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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

'94 MAR 24 P5:24

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))	Re: Licensee Amendment
)	(Transfer to Southern Nuclear)

OFFICE OF SECRETARY
OF SERVICE

NRC STAFF OPPOSITION TO INTERVENOR'S MOTION
TO STRIKE NRC STAFF MOTION FOR A STAY

Charles A. Barth
Counsel for NRC Staff

March 24, 1994

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INTRODUCTION

On March 3, 1994, the Licensing Board below 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 a 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.

On March 14, 1994, the Staff filed a motion for a stay of the Licensing Board's March 3, 1994 Order. On March 15, 1994, the Intervenor filed "Intervenor's Motion to Strike NRC Staff Motion for a Stay of the Licensing Board Order Releasing the Office of Investigation Report" (Motion). On March 18, 1994, the Commission issued a

temporary stay to permit it to review the parties' responses to the Staff motion. The Staff opposes Intervenor's motion to strike for the following reasons.

DISCUSSION

- I. The Intervenor argues that the Staff must file its application for a stay with the Appeal Board. Motion at 2. The Appeal Board no longer exists. Section 2.788 of the Commission's regulations now provides that an application for the stay of the effectiveness of an action pending filing a petition for review "may be filed with the Commission or the presiding officer." Therefore, this ground for the motion should be rejected.
- II. The Intervenor argues that the Staff's motion must be stricken as the Staff had not, as of March 14, 1994, filed an appeal of the March 3, 1994, Licensing Board Order. Motion at Section 2.786(b)(1) of the Commission's regulations provides that a petition for review may be filed 15 days after service of an action of the Licensing Board. As shown by the Certificate of Service, the Board's March 3 Order was officially served on the Office of the General Counsel by first class mail on March 4, and the Staff's petition for review is due March 24, 1994. See 10 C.F.R. § 2.710. Therefore, Intervenor's argument that the time had expired for filing an appeal should be rejected.
- III. The Intervenor finally argues that the Staff's motion for a stay should be stricken as the Staff did not petition the Licensing Board for reconsideration of its March 3, 1994 Order to disclose parts of the OI report. Motion at 3-3. He argues that the Staff must, or should have, filed a petition for reconsideration under 10 C.F.R. § 2.771(a), before applying to the Commission for a stay. *Id.* That provision provides: "A petition for

reconsideration of a final decision may be filed by a party within ten (10) days after the date of the decision." There is no requirement that reconsideration be sought before a party can seek appellate review. The section is merely permissive and provides a time to file such a motion, should a party choose to do so.¹

Further, the Licensing Board's order to disclose a part of the OI report was not "a final decision"² within the meaning of the term as used in 10 C.F.R. § 2.771(a). It was an order, which as a practical matter, could not be appealed later. In any event, the Commission has previously advised the parties in the proceeding that they may file an application for stay under 10 C.F.R. § 2.788 or for interlocutory review under 10 C.F.R. § 2.786(g), "provided certain criteria are met, in the event a party believes it has been

¹ The Staff chose not to seek reconsideration by the Licensing Board because of its view that the matter raised -- potential harm to the Commission's deliberative process so as to compromise deliberations on possible enforcement action -- is of such importance that the Commission, itself, should decide the issue.

² "Final decision" under 28 U.S.C. § 1291 has been exhaustively addressed in the Federal Courts. A recent and clear exposition is in *Boughton v. Cotter Corp.* 10 F.3d 746, 748 (10th Cir. 1993).

Final decision jurisdiction under 28 U.S.C. § 1291 typically "depends on the existence of a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945)). District Court orders for the production of documents during the course of litigation are not "final orders" subject to immediate appellate review.

Under the Commission's regulations, interlocutory orders such as LBP-94-06, 39 NRC ____ (served March 4, 1994), are appealable. See 10 C.F.R. § 2.786(g).

aggrieved by a future Licensing Board order." CLI-93-6, 37 NRC 172, 174 (1993).

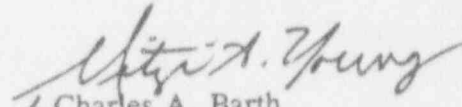
Thus, this ground for the Motion should also be rejected.

CONCLUSION

The Motion presents no legal basis or factual basis to strike the Staff's motion.

Therefore, the Motion should be denied.

Respectfully submitted,


for Charles A. Barth
Counsel for NRC Staff

Dated at Rockville, Maryland
this 24th day of March 1994

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GEORGIA POWER COMPANY, *et al.*) ~~50-425-OLA-3~~ SERVICE
) BRANCH
)
(Vogtle Electric Generating Plant) Re: License Amendment
Units 1 and 2) (Transfer to Southern Nuclear)
)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF OPPOSITION TO INTERVENOR'S MOTION TO STRIKE NRC STAFF MOTION FOR A STAY" 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 24th day of March 1994.

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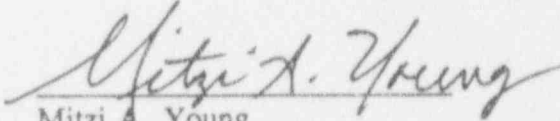
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