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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

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

NRC STAFF MOTION FOR A STAY OF THE LICENSING BOARD
ORDER RELEASING THE OFFICE OF INVESTIGATIONS REPORT

Mitzi A. Young
Counsel for NRC Staff

March 14, 1994

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

NRC STAFF MOTION FOR A STAY OF THE LICENSING BOARD
ORDER RELEASING THE OFFICE OF INVESTIGATIONS REPORT

INTRODUCTION

The NRC Staff hereby requests a stay of LBP-94-06, 39 NRC ____ (March 3, 1994), in which the Licensing Board, *inter alia*, ordered the Staff to (1) "promptly release to Georgia Power and Allen Mosbaugh all of the easy-to-separate factual information that is contained in the Office of Investigation's Report in Case No. 2-90-020R and that is not inextricably intertwined with privileged material" and (2) release the remainder of the Office of Investigations (OI) Report on April 4, 1994, subject to protective order. Slip op. at 9. The report sets forth OI's analysis of whether its investigation of alleged false statements regarding the reporting of diesel generator test results disclosed any wrongdoing.

BACKGROUND

On August 9, 1993, Georgia Power Company (Licensee) filed a motion to compel the Staff to produce forty-four tape recordings provided by Intervenor to the NRC, (2) transcripts of these tape recordings and (3) certain documents evidencing statements

by Intervenor to the NRC.¹ The Staff opposed the motion on the grounds that release of the documents could compromise ongoing investigation and enforcement activities and that the Licensee had not shown it would be prejudiced by postponing disclosure until the NRC determines what enforcement action, if any, is appropriate.² In a Memorandum and Order, dated August 31, 1993 (unpublished), the Board temporarily denied the motion to compel until November 8, 1993, finding that the documents were exempt because they related to an ongoing investigation, and advised the Staff to make a fresh showing before that date, if necessary, as to why the documents should not be released. Slip op. at 6-7.

The Staff subsequently requested an extension of time to produce the requested materials at least until March 15, 1994 -- the estimated time needed to complete the ongoing investigation and to determine, with Commission consultation, whether enforcement action was appropriate.³ On November 17, 1993, the Board ordered that the documents be produced on December 17, 1993, the projected date for the issuance of the OI Report.⁴ The Board also provided for reconsideration of its order and

¹ Georgia Power Company's Motion to Compel NRC Staff Production of Documents, August 9, 1993.

² NRC Staff Response to Georgia Power Company's Motion to Compel Production of NRC Staff Documents, August 26, 1993, at 2-11, and Affidavits of Ben Hayes, the Director of the Office of Investigations, and James Lieberman, the Director of the Office of Enforcement.

³ NRC Staff Motion for a Further Extension of Time to Defer Discovery Documents to the Licensee, October 27, 1993 (Extension Motion).

⁴ LBP-93-22, 38 NRC 189, 198 (1993).

indicated that the Staff's motion for reconsideration could include a showing that an *in camera* presentation would sway the balancing test applied. *Id.* at 193. After the issuance of the OI Report, the Staff made copies of the requested documents and tapes available at the Region II office beginning on December 20, 1993.

By Order of January 3, 1994, the Board asked the parties to negotiate a partial or complete agreement about the status of the proceeding and to suggest procedures and schedules to resolve matters. On January 24, 1994, in addition to its status report, the Staff sought deferral of discovery against the Staff until after it had evaluated the OI Report for possible enforcement action and consulted with the Commission on any action proposed.⁵ After the January 27, 1994 status conference,⁶ the Board issued an order, *inter alia*, asking the Staff to state whether it would voluntarily release factual attachments or exhibits to the report and directing the parties to submit briefs concerning (a) whether the Board should release the entire OI Report, with or without a protective order, and (b) whether the Board should hear an *in camera* presentation from the Staff prior to determining whether to release the alleged privileged Staff documents.⁷ On

⁵ NRC Staff Motion to Defer Certain Prehearing Activities Until the Staff Has Formulated a Position, dated January 24, 1994.

⁶ At the status conference between the Board and parties on January 27, 1993, counsel for Intervenor stated that the OI report was necessary for him to proceed with his case, including discovery. Kohn, Tr. 157-59. Licensee stated that it had no specific interest in opinions stated in the OI report or the report itself, but could use factual information underlying the report, namely the transcripts of GPC interviews and summaries of NRC interviews conducted by OI. Blake, Tr. 161-63, 188-89.

⁷ Memorandum and Order (Prehearing Conference Order: Schedule), dated February 1, 1994.

February 4, 1994, the Staff supplied the Affidavit of James M. Taylor, Executive Director for Operations (EDO Affidavit), and explained that the OI Report was still being evaluated for possible enforcement action and should be withheld as a predecisional document inasmuch as (1) it contained the views of only one NRC office that would be considered in reaching an enforcement decision and (2) was an integral part of the material upon which the EDO would base any recommendation for enforcement action to the Commission.⁸

After conducting an informal status conference on March 1, 1994, the Board ordered the Staff to promptly release the Report's easy-to-separate factual information and the remainder of the report on April 4, 1994, subject to a protective order. *Id.* at 9.

DISCUSSION

I. Special Circumstances Warrant Deferring Release Of The OI Report Until After The Staff Consults With The Commission On Whether An Enforcement Action Should Be Instituted

There are special circumstances present in this proceeding which call for the Commission to exercise its inherent supervisory authority to prevent release of the OI Report and exhibits until after the Staff consults with the Commission on whether enforcement action, if any, is appropriate. *See Pacific Gas & Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 (1986). The Executive for Operations has indicated that the OI Report should not be released, even under a

⁸ NRC Brief on Release of OI Report Requested in Licensing Board Order of February 1, 1994, dated February 4, 1994, and attached EDO Affidavit. Intervenor argued that neither the deliberative process exemption or the Policy Statement justified the nondisclosure of the document.

protective order, until after the Staff consults with the Commission on whether to institute an enforcement action. EDO Affidavit at 2-3; *see* 10 C.F.R. Part 2, Appendix C.III. Disclosure of the OI Report before enforcement action is taken is contrary to long standing agency practice⁹ and the spirit of the "Statement of Policy; Investigations, Inspections, and Adjudicatory Proceedings," 49 Fed. Reg. 36,032, 36,033 (1984) (Policy Statement). The character and integrity of the Licensee and affiliated corporations, including past and present officers, are at issue in this proceeding and the Staff intends to forward its recommendation of whether the OI Report on alleged wrongdoing warrants any enforcement action to the Commission this month. EDO Affidavit at 3.

Disclosure of the OI Report (which contains facts intertwined with the views, analyses, conclusions of only one NRC office) and its supporting documentation to the parties, at this time, could adversely affect the ability of the Commission and its Staff to deliberate concerning whether to institute an enforcement action against the Licensee. Even disclosure under a protective order would not adequately insulate the Commission's enforcement deliberations. EDO Affidavit at 2-3. The Commission has recognized that a balance must sometimes be struck between immediately proceeding with a hearing or delaying it so as to prevent the compromise of an ongoing investigation of either a civil or criminal nature. Investigatory material is not to be prematurely released so as to

⁹ *See e.g.*, NRC Enforcement Manual (May 1990) at 5.3.4.h; Memorandum from J. Lieberman, Release of OI Transcripts of Interviews, dated May 20, 1992. Allegers are informed when an OI investigation is completed, but the investigation report is released to the alleged, only if requested, after the NRC and/or other Federal agencies have taken whatever action they deem appropriate, and appropriate proprietary, privacy, and confidential source information has been deleted.

compromise investigations and inspections. 49 Fed. Reg. 36,032. There are guidelines for the consideration of such material *in camera* and, in certain instances, on an *ex parte* basis, to address the concern for premature disclosure and to make it possible for Boards "to provide for the timely consideration of relevant matters derived from investigations and inspections through the deferral or rescheduling of issues for hearing." 49 Fed. Reg. 36,033. Although the investigation at issue is now complete, the Commission has previously indicated that there may be a need to withhold information until an "investigation or inspection is completed *and evaluated for possible enforcement action.*" [emphasis added]. *Id.*; See also "Revision To Procedures To Issue Orders: Challenges To Orders That Are Made Immediately Effective," 57 Fed. Reg. 20,194, 20,197 (May 12, 1992).¹⁰ The Commission has also stated that, "Due process requires only that an opportunity be granted at a meaningful time in a meaningful manner for a hearing appropriate to the nature of the case. . . . What is meaningful depends on appropriate accommodation of the competing interests involved." *Id.* Thus, special circumstances -- namely, the public interest in agency decisionmaking concerning an enforcement action

¹⁰ In the Statement of Considerations, the Commission stated that, "A prime example [of a need to delay a proceeding] would be the temporary need to halt the proceeding where continuation would interfere with pending criminal investigation or jeopardize prosecutions." 57 Fed. Reg. 20,197. While the policy addresses the immediate effectiveness of orders suspending or revoking a license to protect public health and safety in the context of potential criminal prosecution, a temporary delay concerning one area of discovery in this license transfer proceeding -- from one subsidiary of a public utility holding company to another subsidiary -- is less violative of rights than a delay of a hearing on an immediately effective order which might suspend or revoke a license.

-- warrant deferral of release of the OI Report until the agency determines whether to institute an enforcement proceeding.¹¹

II. The Commission's Criteria For A Stay

Even should the Commission determine that no special circumstances are present, a stay of the release of the OI report should be granted under the four general legal criteria for stays set out in 10 C.F.R. § 2.788(e).¹²

A. Irreparable Harm Absent A Stay Of the four factors governing the granting of a stay request, the movant's need to show irreparable harm is the most important. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990). The disclosure ordered by the Board would adversely and irrevocably affect the Commission's deliberative process. As stated in the

¹¹ A balancing of the four-factor test used in LBP-93-22 also favors postponing release of both the factual information and the opinions contained in the OI Report. The length of the delay is likely to be short given that the Staff plans to consult with the Commission this month. EDO Affidavit at 3. The delay is for good reason -- to protect the Commission's deliberative process while the NRC completes its regulatory responsibilities. The issuance of any enforcement action could affect what position the Staff will take in this proceeding and the scope of the other parties' cases. The limited delay does not prevent discovery of other information which is currently ongoing. For example, the parties are currently reviewing lengthy Licensee stipulations concerning the alleged illegal transfer, the diesel generator reporting issue and tape transcripts which, in part, involve the time-consuming review of audio tapes. See Letters of John Lamberski dated February 3, 1994, February 28, March 1, 1994. A delay until an enforcement determination is reached may also assist a prompt determination in this proceeding.

¹² Those factors are: (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. The movant has the burden to establish 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).

EDO's affidavit, release of the report would not insulate him or the Commission during the decisionmaking process and would not protect the Commission's deliberative process. See EDO Affidavit at 2-3. It also would be contrary to the Commission's longstanding policy and practice of not releasing or publicizing the factual basis or the opinions leading to its enforcement decisions until after an enforcement action is taken. Thus, this factor weighs in favor of granting a stay on the release of the OI Report.

B. Likelihood of Success on the Merits Inasmuch as the Board ordered release of the OI Report contrary to Commission policy and practice, and without hearing an *in camera* presentation by the Staff, it is the Staff's view that it will ultimately prevail upon the merits. See 49 Fed. Reg. 36,032; 10 C.F.R. § 2.744(c). At issue is the scope of the Commission's Policy Statement and the Commission's need to withhold information during the pendency of its determination of whether and what enforcement action is appropriate. This factor also favors the grant of a stay.

C. Harm to Other Parties Neither Licensee nor Intervenor would suffer cognizable harm if a stay is granted until after the Staff, after consultation with the Commission, decides whether to institute an enforcement action. Considerable information is available to both parties so that discovery and pretrial preparation can continue without now releasing the OI Report. Much information is known to both parties because they were involved in the events investigated. The audio tapes and other information have been available since December 1993.¹³ Intervenor's tape recordings

¹³ Due to the passage of time and fading recollection, the tapes and other contemporaneous documents are likely to be the best evidence of what transpired in 1990.

formed the basis for OI's investigation and he has first hand knowledge about the voices and conversations recorded.¹⁴ Intervenor (who has stressed his need for the report) had not even reviewed materials released thus far when he raised his claim of harm. Intervenor is not harmed by delays in a hearing on a license transfer which he opposes and the requested delay would not prejudice him. Licensee has prepared lengthy stipulations concerning the issues in this proceeding and the delay sought would not seriously hamper defense of its case.¹⁵ See note 12, *supra*. Licensee has a strong interest in the Commission's continuing to evaluate the OI Report in a thoughtful and unhurried manner before determining whether to institute a possible enforcement action against Licensee. Thus, neither party will be prejudiced by further limited delay resulting from a stay of the release of the OI report until it is determined if an enforcement action should be instituted.

D. The Public Interest The public interest is served by the Staff fulfilling its regulatory obligations without (a) the diversion of NRC resources to engage in prehearing

¹⁴ See Intervenor's Brief at 4. The harm Intervenor asserts is a patent attempt to short-cut the burden of litigating its contention. Counsel for Intervenor did not take the opportunity to avail himself of the tapes, transcripts and other information made available in December 1993. His statements at the February status conference and in a recent filing show that he has remained content until recently, to rely on the six tapes containing excerpts from other recordings, see Tr. 189; Intervenor's Brief at 15, and believes the OI Report "will provide Intervenor with a road map" for his case, Tr. 189. Fairness and fulfillment of the responsibility of a party demand that Intervenor not await the OI Report to sort out the information developed by his client over three years ago. See *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 453-54 (1981).

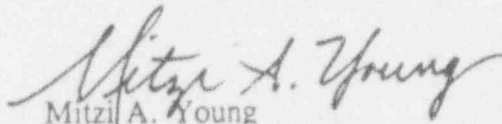
¹⁵ Licensee's counsel represented most of the Licensee employees interviewed by OI and has direct knowledge about information disclosed in those transcribed interviews. Licensee has all tapes the allegor provided to the NRC and custody of all records or relevant correspondence during the period in question.

activities that may not be meaningful until after it has determined whether and what enforcement action is appropriate and (b) the Commission's deliberative process being harmed by the premature disclosure of the OI Report. See EDO Affidavit at 2-3. Although all parties could be served by a prompt determination in this matter, the need for a prompt hearing should not override the obligations of the Staff to pursue enforcement matters to their proper conclusion prior to release of the report. Thus, this factor favors a stay.

CONCLUSION

As stated above, special circumstances and the factors in 10 C.F.R. § 2.788(e) warrant the deferral of release of the OI Report, including its factual basis, until after the Staff consults with the Commission concerning whether and what enforcement action is appropriate. Accordingly, the Commission should grant the requested stay.

Respectfully submitted,


Mitzi A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 14th day of March, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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) 50-425-OLA-3
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(Vogtle Electric Generating Plant) Re: License Amendment
Units 1 and 2) (Transfer to Southern Nuclear)
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION FOR A STAY OF THE LICENSING BOARD ORDER RELEASING THE OFFICE OF INVESTIGATIONS REPORT" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a double asterisk by facsimile this 14th day of March 1994.

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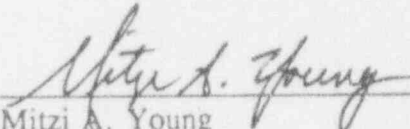
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