immediately released.

IV. PROTECTING THE REPUTATIONS OF PERSONS AND CORPORATIONS ALLEGED TO HAVE COMMITTED ILLEGAL ACTIONS CANNOT JUSTIFY WITHHOLDING THE OI REPORT FROM PUBLIC DISCLOSURE

A novel justification offered by NRC Staff as grounds to withhold the OI Report was that nondisclosure is necessary to "protect the reputations of persons and corporations alleged to be involved in wrongdoing." Lieberman Affidavit, ¶ 4.¹ This argument, as a matter of law, must be rejected. Under the controlling regulations, 10 C.F.R. §§ 2.744 and 2.790, there is simply no provision that allows Staff to withhold the production of discoverable materials under this rationale.

Moreover, such an objection raises serious First Amendment concerns and is not recognized under either the NRC Statement of Policy or the Freedom of Information Act, 5 U.S.C. 552. Accord., Goldschmidt v. U.S. Dept. of Agriculture, 557 F.Supp. 274 (D.C.D.C. 1983).² In Coastal States Gas Corp. v. Department of

¹ GPC asserted at the January 27th hearing that it did not object to the release of the OI Report on the basis of potential harm to its reputation or of the reputation of individuals being represented by GPC's corporate counsel. See Tr., pp. 168, 174. As such, Intervenor questions whether NRC Staff has the statutory or legal standing or authority to raise an objection to releasing a document based on the potential harm the release could have on a corporation or individual regulated by NRC.

² The Goldschmidt case completely supports Intervenor's position on this matter. In a case under the Freedom of Information Act, the Goldschmidt court rejected the validity of the type of argument raised by NRC Staff, holding that:

Energy, 617 F.2d 854, 868 (D.C. Cir. 1980), the Court "emphasized" the "narrow scope" of the deliberative process exemption and the fact that "the public is entitled to know what its government is doing and why."

Far more seriously, however, the fact that the NRC Staff has chosen to raise this concern in its sworn affidavit underscores the extent to which NRC staff has used various pretexts to object to discovery. Is the motive of NRC Staff truly to protect the NRC's deliberative process or is it merely to protect the public relations image of the licensee and the nuclear industry?

The NRC is mandated to safeguard the public. It is, therefore, inappropriate for NRC Staff to weigh considerations of potential harm to a corporation's or individual's reputation when evaluating whether to release a document (or for that matter in deciding to take enforcement action against any individual or corporation). The fact that NRC Staff is willing to consider harm to the licensee's reputation in its deliberations about a public safety matter will feed the public's concern that NRC Staff is more concerned with protecting the industry from public

Congress never intended [an FOIA exemption] to be so broad as to prohibit disclosure where, as here, publicity surrounding an establishment's violations 'interferes' with enforcement by embarrassing the establishment so that it drags its heels in remedying its compliance. Such a broad application would enable an agency to withhold investigatory records in almost all cases; it is difficult to imagine a situation in which publicity surrounding an investigation might not have some detrimental effect on the target's behavior or attitude.

Goldschmidt, at p. 277-278.

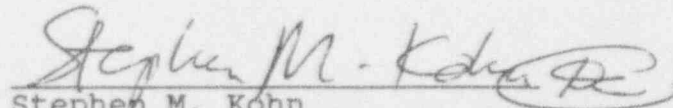
scrutiny than protecting the public. This point is underscored by the failure of NRC Staff, in its affidavit supporting its motion, to raise the concern that release of the OI Report would harm the public health and safety.

Additionally, NRC Staff's argument is wholly speculative. NRC Staff could just as easily assert that public disclosure could enhance its deliberative process inasmuch as the release of the OI Report could prompt Intervenor, GPC or someone else to provide NRC staff with documentation to clarify areas of the OI Report. Public scrutiny is a part of our system. NRC Staff should not be allowed to exempt itself from public scrutiny at its own discretion. As such, harm associated with public scrutiny does not constitute a substantial concrete or recognizable harm sufficient to justify withholding the release of the OI Report.

Conclusion

For the foregoing reasons, this Board should immediately order NRC Staff to provide Intervenor with an unredacted copy of the OI Report.

Respectfully submitted,



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February 4, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

94 FEB -9 AM 11:49

In the Matter of)

GEORGIA POWER COMPANY)
et al.,)

(Vogtle Electric Generating)
Plant, Unit 1 and Unit 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)

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 1994, a copy of
Intervenor's Brief Concerning the Release of NRC Office of
Investigations Report, No. 2-90-020R, was served, via First Class
Mail, postage prepaid, upon the following, and by facsimile to
the parties and licensing board members:

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Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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Dr. James H. Carpenter
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U.S. Nuclear Regulatory Commission
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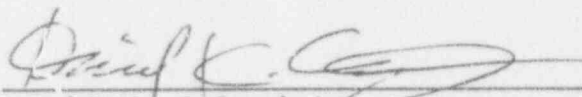
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