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March 3, 1994

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

SERVED MAR - 4 1994

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
(Discovery Related to Office of Investigation Report)

Before us is the "NRC Staff Motion to Defer Certain Prehearing Activities Until the Staff Has Formulated a Position," January 24, 1994 (Staff Motion). The principal question is whether we should order the Staff of the Nuclear Regulatory Commission (Staff) — before it has decided whether to take possible enforcement action — to produce for discovery all or part of a report of the Office of Investigation concerning the Mosbaugh allegations that are the kernel of this case.

The Staff of the Nuclear Regulatory Commission claims that the document sought is a privileged pre-decisional

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Report (Case No. 2-90-020R) has been produced by the Office of Investigations after extensive investigative work. Based on our knowledge of similar reports, we are confident that this Office of Investigation report is carefully prepared and is extensive in its documentation. It is a report that the Staff has already decided is destined to be released. Tr. 169.

The Law²

Under the NRC's Rules of Practice, if a document is relevant and not covered by an exemption under 10 CFR § 2.790 and is not otherwise privileged, 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 NRC 117, 119-20 (1980).

In our Rules, there is a deliberative process exemption, which protects from disclosure intragency memoranda "which would not be available by law to a party other than an agency in litigation with the Commission." See Long

²We have borrowed language for this section from Georgia Power Company's Brief Concerning NRC Staff Release of Certain Investigatory Material, February 4, 1994 (GP Brief), at 2-5.